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Articles

DIFFERENCE AND DEFERENCE IN TREATY INTERPRETATION

ALEX GLASHAUSSER*

I. INTRODUCTION

THE Vienna Convention on Consular Relations provides that when a citizen of one country is arrested in another, authorities “shall inform the person concerned without delay of his rights” to inform his consulate of the arrest.1 The U.S. Department of State has interpreted the convention as conferring no privately enforceable right on foreign nationals.2 Some courts have deferred to that interpretation in reaching the same result.3 According to the U.S. Supreme Court, individuals may or may not have a private right of action, but regardless, the convention allows federal law to preclude a foreign national from raising such a claim in a petition for writ of habeas corpus if the petitioner failed to develop the claim in state court.4

The International Court of Justice has disagreed on both counts. In two cases, it has held not only that prisoners have a private right of action

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2. See United States v. Li, 206 F.3d 56, 63–64 (1st Cir. 2000) (en banc). In Li, the First Circuit requested an opinion from the State Department about how to interpret the Consular Convention. See id. at 63 (“We first consult the United States Department of State’s interpretation of the [treaty], to which we accord substantial deference.”). The department responded that the convention “establish[es] state-to-state rights and obligations” and does not “establish[] rights of individuals.” Id. (quoting Department of State Answers to Questions Posed by First Circuit in United States v. Nai Fook Li at A-3, United States v. Li, 206 F.3d 56 (1st Cir. 2000) (No. 97-2034)). The State Department has taken the same position before the International Court of Justice. See Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, Verbatim Record 98/7 (Apr. 7), ¶¶ 3.19–3.20, available at http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm (statement of John Crook, Assistant Legal Adviser for United Nations Affairs, United States Department of State) (finding “absolutely no support” in Consular Convention for claim of private right of action).

3. E.g., Li, 206 F.3d at 63–64 (describing and relying on convention interpretation); State v. Martinez-Rodriguez, 33 P.3d 267, 273–74 (N.M. 2001) (explaining treaty interpretation).

under the convention, but also that countries may not override that right through procedural default rules such as that invoked by the Supreme Court. Three times, it has provisionally ordered the United States to "take all measures at its disposal" to ensure that prisoners asserting rights under the convention are not executed before a final judgment of the International Court in cases brought on their behalf. The Supreme Court has refused to take any such measures, and when given the opportunity in later cases, it has declined to rethink its substantive stance as to the meaning of the Consular Convention.

Two courts, each of which is in some sense "supreme." Two different judicial interpretations of the same treaty. A natural question is, which is correct? A less obvious, but no less important, question is whether one of them is necessarily wrong. It is tempting to say that when two tribunals disagree on the same issue, one (or both) must be wrong. But that need not be the case. If there is any type of legal document that legitimately can be interpreted in contradictory ways, it is treaties.

International agreements (which I will generally refer to as "treaties," in the broad sense of that term) are protean instruments, both legal and


6. See LaGrand, 2001 I.C.J. at 497–98 (noting that procedural default rule is problematic when it prevents "person from seeking and obtaining consular assistance"); Avena, 2004 I.C.J. 128 at ¶¶ 112–114 (noting that application of procedural default rule may prevent rights under Article 36 from being given "full effect").


9. Though agreements between intergovernmental organizations are sometimes referred to as "treaties," my use of the term is generally limited to agreements between sovereigns. Likewise, this article focuses not on quasi-private international agreements, such as purely commercial ones, but rather on the sort of agreements that by their nature arise only between nation-states. See, e.g., 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1108 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (quoting James Monroe's statement at Virginia Convention that power to regulate "commerce" was distinct from power to regulate "treaties"). Moreover, my analysis does not turn on distinctions that are important in other contexts, such as that between (1) treaties in the constitutional sense of documents requiring the advice and consent of the Senate and (2) treaties in the international sense that would include, for example, congressional-executive agreements. See LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 256 (2d ed. 2000) (discussing executive agreements); Bruce Ackerman & David Golove, IS NAFTA Constitutional?, 108 HARV. L. REV. 799, 802 (1995) (discussing congressional-executive agreements).
diplomatic, that to some extent can reflect the eye of the beholder. Diver-
tgent institutional forces influencing the Supreme Court and the Interna-
tional Court make occasional disagreements inevitable, but both courts
can be correct, because the interpretation of treaties can legitimately de-
pend on the identity of the interpreter. As a result, neither court has rea-
tion to defer to the other. Each, however, should be open to the other’s
views as potentially persuasive.

The Consular Convention cases also raise the question of whether
multiple interpretations of the same treaty can coexist within a single na-
tion. Should courts in the United States defer to the views of the executive
branch in the interest of facilitating foreign policy? Or might the distinct
institutional role of the judiciary encourage dissent? I argue that just as
interpretation of the same treaty provision can vary between domestic and
international courts, it can vary across interpreters within a single govern-
ment; thus, courts need not defer to the views of other branches.

This article discusses not so much how treaties are interpreted as who
interprets them. Just as words can have different meanings when their
linguistic context changes,\textsuperscript{10} they can have different meanings when their
interpretive context changes, geographically or institutionally. Part II ex-
plains why treaties, even more so than other documents, need not be read
identically in all circumstances.\textsuperscript{11} Part III discusses the implication of that
inconstancy for traditional doctrines of judicial deference to other
branches’ interpretations of treaties.\textsuperscript{12} Part IV considers the level of re-
spect that U.S. courts should accord to treaty interpretation decisions of
the International Court of Justice.\textsuperscript{13} Part V concludes that courts in the
United States can fulfill their domestic duty while contributing to global
legal order if they defer less to the executive branch and, while not ceding
their constitutional authority over the internal application of treaties, treat
the judgments of the International Court of Justice with something more
than indifference.\textsuperscript{14}

\textsuperscript{10} As Judge Calabresi memorably noted, “Language does not have a ‘plain
meaning’ outside of its particular context. ‘You should have passed, dummy,’
means something entirely different at a bridge table from what it means on
Superbowl Sunday. The same words signify very different things because the lin-
guistic context has changed.” Peterson Marital Trust v. Comm’r, 78 F.3d 795, 796
(2d Cir. 1996).

\textsuperscript{11} For a discussion of treaties’ inherent inconstancy, see infra notes 15–45
and accompanying text.

\textsuperscript{12} For a discussion of treaty interpretation, see infra notes 46–177 and ac-
companying text.

\textsuperscript{13} For a discussion of U.S. courts and the International Court of Justice, see
infra notes 178–328 and accompanying text.

\textsuperscript{14} For a discussion of that view, see infra notes 329–36 and accompanying
text.
II. The Inherent Inconstancy of Treaties

When interpreting treaties, we must never forget what we are expounding.\textsuperscript{15} But we must also bear in mind who "we" are. The perspective of the interpreter inevitably influences the reading of a text.\textsuperscript{16} For treaties, more than other documents, that reality is not problematic: they can legitimately be interpreted differently depending on the identity of the interpreter.\textsuperscript{17} In other words, they have no fixed "correct" meaning.

That claim of polyvalence may sound anomalous. Surely the answer to a legal question about what a provision in an agreement means cannot change with the forum.\textsuperscript{18} There may be descriptions of why answers differ, but normatively, one might say that conflicting results mean that one interpreter has erred.\textsuperscript{19} Indeed, Oliver Wendell Holmes argued that "any

\textsuperscript{15} Justice Marshall famously cautioned that when interpreting the U.S. Constitution, "we must never forget that it is \textit{a constitution} we are expounding." M'Culloch v. Maryland, 17 U.S. 316, 407 (1819). I have argued elsewhere that treaties also warrant special interpretive attention to distinguish them from statutes and contracts. See Alex Glashauser, \textit{What We Must Never Forget When It Is a Treaty We Are Expounding}, 73 U. Cin. L. Rev. (forthcoming 2005) (manuscript at 35–39, on file with author) (describing differences between treaties, contracts, and statutes in form and function).

\textsuperscript{16} Philosophers such as Thomas Nagel have acknowledged the difficulty of approaching problems objectively but have encouraged people to try to suppress their individual perspectives and make decisions that take into account the reality that no single one of us is the center of the universe. See, \textit{e.g.}, THOMAS NAGEL, \textit{The View from Nowhere}, 4, 60–66, 176 (1986) (describing way of looking at world and explaining objectivity). That approach may be desirable for personal moral dilemmas. But a treaty reader's view is not from Nagel's utopian "Nowhere"—it is from the reader's nation and from the reader's particular function (such as judicial or executive) within that nation. To fulfill the interpreter's role, that particular perspective should be embraced, not suppressed.

\textsuperscript{17} Cf. William N. Eskridge, Jr., \textit{Dynamic Statutory Interpretation}, 135 U. Pa. L. Rev. 1479, 1554 (1987) (arguing that statutes "have different meanings to different people").

\textsuperscript{18} The forum for interpretation of a treaty may be not only "a national court, . . . an \textit{inter}national court, or . . . a university classroom," Richard Stith & J.H.H. Weiler, \textit{An Epistolary Exchange: Can Treaty Law Be Supreme, Directly Effective, and Autonomous—All at the Same Time?}, 34 N.Y.U. J. INT'L L. & POL. 729, 729 (2002), but also a national executive or legislative body.

\textsuperscript{19} The premise of a short story of legal science fiction entitled \textit{Non Sub Homine} is that a computer programmed with all legal precedent has been granted full authority to make decisions binding on the populace, to "take[e] law out of the hands of man." H.W. Whyte, \textit{Non Sub Homine, in Dark Sins, Dark Dreams} 121, 123 (Barry N. Malzberg & Bill Pronzoni eds., 1978). On reading legal questions that were typed in, the computer offers definitive answers. But one day, the computer does double duty and prints out two conflicting opinions interpreting an ambiguous contract, baffling its creators. \textit{Id.} at 124–25. Which is more fictional—the premise that a computer could usurp the function of judges and resolve legal disputes, or the notion that such a computer could never reach two different conclusions in the same case because in a government \textit{sub lege} rather than \textit{sub homine}, only one result could be legitimate? Surely the computer is realistic in resisting the idea that precedent and interpretive canons could produce but one outcome. Although the solution of the computers' creators in the story is to choose randomly between the decisions, \textit{Id.} at 125, in real life the choice of which of multiple legi-
document purporting to be serious and to have some legal effect has one meaning and no other . . . .” I posit, though, that while treaties are “serious,” they can be read in different ways without any of the interpreters’ being wrong.

It is not hard to construct an example of an agreement whose interpretation should differ from one interpreter to another. Suppose parties from two jurisdictions agree as follows: “A promises to give x to B in exchange for y, if a dispute arises, the parties intend that the substantive rule of the forum court be used to interpret x and y.” A court in A’s jurisdiction giving effect to the parties’ intentions would apply ruleA, whereas a court in B’s jurisdiction would apply ruleB. Thus, the interpretive result could well differ by forum without an error by either court. In one sense, the agreement has a single meaning, but with the important gloss that the outcome of a dispute may well depend on its location.

In that example, the choice-of-law clause was explicit. Even when an agreement is silent on that topic, though, the content of that clause may be understood and accepted by the parties; if so, then to give effect to the parties’ intentions, the agreement should be construed as if the clause were explicit. Treaty partners generally do not include clauses such as the following: “The parties intend that no matter what tribunal interprets this agreement, the rules of interpretation set forth in articles 31 and 32 of the Vienna Convention on the Law of Treaties shall apply.” The absence of such provisions suggests that the parties accept, and most likely even intend, that rules of interpretation will vary by court. Therefore, multiple interpreters can reach disparate results without any error.

Much of the above explanation could apply to private domestic contracts as well as to treaties. But it has particular relevance to treaties because the crucial factual assumption is more likely to be true. Differences in treaty interpretation rules between tribunals such as the International Court of Justice and U.S. courts are more pronounced than differences in interpretive rules for contracts among the various U.S. jurisdictions. Accordingly, treaty negotiators are more likely than domestic

mate decisions to make is not random but rather slanted in terms of who is issuing the decision.

20. Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417 (1899) (comparing legal meaning in theory with that in practice when word does not just have one meaning); see also Charles de Secondat, Baron de Montesquieu, The Spirit of the Laws 613 (Anne M. Kohler et al. trans., Cambridge Univ. Press 1989) (“It is essential for the words of the laws to awaken the same ideas in all men.”).

21. Cf. Restatement (Second) of Contracts § 201(2) (1981) (binding contracting parties to each other’s interpretations that they knew of or had reason to know of at time of contracting).


23. The International Court of Justice usually follows the textualist approach of the Vienna Convention on the Law of Treaties, regardless of whether that con-
contracting parties to be aware of the distinction; silence in the agreement as to which interpretive rules control is thus more likely to evince an intent to have one set of rules apply in one forum and a different set in another. Moreover, as sophisticated representatives of sovereigns, the parties negotiating treaties are more likely to contemplate the significance of interpretive jurisprudence than drafters of domestic contracts. In short, for treaties, silence is less likely to reflect mere lack of thought about what interpretive rules should govern.24

A further basis for treaties’ especial susceptibility to diverse interpretations is their diplomatic nature.25 In that vein, parties could intend that in any dispute arising from a certain treaty provision in a domestic court, that court should act in its country’s own national interest and avoid interpretations that would dramatically shift the status quo. Thus, results could legitimately differ from one court to the next. For example, suppose that in nation A, aliens’ access to civil courts is limited, and in nation B, aliens have no such access whatsoever. In a treaty, the nations agree that the citizens of each shall have “freedom of access” to the other’s courts.26 A court in A might interpret the treaty to give aliens from B equal access, whereas a court in B might read it as allowing aliens from A some limited access.27 Those results would reflect the different baselines of the parties’ domestic legal systems. Although the treaty provision appeared to be re-

vention specifically applies in the case at hand; U.S. courts tend to stray from the text more often. For a discussion of U.S. courts’ approach to treaty interpretation, see infra Section IV.A.

24. The “silence equals consent” view can be abused. For example, in United States v. Alvarez-Machain, 504 U.S. 655 (1992), one way the Supreme Court justified its holding that kidnapping did not violate an extradition treaty was by stating that Mexico was on notice at the time of the treaty of the Court’s Ker doctrine, under which abduction is acceptable. Id. at 665 & n.11. Even if Mexico’s negotiators were aware of that doctrine, it seems unlikely that they would have intended as part of the extradition treaty that the United States could circumvent the treaty by abduction. In contrast, it is not implausible that parties could, through their silence as to interpretive rules, acquiesce or even affirmatively intend to have different rules apply in different fora, because that condition would not lead as inexorably to a shocking substantive result.

25. See Tucker v. Alexandroff, 183 U.S. 424, 437 (1902). Tucker summed up treaty diplomacy as follows:

As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war . . . but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity . . . .

Id.

26. See, e.g., Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, art. III, para. 2, 8 U.S.T. 899, 902–03 (allowing “freedom of access to the [other party’s] courts of justice . . . upon terms no less favorable than those applicable to nationals . . . of [the other party] or of any third country”).

27. See Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 73 (2d Cir. 2003) (interpreting similar treaty as granting less than national treatment).
ciprocal, the parties might well have understood that in light of the different domestic backgrounds, the end results need not be identical.

Along the same lines, some treaty provisions are drafted as much for political purposes as for legal effect. And certain provisions may be legally effective only on an international plane, without being enforceable in domestic courts; such provisions are referred to as “non-self-executing.” As a result, domestic courts in treaty partners’ countries may render what appear to be conflicting decisions without being wrong. For example, suppose that in two countries, the background law is that citizens have more leeway than aliens to choose the venue of a domestic suit, but a treaty provides that citizens of each country shall receive national treatment in the other’s courts. In a suit by a citizen of against a citizen of in nation , the court may interpret the treaty and conclude that the plaintiff’s choice of forum controls, whereas for the same suit in nation , the court may read the treaty and hold that the defendant’s choice governs. It might appear that one court must be wrong, but the treaty partners may have intended that the national treatment provision be non-self-executing and thereby unenforceable in domestic courts. Thus, the outcomes in identical suits would, pursuant to the intentions of the parties, vary by court.

This notion of variable treaty interpretation may run counter to Ronald Dworkin’s well-known insight that rarely, if at all, is there a hard case


30. For a discussion of treaty language citing this effect, see supra note 26 and accompanying text.
with no right answer.\textsuperscript{31} I posit that treaty interpretation cases often have no right answer—or more precisely, that they have more than one legitimate answer. Professor Dworkin conceives of the possibility that a case might not have a right answer if it is posed as a choice between two alternatives when in fact there is a third possible outcome, or when the answer is on the borderline of the two choices.\textsuperscript{32} Still, he argues that such cases hardly ever occur because, empirically, lawyers treat “not liable” as the negation of “liable,” with no middle ground between the two concepts.\textsuperscript{33}

In my view, treaty disputes regularly present such cases. Treaties are often designed in part to cement diplomatic ties, not only to create rights and obligations between the parties.\textsuperscript{34} When nations enter into a treaty, they know that although it is a legal document, it is not subject to the same enforcement mechanisms as other legal documents; compliance is often a matter of politics.\textsuperscript{35} Treaties are thus inherently less susceptible to legalistic categorization than other documents. There is conceptual space between the following two ideas: “the treaty provision is law and requires x to do y” and “the treaty provision is not law and x has no need whatsoever to do y.”\textsuperscript{36} That space leaves leeway for interpreters; within a circumscribed

\textsuperscript{31} See Ronald Dworkin, A Matter of Principle 119, 144 (1985) (arguing that “no-right-answer cases” are real).

\textsuperscript{32} See id. at 120–21. For example, in a case putatively about whether or not a contract exists, the correct result might be that only an “inchoate” contract exists. Id. at 121.

\textsuperscript{33} See id. at 123, 126 (arguing that lawyers tend not to see gray area between “not valid” and “valid,” “not liable” and “liable,” and “is not a crime” and “is a crime”).

\textsuperscript{34} For a case citing this effect of treaties, see supra note 25 and accompanying text.

\textsuperscript{35} See Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 37 (Dec. 2) (acknowledging that enforcement of International Court decisions is political matter). The common perception that treaties are legitimate legal documents tends to have the practical effect of inducing compliance, even if traditional enforcement mechanisms are absent. See Thomas M. Franck, Legitimacy in the International System, 82 Am. J. Int’l L. 705, 705–06, 758 (1988) (noting that nations’ compliance with international law is voluntary and unenforced).

\textsuperscript{36} See Louis Henkin, How Nations Behave 19 (2d ed. 1979) (noting common view among diplomats that principles observed by nations on international plane do not constitute “law”); Rosenne, supra note 28, at 60 (“[T]he exact language of the treaty provision in question must always be carefully scrutinized and analysed before the conclusion is reached that the provision is truly mandatory and not merely exhortatory or optative.”); Oscar Schachter, The Twilight Existence of Nonbinding International Agreements, 71 Am. J. Int’l L. 296, 297–98 (1977) (noting “calculated ambiguity about the obligatory force” of many agreements).

The Supreme Court has carved out a similar wedge of conceptual space in a different context. When the Court instructs another federal court on a remand, it mandates further proceedings “consistent” with its opinion. See, e.g., Ashcroft v. ACLU, 124 S. Ct. 2783, 2795 (2004) (addressing federal district court). When it sends a case back to a state court, however, the request is a more oblique one for proceedings “not inconsistent” with its opinion. See, e.g., Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004) (addressing state court). That linguistic variation reflects the lesser degree of supervisory power the Court exerts over state courts. There is room between “consistent” and “inconsistent” for the murky status of “not
range of possible results, no single result may be mandated.\textsuperscript{37}

Moreover, even if an interpreter had no discretion and could reach but a single correct answer, that answer might well change with the interpretive circumstances. Heisenberg’s "uncertainty principle" explains that it is impossible to know the exact position and velocity of an object at the same time, as measuring an object’s position alters its velocity.\textsuperscript{38} Likewise, an interpreter interacts with a document, making the ideal of a single, static interpretation unrealistic—particularly for treaties.\textsuperscript{39}

The European Court of Human Rights has developed a doctrine that reflects this protean nature of treaties: "margin of appreciation." The doctrine began as a safety valve to allow nations to ignore their obligations under the European Convention on Human Rights during times of public emergency.\textsuperscript{40} It has now acquired somewhat broader currency and allows inconsistent." Likewise, there is room between "binding" and "non-binding" for a condition one might call "not non-binding." Certain treaty provisions are "not non-binding": not exactly binding in the traditional sense of being subject to effective enforcement measures, but not non-binding either, because they are treated by parties as creating legal obligations. Professor Dworkin generally refuses to acknowledge that type of conceptual space. See Dworkin, supra note 31, at 133 (equating "[l]awmakers have commanded that the contract not be enforced" and "[l]awmakers have not commanded that the contract be enforced") (quoting Sec’y of State for Educ. & Sci. v. Tameside Metro. Borough Council, [1976] 3 W.L.R. 641). But if such hair-splitting is appropriate in the context of federal-state relations, it is for international agreements as well.

37. See J.L. Briery, The Law of Nations 325 (6th ed. 1963) ("[D]iplomatic documents, including treaties, do not as a rule invite the very strict methods of interpretation that an English court applies, for example, to an Act of Parliament."); Oliver Morse, Schools of Approach to the Interpretation of Treaties, 9 Cath. U. L. Rev. 36, 37 (1960) (observing that out of “moderation and courtesy, . . . the [treaty] language used is not completely indicative of [the parties’] desires and demands, i.e. intentions”). As H.L.A. Hart recognized, “in any legal system there will always be certain . . . cases in which on some point no decision either way is dictated.” H.L.A. Hart, The Concept of Law 272 (2d ed. 1994) (contrasting this view with Professor Dworkin’s position that judge can resort to implicit principles to reach correct result).


39. Scientists know that although multiple observations of the same phenomenon theoretically should be identical, they are not, because observers are human; the “method of least squares” has emerged as one way to assess the mostly likely correct answer among varying measurements. See Stephen M. Stigler, The History of Statistics 146 (1986) (claiming that least squares method provides most accurate estimates). Varying measurements happen in the law too, of course—different interpreters can read the same document and reach different results. That may be an unfortunate truth for documents such as contracts or statutes. Due to treaties’ diplomatic nature, though, it is less of a problem when they are inevitably read differently by different entities.

nations reasonable deviation in their domestic implementation of human rights norms from multilateral treaties.\textsuperscript{41} As one observer has noted, "[w]hat is most striking about the margin of appreciation is that it expressly contemplates that international treaty obligations originating from a unitary text may be interpreted in different ways in different states."\textsuperscript{42} Still, to date, the doctrine's application largely has been limited to the Human Rights Convention. Though the idea of a "margin of appreciation" has been criticized for its arbitrariness,\textsuperscript{43} it makes sense for other treaties as well. Whether under that label or not, interpreters should acknowledge that a treaty's meaning may vary with its context.

The U.S. Supreme Court recently offered a surprisingly explicit admission that the timing of an interpretation of the Constitution can affect the result. Specifically, it predicted that the correct resolution of an equal protection issue today would likely be incorrect in twenty-five years.\textsuperscript{44}

or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation." European Convention on Human Rights, Nov. 4, 1950, art. 15, 213 U.N.T.S. 221. One of the article's first uses came after Ireland detained an individual without charging or trying him, in potential violation of Article 5 of the convention. \textit{See generally} Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. B) (1961) (determining whether suspect's detention violates Article 5). The European Commission of Human Rights held that because Ireland was at that time in a state of emergency and because the detention was necessary, Ireland had not violated its obligation under the convention. \textit{See id.} at 408 (noting that national security measures under declared national emergency permitted suspect's detention without violating Article 5).


42. Laurence R. Helfer, \textit{Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy}, 39 HARV. J. INT'L L. 357, 404 (1998) (commenting on margin of appreciation as tool by which states are given "breathing room" to balance protection of liberties against other societal concerns).


44. Grutter v. Bollinger, 539 U.S. 306, 309–10 (2003); \textit{cf.} William N. Eskridge, Jr., \textit{Dynamic Statutory Interpretation} 58 (1994) ("The interpreter's understanding is . . . a historically situated event."); Eskridge, \textit{supra} note 17, at 1554 (arguing that statutes "have different meanings . . . at different times"). In upholding the pro-diversity admissions policy of the University of Michigan Law School, the Court found the policy "necessary" to further the state government's "compelling" interest in the educational benefits of student body diversity. \textit{Grutter}, 539
Surely if chronological time can properly influence interpretation, so can institutional place. As delicate instruments that mix foreign policy and legal obligation, treaties are particularly susceptible to interpretations that vary with the role of the interpreter. The President, a U.S. court, a domestic court of a treaty partner, the International Court of Justice—even on the same day, all can be metaphorically more than a quarter-century apart in their perspectives on treaties.

III. INTERBRANCH INTERPRETATIONS OF TREATIES

As Guido Calabresi elegantly illustrated in a situation that brought his roles as academic and government official to a head, even the same person can legitimately reach different opinions when wearing different institutional hats. Dissenting in a product liability case, Judge Calabresi backed the risk-utility test as the measure of design defects. In a footnote, however, he mentioned that Professor Calabresi had written a law review article favoring the consumer expectations test used by the majority. As he explained, "my personal preferences are, of course, irrelevant to the task before us." Because he was deciding a diversity case, what mattered to Judge Calabresi was which test the New York Court of Appeals would likely use. This shunting aside of personal preferences happens every day when judges decide cases. It is not particularly surprising that one's formal role helps shape the outcome of one's decision. It is also no surprise that actors in different branches of government might interpret the same treaty differently. That does not mean that some of the interpretations are wrong, any more than Judge Calabresi had to be wrong if Professor Calabresi was right. Thus, in a system of parallel branches, doctrines of deference are unwarranted.

U.S. at 328–29 (stating holding of case). That necessity is temporary, though: "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Id. at 310.

45. Time can legitimately affect a decision not only because surrounding factual circumstances change, but also because people's view of the historical background underlying legal documents such as treaties is unavoidably influenced by the present. See Friedrich Nietzsche, ON THE ADVANTAGE AND DISADVANTAGE OF HISTORY FOR LIFE 34 (Peter Preuss trans., Hackett Publ'g Co. 1980) (1874) (criticizing historians who pride themselves on their "objectivity" when they "measur[e] past opinions and deeds by the common opinions of the moment").

46. McCarthy v. Olin Corp., 119 F.3d 148 (2d Cir. 1997) (affirming dismissal of plaintiffs' claim that manufacturer of bullets used to shoot them was strictly liable for injuries).

47. See id. at 172–73 (Calabresi, J., dissenting) (explaining belief that majority erred in applying consumer expectations test in dismissing plaintiff's claim).

48. Id. at 172 n.30 (Calabresi, J., dissenting).

49. See id. at 172–73 (Calabresi, J., dissenting) (declaring that New York Court of Appeals would likely apply risk-utility test to determine defectiveness of product).
A. Due Difference

The Supreme Court has boldly proclaimed its "duty . . . to enforce the . . . treaties of the United States, whatever they might be."\(^{50}\) It has not, unfortunately, added a vow to enforce treaties "whatever the executive branch's interpretation might be." Instead, it has historically deferred mightily to the interpretations of the executive branch, perhaps because that branch handles the actual enforcement.\(^{51}\) As David Bederman has put it, "[J]udicial deference to the Executive's position is the single best predictor of interpretive outcomes in American treaty cases."\(^{52}\) A close cousin of deference is the "political question" doctrine. Courts often invoke that doctrine to avoid reviewing executive branch activity in cases involving foreign policy.\(^{53}\) The Supreme Court has explicitly denied itself power in such cases: "[T]he very nature of executive decisions as to foreign policy is political, not judicial."\(^{54}\)

The extent of judicial deference is so extreme that some courts have deferred to the executive branch even when the third branch—the legislature—disagrees. For example, in \textit{Kucinich v. Bush},\(^{55}\) thirty-two representatives challenged President Bush's withdrawal from the 1972 Anti-Ballistic


52. David J. Bederman, \textit{Revivalist Canons and Treaty Interpretation}, 41 UCLA L. Rev. 953, 1015 (1994) (indicating that in all but one of ten cases considered by Rehnquist Court, holdings followed express wishes of executive branch). When individual rights are concerned, courts are a bit more probing of executive policy than otherwise, but even so, they tend to defer. \textit{See Henkin, supra note 29, at 136} (listing series of cases in which court reviewed executive decisions relating to civil liberties).

53. \textit{See, e.g.}, Smith v. Reagan, 844 F.2d 195, 198 (4th Cir. 1988) (ordering dismissal of case in which plaintiff sought to require President to take action to obtain release of American prisoners of war); Occidental of Umm al Qaywayn, Inc. v. Certain Cargo of Petroleum, 577 F.2d 1196, 1204 (5th Cir. 1978) (affirming dismissal of dispute about sovereignty because case fell in exclusive domain of executive branch); \textit{c.f} Baker v. Carr, 369 U.S. 186, 211–13 (1962) (discussing discretionary applicability of political question doctrine in context of foreign policy). \textit{But see Henkin, supra note 29, at 141–42} (questioning whether Supreme Court has approved of political question doctrine in foreign affairs cases).

54. Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (explaining proposition that decisions of foreign policy are "wholly confided" by Constitution to political departments of government, not to courts).

Missile Treaty without receiving approval from Congress. One of the
district court’s alternative grounds for dismissing the suit was nonjusticiability under the political question doctrine. Whatever the label, unwarranted deference amounts to nothing short of abdication of the judiciary’s responsibility in our constitutional system.

1. Separation of Powers

Courts often preface their genuflection to the executive branch with comments about the uniqueness of treaties. That uniqueness does properly affect how treaties should be interpreted. It should not, however, change who interprets them. The mere fact that treaties are instruments of diplomacy does not change their status as “Law of the Land.” To be sure, some treaty provisions may be more politically affective than legally effective. But sorting out what treaties mean is a role for courts. Under our constitutional separation of powers, the judiciary is an equal branch, not subservient to the executive, and is charged with deciding cases “arising under . . . Treaties.” In doing so, federal courts should affirmatively interpret treaties rather than deferring to the will of the executive.

a. One Voice

The Supreme Court’s justification for judicial deference in matters of foreign policy is that international issues “uniquely demand single-voiced
statement of the Government’s views.”64 Along those lines, Justice O’Connor has written an essay about the limitations necessary on judicial review to preserve the “unity” of U.S. foreign policy.65

Scholars have also touted the benefits of monolithic treaty interpretation. For example, John Yoo has argued that because the treaty power is fundamentally executive—given its placement in Article II of the Constitution—the President should have the last say, or even the only say, in interpreting treaties.66 In his view, the President should be able to interpret, reinterpret, and violate treaties as he sees fit, deciding when it would be appropriate to incur the international political costs of violations.67 Professor Yoo acknowledges that interpretations of a certain treaty might evolve over time, but stresses that the interpreter does not: it is the President.68 He finds the notion that a treaty might have one meaning internationally, as interpreted by the President, and another meaning domestically, as interpreted by courts, to be “bizarre.”69 That notion, he says, makes little sense constitutionally and “makes for unacceptable foreign policy.”70

64. See Baker v. Carr, 369 U.S. 186, 211 (1962) (“Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

65. See Sandra Day O’Connor, Federalism of Free Nations, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 14 (Thomas M. Franck & Gregory H. Fox eds., 1996) (explaining that power of judicial review is limited by political branches’ autonomy with respect to foreign relations).


67. See Yoo, ABM Treaty, supra note 66, at 874–77 (arguing that it is within President’s executive power to interpret, abrogate, and violate treaties, if necessary, just as it is in President’s power to conduct day-to-day task of managing international relations).

68. See id. at 881 (comparing courts’ continued interpretation of evolving statutes with President’s ongoing interpretation of evolving treaties).

69. See id. at 862 (noting that if treaties can have two meanings, then they could impose differing legal obligations in different settings).

70. See id.; see also Paul Reuter, INTRODUCTION TO THE LAW OF TREATIES 74 (José Mico & Peter Haggenmacher trans., 1989) (“The fact that different entities are called upon to interpret the treaty does not in principle affect the manner in which interpretation must be performed.”); Rosenne, supra note 28, at 124 (calling inconsistent domestic interpretations in different countries “[a] problem”); Kenneth S. Gallant, American Treaties, International Law: Treaty Interpretation After the Biden Condition, 21 ARIZ. ST. L.J. 1067, 1072–74 & n.24 (1989) (arguing that treaty provisions should receive same interpretation domestically and internationally); Malvina Halberstam, A Treaty Is a Treaty Is a Treaty, 33 VA. J. INT’L L. 51, 53 (1992) (“[A] treaty cannot have different meanings domestically and internationally . . . .”); John Norton Moore, Treaty Interpretation, the Constitution and the Rule of Law, 42 VA. J. INT’L L. 163, 175 (2001) (arguing that standards of treaty interpretation must be “unitary,” rather than allowing Senate’s unilateral understandings to control over internationally accepted legal standards). But see RESTATEMENT
This chorus calling for the federal government to speak with one voice has deep roots. James Madison wrote that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”\textsuperscript{71} Building a reputation of the United States as a trustworthy treaty partner was seen as important to protect the safety of the nation.\textsuperscript{72} Alexander Hamilton worried that the weak existing confederation stopped the country from entering treaties and that no nation in the future would have any reason to enter any pacts with the United States if it continued to be unable to control its members.\textsuperscript{73} Indeed, one of the prominent perceived benefits of a strong federal government, as opposed to the loose arrangement of states under the Articles of Confederation, was that treaties would have one fixed meaning. As John Jay explained, under the Constitution, “treaties . . . will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions, in thirteen States, . . . [absent the Constitution] will not always accord or be consistent.”\textsuperscript{74}

\footnotesize{(THIRD) OF FOREIGN RELATIONS, supra note 29, § 326 cmt. b (1987) (suggesting that President and courts may adopt different interpretations of treaties); Abraham D. Sofaer, Treaty Interpretation: A Comment, 137 U. PA. L. REV. 1437, 1440 (1989) (arguing that because pre-ratification Senate understandings can bind President under domestic law, treaties can have different meanings on national and international planes).


72. See The Federalist No. 3, at 45 (John Jay) (Clinton Rossiter ed., 1961) (noting that treaty breach was just cause of war); The Federalist No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that court judgments, including those involving treaties, can be just cause of war).

73. See The Federalist No. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that lack of uniform power to regulate commerce under confederation forced many countries to avoid entering into treaties with states).

74. The Federalist No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961); see The Federalist No. 22, at 151 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (bemoaning fact that under Confederation, treaties were subject to final judgments of thirteen different courts and noting that foreign nations could not “respect or confide in such a government”). Charles Pinckney, a delegate from South Carolina at the Constitutional Convention, warned that the Constitution had to assure potential treaty partners of the new union’s trustworthiness: “Shall we not be stigmatized as a faithless, unworthy people, if each member of the Union may, with impunity, violate the engagements entered into by the federal government? Who will confide in us?” 4 Elliot’s Debates 278 (1937). As David Golove has written, “conflicts over the treaty power and states’ rights were recurrent under the Confederation,” and by the time of the Constitution, the Framers had learned that “the federal government had to have sufficient power to ensure that any obligations it undertook to foreign countries would be observed by the states . . . .” David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 Mich. L. Rev. 1075, 1103–04 (2000).}
Jay had particular experience with the problem of having states undermine treaties. In a 1786 report to Congress about British charges that individual states were violating the provision in the Treaty of Peace assuring that British creditors would face no “lawful impediment” to collecting “bona fide debts,” Jay complained that several states had enacted laws that impeded such collection efforts. Individual states could not be free to wreak such havoc on the nation’s foreign policy, in Jay’s view, or else “the same article of the same treaty may by law mean one thing in New Hampshire, another in New York, and neither the one nor the other in Georgia.”

As a result of those concerns, the Constitution vested the treaty power in the federal government and specifically barred states from entering treaties. Moreover, the Supremacy Clause and the Foreign Affairs Clauses helped ensure that despite the nation’s federal nature, it could, to a great extent, act uniformly with respect to treaties. Indeed, when it


76. See U.S. Const. art. I, § 10, cl. 1 (denying states power to enter into any treaty, alliance, or confederation); see also The Federalist No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) (noting that many states are likely to interpret treaties in varying manners).

77. According to Louis Henkin, when it comes to foreign relations, “the states ‘do not exist’.” Henkin, supra note 29, at 150 (discussing limited state role in facilitating foreign relations) (quoting United States v. Belmont, 301 U.S. 324, 331 (1937)). The current position of the federal government, however, is that it cannot force states to comply with the nation’s treaty obligations. See Breard v. Greene, 523 U.S. 371, 375 (1998) (stating that normally procedural rules of forum state govern implementation of treaties within that state). In one of the Consular Convention cases in which the International Court of Justice had provisionally ordered the United States to stay the execution of a prisoner, the Solicitor General argued that in some circumstances, the only way the federal government can influence state court systems is “persuasion.” Brief for the United States as Amicus Curiae at 46, 51, Breard v. Greene, 523 U.S. 371 (1998) (Nos. 97-1390, 97-8214). In that case, the method of persuasion was a request by the Secretary of State to the Governor of Virginia to stay the execution. Id. For a discussion of a 1906 clash between the federal government and the city of San Francisco over a treaty with Japan, see infra note 125 and accompanying text.

In addition, it is fairly common for the United States to include reservations in multilateral conventions that stress the incomplete ability of the federal government to control states, such as the one in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, art. 1, para. 1, available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm:

The United States shall implement the Convention to the extent that the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein; to the extent that constituent units exercise jurisdiction over such matters, the Federal Government shall take appropriate measures, to the end that the competent authorities of the
comes to treaties, instead of its frequent posture of constraining the federal government from overreaching vis-à-vis the states, the Supreme Court has focused more on preventing states from disrupting the federal government’s foreign policy. That approach, enshrined in the Constitution, makes the country’s foreign relations easier because, in one sense at least, the nation can speak with a single voice.

b. Cords and Branches

The benefits of speaking with a single voice notwithstanding, there is no escaping the constitutional reality that the voice of the federal government has several cords: the three branches. Foreign relations might run more smoothly if the federal executive branch could not only control unruly states but also bar the federal judiciary from potentially disruptive domestic interpretations of treaties. Within the federal government, though, there is no parallel to the Supremacy Clause. The executive branch may have the exclusive power to make treaties, but under the constitutional separation of powers, it has no basis for stifling courts’ application of such treaties in domestic litigation. Instead, by invoking a rule of deference constituent units may take appropriate measures for the fulfillment of this Convention.


In contrast, a recent unsigned note argues that the federal government need not be reduced to mere exhortation in its efforts to have states obey the obligations it has taken on. See Note, Too Sovereign but Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?, 116 HARV. L. REV. 2654, 2671–73 (2003). Rather, the author suggests several ways for the federal government to flex its power: (1) stays of execution by federal courts against state court judgments; (2) suits in federal court for injunctive relief against states; and (3) suits by foreign nations against states in federal court. Id. Although the last alternative would require a reevaluation of Eleventh Amendment doctrine, the first two options may be feasible ways to rein in the states. But see Curtis A. Bradley, The Treaty Power and American Federalism, 97 MICH. L. REV. 390, 394 (1998) (questioning “nationalist view” of federal government’s almost unlimited treaty power).

78. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (refusing to allow states to adopt interpretations of international law different from that of federal government); Ward, 3 U.S. at 243–45 (upholding treaty allowing British creditors to collect debts despite Virginia statute purporting to discharge such obligations).

79. See United States v. Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."). In holding unconstitutional a California statute that gave victims a cause of action against German and Japanese corporations that engaged in slave labor during World War II, the Ninth Circuit recently listed the various clauses in articles I and II (including the Treaty Clause) that allocate the power to determine foreign policy to the federal government and bar states from engaging in their own foreign policy. See Deutsch v. Turner Corp., 317 F.3d 1005, 1020 (9th Cir. 2003) (holding that despite lack of constitutional text so specifying, states do not have power to conduct their own foreign policies).

and creating the political question doctrine, courts have improperly stifled themselves.

Judicial review of executive interpretations of treaties may well disrupt the unity many have clamored for. While the benefit of unity—or the downside of dissent—may be particularly strong in the area of foreign relations, unblinking solidarity undermines the essence of our system of checks and balances. Expressing an opinion does not tread on the executive’s power; indeed, no judicial opinion can be enforced without the assent of the executive branch.\(^{81}\) To say that a court should decline to interpret documents drafted by other branches because such review might disrupt unity is to say that the judicial branch should not be independent. As Alexander Hamilton wrote in *The Federalist*, to maintain the separation of powers that is “essential to the preservation of liberty, it is evident that each department should have a will of its own.”\(^ {82}\) The judiciary has its own will and need not subvert it to that of the executive just because the matter involves a treaty.

Some have tried to discourage the judiciary from fulfilling its constitutional function by appealing to extralegal duties. For example, Justice Iredell once pressured courts not to disrupt the country’s foreign affairs:

[A] treaty . . . is valid and obligatory, in point of *moral obligation*, on all, as well on the Legislative, Executive, and Judicial Departments, (so far as the authority of either extends, which in regard to the last, must, in this respect, be very limited) . . . because it is a promise in effect by the whole nation to another nation, and if not in fact complied with, unless there be valid reasons for non-compliance, the public faith is violated.\(^ {83}\)

Whatever “moral obligation” courts may have to ensure that the nation keeps its international promises, however, is irrelevant to whether courts must agree with the executive branch about the substance of those promises. Federal courts’ primary obligation, whether one labels it legal or moral, is to render opinions in the cases before them, not to abnegate that role in the name of unity.\(^ {84}\)

\(^{81}\) Much has been written about the purported supremacy of the judicial branch since *Marbury v. Madison*. See, e.g., Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 Rep. of A.B.A. 995, 406–07 (1906) (detailing “political jealousy of the courts” caused by judiciary’s claim to supremacy of law). But mere comments on the legality of the actions of other branches of government hardly threaten to usurp constitutional power.

\(^{82}\) *The Federalist* No. 51 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (advocating separate and distinct exercise of different powers of government).

\(^{83}\) *Ware*, 3 U.S. at 272 (Iredell, J., concurring in part and dissenting in part) (emphasis added) (explaining supremacy of treaties over state law).

\(^{84}\) See United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109–10 (1801) (noting federal courts’ “obligation” to apply treaties as supreme law of land); see also Goldwater v. Carter, 444 U.S. 996, 1001 (1979) (Powell, J., concurring) (describing Supreme Court’s “duty ‘to say what the law is’”) (quoting United
Independent judicial review of executive treaty interpretations is important for reasons beyond the theoretical separation-of-powers implications. As a practical matter, courts must prevent the President from misusing the treaty power for domestic purposes. Self-executing treaties operate as domestic law without any implementing legislation.\textsuperscript{85} Thus, a President who cannot convince Congress to enact a bill has the opportunity to effect the same result through a treaty. The treaty must be ratified by two-thirds of the Senators present, but the House of Representatives plays no role.\textsuperscript{86} It would likely be unconstitutional for a President to conclude a treaty with the goal of advancing domestic policy.\textsuperscript{87} If courts defer to the President's view of what the treaty means, however, such an end run around the constitutional process for enacting federal legislation would be unchecked.

Moreover, even if Congress is politically amenable to enacting a domestic bill, the law might be struck by courts as falling outside the legislature's enumerated powers. If the President circumvents that problem by concluding a self-executing treaty to the same effect, the treaty might be constitutional under Missouri v. Holland.\textsuperscript{88} But the constitutionally permissible scope of treaties is not unlimited: they must stay within the bounds of "proper subjects of negotiation between our government and other nations."\textsuperscript{89} If courts defer to executive branch readings of treaties, that limitation will be no restriction whatsoever, because the President will be the only one to decide whether the subject of the treaty was proper.

Even when there is no concern that the President might have used a particular treaty to substitute for a statute, courts still have good reason to interpret the treaty. After all, domestically, a self-executing treaty is the equivalent of a federal law.\textsuperscript{90} If courts defer to executive interpretations, then such a treaty becomes akin to a statute that means only what the

\begin{footnotesize}
\textsuperscript{85} See U.S. Const. art. VI, cl. 2 (establishing treaties as "Law of the Land").

\textsuperscript{86} See id. art. II, § 2, cl. 2 (providing that Senate alone has power to approve treaties).

\textsuperscript{87} See, e.g., David Golove, Human Rights Treaties and the U.S. Constitution, 52 DePaul L. Rev. 579, 595, 598 (2002) (arguing that if "sole purpose" of treaty were to legislate domestic policy, treaty would be unconstitutional).

\textsuperscript{88} 252 U.S. 416, 432–34 (1920) (holding that Congress may enact legislation to implement non-self-executing treaty even though that same legislation, when enacted without reference to treaty, was outside its enumerated powers).

\textsuperscript{89} Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); see Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) ("The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations . . . ."); Holland, 252 U.S. at 433 ("We do not mean to imply that there are no qualifications to the treaty-making power . . . .").

\textsuperscript{90} See U.S. Const. art. VI, cl. 2 (declaring federal laws and treaties to be "Law of the Land").
\end{footnotesize}
President wants it to mean. It is one thing to let the President decide how to interpret a treaty when dealing with a foreign country, but it is another to let that interpretation dictate domestic meaning. Whatever desire for unity may militate against judicial interference with international relations, interpreting a treaty qua statute is within the core judicial role.\textsuperscript{91} As Alexander Hamilton wrote in \textit{The Federalist}, the “true import” of treaties, at least with respect to individuals involved in domestic litigation, “must, like all other laws, be ascertained by judicial determinations.”\textsuperscript{92}

The idea that executive interpretations of treaties warrant deference in the name of a united voice is not confined to the judiciary. The legislature has also generally acted in accordance with the President’s wishes when it comes to treaties. Theoretically, Congress could refuse to enact legislation necessary to implement non-self-executing treaties, but it has rarely done so.\textsuperscript{93} An early attorney general opinion weighed in strongly about Congress’s purported constitutional obligation:

A treaty, though complete in itself, and the unquestioned law of the land, may be inexecutable, without the aid of an act of Congress: in which case Congress has never failed to enact the requisite laws, and so to recognise and to perform the duty imposed on it by the Constitution.\textsuperscript{94}

That statement is remarkable, considering the lack of any constitutional text compelling Congress to enact certain legislation. Following the lead of the executive branch may sometimes be prudent, but to turn discretion into a duty stands separation of powers on its head.\textsuperscript{95}

Of course, sometimes legislators will rebel. When legislative actors dispute the executive’s actions with regard to a treaty, the judiciary has even less reason than otherwise to rubber-stamp the executive interpretation. If it does, it hands the executive branch the power to override not only the judiciary but also the legislature. Yet this is precisely what the

\textsuperscript{91} See Van Alstine, \textit{supra} note 80, at 1271, 1274–76 (arguing that because some treaties create rights enforceable by individuals in domestic courts, and because Constitution makes treaties “law of the land” within an Article III court’s power of judicial review, courts may interpret treaties independently).

\textsuperscript{92} \textit{The Federalist} No. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

\textsuperscript{93} See 1 \textsc{Charles Henry Butler, The Treaty-Making Power of the United States} 431 (1902) (noting that no treaty had been pledged by Union that had not been fully carried out by Congress).

\textsuperscript{94} 6 Op. Att’y Gen. 291, 295–96 (1854) (emphasis added); see, e.g., \textit{Henkin}, \textit{supra} note 29, at 203 (citing Congress’s “duty”). Even under the doctrine that carved out an exception to the Supremacy Clause, making certain treaties non-self-executing, unexecuted treaties still bind the United States internationally—just not the judiciary domestically. See \textit{id.} at 203–04 (explaining that non-self-executing treaties, while not binding on courts, still bind President and Congress).

\textsuperscript{95} See 2 \textsc{Butler, supra} note 93, at 382 (calling congressional deference “honorable” but acknowledging power of Congress to refrain from enacting implementing legislation).
federal district court did in *Kucinich v. Bush*.96 In dismissing the suit by representatives challenging the President’s unilateral withdrawal from a treaty on grounds of nonjusticiability,97 the court cited the “embarrassment” that would result from “multifarious pronouncements by various departments on one question.”98 One person’s multifariousness, however, is another’s diversity. And one person’s embarrassment is another’s pride in a system that places unchecked power in no single branch of government.

The problem of potentially discordant voices is intractable without eliminating the separation of powers altogether. Conceivably, the Framers could have promoted unity by giving the judiciary approval power over treaties.99 Or they could have stripped federal courts of some of their jurisdiction and given the executive branch the sole power to interpret treaties in cases arising from treaties. But either move would have undercut the core principle that one branch of government should review the acts of another. While the separation of powers doctrine has been rightfully praised as a pillar of our republican democracy, it does come with an inevitable price to pay.100 The fact that treaties are not always interpreted

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97. See *Kucinich*, 236 F. Supp. 2d at 14–15 (using nonjusticiability as grounds for dismissing representatives’ challenge). Under the guise of nonjusticiability, courts sometimes do express opinions on the merits of the case. For example, in a case addressing the same issue as *Kucinich* with regard to an earlier treaty, a splintered Supreme Court decision had the effect of dismissing the suit for raising a nonjusticiable political question, but Justice Rehnquist’s plurality opinion left no doubt about the merits: “[W]hile the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body’s participation in the abrogation of a treaty.” *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring). It may well be that the President has the power to terminate a treaty unilaterally, but a court should not shroud its opinion on that matter in the mists of putative nonjusticiability.


99. John Jay argued that even though treaties are law, they need not be made only by legislators. After all, he pointed out, judgments of a court are just as legally valid as acts of a legislature. See *The Federalist* No. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961).

100. See, e.g., *The Federalist* No. 22, at 149 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that dilution of executive power may lead to corruption, whereas when power is centralized in single figure, that person has too much personal stake in country’s glory to commit treason); cf. *Hart*, supra note 37, at 275–76 (calling cumbersome process for constitutional amendment inevitable price to pay for system with checks and balances).
domestically the way the executive would like is one of those prices, but it is hardly a reason to do away with our system of checks and balances.

Professor Yoo, who seems to envision unchecked power in the President, would apparently disagree. When viewed from the perspective of a top-down government that brooks no internal disagreement, our system may be, as he calls the notion that treaties can have diverse interpretations, "bizarre." But such is the nature of our constitutional structure. Professor Yoo laments that treating important foreign affairs questions as legal issues rather than purely political ones forces debates about treaties to focus on "principle rather than policy." Calling a matter one of important foreign affairs, however, is no justification for ignoring principles. The President may interpret or even reinterpret a treaty one way in dealing with foreign nations, but when treaty interpretation questions appear in cases or controversies before courts, judges should not shackle themselves. If the President must apologize to his international counterparts for the recalcitrance of domestic courts, so be it.

c. Equivocal Accords

While an independent judiciary is good for the United States, it poses problems for treaty partners. When negotiators from the executive branch make promises to other nations, they lack the ability to ensure that those representations are met. For example, the United States might agree with another country pursuant to a Treaty of Friendship, Commerce

101. Cf. Henkin, supra note 29, at 206 (acknowledging that although executive interpretations warrant "great weight," sometimes courts might properly interpret treaties differently, and calling that possibility "cost of the separation of powers").

102. See The Federalist No. 38, at 237 (James Madison) (Clinton Rossiter ed., 1961) (defending imperfections of Constitution by noting that "[n]o man would refuse to give brass for silver or gold, because the latter had some alloy in it").

103. See Yoo, ABM Treaty, supra note 66, at 862 (noting that diverse interpretation may subject United States to onerous treaty provisions while granting treaty partners more favorable standing). For a discussion of how treaties can have differing interpretations, see supra notes 68–70 and accompanying text.

104. Yoo, ABM Treaty, supra note 66, at 863–64 (stating that treaties should be interpreted by considering political policy).

105. See Van Alstine, supra note 80, at 1274 (noting that because treaties function internally as Article I legislation, they are and should be interpreted by courts). Professor Van Alstine acknowledges that deference to presidential interpretation may sometimes be warranted but stresses that the judiciary has the ultimate interpretive power over treaties. See id. at 1277 (comparing deference owed to executive branch by judiciary when interpreting treaties with deference owed by judiciary to legislative branch when interpreting statutes, but noting that final interpretive authority rests with judiciary).

106. Scholars such as John Moore cringe at the thought of having an actor in one branch of government put the United States in violation of its international obligations. See Moore, supra note 70, at 184 (discussing Senate conflicts with executive branch). I, however, cringe more at the prospect of losing the benefits we have from the separation of powers.
and Navigation (FCN) that either nation’s companies doing business in the other may hire personnel “of their choice.”107 All involved in the negotiation and ratification might understand that phrase to mean that a foreign company may consider applicants’ national origin in making hiring decisions. But when litigation arises, a domestic court may read the treaty—rightly or wrongly—to mean that a foreign company may consider citizenship but not national origin.108 The company may face a damages judgment or an injunctive remedy. In situations like that one, the executive branch can do little (short of refusing to enforce the decision) but offer diplomatic regrets to the treaty partner. That impotence inevitably sounds a cautionary note to nations considering entering treaties with the United States. Why make a pact with an entity that cannot be counted on to deliver?

From the standpoint of a treaty partner, it is much easier to deal with a dictatorship. If a dictator tells you that your country’s nationals will be treated a certain way, you can count on it, at least to the extent that you trust the dictator’s word.109 Fortunately, in the United States, not even one whole branch of the federal government, let alone a single person, can unilaterally control domestic activity. The inevitable by-product of the separation of powers is that treaty negotiators are unable to make guarantees about internal affairs. Potential treaty partners are on notice of our decentralized structure and our independent judiciary; as a result, they might rationally hesitate before signing treaties with the United States.110

This point sounds less controversial in the context of other limitations on executive power. For example, if the executive branch promises to suppress political speech in favor of a group deemed by the international community to be sponsoring terrorism, treaty partners should be aware that, because of the First Amendment, the promise may be empty.111


109. Cf. THE FEDERALIST No. 75, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that treaty power must vest at least partly in President because President acting as “constitutional representative of the nation” is necessary to gain “confidence and respect of foreign powers”).

110. The Founders worried greatly about this problem, mostly in the context of making sure that the new Constitution prevented states from being able to abrogate treaties. For a discussion of the Framers’ views on the importance of strong federal treaty power, see supra text accompanying notes 71-79. But few considered whether other branches of the federal government could be stopped from undermining treaties, and I argue that as part of the separation of powers, the answer is no. Joseph Story was one who worried about that issue, but he brushed aside the anxiety about other branches as minor compared to the more pressing concern of whether states might abrogate treaties on their own. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1837-1840, quoted in 1 BUTLER, supra note 93, at 405-06.

111. Some have argued that the United States has entered many treaties that violate the Constitution. See, e.g., ALBERT LEVITT, THE PRESIDENT AND THE INTERNA-
Likewise, the doctrine of *lex posterior* allows for the possibility that even if the judiciary agrees with the executive’s interpretation of a properly ratified treaty, Congress may abrogate that treaty domestically by enacting a later statute (perhaps over a presidential veto) that conflicts with it.\(^\text{112}\)

Just as potential treaty partners must be wary of promises that violate express constitutional norms and that might be overridden by statutes,\(^\text{113}\) they must take into account the extent to which the separation of powers dilutes the reliability of otherwise clear undertakings.\(^\text{114}\) When countries

INTERNATIONAL AFFAIRS OF THE UNITED STATES 83, 86 (1954) (proposing constitutional amendment to make explicit requirement that all treaties and executive agreements comply with Constitution).

112. See Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 Am. J. Int’l L. 458, 459 (1998) (noting that *lex posterior* rule causes “distrust of this country as a treaty partner”). Indeed, in light of the institutional threats to treaties, it may seem surprising that countries enter treaties with us at all. As John Jay wrote a bit pessimistically, arguing why treaties had to be part of the law of the land, “it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it.” *The Federalist* No. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961). The fact that nations do enter such bargains despite the fact that the law of the land can, in the domestic sphere, cede to the next law of the land without any consultation with the treaty partner shows many things, such as that treaties represent something beyond mere legal obligations, and that the United States has the upper hand in bargaining power.

113. Although one might think that treaty partners would be on notice of basic principles of U.S. law, sometimes they express shock. For example, in 1889, the Supreme Court held that an 1888 statute prohibiting Chinese laborers from returning after leaving the United States trumped an 1880 treaty under which the United States promised that Chinese laborers would be “allowed to go and come of their own free will and accord.” Chinese Exclusion Case, 130 U.S. 581, 596–97 (1889) (affirming exclusion of individual from entry into United States pursuant to statute). A Chinese diplomat expressed the country’s outrage: “I was . . . not prepared to learn . . . that there was a way recognized in the law and practice of [the United States] whereby your Government could release itself from treaty obligations without consultation with or the consent of the other party to what we had been accustomed to regard as a sacred instrument.” Letter from Chang Yen Hoon, Minister Plenipotentiary of China, to James G. Blaine, U.S. Secretary of State (July 8, 1889), 1890 FOREIGN RELATIONS OF THE UNITED STATES 132, 133, quoted in Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 Am. J. Int’l L. 313, 317–18 (2001).

Likewise, when a 1988 U.S. tax statute expressly overrode any treaty to the contrary, international reaction was bitter: The violation of a . . . treaty by unilateral action of one contracting party undermines the basis of trust existing between the two countries involved, erodes the certainty and security intended by international agreements and ultimately poses the question as to whether an international convention . . . serves any purpose at all if it can be altered at will by one of the contracting parties.


114. A similar dynamic arises with treaties that are unambiguously non-self-executing. For example, in the migratory bird treaty at issue in *Missouri v. Holland*, 252 U.S. 416 (1920) (establishing broad scope of permissible subject matter for treaties), the parties “agree[d] themselves to take, or propose to their respective
choose to enter treaties with the United States, they are forewarned, and courts should not placate the executive's desire to give the nation a single voice by abjuring interpretation.

2. Separation of Obligations

Despite the potential unreliability of the United States, many nations choose to enter treaties with it. When they do, they create a relationship between sovereigns that is governed by international law. The resulting obligation on the executive branch of the U.S. government is separate from its domestic duties. That obligation does not bind the judiciary.

The basic responsibility of the federal government is to manage the country according to the Constitution, which bestows authority on it. "We the People" are the beneficiaries of that obligation. The role of the judiciary branch as part of that government is to decide various cases and controversies, including those arising under federal law. Under the Constitution, federal law includes treaties, and as the Supreme Court has proclaimed, "[i]nternational law is part of our law." Thus, courts have a constitutional obligation to interpret and apply self-executing treaties. But in the United States, international law, including that in treat-appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention." Convention Between the United States and Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit., art. VIII, 39 Stat. 1702, 1704. In such situations, the recognition of each party that the other may not be able to convince the lawmaking bodies to enact necessary measures is explicit. But in all U.S. treaties, the similar point that Congress might in the future abrogate the treaty domestically is implicit.

115. See U.S. CONST. art. III, § 2, cl. 1 (extending judicial power to cases "arising under ... Treaties"); id. art. VI, cl. 2 (including treaties in list of "supreme Law of the Land"); see also 28 U.S.C. § 1331 (2000) (conferring federal question jurisdiction on civil actions "arising under ... treaties of the United States").

116. The Paquete Habana, 175 U.S. 677, 700 (1900) (adding that international law "must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"). See generally Thomas M. Franck & Gregory H. Fox, Introduction: Transnational Judicial Synergy, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, supra note 65, at 1, 3 (recognizing increase in international agreements since World War II and various international tribunals to enforce them). The Paquete Habana rhetoric is rarely questioned, see, e.g., Frank E. Holman, DANGERS OF "TREAY LAW" 13-16 (1952) (urging constitutional amendment to prevent treaties from controlling over state laws and earlier federal statutes), but the details underlying it are hotly disputed. See William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 DUKE L.J. 1215, 1264 (2001) (predicting that United States will eventually follow transnational trend of interpreting domestic statutes in light of international law); Louis Henkin, INTERNATIONAL LAW AS LAW IN THE UNITED STATES, 82 MICH. L. REV. 1555, 1555 (1984) (exploring ramifications of Paquete Habana dictum).

117. Indeed, though international law is at root a matter between sovereigns, individuals often have a role in enforcing it through domestic court systems. See, e.g., Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (giving district courts jurisdiction over actions brought by aliens for torts "in violation of the law of nations or a treaty of the United States"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, supra
ties, is not superior to the Constitution. To the extent that a treaty violates the Constitution directly or is superseded by later federal law, courts must not enforce it; their paramount allegiance is to the Constitution.

When the government, through the executive branch, enters into a treaty, it incurs an additional, extraconstitutional obligation. The treaty presumably will benefit “We the People,” but we are only indirect beneficiaries. The principal obligee is the other nation. Regardless of what “We the People” do domestically that might impair that obligation—including the acts of courts or legislatures or states or private citizens—the international responsibility of the United States remains. Under international law, internal affairs generally do not excuse treaty violations.

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118. See Reid v. Covert, 354 U.S. 1, 16–18 (1957) (stating that treaties entered into by United States must comply with U.S. Constitution).

119. If Congress enacts a statute conflicting with an earlier treaty, the lex posterior doctrine bars courts from enforcing the treaty domestically, but does not control the executive branch. See Peter Westen, The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin, 101 HARV. L. REV. 511, 512–15 (1987) (stating that domestic courts are required to uphold subsequent statutes over treaties but that treaties are still “lexically superior” and international duty under treaty remains). As Professor Westen points out, the Supremacy Clause, which is the root of lex posterior, provides that judges are bound by supreme laws but says nothing of other branches, in stark contrast to the analogous provision in the Articles of Confederation. See id. at 513–15 (noting contrast between provisions). Compare U.S. CONST. art. VI, cl. 2, with ARTICLES OF CONFEDERATION art. XIII (U.S. 1781). In other words, an earlier treaty does not become invalid in any broad sense upon the enactment of a conflicting later statute; it merely becomes unenforceable in domestic courts. Westen, supra, at 516 (stating that domestic courts are bound by subsequent statutes but that treaties must still be enforced by political branches of government).

120. See Whitney v. Robertson, 124 U.S. 190, 194 (1888) (stating that even though treaty might no longer have force in U.S. courts, aggrieved nation “may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests”).

121. See LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 500, 506 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_judgment_20010625.htm (holding order to be binding despite protest by United States that federal government could not control conduct of states); Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”); cf. id. art. 46 (allowing internal law to vitiate consent to be bound by treaty only if internal law is of “fundamental importance”).
Though the enforceability of international law is a subject of extensive academic debate, nations generally comply because violating treaties brings repercussions. Remedies for treaty breaches can take many forms, but one way or another, as Alexander Hamilton wrote, "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members." For example, the foreign power might convince the executive branch to exert pressure on the offending actor. If that fails, 

122. See, e.g., 1 John Austin, Lectures on Jurisprudence 121, ¶ 199 (Robert Campbell ed., 1875) ("[T]he law obtaining between nations is not positive law; for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author."); Hart, supra note 37, at 3-7, 214 (concluding that because of its congruence with morality or justice, "international law" probably does exist); Henkin, supra note 36, at 19 (noting common view among diplomats that principles observed by nations on international plane do not constitute "law"); Anthony D'Amato, Is International Law Really "Law"?, 79 Nw. U. L. Rev. 1293 (1985) (answering "yes" to question in title).

123. See Henkin, supra note 36, at 47 (noting that whereas violations of international law garner disproportionate amount of attention, nations obey their international obligations "almost all of the time"). But cf. Benedict Kingsbury, The Concept of Compliance as a Function of Competing Conceptions of International Law, 19 Mich. J. Int'l L. 345, 346-47 (1998) (questioning whether notion that international law is largely compelled with has adequate empirical support).

124. See United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001) ("[I]nfraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.") (quoting Head Money Cases, 112 U.S. 580, 598 (1884)).

125. The Federalist No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing dangers of failing to abide by international law).

126. In 1906, fervor against Japanese immigrants was sweeping San Francisco as locals perceived that cheap foreign labor was undermining unions. Thomas A. Bailey, Theodore Roosevelt and the Japanese-American Crises 43 (1934). A newspaper editorial summed up the common sentiment: "We object to them . . . as we would object to any other moral poison." Id. at 36 (quoting S.F. Chron., Nov. 6, 1906). A dramatic manifestation of that prejudice was a resolution by the city's Board of Education to send all Japanese (and other Asian) children to a separate school. See id. at 28-29. Outraged Japanese officials cited a treaty guaranteeing citizens of each country "the same privileges, liberties, and rights" relating to "residence" as those of native citizens. Commerce and Navigation Treaty, Nov. 22, 1894, U.S.-Japan, art. I, 9 Bevans 387, 388. Livid, President Roosevelt vowed to make San Francisco bend: "I shall exert all the power I have under the Constitution to protect the rights of Japanese . . . ." Bailey, supra, at 81 (quoting cable message). He even hinted at using the U.S. Army to back up his position. See id. at 100-01. Instead, he bartered a deal in which Congress limited Japanese immigration in exchange for desegregation of the San Francisco schools. See id. at 148-49. Even so, resolving the crisis for good entailed a further campaign by the President to convince the California governor not to approve new anti-Japanese measures. Id. at 170-74.

David Golove cites this incident as an example of the historical rise of the nationalist view of the treaty power: the view that the federal government controls the execution of treaties. Golove, supra note 74, at 1249-54. But it serves equally well as an example of how the best-laid plans of a federal executive can be undermined by renegade acts within the domestic sphere. There was certainly no guarantee that President Roosevelt would, or should, be able to keep San Francisco in line with federal policy.
the executive branch may end up simply apologizing.127 If the treaty partner wishes to pursue a matter further, it may file a case with the International Court of Justice. It might mete out its own tit-for-tat diplomatic sanctions, perhaps even starting a war.128 In short, the obligation taken on by the executive branch when entering a treaty is a serious one—but one that does not directly bind the judiciary.

The duality of the federal government’s obligations was described by James Wilson during the Constitutional Convention of 1787: “Every nation may be regarded in two relations, first, to its own citizens; secondly, to foreign nations. It is, therefore, not only liable to anarchy and tyranny within, but has wars to avoid and treaties to obtain from abroad.”129 Along those lines, scholars have long debated the “monist” and “dualist” views of international law.130 Monists see international law as part of every country’s internal legal system and in fact superior to domestic laws.131 Dualists posit two distinct spheres of law.132 According to strict dualism,


128. 1 BUTLER, supra note 93, at 452.

129. Id. at 314.

130. See, e.g., ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 156–57 (2000); Anne-Marie Slaughter, A Typology of Transjudicial Communication, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, supra note 65, at 37, 63 (stating that dualism “cannot be sustained”); J.G. Starke, Monism and Dualism in the Theory of International Law, 17 BRIT. Y.B. INT’L L. 66 (1936) (analyzing both viewpoints from positivist perspective).

131. See Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 HARV. L. REV. 853, 864 (1987) (describing monist view). Monists have been described as falling into two camps: those who see the supremacy of international law as the most efficient way of protecting human rights, and those whose position is based on formalistic logic and the unitarian nature of law. MALCOLM N. SHAW, INTERNATIONAL LAW 100–01 (4th ed. 1997) (discussing two types of monists). Professor Henkin has stressed that the Framers were essentially monistic in their view and that with increasing globalization, retreat to a dualist viewpoint would be bad policy. Henkin, supra, at 886 (concluding that Framers’ views were monist).

132. See 1 L. OPPENHEIM, INTERNATIONAL LAW 37 (Hersch Lauterpacht ed., 8th ed. 1955) (detailing dualist view). This view is rooted in the work of various philosophers. For example, Rousseau noted that “the relation of the body politic to a foreign Power is that of a simple individual.” Jean-Jacques Rousseau, The Social Contract, in SOCIAL CONTRACT 167, 183 (Gerard Hopkins trans., 1960) (1762). He specifically declined to expound on the “vast” field of treaties between one state
international law applies only to nations, not to individuals.\textsuperscript{133} Most countries' treatment of international law is actually somewhere in between the two extremes.\textsuperscript{134}

The United States is no exception.\textsuperscript{135} To the extent that it requires treaties to be "executed," it is dualistic, but courts' acknowledgment of "self-executing" treaties is a monistic view.\textsuperscript{136} Regardless of the extent to which one envisions international law as infiltrating a domestic legal system, the important point is that when the executive branch makes a treaty, it incurs an obligation that is qualitatively different from its obligation to the domestic populace\textsuperscript{137}—an obligation that the judiciary does not share.

and another, but his writings leave the strong impression that states interact with each other on an international plane much as individual citizens do within a state. \textit{Id.} at 307. Likewise, Montesquieu wrote that "[t]he life of states is like that of men." \textsc{Montesquieu, supra} note 20, at 138 (analogizing individuals' legal rights to those of states under law of nations). John Rawls also viewed the international plane as essentially another version of the domestic one. Just as an individual in a society should decide such rules without knowing that individual's particular circumstances, he wrote, so should representatives of states decide international rules without knowing that country's circumstances. \textsc{John Rawls, A Theory of Justice} 378 (1971). \textit{But cf. id.} at 8 (warning that law of nations may require special principles not applicable to notions of justice within a society).

\textsuperscript{133} See Jonathan I. Charney, \textit{The Power of the Executive Branch of the United States Government to Violate Customary International Law}, 80 Am. J. Int'l L. 913, 914 (1986) (describing dualist view); Henkin, \textit{supra} note 131, at 864–65 (discussing differences between monists and dualists); George Slyz, \textit{International Law in National Courts, in International Law Decisions in National Courts, supra} note 65, at 71, 73 (detailing dualist system). Jeremy Bentham ranks as the honorary father of dualism on the basis of his definition of international law as "the mutual transactions between sovereigns as such." \textsc{Jeremy Bentham, Introduction to the Principles of Morals and Legislation} 6, 296 & n.x (J.H. Burns & H.L.A. Hart eds., 1970) (excluding transactions involving individuals from province of "international jurisprudence").

\textsuperscript{134} See Shaw, \textit{supra} note 131, at 127 (noting variety of countries' nuanced positions in terms of relative status of treaties and domestic legislation); Henkin, \textit{supra} note 131, at 865 ("Few if any nations are either strictly monist or strictly dualist.").

\textsuperscript{135} See Ralph G. Steinhardt, \textit{The Role of International Law as a Canon of Domestic Statutory Construction}, 43 Vand. L. Rev. 1103, 1106 (1990) (noting that Supreme Court has steered between extremes).

\textsuperscript{136} Most common law countries are dualistic in the sense that they recognize no treaties as being self-executing. See Mark W. Janis, \textit{An Introduction to International Law} 98–99 (3d ed. 1999) (describing English rule prohibiting self-execution of treaties). Indeed, the United Kingdom's system has been called "perhaps the purist form of dualism." AUST, \textit{supra} note 130, at 145, 151–54. Civil law countries are much more likely to grant explicit recognition of treaties as part and parcel of domestic law, often in explicit constitutional provisions. See \textsc{Janis, supra}, at 101.

\textsuperscript{137} John Locke envisioned one governmental organ for orchestrating relationships among individuals and another one for managing the collective affairs of that group of individuals in its interactions with other such groups: "[T]hough in a common-wealth the members of it are distinct persons still in reference to one another, and as such as governed by the laws of the society; yet in reference to the rest of mankind, they make one body." \textsc{Locke, supra} note 71, § 145. Thus, he described two distinct planes of relationships: one among citizens, and one among
When a case arises under a treaty, executive branch actors may well hope that the court does nothing to impair that additional obligation. In a word, what they wish for is deference. After all, they are in a better position than judges to know what interpretation of the treaty will suit current foreign policy—which is not necessarily the same as the “correct” interpretation of the treaty, to the extent that one exists. The court, though, should not acquiesce to the executive’s interpretation. Instead, it should interpret the treaty only in light of its fealty to the Constitution. The court has not taken on the separate obligation to another sovereign.\footnote{138}

For example, the President may have decided for diplomatic reasons that the language in an FCN treaty \footnote{139} allowing foreign companies to hire personnel “of their choice” exempts foreign companies from all employment discrimination suits. But a court might properly read the treaty as having a more limited effect. The court’s duty to interpret the treaty as a self-executing domestic law runs to “We the People,” one of whom might well be a wrongly rejected job applicant. Reading the treaty as the President desired would violate that duty.

In sum, courts should remember that their obligation is to apply the Constitution. When the executive branch undertakes a separate obligation to another sovereign, the substance of that promise often becomes domestic law that courts can enforce, but because that extraconstitutional obligation is not directly incurred by the judiciary, courts need not appease the executive branch by deferring to its interpretations. If a court’s interpretation causes a treaty partner to complain of a violation, that partner will have recourse to various possible sanctions, formal or informal; thus, courts should not worry overly about the plight of the international obligee. In any event, better that courts apply the law at the possible expense of international obligations than bow to international obligations at the definite expense of their constitutional duty.

3. \textit{Separation of Interpretations}

Occasionally, courts stand up to the executive branch. One judge who did accept the general concept of deference directly challenged the assumption that it was a code word for submission:

\begin{quote}
\footnote{nations. The distinction between the planes is evident in the way Locke described the management of them. \textit{Id.} Although he favored the political consistency that would result from having the same people administer both planes, he stressed that two distinct powers would be wielded: a \textit{federative power} and an executive power. \textit{Id.} § 147. The executive power concerned the “laws of the society \textit{within} its self,” while the federative power managed the “\textit{security and interest of the public without}.” \textit{Id.} §§ 146–148.


139. For a discussion of FCN treaties, see \textit{supra} text accompanying notes 107–108.
\end{quote}
Implicit in the Government’s posture is that its concept of “great weight” necessarily must yield concurrence. . . . Were this notion to prevail, the Court’s constitutional role and discretion in treaty interpretation effectively would be reduced to that of a mere echo of the Government’s perspective. . . . Even in articulation the theory makes a mockery of constitutional separation of powers. Manifestly, its effectuation would spell doom for judicial independence.140

In my view, even a more limited notion of “great weight” can portend similar doom. If a court would independently arrive at an interpretation different from that of the executive branch but announces a decision consistent with the executive’s view—in other words, if the deference is not mere dicta—then the judicial role has been compromised.141 Neither interpreter in such a situation needs to be wrong. Actors in the two branches have unique responsibilities and operate under diverse restrictions and allegiances.142 Judicial and executive interpretations of treaties thus have reason to be different, and when they are, the judiciary has little reason to back down.143

As long as courts retain their essential independence, there is nothing wrong with using prudential discretion to weigh the position of the executive branch on occasion; declining to defer does not rule out consideration of others’ opinions. After all, the executive branch negotiates treaties and is in a better position than the judiciary to understand how they work in practice.144 Much as appellate courts respect the fact-finding of trial


141. See Japan Whaling Ass’n v. Am. Cetacean Soc’y, 478 U.S. 221, 250 (1986) (stressing Court’s responsibility to interpret statutes rather than deem all sensitive political cases as being nonjusticiable).

142. For example, judges act only when a case happens to come before them, whereas the executive branch conducts its affairs more systematically. See Aharon Barak, A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 HARV. L. REV. 16, 32 (2002) (discussing courts’ consideration of sporadic nature of their lawmaking). That distinction may partially explain judicial deference—why let one case upset a carefully drawn scheme?—but still, when a case does come before a judge, the episodic nature of litigation does not justify abstention.

143. One scholar has qualified his view that the judiciary should defer to executive authority on matters of international law by stressing that deference “must not be achieved by sacrificing judicial independence.” RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 10 (1964) (arguing that attitudes towards nations should not influence judicial outcomes). It is hard to have it both ways, though. “Deference” presupposes the lack of a truly independent judiciary.

144. See Van Alstine, supra note 80, at 1298–1302 (arguing that structural advantages give executive interpretations more force for certain treaties and that type of treaty dictates how much deference is warranted).
judges who receive live testimony, courts might recognize the particular value of the executive perspective.

Moreover, a pitfall of the separation of powers is the potential for a paralyzed government. At some point, when the pragmatic need for the nation to speak with one voice becomes particularly strong, it may be wise for the judiciary to echo the executive in the spirit of overlooking one principle of the republic to save the whole. Likewise, at times, a court’s own sustained legitimacy might depend on avoiding clashes with the executive branch. Federal courts do not have their own armies to enforce judgments. It is one thing to disagree with an executive interpretation in a case between private parties; it is another when the President is a party. In direct challenges to executive authority, such as that in *Kucinich v. Bush*, courts as a practical matter can reasonably take into account their own long-term self-interest. But even then, they can reach


147. *See, e.g.*, United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109–10 (1801) (recognizing danger of international retribution if nation’s treaty obligations are seen as being breached by court decision).


149. A similar point was stressed recently by a representative who urged Congress to amend an appropriations bill to ensure that no agency could use federal funds to enforce a federal court decision declaring the placement of a monument of the Ten Commandments in the Alabama Supreme Court to be unconstitutional. *See* 149 Cong. Rec. 7277 (2003) (statement of Rep. Hostetler) (decrying decision in *Glassboro v. Moore*, 335 F.3d 1282 (11th Cir. 2003)). When the Supreme Court has defied the executive branch, however, the executive branch has generally complied. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 707 (1974) (concluding that “needs of judicial process” outweigh presidential privilege); Neil A. Lewis & David E. Sanger, *Administrati* Changing Review at Guantánamo Bay, N.Y. Times, July 1, 2004, at A9 (describing Bush administration’s plan to comply with *Rasul v. Bush*). Still, federal courts surely do not want to test those waters too often.

an accommodating result without invoking the damaging doctrines of deference or nonjusticiability.¹⁵¹

I am not decrying judicial deference to the executive interpretations of all laws—only of treaties. For example, courts defer to agencies’ interpretation of regulations and statutes.¹⁵² Descriptively, that deference has been a bit weaker than with treaty interpretation.¹⁵³ Prescriptively, though, it makes more sense. In that situation, Congress has explicitly delegated the implementation of a statutory scheme to an executive agency. To the extent that congressional intent concerning a statute is meaningful, so is agency intent, because Congress may delegate that role. As to any given statute, Congress comprises all the drafters. As to treaties, in contrast, the executive is only one of the two (or more) parties to the agreement. The executive’s self-serving intent is thus less of a guide to what a treaty means than is Congress’s intent as to what a statute means.¹⁵⁴

If courts were to assert themselves and interpret treaties independently, perceived violations of the international obligations of the United States would not suddenly spike. Although the perspectives of the executive and the judiciary differ somewhat, cross-branch interpretations should be fairly consistent. Executive interpretations will presumably tend to favor results that maintain smooth diplomatic relationships with treaty partners, and so will judicial ones, because the collective intent of the parties to a given treaty is likely cooperative as well. Along the same lines, it is

¹⁵¹. Cf. Criddle, supra note 61, at 481–82 (concluding that although courts should not blindly defer to executive interpretations, such interpretations can have legitimate weight, particularly when treaty partner has ratified executive interpretation); Van Álstine, supra note 80, at 1268, 1298–1302 (arguing for “calibrated deference” rather than “absolute judicial abdication”).


¹⁵³. For example, one quantitative study measured the level of Chevron deference by counting how often courts deferred to executive interpretations and put that level at seventy-one percent. William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993 Term—Foreword: Law as Equilibrium, 108 HARV. L. REV. 26, 72 (1994–1995) (tabulating Supreme Court cases from 1981 through 1992). No similarly thorough analysis of deference to the executive’s treaty views exists, but most agree that defections are rare. See, e.g., Bederman, supra note 52, at 1015 (positing that judicial deference to executive branch in treaty interpretation is expansive); Criddle, supra note 61, at 459–60 (espousing same idea). But cf. John A. Townsend, Tax Treaty Interpretation, 55 TAX LAW. 219, 257 (2001) (equating tax treaty interpretation with statutory interpretation in terms of deference). Examples of cases in which the Supreme Court defied the executive branch include Perkins v. Elg, 307 U.S. 325, 335–42 (1939) (disagreeing with Secretary of State’s interpretation of naturalization treaty with Sweden), and Valentine v. United States, 299 U.S. 5, 10–12, 18 (1936) (limiting executive power under extradition treaty with France).

¹⁵⁴. But see James C. Wolf, Comment, The Jurisprudence of Treaty Interpretation, 21 U.C. DAVIS L. REV. 1023, 1051 (1988) (arguing that more judicial deference to executive branch is warranted with treaties than as to statutes).
unlikely that courts will read treaties in ways that cause violations of other norms of international law. Treaty drafters presumably intend their work product to comply with those norms; after all, the documents they write are themselves an important part of international law. Courts’ interpretations ought to reflect that intent. In short, disdaining deference would hardly be cataclysmic for foreign policy.

Even when judicial interpretation does deviate from that of the executive branch, disdaining deference would not cause the chaos that some fear. The Framers’ main concern about courts and treaties was the “hydr” problem—that the voices of multiple courts would turn foreign policy into a cacophony. But that problem will not rear its head because the independent judiciary has one ultimate arbiter. And that unitary head, the Supreme Court, unlike many countries’ highest courts, considers itself bound by stare decisis. Therefore, although the federal judiciary might speak with a voice different from that of the executive, that voice is stable enough to help maintain positive foreign relations. The inconstancy of treaties need not spawn instability of interpretation within a single branch of government. With that in mind, courts should fulfill their constitutional duty to interpret treaties without being cowed into silence. They need not be indifferent to executive interpretations, but nor should they be deferent.


159. See The Federalist No. 64, at 391–92 (John Jay) (Clinton Rossiter ed., 1961) (indicating role of federal judiciary in foreign relations). In explaining why the President and the Senate held the treaty power, Jay emphasized that the nature of the power was such that it should not be entrusted to a body with fast turnover, namely the House of Representatives. Id.; see The Federalist No. 75, at 450, 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that “particular nature” of treaty power justified “peculiar propriety” of President and Senate over House, with its “fluctuating” views and “multitudinous” membership).
B. Undue Inference

Courts also should avoid unwarranted deference to the legislative branch. Under the \textit{lex posterior} doctrine, conflicts between self-executing treaties\textsuperscript{160} and federal statutes are resolved in favor of the later document.\textsuperscript{161} In \textit{Dred Scott v. Sandford},\textsuperscript{162} Justice Curtis expressed doubt that a treaty could be supreme to later-enacted federal law,\textsuperscript{163} and thirteen years later, the Supreme Court formally recognized the doctrine.\textsuperscript{164} Judges often shrink from its harsh effect, though, by interpreting treaties and statutes as being consistent with each other.\textsuperscript{165} To the extent that this policy of harmonization has any theoretical foundation, it would seem to be a presumption that when legislators enact statutes, they are aware of existing treaties and do not, absent indications otherwise, intend to abrogate them.

But congressional silence does not readily support such an inference. Most likely, when weighing statutory language, legislators give little consideration to ensuring the continued domestic viability of treaties. Such was

\textsuperscript{160} The \textit{lex posterior} doctrine logically applies only to self-executing treaties. See Cameron Septic Tank Co. v. Knoxville, 227 U.S. 39, 44, 50 (1913) (discussing application of \textit{lex posterior} doctrine); see also \textit{Restatement (Third) of Foreign Relations, supra} note 29, § 115 cmt. c (1987) (distinguishing non-self-executing treaties). The Supreme Court rarely invokes this gloss on the rule. See \textit{Jordan J. Paust, International Law as Law of the United States} 82–83 (1996) (explaining Supreme Court’s stance on issue). Still, it would make little sense to say that a treaty is non-self-executing and yet has the effect of negating federal legislation. Most likely, the Court simply forgets that some treaties are non-self-executing. Certainly, it also forgets sometimes that some treaties are self-executing. See \textit{Van Alstine, supra} note 80, at 893–94 (noting that in disclaiming existence of federal common law, \textit{Erie Railroad Co. v. Tompkins}, 304 U.S. 64 (1938), inexplicably omitted treaties in list of sources of law for federal courts).

\textsuperscript{161} See Whitney v. Robertson, 124 U.S. 190, 194 (1888).

\textsuperscript{162} 60 U.S. (19 How.) 393 (1856).

\textsuperscript{163} See \textit{id.} at 629 (Curtis, J., dissenting) (discussing inconsistent treaty and law).

\textsuperscript{164} See \textit{The Cherokee Tobacco}, 78 U.S. (11 Wall.) 616, 621 (1870) (determining that proper redress is with Congress). Before the ratification of the Constitution, John Jay argued against this weakening of treaties; in his view, only a later treaty by the same parties could change the nature of such an agreement. See \textit{Nelson, supra} note 75, at 256 n.95 (conveying different views on resolution of treaty-statute conflicts). Though the \textit{lex posterior} doctrine stems from a questionable analysis of the Supremacy Clause, a full analysis of its merits is beyond the scope of this article.

\textsuperscript{165} See, e.g., Moser v. United States, 341 U.S. 41, 45 (1951) (reading treaty in way that avoided direct conflict with later statute); \textit{MacNamara v. Korean Air Lines}, 863 F.2d 1135, 1140–41 (3d Cir. 1988) (interpreting treaty provision allowing foreign companies to hire personnel “of their choice” not to conflict with ban on employment discrimination based on “national origin” because treaty permitted hiring decisions based on only citizenship, not national origin); \textit{Whitney}, 124 U.S. at 194 (“[C]ourts will always endeavor to construe [treaties and statutes] so as to give effect to both.”); \textit{Murray v. The Schooner Charming Betsy}, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”); see also \textit{Restatement (Third) of Foreign Relations, supra} note 29, § 114 (1987) (suggesting that courts construe statutes not to conflict with treaties when “fairly possible”).

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the case in *Ropes v. Clinch*, one of the earliest clean examples of *lex posterior*. In 1832, the United States had entered into a treaty with Russia providing most-favored-nation treatment for duties on Russian goods. In 1861, Congress enacted a law that imposed a duty of forty dollars per ton on Russian hemp and twenty-five dollars per ton on Indian hemp. The *Ropes* plaintiff, who had paid the higher duties on Russian hemp under protest, sued the duty collector on the theory that any duty above twenty-five dollars per ton violated the treaty. The plaintiff advanced the theory that although Congress had enacted the disparate duties, it had not intended to abrogate the treaty with Russia. The court indignantly rebuffed that argument as tantamount to saying that "congress did not intend that [the statute] should have the effect which necessarily follows from enforcing it." Reading the statute as written, the court held for the duty collector.

Still, the court clung to the idea that reconciliation was generally a good idea: "[I]f the [statutory] language were doubtful . . . , it would be the duty of the court to look at the treaty, and, if it be possible to find an interpretation of the statute which will involve no infraction of the treaty . . . , to give it that interpretation, and without hesitation." Had the court succumbed to that temptation, it might have presumed that in drafting the duty statute, Congress had interpreted the treaty to mean something that would not have conflicted with the statute—for instance, as carving out an exception for hemp. Such a presumption would have been baseless because in fact, the legislators had not even read the treaty at all: once the discrepancy became news, Congress amended the statute to eliminate the conflict. Yet courts make such unwarranted inferences whenever they strain to avoid treaty-statute conflicts. They should recognize instead that, as with the hemp statute, the assumption that legislators have drafted a statute in light of their interpretation of relevant treaties is likely to be false.

Moreover, even if legislators have in fact interpreted old treaties as reconcilable with new laws, judges are entitled to their own opinions and need not strain to achieve an artificial ideal of harmony—between the laws

166. 20 F. Cas. 1171 (C.C.S.D.N.Y. 1871) (No. 12,041).
167. See id. at 1175 (holding that court was bound by congressional act).
169. See Act to Provide Increased Revenue from Imports, ch. 45, § 1, 12 Stat. 292, 292 (1861) (declaring that additional duties apply to goods such as sugar, tea, coffee, silk, and hemp).
170. See *Ropes*, 20 F. Cas. at 1171.
171. *Id.* at 1173.
172. See *id.* at 1175 (holding that court was bound by congressional act).
173. *Id.* at 1172–73 (advocating for reconciliation of both treaties).
174. See Act to Reduce Internal Taxes, ch. 255, § 21, 16 Stat. 256, 264 (1870) (unifying duty at twenty-five dollars per ton after duties in *Ropes* were paid).
or between the branches.\textsuperscript{175} Pointing out conflicts may make violations of international obligations through congressional acts starker and thereby cause the executive branch to have to make amendments.\textsuperscript{176} Straightforward interpretations, however, are preferable to spurious ones.\textsuperscript{177} Foreign policy may suffer, but such is the price we pay for the separation of powers. When courts reconcile a treaty with a later statute by inferring that legislators must have read the two laws to be in harmony, they improperly defer to congressional interpretation.

IV. Intercourt Interpretations of Treaties

Treaty interpretation can legitimately diverge not only across different branches of government, but also among courts with different institutional roles. In discussing the role of courts in protecting democracies, Aharon Barak, president of Israel's Supreme Court, noted the importance of context in judging: "[A] judge who develops the law does not perform an individual act, isolated from an existing normative system. The judge acts within the context of the system, and his ruling must integrate into it."\textsuperscript{178}

Indeed, a judge decides cases on behalf of a court, and the nature of the court can and should influence outcomes. When courts resolve the same interpretive question about a treaty differently, both courts may, in

\textsuperscript{175} Under the "\textit{non obstante}" provision of the Supremacy Clause, state judges are bound by treaties and federal laws, "\textit{any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.}" U.S. CONST. art. VI, cl. 2. At the time of the drafting of the Constitution, such provisions were a common way of telling interpreters not to try too hard to harmonize conflicting legal rules. Nelson, supra note 75, at 252. The lack of a similar provision relating to conflicts between treaties and statutes might lead one to believe that interpreters should strive to find concordance. But that view would ignore the function of the Supremacy Clause. It addresses the supremacy of the national government over state government when legal norms of the two clash, and the \textit{non obstante} provision furthers that interest. The Clause is not about conflicts between federal norms. Therefore, it is not surprising that there is no such provision, and little should be read into its absence.

\textsuperscript{176} See Rainey v. United States, 232 U.S. 310, 316–17 (1914) (noting that if Congress passes later law that abrogates treaty, "[t]he other nation may have ground for complaint, but every person is bound to obey the law"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, supra note 29, § 115(1)(b) (1987) (noting continuing international obligation despite abrogation of treaty by later domestic law). \textit{But see} Vagts, supra note 112, at 458–59 (warning of recent trend of executive branch not to make any attempt at reparations when nation breaches international obligation through action such as court decision).

\textsuperscript{177} Cf. RESTATEMENT (SECOND) OF CONTRACTS § 203 cmt. c (1981) ("If a term or contract is unconscionable or otherwise against public policy, it should be dealt with directly rather than by spurious interpretation."); Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 Rep. of A.B.A. 395, 408 (1906) ("[T]o interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion.").

\textsuperscript{178} Barak, supra note 142, at 30.
light of their diverse perspectives, be correct. Thus, just as deference to the executive branch is unwarranted, the U.S. Supreme Court (and lower federal courts) should not give undue weight to the decisions of other courts interpreting treaties. Specifically, despite globalization and the rush to harmonize legal systems, U.S. courts should not cede their authority to the International Court of Justice. But neither should they ignore it. The most appropriate level of respect is somewhere between indifference and deference.

A. Heterogeneous Heuristics

Historically, the principles of treaty interpretation in U.S. courts have differed somewhat from those in the International Court of Justice. The jurisprudence of the U.S. Supreme Court, and by extension the lower federal courts, has developed somewhat haphazardly. As with the interpretation of statutes and contract, the basic starting point has been the text. In reading the text of treaties, the Court has considered the context of the specific terms at issue. The Court's willingness to depart from the text has varied through the years.

When the Court does examine extratextual sources, it sometimes considers a treaty's "preparatory work" (often referred to as travaux préparatoires), as well as legislative history from the domestic ratification process and subsequent conduct of the parties. The Court has also considered treaties' purposes, but usually to add unnecessary support to its

179. Cf. Montesquieu, supra note 20, at 9 (arguing that because of differences among nations in climate, culture, and other factors, laws that are appropriate to govern one are rarely appropriate to govern another). But cf. Falk, supra note 143, at 93 (arguing that factors unrelated to merits should not affect adjudication and that cross-court uniformity of outcomes would "improve the quality of international justice").

180. For a fuller discussion of the treaty interpretation jurisprudence of the U.S. Supreme Court, see Glashauser, supra note 15 (manuscript at 5-18).


182. See, e.g., Air France v. Saks, 470 U.S. 392, 396-97 (1985) (indicating that treaty analysis begins with specific words and with context in which they are used).


184. See, e.g., Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700-02 (1988) (using negotiating history to bolster holding that because Illinois law allowed service on foreign corporation via its American subsidiary, Hague Service Convention did not apply); Air France, 470 U.S. at 400-03 (discussing preparatory work at length even though that history merely confirmed what was already "evident" from treaty's text).


conclusions, not to serve as the foundation for them. More specific interpretive canons articulated by the Court include the rule that if practicable, meaning should be given to all provisions in a treaty. Likewise, the Court prefers treaty constructions that are "effective" and favorable to rights claimed under a treaty over those that restrict rights. Of course, as discussed above, perhaps its most important doctrine of treaty interpretation has been that of deference to the executive branch.

Unlike the Supreme Court, the International Court of Justice relies heavily on a codified guide to interpretation: the Vienna Convention on the Law of Treaties. Even if the parties to a dispute before the Court have not ratified the convention, the Court often applies it as customary law. As explained by its drafters, the convention anoints a strong version of textualism: "[T]he text must be presumed to be the authentic expression of the intentions of the parties, and . . . in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties." That approach sprung from precedent in the International Court, which was already perceived as having adopted textualism.

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the parties . . . and the subsequent interpretations of the signatories helps clarify the meaning of [a] term.

187. See, e.g., Volksvagenwerk, 486 U.S. at 704–05 (rejecting argument that purpose of Hague Service Convention undermined Court’s conclusion that domestic law controlled whether service of process on foreign defendants had to follow convention).

188. See, e.g., Geofroy v. Riggs, 133 U.S. 258, 270 (1890).

189. See, e.g., Nielsen v. Johnson, 279 U.S. 47, 52 (1929) ("When a treaty provision fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred . . . .”).

190. For a discussion of the Supreme Court’s deference to the executive branch, see supra note accompanying notes 50–54.

191. For a fuller discussion of the treaty interpretation jurisprudence of the International Court of Justice, see Glashausser, supra note 15.


194. ILC Reports, supra note 193, at 354 ("[T]he jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law."); see BP Exploration Co. (Libya) v. Libya, 53 I.L.R. 297, 332 (Arb. 1973) (viewing Vienna Convention as codification of existing customary interna-
Article 31 of the convention sets out the basic standard: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."195 The convention does allow for the use of evidence of "subsequent practice" of the parties, as long as that practice "establishes the agreement of the parties regarding [the treaty's] interpretation."196 Interpreters may also consider a "subsequent agreement" about interpreting or applying the treaty,197 as well as "any relevant rules of international law." A second article on interpretation erects strict hurdles before consideration of other extratextual sources is appropriate.199 That standard has tethered interpreters to the text more than U.S. courts traditionally have done. Though some have noted the International Court's unpredictable mix of formality and flexibility,200 its treaty interpretation doctrine has mainly been rooted in the textualism reflected in the Vienna Convention.201


196. Id. art. 31, para. 5(b).

197. Id. art. 31, para. 5(a).

198. Id. art. 31, para. 5(c).

199. Id. art. 32. Article 32 provides as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Id.


201. See, e.g., Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), 1994 I.C.J. 112, 121-22 (July 1) (refusing to give any weight to statement of foreign minister because of purported clarity of text); IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATL LAW 632 (5th ed. 1998) (describing Court's textualism). But see Western Sahara, 1975 I.C.J. 12, 53-54 (Oct. 16) (relying on diplomatic correspondence in holding that Morocco's sovereignty did not extend to certain area, despite treaty providing that area "belong[ed]" to Morocco).
The policy of the U.S. Department of State has been to treat the Vienna Convention as "the authoritative guide to current treaty law and practice." Although federal courts have cited a national policy to treat the convention as customary international law, which theoretically implies that the convention is the law of this land. Still, the United States has not ratified the convention, and the Supreme Court has cited it only sporadically. Although the principles of the Vienna Convention and the practice of the International Court do not diverge drastically from American treaty interpretation jurisprudence, some salient differences have emerged. For example, U.S. courts tend to ignore the convention's focus on principles of customary international law. Overall, the substantive approach of the International Court, through the convention, is more textual; in terms of form, it is more hierarchical. As a result, U.S. courts


203. See, e.g., Gonzalez v. Gutierrez, 311 F.3d 942, 949 n.15 (9th Cir. 2002).

204. See, e.g., Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting) (criticizing majority for ignoring plain meaning of convention); Restatement (Third) of Foreign Relations, supra note 29, § 325 cmt. a (1987) (noting that Restatement (Third) of Foreign Relations section tracking Vienna Convention's approach to interpretation "does not strictly govern interpretation . . . by courts in the United States [but] represents generally accepted principles [that] the United States has appeared willing to accept"); Criddle, supra note 61, at 433–34 (noting that Court has cited the convention only twice, including once in dissent). State courts and other federal courts have been more likely to rely on the convention. Id. at 434.

205. The Restatement (Third) of Foreign Relations has adopted many interpretive principles from the Vienna Convention. See, e.g., Restatement (Third) of Foreign Relations, supra note 29, § 325 (1987) (importing significant aspects of Article 31 of Vienna Convention). The Restatement (Third) of Foreign Relations notes that its section on interpretation suggests principles "somewhat different" from those ordinarily applied by U.S. courts. Id. § 325 cmt. g. Other principles in the Restatement (Third) of Foreign Relations stem from the practice of federal courts, which tend to focus less on the text than the Vienna Convention would suggest. See, e.g., Restatement (Third) of Foreign Relations, supra note 29, § 326(2) (1987) (noting "great weight" due executive interpretations).

206. Vienna Convention, supra note 121, art. 31, para. 3(c) (directing interpreters to take into account "any relevant rules of international law").

207. See Reuter, supra note 70, at 74–75 (praising Vienna Convention's "carefully and subtly graduated elements" that guide interpreters to parties' intentions through primacy of text). The United States manifested its desire for a less textualistic approach during the drafting of the Vienna Convention. The U.S. representative on the drafting commission proposed combining articles 31 and 32 into a list of parallel interpretive factors to avoid the apparent hierarchy of sources and water down the textualism. That proposal, though, was soundly rejected. See Richard D. Kearney & Robert E. Dalton, The Treaty on Treaties, 64 Am. J. Int'l L. 495, 519–20 (1970) (noting that one basis for rejection was concern that wealthier nations such as United States would have better access to extratextual sources); Rosenne, supra note 193, at 221 (reporting that concerns about diluting textualist approach fueled rejection of proposed amendment).
tend to consult extratextual sources a bit more readily than they would if they followed the convention.\textsuperscript{208}

B. The Influence of the International Court of Justice

Courts in foreign countries vary in terms of how often and how respectfully they cite decisions of the International Court of Justice as evidence of international law about treaty interpretation.\textsuperscript{209} Compared with other domestic court systems, U.S. courts have given perhaps the least deference to the decisions of international tribunals such as the International Court.\textsuperscript{210} In cases involving private law, when no particularly salient national interest is at stake, U.S. courts have sometimes deferred,\textsuperscript{211} but as a general matter, courts in this country have been much more reluctant to cede their judicial power to international tribunals than to the executive branch.

Deference to judgments of the International Court can take at least three forms. The lowest level occurs when U.S. courts treat those judgments as merely persuasive evidence of what international law is. Courts have accorded this type of deference on occasion.\textsuperscript{212} A more robust form

\textsuperscript{208} See Restatement (Third) of Foreign Relations, supra note 29, § 925 reporters’ note 4 (1987) (noting subtle contrast in “emphasis and presentation” between U.S. courts’ intentionalism and interpretive approach of Vienna Convention); Bederman, supra note 52, at 975 (“The overall effect of the Vienna Convention on American treaty jurisprudence has been to check slightly the use of extratextual means of interpretation.”); Gallant, supra note 70, at 1094 (describing U.S. Supreme Court interpretation as “more open” than what Vienna Convention calls for); David A. Koplow, Constitutional Bail and Switch: Executive Reinterpretation of Arms Control Treaties, 137 U. Pa. L. Rev. 1353, 1385 n.132 (1989) (describing interpretation in U.S. courts overall as less text-bound than interpretation under Vienna Convention).

\textsuperscript{209} See Sarita Ordonez & David Reilly, Effect of the Jurisprudence of the International Court of Justice on Domestic Courts, in International Law Decisions in National Courts, supra note 65, at 335, 344–45, 365. Institutional factors such as the nation’s constitution, statutes, and custom play a role in affecting how that nation will treat decisions of the International Court. \textit{Id.} at 345.

\textsuperscript{210} Franck & Fox, supra note 116, at 5–6. The “perhaps” is a necessary qualifier because the issue of the reception in domestic courts of the decisions of any international tribunal has “scarcely been studied at all.” Mohammed Bedjaoui, The Reception by National Courts of Decisions of International Tribunals, in International Law Decisions in National Courts, supra note 65, at 21, 21-22; see also Yuji Iwasawa, International Law, Human Rights, and Japanese Law 107–08 (1998) (noting dearth of scholarship on this subject).

\textsuperscript{211} Franck & Fox, supra note 116, at 10. Not surprisingly, “municipal courts are more inclined to acknowledge the applicability of [a decision by an international court if it] favours its government or its nationals.” Bedjaoui, supra note 210, at 32.

\textsuperscript{212} See, e.g., United States v. Maine, 475 U.S. 89, 99, 103 n.18 (1986) (relying on two International Court decisions as evidence of international law in holding that Nantucket Sound belongs to United States); United States v. Louisiana, 394 U.S. 11, 43 n.55, 69–71 & n.93 (1969) (relying on International Court decision to help interpret Convention on Territorial Sea and Contiguous Zone); Siderman de Blake v. Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (citing International Court’s
of deference involves giving weight to International Court judgments in cases involving a common party. For example, in National Airmotive v. Iran,\textsuperscript{213} the government of Iran was defending a claim for breach of contract. It moved for a stay on the grounds that in light of a presidential order banning travel between the United States and Iran, its American counsel could not obtain necessary factual information.\textsuperscript{214} In denying the motion, the court noted that Iran’s own conduct in the hostage crisis had provoked the travel ban.\textsuperscript{215} The International Court’s judgment that such conduct was unlawful was a significant factor in the district court’s decision to deny the motion for stay.\textsuperscript{216}

The most extreme form of deference entails treating International Court judgments and orders as binding. Such deference is relatively rare.\textsuperscript{217} For the most part, U.S. courts have resisted the notion that they must obey International Court rulings.\textsuperscript{218} The most dramatic example of that resistance has been the turf battle over the Vienna Convention on Consular Relations. Under that convention, national authorities must inform arrested or detained foreigners “without delay” of the right to contact their consulate.\textsuperscript{219}

In 1993, Angel Francisco Breard, a citizen of Paraguay, was convicted of a capital offense by a Virginia court and sentenced to death.\textsuperscript{220} In a federal petition for a writ of habeas corpus, Breard argued that he should be freed because at the time of his arrest, nobody had notified him of his right to contact the Paraguayan Consulate.\textsuperscript{221} That petition failed at the

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\textsuperscript{214} Id. at 556.
\textsuperscript{215} Id. at 556 n.7.
\textsuperscript{216} Id.

A. Mark Weisburd, International Courts and American Courts, 21 Mich. J. Int’l L. 877, 886 (2000). For example, a court in Morocco once treated an International Court decision as binding precedent on the issue of whether Americans were subject to the jurisdiction of French courts in Morocco. Administration des Habous v. Deal, 19 I.L.R. 342, 343 (Ct. App. Rabat, Morocco 1952). According to Yuji Iwasawa, a Japanese trial court, in dicta, once referred to International Court decisions as binding on domestic courts; on appeal, although the trial court’s judgment was affirmed, the appellate court ordered the deletion of that dicta. Iwasawa, supra note 210, at 113 (detailing procedural history of case).

\textsuperscript{218} See, e.g., Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 934 (D.C. Cir. 1988) (holding that individuals cannot challenge failure by United States to comply with International Court judgment).

\textsuperscript{219} Consular Convention, supra note 1, art. 36, para. 1(b).


trial and appellate levels on the ground that Breard had procedurally defaulted by not raising his argument in state court. Breard then petitioned the U.S. Supreme Court for a writ of certiorari.

A week and a half before the scheduled execution, Paraguay initiated a case in the International Court, alleging that the United States had violated the Consular Convention. The International Court responded almost immediately with a provisional order: "The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order." In light of that order, Breard petitioned the U.S. Supreme Court to stay his execution pending the final International Court decision. In Breard v. Greene, the Supreme Court denied that petition, as well as his petition for certiorari, on the day of Breard's execution.

The Supreme Court grudgingly acknowledged the International Court's order: "[W]e should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." That dictum, however, was tellingly buried in a subordinate clause. The Supreme Court gave more respect to its own analysis of international law, holding that the Consular Convention was by its own terms subject to domestic rules about procedural defaults and thus could not save Breard. Aside from whatever substantive merit that interpretation may have had, the opinion was remarkable for its casual dismissal of the International Court's authority. It was not that the Supreme Court found international law to be irrelevant; rather, it found its own view of international law to be more relevant than that of the Inter-

225. Despite the use of what seem like precatory terms, the International Court has held that such orders are binding. See LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 500-06 (June 27), available at http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/ igus_judgment_20010625.htm. 
227. See id. at 378-79. Breard was executed six hours after the Supreme Court issued its opinion. See David Stout, Clemency Denied, Paraguayan Is Executed, N.Y. Times, Apr. 19, 1998, at A18.
228. Breard, 523 U.S. at 375.
229. See id. at 375-77 (explaining that domestic rules accounted for Breard's failure to establish that violations of convention were prejudicial).
230. See generally id. The Supreme Court relied on the convention's provision that it "shall be exercised in conformity with the laws and regulations of the receiving State" while glossing over the qualification that such laws and regulations "must enable full effect to be given to the purposes for which the rights [to contact the consulate] are intended." Id. at 375.
national Court—so much that it was not even willing to await a final judgment.

That final judgment arrived in a different case arising under the same circumstances. In the LaGrand Case, two German brothers were convicted of murder and sentenced to death by an Arizona court. Their federal habeas corpus petitions asserting failure to notify them of their rights under the Consular Convention were rejected for procedural default. The day of the scheduled execution of one of the brothers, the International Court issued a provisional order to the same effect as the one in the case brought by Paraguay on behalf of Breard, but the Supreme Court again denied an application for stay and the execution went forward. In its final judgment, the International Court held that the United States had breached its obligations to Germany and to the brothers. According to the Court, the Consular Convention created individual rights of action, and the application of the procedural default rule in the United States violated the convention.

When the Supreme Court had occasion to revisit this issue in a later case, Torres v. Mullin, it refused to rethink its stance from Breard. In a case brought by a citizen of Mexico who was on death row in Oklahoma and raising the same issue as that in Breard and LaGrand, the Court denied

231. At the request of Paraguay, the case involving Breard was taken off the docket of the International Court. International Court of Justice, Press Release 98/36, at http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm (last visited Oct. 24, 2004).


234. See LaGrand v. Stewart, 133 F.3d 1253, 1261 (9th Cir. 1998) (acknowledging Arizona’s failure to notify LaGrands of their rights, but holding that issue was procedurally defaulted because of failure to raise it in state proceedings).


238. See id. at 494 (explaining individual rights that were violated by United States). The decision about the private right of action was a surprise to some because of the International Court’s reputation as being “state-centered.” See Lori Fischer Damrosch, Is International Law Part of U.S. Law? Understanding an Awkward Relationship: Interpreting U.S. Treaties in Light of Human Rights Values, 46 N.Y.L. SCH. L. REV. 43, 57 (2002).

239. See LaGrand, 2001 I.C.J. at 497–98 (elaborating that procedural default rule failed to give convention its full intended effect).


241. See id. at 1036 (noting tension between Breard holding and Vienna Convention).
certiorari.242 Preceding that denial was not only the International Court’s final judgment in *LaGrand*, but also a provisional order in a case brought by Mexico directing the United States to take whatever measures necessary to ensure that the prisoner was not executed before a final judgment.243

In *Torres*, Justice Stevens cited the International Court’s ruling in *LaGrand* and pointed out that allowing the procedural default rule to overcome individuals’ rights under the Consular Convention permitted states to put the nation in violation of its treaty obligations.244 Justice Breyer, in dissent, more squarely addressed the relationship between the Supreme Court and the International Court. He acknowledged that, as the United States argued, the International Court “does not exercise any judicial power of the United States, which is vested exclusively by the Constitution in the United States federal courts.”245 But he wondered whether the United States might have delegated that power to the International Court by entering into treaties: “The answer to Lord Ellenborough’s famous rhetorical question, ‘Can the Island of Tobago pass a law to bind the rights of the whole world?’ may well be yes, where the world has conferred such binding authority through treaty.”246 In light of that uncertainty, Justice Breyer advocated postponing the decision until after the final International Court judgment.247 In that final judgment, the International Court reaffirmed its holdings from *LaGrand*.248

Unlike the brother in that case, though, the Mexican petitioner was spared, as Oklahoma was more solicitous than the Supreme Court of the decision of the International Court. After the International Court’s final judgment, the Oklahoma Court of Criminal Appeals ordered that the petitioner receive a new hearing.249 The governor then commuted the sen-

242. See id. at 1035 (denying writ of certiorari); see also Vasquez v. State, 793 A.2d 1249 (Del. 2001) (citing procedural default as proper basis for refusal to consider claim based on rights under Consular Convention, despite ruling to contrary by International Court in *LaGrand*).


246. *Id.* (Breyer, J., dissenting) (citing Buchanan v. Rucker, 103 Eng. Rep. 546 (K.B. 1808)).

247. See id. (Breyer, J., dissenting) (noting international implications of issue and need for further evaluation).


249. See American Civil Liberties Union of Oklahoma, Court of Criminal Appeals Grants Stay of Torres Execution, at http://www.acluok.org/TakeAction/OsbaldoTorresStory.htm (reporting decision of May 13, 2004, ordering hearing to determine “whether [the petitioner] was prejudiced by the State’s violation of his
tence to life without parole. He did not mention the International Court specifically but did "t[ake] into account the fact that the U.S. signed the 1963 Vienna Convention [on Consular Relations] and is part of that treaty."250 For other prisoners in similar situations, though, as well as any individuals who may have private rights under treaties, the question still remains about the extent to which U.S. courts should take into account the judgments of the International Court.

C. Sovereignty and Supremacy

Though deference to the International Court of Justice may sound like a natural value in the age of globalization, U.S. courts should remember that the source of their authority is the Constitution, ratified with the consent of "We the People."251 Just as courts should interpret treaties without abdicating their responsibility to the executive branch, they should hesitate before surrendering to the siren song of universalism at the expense of their constitutional duty. Treaties are malleable enough to mean different things to different courts, and thus even when an International Court interpretation is correct, a court in the United States can reach a different decision without being wrong. Undue deference would strip away the sovereignty of the United States.

The judicial power of the United States extends to the federal courts.252 In cases that arise under federal law, including treaties, those courts have the final say and need not defer to the interpretations of other courts. For example, if a domestic court of a treaty partner has interpreted a treaty one way, the U.S. Supreme Court need not defer to that interpretation (or to the desire of the executive branch that it do so), any more than it must defer to an interpretation by a state court about federal law.253 The other domestic court's interpretation might be wrong, and

Vienna Convention rights in failing to inform [the petitioner] after he was detained, that he had the right to contact the Mexican consulate").

250. Id.
251. U.S. CONST. pmbl.
252. See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
moreover, even if it is not, a proper interpretation in a U.S. court might differ in light of the different institutional forces acting on it. Countries recognize that reality; they routinely sign multilateral treaties despite knowing that interpretations will likely vary greatly from one domestic court system to another.

It may be easy to conclude that U.S. courts need not defer to parallel courts in other nations. But what respect is due the judgments of the principal tribunal purporting to transcend domestic courts—the International Court of Justice? Questions of federal law theoretically are susceptible to a single definitive answer. Supreme Court holdings are binding, and when it has not addressed an issue, lower federal courts as well as state courts are charged with following its precedent and sitting in its shoes to predict what it would decide. Is international law similar in that domestic courts should treat International Court precedent as binding and sit in its shoes when addressing novel questions of treaty interpretation?

Justice O’Connor has hinted that beyond state law and federal law, international law sits atop the legal hierarchy:

Just as state courts are expected to follow the dictates of the Constitution and federal statutes, I think domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives considerable weight” (quoting Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978)).

A decision of a foreign domestic court may shed light on a treaty partner’s understanding of what a provision means. Indeed, consistency across domestic courts may be a more worthy goal than deference to the International Court. If a provision is reciprocal, and the partner’s court has interpreted it in a way that restricts rights for U.S. nationals, then a U.S. court might well interpret the provision as restricting rights for nationals of the treaty partner, on the theory that such interpretation would be consistent with the general goal of reciprocity.


255. See, e.g., Jamie Smyth, Government to Sign Crime Treaty Despite Concerns, Irish Times, Jan. 18, 2002, at 59 (noting Ireland’s plan to sign cybercrime treaty despite uncertainty stemming from fact that “[e]ach state’s interpretation of the text of the treaty is likely to differ substantially”). The doctrine of margin of appreciation is an explicit example of this effect. For an examination of the background of the doctrine of margin of appreciation, see supra notes 40–43 and accompanying text.

256. The International Court of Justice is the preeminent international court, with broad subject matter jurisdiction. Cf. Shaw, supra note 131, at 745 (calling International Court “by far the most important” international tribunal).

257. See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (insisting that lower courts follow Supreme Court precedents rather than predicting future overruling); Spector Motor Serv., Inc. v. Walsh, 159 F.2d 809, 823 (2d Cir. 1944) (Hand, J., dissenting) (“[T]he measure of [a lower court’s] duty is to divine, as best it can, what would be the event of an appeal in the case before it.”).
legal force to treaties, and our status as a free nation demands faithful compliance with the law of free nations.\textsuperscript{258}

She values the "federalist ideal of healthy dialogue and mutual trust" as a model for the relationship between domestic and international courts.\textsuperscript{259} Indeed, what she envisions is nothing short of "the federalism of free nations."\textsuperscript{260} To be sure, she stops short of saying that U.S. courts should defer to the opinions of the International Court. But if the relationship between domestic courts and international law is akin to that between state courts and the Constitution, it would hardly be a stretch to conceive of a subordinate role for U.S. courts.\textsuperscript{261} Indeed, that was the possibility broached by Justice Breyer in considering the impact of International Court decisions about the Consular Convention.\textsuperscript{262}

U.S. courts, though, should not succumb to subsidiarity.\textsuperscript{263} To begin with, the International Court is not the unquestioned final arbiter in matters of international law.\textsuperscript{264} It does happen to be the one permanent international (as opposed to merely supranational) court with general jurisdiction; its decisions, however, are inherently no more authoritative about international law than the decisions of a temporary arbitral panel or

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258. O'Connor, supra note 65, at 18.
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259. Id. at 17; see also Michael P. Van Alstine, Dynamic Treaty Interpretation, 146 U. Pa. L. Rev. 687, 732–33, 792–93 (1998) (arguing that federal courts should seek "cooperation among domestic courts on an international level" to achieve "transnational" body of law).
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260. O'Connor, supra note 65, at 17–18 (elaborating on idea that international law should develop through dialogue between national and international tribunals) (quoting Immanuel Kant, The Eternal Peace, in The Philosophy of Kant 441 (Carl J. Friedrich ed., 1949)). Justice O'Connor does acknowledge that the analogy breaks down to the extent that nations are not as closely intertwined as our states, but rather are closer to "a loose confederation of sovereign states." Id. at 18.
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261. Congress has explicitly agreed to such subordination in certain limited circumstances, such as when it agreed to subject U.S. judicial rulings to review by supranational tribunals in certain cases arising under the North American Free Trade Agreement. See Adam Liptak, Review of U.S. Rulings by Nafta Tribunals Stirs Worries, N.Y. Times, Apr. 18, 2004, at A1 (describing surprise of American judges at review of their decisions).
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262. For a discussion of Justice Breyer's views about international jurisdictional relationships, see supra notes 245–47 and accompanying text.
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263. See Ordonez & Reilly, supra note 209, at 344–45 (noting that relationship between International Court and other courts "has few parallels" and "is unlike the interaction of courts of first instance and appellate courts within a single legal system"). But see Franck & Fox, supra note 116, at 4 (arguing that synergy between international and domestic courts sometimes approaches "that found in a mature federal system" and that United States should strive for that goal by deferring more to international tribunals).
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264. See Morgenthau, supra note 28, at 280–81 (citing International Court's lack of centralized authority to be final arbiter on matters of international law as major problem with its contribution to international law); Henkin, supra note 116, at 1562 ("[International law] is determined primarily and more authoritatively by international courts and with equal authority by domestic courts . . . ").
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even the decision of a domestic court.\textsuperscript{265} The International Court is a tribunal parallel to others, not above them. A hierarchy of the sort that places the U.S. Supreme Court at the top for interpretations of federal law\textsuperscript{266} is simply not in place for international law.\textsuperscript{267}

Moreover, even if an international consensus were to emerge that the International Court is the final arbiter of international law, the United States has never consented, explicitly or implicitly, to that condition.\textsuperscript{268} Through the ratification of the Constitution, the thirteen original states accepted the authority of the Supreme Court and federal law under Article III and Article VI.\textsuperscript{269} Later, states made the same decision when they chose to join the union. The United States has never made a like decision to have its own courts bow to another as to all matters of international law. Indeed, the Constitution bars Congress from delegating "the essential attributes of the judicial power" to non-Article III courts.\textsuperscript{270} Furthermore, the Constitution does not elevate international law as enunciated in trea-

\textsuperscript{265} Domestic courts are accepted as tribunals that can properly help develop international law. See First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 775 (1972) (Powell, J., concurring) ("Until international tribunals command a wider constituency, the courts of the various countries afford the best means for the development of a respected body of international law."); 1 Oppenheim, supra note 132, at 92 ([J]udgments of municipal tribunals are of considerable practical importance for determining what is the correct rule of International Law."). But cf. Perkins v. Elg, 307 U.S. 325, 329 (1939) (stating that domestic court rulings have no effect on international law). Even if international tribunals eventually command a wider constituency, the International Court will not necessarily be considered the final arbiter of international law. In fact, the sources of international law are nonhierarchical enough to lead some to argue that a President can violate existing international law to make new international law. See Charney, supra note 133, at 914, 917. Otherwise, goes Professor Charney's argument, the United States can play no role in effecting change in international law. See id. at 914.

\textsuperscript{266} See Cooper v. Aaron, 358 U.S. 1, 18 (1958) (declaring supremacy of judiciary in interpreting federal law); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). With respect to other courts in the United States, the Supreme Court also is the final arbiter of international law. See Restatement (Third) of Foreign Relations, supra note 29, § 112(2) (1987) ("The determination and interpretation of international law present federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States.").

\textsuperscript{267} See Charney, supra note 133, at 914, 917 (describing international law as nonhierarchical). In fact, unlike U.S. Supreme Court decisions, International Court judgments purport to be binding on nobody but the parties to the case. See I.C.J. Statute, supra note 155, art. 59.

\textsuperscript{268} See Yoo, Treaty Interpretation, supra note 66, at 1334–35 (noting constitutional problems with scheme in which judgments of foreign courts would have any more precedential value to federal courts than those of state courts or parallel circuits).

\textsuperscript{269} See Weisburd, supra note 217, at 892–900 (arguing that Constitution forbids any arrangement that would make federal courts subservient to International Court).

ties to a position of supremacy over federal law. Thus, neither the text nor the structure of the Constitution suggests that federal courts (or any courts in the United States) should defer to an international body’s interpretation.

Even to the extent that the U.S. government has consented to the jurisdiction of the International Court, that consent is only to have the Court resolve the nation’s international obligations. As to domestic application of treaties, the U.S. Supreme Court has ceded no control. If the International Court, in a proper exercise of its jurisdiction, renders a judgment against the United States, failure to abide by it is a violation of international law. That does not mean, however, that U.S. courts are bound to obey judgments of the International Court.

In such a scenario, the executive branch has agreed that the nation will be bound by those judgments; because of the separation of powers, though, the executive branch does not have the capacity to strip the judiciary’s power and to make federal courts subservient to others. Just as the judiciary does not share the obligation of the executive branch to another nation when the executive negotiates a treaty, federal courts do not incur an extraconstitutional duty to defer to another court in their domestic application of treaties when the executive agrees to have the nation bound by the judgments of the International Court. That reality may

271. Rather, the two are considered parallel; hence the *lex posterior* doctrine. See Whitney v. Robertson, 124 U.S. 190, 194–95 (1888) (“By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation.”). Indeed, the Supreme Court has repeatedly held that international law as applied in the United States is subject to the restraints of the Constitution. See, e.g., Reid v. Covert, 354 U.S. 1, 16–18 (1957).

272. See Weisburd, *supra* note 217, at 933–34 (noting that despite common academic assumption that international law must trump domestic law, there is no justification for arguing that U.S. courts must defer to judgments of international tribunals). Federal courts do defer to state courts’ interpretation of state laws. See Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) (citing requirement of specific authorization before interfering with states). That doctrine, however, has constitutional roots in the Tenth Amendment.

273. See I.C.J. Statute, *supra* note 155, art. 36, paras. 1–2 (defining International Court’s jurisdiction). All members of the United Nations are parties to the International Court. U.N. CHARTER art. 93, para. 1. The Court has jurisdiction, however, only when parties consent. See I.C.J. Statute, *supra* note 155, art. 36, paras. 1–2. Nations can consent to jurisdiction broadly, under “optional compulsory jurisdiction” in individual cases; or through a treaty in which they agree to accept the jurisdiction of the Court for any disputes that arise. See id. The United States has consented to the Court’s jurisdiction under several dozen treaties. See Henkin, *supra* note 29, at 267 (indicating specific instances).

274. For further discussion of the Supreme Court’s deference to the executive branch on matters of foreign policy, see *supra* Section III.A.2.

frustrate diplomatic policy, but it is a price we pay for the separation of powers. Globalization already has its discontents, and an independent judiciary should not become another one.

Thus, in the language of Justice Breyer's dissent in Torres, the Island of Tobago can pass a law to bind the rights of another nation if that other nation confers such authority. But when that other nation is one of separated powers and it is the executive branch alone that confers such authority, the judiciary is not bound. Many academics have criticized the reluctance of the United States to defer to International Court judgments in the Consular Convention cases, but that reluctance does have a valid basis. Conflicting interpretations of treaties by different courts are no more absurd than inconsistent decisions about federal law among the various circuits. Multiformity may not be ideal, but it preserves the rights of different courts to act within their proper spheres, without having to defer

276. See United States v. Stuart, 489 U.S. 353, 374–75 (1989) (Scalia, J., concurring) (describing how judicial decisions could affect diplomacy). Decisions by federal courts are hardly the only way to frustrate diplomatic policy. In a government of checks and balances, it is impossible for the President to embark on foreign policy without any reins. For example, the Senate could refuse to ratify a self-executing treaty; Congress could refuse to enact legislation necessary to implement a non-self-executing treaty; or Congress could enact later legislation that would trump the treaty domestically under the lex posterior doctrine. See id. (Scalia, J., concurring) (explaining how presidential power can be limited).

277. For further discussion of the impact of the separation of powers on treaty diplomacy, see supra Section III.A.1.

278. See generally JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 6 (2002) (arguing that globalization has benefited rich countries' commercial interests at expense of developing countries).

279. But cf. John B. Attanasio, Of Sovereignty, Globalization, and Courts, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, supra note 65, at 373, 394 (“The over-arching trend . . . is away from sovereignty and toward a greater acceptance of a variety of supranational decision-making authorities . . . .”); Ordonez & Reilly, supra note 209, at 371 (opining that domestic courts should follow International Court judgments, paying "a small price" of loss of discretion in exchange for strengthening law of nations).

280. See supra text accompanying note 245 (quoting from Justice Breyer's dissent in Torres).

281. See, e.g., Louis Henkin, Provisional Measures, U.S. Treaty Obligations, and the States, 92 Am. J. Int'l L. 679, 681 (1998) (arguing that International Court's provisional order was binding on President); Anne-Marie Slaughter, Court to Court, 92 Am. J. Int'l L. 708, 708–09 (1998) (arguing that Supreme Court should have stayed execution out of comity or civility, if not compulsion). In a different context, many have also written that treaties must have the same meaning domestically and internationally. For citation of sources arguing to that effect, see supra note 70 and accompanying text. That position is tantamount to saying that if the International Court has interpreted a treaty, U.S. courts must follow that interpretation.

282. I do not necessarily agree with the result of the Supreme Court's Consular Convention cases, and I acknowledge that it can be useful to know the position of the International Court on an issue of treaty interpretation, just as it can be useful to know the position of the executive branch. I do, however, agree with the Supreme Court's implicit insistence that it need not defer to any other court when applying a treaty as domestic law.
unnecessarily to the rulings of others. And because of the nature of treaties, the interpretations of those different courts might all be correct.

D. *Vive la Différence*

Not only should U.S. courts not defer to judgments of the International Court of Justice, but compared with interbranch interpretations, there are more reasons for substantive results to diverge, in light of different institutional forces.\(^{283}\) The legal contexts in which U.S. courts and the International Court operate vary starkly. Most importantly, U.S. courts constitute a branch of a national government,\(^{284}\) whereas the International Court is a product of the United Nations.\(^{285}\) As a result, treaty interpretation by U.S. courts has been described as “nationalist” compared with the “internationalist” approach of the International Court.\(^{286}\) While the International Court is neutral between parties to a treaty, U.S. courts have incentives to shade their interpretations in ways that favor the United States.\(^{287}\) U.S. judges apply treaties as domestic law and fall back on their Anglo-American jurisprudential background to inform their interpretation, but judges of the International Court naturally rely, to an extent, on the legal culture of their own domestic legal systems.\(^{288}\)


\(^{284}\) See U.S. Const. art. III, § 1 (creating judicial branch of federal government). The Restatement (Third) of Foreign Relations reflects this reality, noting that certain materials may be considered by U.S. courts that might not be considered by the International Court, such as documents shedding light on the Senate’s understanding of a treaty. *See Restatement (Third) of Foreign Relations, supra* note 29, § 325, reporters’ note 5 (1987) (suggesting that U.S. courts look at committee reports, debates, and other legislative materials).


\(^{286}\) See Criddle, *supra* note 61, at 436–37, 446, 464 (explaining nationalist and internationalist approaches to interpretation and application of international law). David Koplow has suggested that perhaps treaties really have three versions: one in each signatory country and one on the international plane. *See Koplow, supra* note 208, at 1411 n.236 (conceptualizing treaties as “three overlapping but independent bodies of law”).

\(^{287}\) See Wolf, *supra* note 154, at 1040 (“It is entirely appropriate—and the polity so expects—that domestic law reflect the interests of the domestic constituency.”). Such favoritism can come in innocuous forms; for example, in considering preparatory work, U.S. courts are likely to focus disproportionately on records compiled by the U.S. Department of State. *See id.* at 1058 (discussing U.S. courts’ approach to treaty interpretation).

\(^{288}\) Cf. Patricia McGowan Wald, *Judging at the Hague*, JUD. DIVISION REC., Summer 2002, at 19, 20 (chronicling experience sitting on Yugoslav War Crimes Tribunal and noting that “judges tend to rely on their own instincts which hark back to their own legal cultures”).
Preeminent in the legal culture of U.S. judges is the Constitution. The basic framework governing International Court judges is the U.N. Charter, but peremptory norms (jus cogens) of international law also inform interpretation. As a coequal branch of government under the Constitution, the U.S. judiciary faces pressure to defer to the executive branch to facilitate the nation’s foreign policy. The International Court does not come under that sort of pressure. It also lacks the

289. See Reid v. Covert, 354 U.S. 1, 16–18 (1957) (“This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”).

290. See U.N. CHARTER pmbl. (directing International Court to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”); id. art. 103 (providing that treaties are invalid if they conflict with country’s obligation under U.N. Charter).

291. Under the Vienna Convention, a treaty is void if at the time of its conclusion, it conflicts with a peremptory norm of international law. See Vienna Convention, supra note 121, art. 53. The content of peremptory norms is a bit murky. See Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) (singling out genocide, slavery, and racial discrimination as violations of “obligations erga omnes” owed apart from any treaty “towards the international community as a whole”); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 4, 296 (July 18) (dissenting opinion of Judge Tanaka) (suggesting that “the law concerning the protection of human rights may be considered to belong to the jus cogens”). In fact, the International Court has never struck down a treaty as violating a peremptory norm. See Aust, supra note 130, at 258 (“There are no reported instances of [the provisions of the Vienna Convention on peremptory norms] being invoked.”); Sinclair, supra note 200, at 209 (stating that International Court judgments have referred to concept of peremptory norms only in individual opinions and dissents).

292. See Koplow, supra note 208, at 1392–99 (describing interrelationship of three branches with regard to treaties). Though I have argued that U.S. courts should not have a policy of deference to the executive branch, I have acknowledged that under certain circumstances, they may rightfully exercise prudential discretion to consider the views of the executive. For that discussion, see supra text accompanying notes 146–54.

If the U.S. Supreme Court, like the International Court, were able to render advisory opinions, the separation of powers problem could conceivably disappear, at least temporarily. See U.N. CHARTER art. 96 (allowing certain entities to request advisory opinions on legal questions); I.C.J. Statute, supra note 155, art. 65, para. 1 (allowing organizations, but not states, to request advisory opinions); Letter from the Supreme Court Justices to President Washington (Aug. 8, 1793), quoted in Robert P. Dahlquist, Advisory Opinions, Extrajudicial Activity and Judicial Advocacy: A Historical Perspective, 14 Sw. U. L. Rev. 46, 60 (1983) (advising President Washington, in response to request for judicial advice, that Supreme Court does not have power to render advisory opinions or otherwise give advice). During the Senate’s advice and consent process, it could ask the Court for an advisory opinion about what the treaty would mean. The Senate could then decide to withhold consent unless the judiciary’s interpretation was consistent with that of the executive branch. Of course, such temporary harmony could be upset later through executive reinterpretation or an overruling of precedent.

293. Even when matters before the International Court are concurrently before political organs of the U.N., the Court has not declined to exercise its judicial function. See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 431–34 (Nov. 26) (refusing suggestion that Court should abstain from hearing case); United States Diplomatic and Consular Staff in
power to conduct "judicial review" of the actions of other organs of the United Nations.294 The difference in political pressure faced by judges in the two systems is reflected in the devices that protect their independence. Whereas International Court judges are elected for nine-year terms,295 federal judges are appointed for life.296

The executive branch is not the only other governmental entity that can interfere with the treaty interpretation of U.S. courts. Congress can complicate matters by enacting legislation that conflicts with treaties, raising the specter of treaty nullification under the *lex posterior* doctrine. Although I have argued that courts should not stretch to harmonize treaties and statutes,297 they do as a descriptive matter, and it may be inevitable that legislative acts affect judicial interpretations of treaties. The International Court is not subject to a corresponding influence. That Court also need not concern itself with the subtleties of federalism. In *LaGrand*, the United States argued to the International Court that its federal structure prevented the government from compelling states to comply with the Con- sular Convention, but the Court brushed aside that argument.298

Ingrained judicial approaches also vary between the United States and The Hague. Most notably, the International Court theoretically limits

Iran (U.S. v. Iran), 1980 I.C.J. 3, 22 (May 24) (stressing importance of Court judgments in leading to peaceful resolution of difficult political situations). But for reference to the Court’s occasional reluctance to wade into politically charged issues, see infra note 308 and accompanying text.


295. I.C.J. Statute, supra note 155, arts. 3, 4, 13. International Court judges are subject to other measures that promote independence. See *id.* art. 16, para. 1 (barring judges from other professional work); *id.* art. 18, para. 1 (barring dismissal without unanimous vote of rest of court); *id.* art. 19 (granting diplomatic privileges and immunities); *id.* art. 32, paras. 5, 8 (decreasing that salaries may not be decreased during term and are tax-free).

296. See U.S. Const. art. III, § 1 (providing that judges hold office “during good Behaviour”).

297. For that argument, see *infra* Section III.B.

the reach of its judgments to the case at hand, whereas U.S. courts generally abide by the doctrine of stare decisis. That doctrine produces more stable, if not more correct, case law over time. Along the same lines, the U.S. Supreme Court's institutional role favors creating law for the future. Each year, it grants only approximately two percent of petitions for writ of certiorari; in doing so, it considers which cases will have the widest impact beyond the individual litigants. In contrast, the focus of the International Court is largely on the case before it. After all, each dispute is between nations and is weighty enough on its own. These diverse perspectives may affect the different courts' interpretations.

Though the International Court's jurisdiction is not discretionary, it does not hear nearly as many cases as the Supreme Court, and as a result, it can (and does) spend years on cases and write tomes about each one. The International Court thus has the time, as well as the institutional inclination, to investigate foreign legal systems. Moreover, U.S. courts are understandably Anglocentric. The International Court conducts its official business in English and French, and its fifteen judges hail from fifteen different countries. It is no stretch to suggest that the

299. See I.C.J. Statute, supra note 155, art. 59 (providing that Court decisions bind only parties); see also M. Cherif Bassiouni, A Functional Approach to "General Principles of International Law", 11 Mich. J. Int'l L. 768, 816 (1990) ("[The International Court] seem[s] to have avoided including the types of formulations in [its] opinions that may lead to the notion that [its] opinions could be deemed the basis for future jurisprudential development."); Ordonez & Reilly, supra note 209, at 342 (noting that nonexistence of legislature to overrule wrong decisions mitigates against stare decisis in international courts). The International Court does, however, often refer to its own precedent in a way that suggests that it values precedent to some extent. See, e.g., Temple of Preah Vihear (Cambodia v. Thail.), 1961 I.C.J. 17, 27 (May 26) (noting that although judgments bind only parties, an earlier decision can be considered as "a statement of what the Court regarded as the correct legal position"). Moreover, despite the lack of formal stare decisis, the Court's decisions can help create international law. See I.C.J. Statute, supra note 155, art. 38, para. 1(d) (citing "judicial decisions" as source of international law).


301. See Sup. Ct. R. 10 (listing considerations governing review on certiorari).

302. I.C.J. Statute, supra note 155, art. 36 (conferring jurisdiction on International Court without mechanism for Court to decline cases).


304. Van Alstine, supra note 259, at 786 n.409 (noting how unrealistic it would be to expect U.S. judges to have thorough appreciation of foreign legal systems). One cause of U.S. courts' lack of deference to International Court judgments may be that courts in the United States are not as familiar with the procedures of international courts as are the domestic courts in other nations. Franck & Fox, supra note 116, at 9 (commenting on varying degree of familiarity with international tribunals in U.S. courts).

305. I.C.J. Statute, supra note 155, art. 3, para. 1 (listing requirements for filling judgebships).
ternational Court might take more seriously the need to compare versions of documents in multiple languages. In short, institutional resources may play a role at the margins of the outcome of cases.

A final factor that may affect the way courts interpret treaties is the likelihood of compliance. The U.N. Charter provides for the possible use of force to back up the judgments of the International Court, but even though some Court judgments are openly flouted, that possibility has never become a reality. Indeed, the Court has acknowledged that once it issues a judgment, enforcement is largely a political issue. Therefore, the Court sensibly may decide cases with one eye on its own legitimacy.

After all, any tribunal at times must consider whether stepping lightly is necessary to preserve its own power. The U.S. Supreme Court is not immune to that dynamic—its order to desegregate schools "with all deliberate speed" has been seen by many as an acknowledgment of the limitations of its influence—but overall, U.S. courts have fewer concerns than the International Court about the execution of judgments. That in-


307. U.N. Charter art. 94. Under that article, a state trying to compel compliance may have recourse to the Security Council. See id. (providing for recourse upon failure to perform judgment obligations).


311. See Dugard, supra note 61, at 465 (accusing International Court of repeatedly "seeking refuge in technical niceties in order to escape a politically explo- sive issue"). The concern about perceptions of legitimacy probably reached its high-water mark with the Iran case. See B.A. Ajibola, Compliance with Judgments of the International Court of Justice, in COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 9, 20–21 (M.K. Bulterman & M. Kuijer eds., 1996) (opining that Iran’s flouting of Court’s judgment "weakened the effectiveness, importance and very possibility of the Court").

312. Though U.S. courts need not defer to the executive’s interpretation, there is no guarantee that the executive will enforce the judiciary’s decisions. Cf. Arthur M. Weisburd, The Executive Branch and International Law, 41 VAND. L. REV. 1205, 1207 (1988) (arguing that "President is not bound by international law").


stitutional confidence can translate into bolder pronouncements about what treaties mean. In the Consular Convention cases, if the U.S. Supreme Court had ordered a state to stay an execution, there is little doubt that the state would have complied. Conversely, when the International Court has ordered the United States to halt an execution, it has largely been ignored.\footnote{\textsuperscript{315}} It would hardly be surprising if the Court weighed the impact of its past words when choosing future ones.

E. Independence Without Ignorance

Though U.S. courts should not defer to treaty interpretations of the International Court of Justice, they can retain their independence without ignoring those decisions. Just as discretionary consideration of the views of the executive branch can be appropriate,\footnote{\textsuperscript{316}} judges should resist the temptation to toss international tribunals aside as would-be usurpers of their authority. Domestic courts must not delegate their constitutional responsibility to decide cases. Instead, they can and should educate themselves about the jurisprudence of the International Court on the way to reaching their own conclusions.

As Anne-Marie Slaughter has written, “the phenomenon of trans-judicial communication is a pillar of a compelling vision of global legal relations.”\footnote{\textsuperscript{317}} She has criticized the U.S. Supreme Court’s insularity and suggested “cross-fertilization among legal systems” as a laudable goal.\footnote{\textsuperscript{318}} I agree that only good can come of efforts to consider how other courts have dealt with universal legal issues.\footnote{\textsuperscript{319}} U.S. courts have made such considerations to some extent in the past.\footnote{\textsuperscript{320}} The U.S. Supreme Court should not be faulted for ultimately deciding each issue itself, regardless of the possible weight of international opinion. It cannot hurt the Court, however, to keep an open mind about not only foreign domestic courts but also international courts.

Conversely, domestic case law has long served to educate international tribunals. One accepted source of international law is the set of

\begin{itemize}
  \item \textsuperscript{315} The exception is the recent case in which the Oklahoma Court of Criminal Appeals ordered that a petitioner was entitled to a new hearing, after which the governor commuted his sentence. For a description of the \textit{LaGrand} decision, see supra notes 236–38 and accompanying text.
  \item \textsuperscript{316} For a discussion of the pragmatic reasons for judicial consideration of executive views, see supra notes 141–51 and accompanying text.
  \item \textsuperscript{317} Slaughter, supra note 130, at 62 (extolling benefits of communication between courts).
  \item \textsuperscript{318} \textit{Id.} at 69 (noting indifference and ignorance in United States towards other nations’ law) (quoting \textsc{Mary A. Glendon}, \textsc{Rights Talk} 158 (1991)).
  \item \textsuperscript{319} Courts in other countries often study the opinions of our courts, particularly as to constitutional issues. See Anthony Lester, \textit{The Overseas Trade in the American Bill of Rights}, 88 \textsc{Colum. L. Rev.} 537, 537 (1988) (describing American influence on courts in Europe and elsewhere).
  \item \textsuperscript{320} For a compilation of Supreme Court decisions that have considered treaty interpretations of foreign domestic courts, see supra note 248 and accompanying text.
\end{itemize}
"general principles of law recognized by civilized nations." In that vein, the International Court has on occasion formulated doctrines of international law, on subjects including treaty interpretation, based on principles of domestic law enunciated by courts such as the U.S. Supreme Court. In short, the effect of domestic and international courts on each other has been, and should continue to be, reciprocal. A two-way flow of influence reflects that U.S. courts and the International Court occupy parallel universes, with neither hierarchically above the other. Treaties need not be interpreted the same way in each system, but even precedent that is not binding can sometimes be persuasive.

Recently, though the U.S. Supreme Court has not embraced International Court judgments, it has been sprinkling its opinions with citations to international and foreign law. Though that trend has prompted sev-

321. I.C.J. Statute, supra note 155, art. 38, para. 1(c).
323. See, e.g., Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 6, 66–67 (Apr. 12) (separate opinion of Judge Koo) (citing comparative law study showing that under municipal law, private individuals have right to access enclaved properties and noting that same principle dictates that states have right of passage to enclaved territories); Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 22–23 (Apr. 6) (relying on domestic nationality laws to determine whether naturalization in Liechtenstein had international effect). But see Wolfgang Friedmann, The Uses of "General Principles" in the Development of International Law, 57 Am. J. Int'l L. 279, 280–81 (1963) (chiding International Court for its reluctance to develop general principles of law based on domestic sources). As one observer put it, "principles of equity and fairness found in national legal systems have played a significant role in the development of international law." Pippa Tubman, National Jurisprudence in International Tribunals, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, supra note 65, at 107, 145.
325. The International Court has on occasion determined principles of international law based on domestic courts' decisions about the content of international law. Bassiouuni, supra note 299, at 789 (listing variety of sources of general principles).
326. For example, in support of its holding that the Due Process Clause protects the right to engage in private sexual acts between consenting adults, the Court noted that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries." Lawrence v. Texas,
eral dozen federal legislators to introduce a resolution condemning it,327
the Court’s willingness to engage the international community is welcome,
and as long as it stops short of formal deference. The Court has been strength-
ening its international ties in other ways as well. In 2004, Justices
O’Connor and Kennedy participated in a two-day workshop to advise Iraqi
judges how to unite Iraq’s disparate regions through a centralized, inde-
pendent judiciary.328 One good lesson for judges in Iraq—or in the
United States—would be that courts can be independent without being
isolated.

V. Conclusion

Isolation from international tribunals has been an unwritten policy of
U.S. courts. Dependence on the executive branch has been a written one.

539 U.S. 558, 576–77 (2003); see also Atkins v. Virginia, 536 U.S. 304, 316 n.21
(2002) (“[W]ithin the world community, the imposition of the death penalty for
crimes committed by mentally retarded offenders is overwhelmingly disap-
proved.”); Printz v. United States, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissent-
ing) (examining decisions from several European countries on grounds that “their
experience may . . . cast an empirical light on the consequences of different solu-
tions to a common legal problem”).

In Lawrence, the Court specifically relied on the holding of the European
Court of Human Rights that a law prohibiting consensual homosexual conduct was
invalid under the European Convention on Human Rights. See Lawrence, 539 U.S.
Scalia strongly disagreed with the relevance of the European decision. Id. at 598
(Scalia, J., dissenting) (calling citation of foreign views “[d]angerous dicta”). Sev-
eral Justices have taken the unusual step of defending that citation informally. Just-
ice Breyer supported it in a television interview, stating that the world is “growing
together.” John H. Cushman Jr., O’Connor Indicates She Will Remain on Court, N.Y.
Times, July 7, 2003, at A9. Justice O’Connor defended the international flavor of
Lawrence in a speech and predicted increased citation of foreign decisions: “I sus-
pect that over time, we will rely increasingly—or take notice increasingly—on in-
ternational and foreign law in resolving domestic disputes.” Jonathan Ringel,
O’Connor Speech Puts Foreign Law Center Stage, Fulton County Daily Rep., Oct. 31,
wise, Justice Ginsburg said in a speech to the American Constitution Society that
the Justices are “becoming more open to comparative and international law per-
spectives.” Gina Holland, Ginsburg: International Law Shaped Court Rulings, Associ-
pdf/AP3.pdf. She expressed the hope that the Court would in the future take
greater notice of the decisions of foreign courts. Id.

327. The resolution provides as follows:
[I]t is the sense of the House of Representatives that judicial determina-
tions regarding the meaning of the laws of the United States should not
be based in whole or in part on judgments, laws, or pronouncements of
foreign institutions unless such foreign judgments, laws, or pronounce-
ments are incorporated into the legislative history of laws . . . or otherwise
inform an understanding of the original meaning of the laws of the
United States.

(describing Justices’ trip and issues addressed in Iraq).
If courts pay less attention to executive interpretations of treaties and more to international ones, they can better serve their constitutional function of applying treaties as domestic law. Formal deference to any other body’s interpretation amounts to an unconstitutional delegation of judicial authority, but courts need not be cloistered. Though judgments of the International Court of Justice are by no means binding on U.S. courts, they can be persuasive. Distant detachment helps neither judges in fulfilling their domestic duty nor the nation in promoting respect for international law—which is, after all, “part of our law.”

In interpreting international agreements, one should keep in mind that there is no such thing as a treaty. A single document, or a single provision, can have multiple meanings. Diverse institutional roles of interpreters can draw out those meanings. Thus, whether one thinks of treaties as flexible or Janus-faced, one must never forget who is expounding them.

When it was the U.S. Department of State interpreting the Consular Convention, the answer was that foreign nationals had no private right of action. That answer confined the treaty to the international plane, the department’s milieu. When it was the U.S. Supreme Court, the answer was that even if the treaty conferred a private right of action, a separate provision allowed domestic procedural default rules to defeat that right. That answer meshed with the Court’s institutional interest in discouraging federal habeas corpus litigation.

When it was the International Court of Justice, the answer was that the convention did grant a private right of action that could not be trumped by procedural default rules. That answer gave the Supreme Court a chance to reconsider its original interpretation, or at least to make a show of doing so, by awaiting the International Court’s final judgment. Only two justices, however, were willing to postpone an execu-

329. The Paquete Habana, 175 U.S. 677, 700 (1900) (noting that courts of appropriate jurisdiction should apply international law when questions are “duly presented”).

330. For a description of U.S. courts’ interpretation of the convention, see supra note 2 and accompanying text.


332. See Ann Althouse, Inside the Federalism Cases: Concern About the Federal Courts, 574 Annals Am. Acad. Pol. & Soc. Sci. 132, 135 (2001) (describing how Court’s jurisprudence on topics such as habeas corpus has advanced institutional goal of conserving judicial resources).


334. See Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. ¶ 59 (Feb. 5), available at http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iorder_20030205.PDF (ordering United States to “take all mea-
tion to await that final judgment.\textsuperscript{335} As usual, the majority of the Court breezily dismissed the significance of the International Court.\textsuperscript{336} The wait for a final judgment could have been a long one. But a reason for the International Court’s deliberate pace is that it examines treaties in much more detail than the Supreme Court, issuing more richly analytical opinions.

To be sure, the Supreme Court was not bound to obey any commands or follow any precedent of the International Court. In applying treaties within the United States, the Supreme Court is indeed supreme. It is not, however, infallible. Prudence—not deference—suggests that before allowing an execution, waiting for the complete opinion of a juristic body with particular competence in an area would be warranted.

In sum, difference among interpreters of treaties may be inevitable. Deference is inappropriate. But independence need not spawn indifference.


\textsuperscript{336} See Breard, 523 U.S. at 375 (purporting to “give respectful consideration” of International Court’s views while disagreeing with its interpretation of Consular Convention and refusing to abide by its order not to allow execution before final judgment).