TREATIES' DOMAINS

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INTRODUCTION

WHEN and why do American judges enforce treaties?[1] The question, always important, has become pressing in an age where the United States is party to over 12,000 international agreements.[2] Article VI of the United States Constitution declares "all treaties" the "supreme Law of the Land,"[3] and American judges have long had the potential power, under the Constitution, to enforce treaties as they do statutes. But over the history of the United States, judges have not enforced treaties that way. Instead, judicial treaty enforcement is widely seen as unpredictable, erratic, and confusing. As a result, the question of treaty enforcement has become a leading question in both American jurisprudence and the study of international law. In recent years, given difficult questions surrounding the enforcement of the Vienna and Geneva Conventions, treaty enforcement questions have also become a regular part of the Supreme Court's docket.[4]

[1] The term "treaty" in this paper is used in the international law sense of the term and refers to both Article II treaties and executive agreements. Article II treaties are separately described as such.

[2] Cong. Research Serv. for S. Comm. on Foreign Relations, 106th Cong., Treaties and Other International Agreements: The Role of the United States Senate 39 (Comm. Print 2001) [hereinafter Cong. Research Serv.].

[3] U.S. Const. art. VI.

[4] See, e.g., Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006); Medellin v. Dretke, 544 U.S. 660, 662 (2005) (dismissing certiorari as improvidently granted in case discussing enforcement of the Vienna Convention on Consular Relations).

Today's dominant theory of treaty enforcement is the doctrine of "self-execution," which suggests that judicial enforcement of treaties is deduced from the nature of the treaties signed.[5] Thought to have originated in the early nineteenth century, the theory holds that some treaties are written so as to be directly enforceable, just like a statute, with full domestic effects, while other treaties are written so as to create duties only under international law. Understandably, the distinction has provoked confusion for more than a century.[6] While academics have criticized the doctrine as perplexing and of little predictive value, they have so far failed to come up with an alternative description of judicial behavior.

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

There is, perhaps unsurprisingly, a strong historical pattern of enforcement of treaties against the individual States of the United States. Beginning in 1796 with the *Great British Debt Case*,[7] courts have consistently enforced treaties to prevent States from placing the United States in breach. While the fact has not been recognized previously, direct treaty enforcement in U.S. courts consists mostly

[5] See Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987).

[6] See, e.g., Curtis A. Bradley, International Delegations, The Structural Constitution, and Non-Self-Execution, 55 Stan. L. Rev. 1557, 1587–88 (2003); Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int'l L. 341, 346–48 (1995); Jordan J. Paust, Self-Executing Treaties, 82 Am. J. Int'l L. 760, 760 (1988); David Sloss, Non-Self-Executing Treaties: Exposing A Constitutional Fallacy, 36 U.C. Davis L. Rev. 1, 4 (2002); Carlos Manuel Vázquez, Laughing at Treaties, 99 Colum. L. Rev. 2154, 2183–88 (1999); Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695, 695 (1995) [hereinafter Vázquez, Four Doctrines]; John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955 (1999).

[7] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236–37 (1796).

of enforcement against State breach of U.S. treaty obligations. There is, moreover, an underlying constitutional logic to such enforcement: States are granted no power under the constitutional design to breach treaties on behalf of the United States. Judges have long enforced what can be called the central dogma of judicial treaty enforcement: that "the peace of the whole ought not to be left at the disposal of a part."[8]

A second clear finding is with respect to an alleged Congressional breach (or anticipatory repudiation) of U.S. treaty obligations. While Congress sometimes arguably misimplements a treaty, or passes inconsistent legislation, courts in practice do not enforce treaties directly in the face of such Congressional action. Instead, courts obey the legislation passed by Congress, limiting themselves to indirect enforcement through interpretative presumptions (most notably, the *Charming Betsy* canon).[9] In other words, in the Congressional domain, questions of treaty enforcement all turn on the usage of rules like *Charming Betsy* to interpret legislation so as not to conflict with treaty obligations.

While this Article identifies fairly clear patterns for Congress and the States, it makes somewhat less progress on perhaps the most vexing problem in treaty enforcement: the patterns of enforcement against Executive breach. In cases of alleged Executive breach, the judiciary faces a difficult question: is an apparent breach an unwarranted violation of the law or the exercise of a legitimate authority to breach the treaty? This Article shows the rough development of a system with some similarity to the system of deference to agency statutory interpretations known as *Chevron* deference.[10] While the system of Executive treaty deference operates in a largely unrecognized and not well understood fashion, we

[8] The Federalist No. 80, at 439 (Alexander Hamilton) (Colonial Press rev. ed. 1901).

[9] The *Charming Betsy* canon, in its original form, states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). The rule is also reflected in the Restatement (Third) of the Foreign Relations Law of the United States § 115 (1987).

[10] See Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984); see also United States v. Mead Corp., 533 U.S. 218 (2001). I will refer to the system of *Chevron* deference as the "statutory system" of deference.

can detect a rough equivalent to the statutory system for deciding when more or less deference is due the Executive.[11]

The descriptive findings in this paper suggest rethinking the law of treaty enforcement in the American legal system. To the extent that a legal theory serves as a prediction of what judges will do, today's doctrine of self-execution is not successful. As scholars have pointed out, the rule of self-execution has been stretched beyond recognition in the twentieth century into a loose doctrine that blocks judicial enforcement of treaties on a seemingly ad hoc basis.[12] As this Article shows, the doctrine is widely used as a judicial device to enforce political and structural policies related to the identity of the breaching party.

A determination that a treaty is self-executing would be better understood as having less to do with the treaty itself and more to do with the fact that the Court considers itself competent to enforce the treaty in question. While this question may sometimes turn on the text of the treaty—the original and narrowest meaning of the phrase "non-self-executing"—over history, judicial enforcement has more often depended on different matters, such as which branch of government is accused of breach and what deference the judiciary owes to that entity's acts. As in statutory cases, that question of deference often depends on what other branches of government have done—whether they have passed implementing legislation, implemented detailed regulations, or otherwise. These kinds of signals from other branches may make it clear to the judiciary that the treaty will be enforced by other branches and that the judiciary therefore owes deference to that decision.

Understanding treaty enforcement this way uproots "self-execution" as the central tool for understanding treaty enforcement. It confines self-execution to a narrower textual question: whether the treaty, by its terms, might create an enforceable right at all. Where that question is indeterminate, the approach recommended here asks judges to explicitly consider whether they should enforce the treaty or defer to other branches of government and, if so, why. Such a change would do much to normalize treaty enforcement: it would be brought roughly in line with the kind of

[11] See infra Subsection I.B.2.c.
[12] See Sloss, supra note 6, at 4.

questions that judges routinely face in statutory interpretation and in administrative law.

Finally, this Article adds to the discussion of the development of treaty enforcement in the twentieth century.[13] Most scholars observe that judges seem to enforce treaties less often or perhaps less vigorously in the twentieth century, particularly since World War II.[14] The usual theory is that either the rise of multilateral treaties or the abuse of the doctrine of non-self-execution is the cause. As David Sloss writes, "the modern doctrine of non-self-executing treaties, created by courts and commentators in the latter half of the twentieth century, distorts [proper treaty enforcement]."[15]

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

To restate, this Article suggests that courts should understand the problem of self-execution as a question of institutional deference. The basic question is whether the alleged act of government breach justifies a judicial remedy. For the judiciary, this is a famil-

[13] On the changes in international law over the twentieth century, see Paul B. Stephan, The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order, 70 U. Colo. L. Rev. 1555 (1999).

[14] See, e.g., John Quigley, Toward More Effective Judicial Implementation of Treaty-Based Rights, 29 Fordham Int'l L.J. 552, 554 (2006) ("The courts, in particular, have declined to read the Supremacy Clause to apply to treaty-based rights that, by the intent of the drafters of the Clause, would seem legitimately to fall within its reach. This approach by the courts in recent decades contrasts with that of our nineteenth-century courts, which more readily interpreted the Supremacy Clause to apply to rights identified in a treaty."); Sloss, supra note 6, at 4; David Sloss, When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in *Hamdan* and *Sanchez-Llamas*, 45 Colum. J. Transnat'l L. 20, 26–27 (2006); Stephan, supra note 13, at 1575.

[15] Sloss, supra note 6, at 4.

iar question with familiar types of answers. Judicial deference to Congressional action with respect to a treaty is to be expected,[16] while, conversely, the judiciary will, with confidence, continue to use treaty law to prevent States from putting the United States in violation of its international obligations. Finally, as to the Executive, the judiciary should begin to explain why, in terms of deference, it is or is not choosing to enforce a treaty against Executive breach.

This Article takes no particular position on whether more or less judicial enforcement of treaties is a good thing. In my view, whether more or less enforcement is desirable depends so much on the treaty in question, and how and why it was formed, to make a general position untenable. The main point is descriptive—to understand what judges have been doing over the last two centuries. Unfortunately, what judges are doing has been hidden behind the unnecessary and counterproductive complexities of the doctrine of self-execution. Bringing out the real question—that of appropriate deference—and making it central to the discussion of treaty enforcement would represent a major step forward in the development of treaty law in United States courts.

Part I introduces the deference theory of treaty enforcement. Part II outlines the origins of the model in the eighteenth and nineteenth centuries, while Part III discusses its application to the problems of the twentieth century.

I. THE SELF-EXECUTION PROBLEM AND THE DEFERENCE MODEL

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

A first-time reader of the United States Constitution might consider the intended role of treaties in the American system as fairly straightforward. Article VI of the Constitution declares in one breath that valid treaties and statutes are the "supreme Law of the Land."[17] The text suggests a rough equivalence in the legal status of the two, and the simple equivalence view is supported by much, particularly early, Supreme Court writing. According to Chief Justice John Marshall, when a treaty "affects the rights of parties liti-

[16] See infra text accompanying notes 45–56 for a description of this tendency.
[17] U.S. Const. art. VI.

gating in court . . . [it] is as much to be regarded by the court as an act of [C]ongress."[18] The equivalence view leads also to the "last-in-time rule" that treaties trump prior statutes and vice versa. As the Supreme Court has said, "[a] treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty."[19] This equivalence theory suggests that treaty language, when raised in court, usually ought to have effects no different from the exact same language found in the United States Code. Yet that is not so. The full legal effects that equivalence promises are blocked by a different doctrine: the doctrine of non-self-execution.

Self-execution is the primary tool used by judges and academics when assessing judicial enforcement of treaties.[20] The theory, usually but wrongly said to have originated in the 1829 case of *Foster v. Neilson*,[21] divides all treaties into two categories. "Self-executing treaties" become a domestic law of the United States immediately upon ratification. "Non-self-executing treaties," by contrast, create no domestic law rules and cannot be directly enforced in American courts. According to this theory, American compliance with a non-self-executing treaty is a problem for entities other than the judiciary.[22]

How can a court tell the difference between the two categories? Self-execution theory suggests that the *intent* of the treaty drafters provides the key. As the Third Restatement of Foreign Relations puts it, "An international agreement of the United States is 'non-self-executing' . . . if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation."[23] Yet discerning what the drafters intended with respect to a treaty's domestic enforcement is often

[18] United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). See also Restatement (Third) of the Foreign Relations Law of the United States § 115 cmt. a (1987) ("An act of Congress and a self-executing treaty . . . are of equal status in United States law, and in case of inconsistency the later in time prevails.").

[19] Thomas v. Gay, 169 U.S. 264, 271 (1898).

[20] See supra text accompanying notes 5–6 (discussing self-execution theory).

[21] 27 U.S. (2 Pet.) 253 (1829). The theory was recognized by a state court as early as *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 403–04 (Pa. Ct. Com. Pl. 1788), forty-one years before *Neilson*.

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

[23] Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987).

quixotic. Treaties are an exchange of promises between nations and almost never speak directly to their enforceability in U.S. courts. To exaggerate slightly, looking for a treaty's intent regarding judicial enforcement is akin to asking whether a sales contract takes a side on the merits of affirmative action. The relevant intent usually just is not in the treaty.

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

> [C]ourts consider several factors in discerning the intent of the parties to the agreement: (1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.[24]

As one might expect, using a multiple-part test to interpret the "intent" of a document that never addressed the question is a recipe for chaos in judicial clothing. Patterns of treaty enforcement, as scholars have noted, seem impossible to square with the "intent" analysis.[25] Consequently, self-execution problems are universally regarded as both confusing and confused.

The goal of the theory of enforcement advanced here is to provide a new and better explanation for what drives judicial treaty enforcement. It is worth noting that the deference model is certainly not the only theory that might conceivably fit the evidence and provide a better explanation than the "intent" theory. One could argue that judges enforce treaties differently according to subject matter, yielding a theory that there lies an evolving domain of areas where treaties will be enforced. One might also argue that the Court is motivated by the likelihood that its orders will actually be obeyed. However, I advance the deference model as the best descriptive fit to the history and record of treaty enforcement deci-

[24] *Frolova*, 761 F.2d at 373.

[25] See, e.g., Sloss, supra note 6, at 4–5; Vázquez, Four Doctrines, supra note 6, at 700–10.

sions. Its basic premise is that concern for domestic government structure is the primary driver of treaty enforcement patterns. Indeed, many of the familiar forces that drive judicial enforcement of statutes are to be found in treaty enforcement cases, albeit in distinctive (some might say mutated) forms that are driven by the contractual nature of treaties and their connection to foreign affairs.

B. The Deference Model of Treaty Enforcement

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

1. A Contract Model

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

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

This leads us to the first question: how, exactly, might government actors put the United States in breach of a treaty? Basic con-

tract theory can help us understand the meaning of breach. As in contract law, there are two general ways in which government actors can put the entire country in breach. First, a State official or the Executive might act in a manner inconsistent with what it promised to do in the treaty—creating the contract law equivalent of a breach through nonperformance.[26] For example, say that the United States and Britain agree by treaty to eliminate visa requirements for citizens who want to enter either country. If federal customs officials continue to demand a visa, a British tourist might argue that the Executive branch has failed to live up to its promise.[27]

Second, lawmaking entities like a State legislature or Congress may pass a law inconsistent with a promise made in a treaty. In so doing they announce that the United States, or part of it, will henceforth act in a manner inconsistent with a promise made in a treaty—the contract law equivalent of anticipatory repudiation.[28] If, for example, Congress or a State legislature writes a law that places an explicit quota on the import of German automobiles, we can say that the law announces an anticipatory breach of the United State's obligations under the General Agreement on Tariffs and Trade ("GATT").[29]

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

[26] Cf. E. Allan Farnsworth, Farnsworth on Contracts § 8.8 (2d ed. 1998) (discussing nonperformance as breach).

[27] Cf. Taylor v. Morton**,** 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13,799), aff'd, 67 U.S. (2 Black) 481 (1862), discussed infra text accompanying notes 151–59.

[28] Cf. Farnsworth, supra note 26, §§ 8.20–.22 ("A repudiation is a manifestation by one party to the other that the first cannot or will not perform at least some of its obligations under the contract.").

[29] It might strike some readers as strange to speak of Congress breaching a treaty through anticipatory repudiation. But notice that, as a positive matter, Congress's passage of the law will not usually nullify the international law duty of the United States to follow the treaty—the GATT in this example. For unless the treaty by its nature allows unilateral amendment, the international law duty survives the passage of an inconsistent law, even though, as we will see, a domestic court is unlikely to enforce that duty directly.

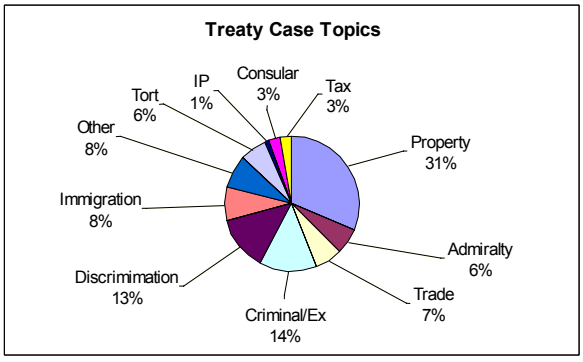
treaty as an international law matter, is it always appropriate for the judiciary to order a remedy?

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

Unfortunately, these questions are rarely asked this way in judicial opinions. Asking the questions in this manner helps us understand how, in fact, courts have acted to remedy treaty breach over the last 200 years. Perhaps thanks to the persistence of the self-execution doctrine, the topic is surprisingly underresearched. Yet it is crucial to informing our view of the underlying normative questions.

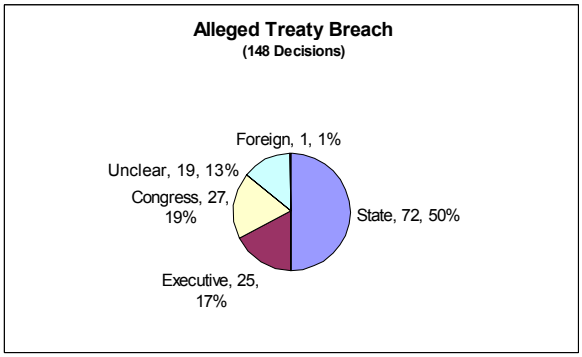
2. Summary of Findings

For purposes of this study, this Article identified 148 Supreme Court cases that address the enforcement of treaties.[30] When important, well-known lower court decisions are also discussed. While a full statistical study of the cases is beyond the scope of this Article and no statistically causal claims are presented, a simple survey of these 148 cases reveals interesting patterns. First of all, by subject matter, the treaty cases break down as follows:

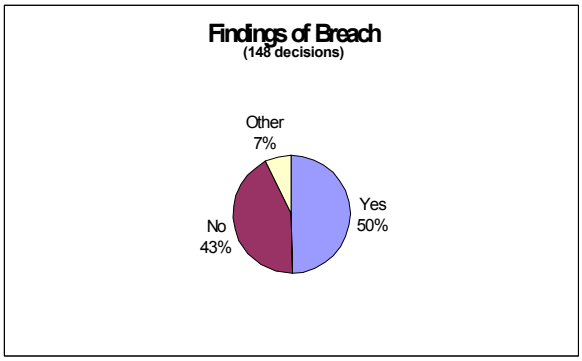


[30] The database is available upon request.

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



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



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

a. State Breach

Courts vigorously enforce treaties to remedy State breach; enforcement against States is the primary and historically most sig-

nificant type of treaty enforcement in the United States, with more than fifty examples in the Supreme Court alone.[31]

The foundational case of State enforcement is the 1796 *Great British Debt Case* (also known as *Ware v. Hylton*), discussed in detail in Part II.[32] In *Ware*, the Supreme Court enforced the 1783 Treaty of Peace between the United States and Great Britain to nullify inconsistent State laws that released debtors from their pre-

[31] See, e.g., Olympic Airways v. Husain, 540 U.S. 644, 646 (2004) (limiting liability of Olympic Airways); El Al Israel Airlines. v. Tsui Yuan Tseng, 525 U.S. 155, 160–61 (1999) (interpreting Warsaw Convention in state law personal injury suit); Zicherman v. Korean Air Lines Co., 516 U.S. 217, 218–19, 227 (1996) (same); Clark v. Allen, 331 U.S. 503, 508 (1947) (deciding that treaty with Germany trumps inconsistent California law); United States v. Belmont, 301 U.S. 324, 331 (1937) (finding that New York State policy is no bar to operation of treaty law); Nielsen v. Johnson, 279 U.S. 47, 52 (1929) (stating that treaty provisions "must prevail over inconsistent state enactments"); Jordan v. Tashiro, 278 U.S. 123, 125–26 (1928) (finding that treaty with Japan is not inconsistent with California law); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (holding that treaty with Japan trumps inconsistent Washington State law); Maiorano v. Baltimore & Ohio. R.R. Co., 213 U.S. 268, 273 (1909) (holding that treaty with Italy is not inconsistent with Pennsylvania law); Geofroy v. Riggs, 133 U.S. 258, 272–73 (1890) (deciding that French commerce treaty supercedes inconsistent D.C. law); Hauenstein v. Lynham, 100 U.S. 483, 488–89 (1879) (deciding that treaty with Switzerland trumps inconsistent Virginia law); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (finding that state ban on immigration of lewd women violates Burlingame Treaty); Pollard's Heirs v. Kibbe, 39 U.S. (14 Pet.) 353, 366 (1840) (holding that Spanish-American treaty trumps state property law); United States v. Percheman, 32 U.S. (7 Pet.) 51, 82–83 (1833) (same); American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 542 (1828) (holding that a treaty, ceding Florida from Spain, is "the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States"); Orr v. Hodgson, 17 U.S. (4 Wheat.) 453, 462–65 (1819) (finding that a treaty with Britain protects inheritance from Virginia law); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 274–78 (1817) (finding that state inheritance law was displaced by a treaty with France); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 356–57 (1816) (finding that a treaty is a relevant source of law for property disputes); Hannay v. Eve, 7 U.S. (3 Cranch) 242, 248 (1806) (finding that state contract law yields to treaty law); Hopkirk v. Bell, 7 U.S. (3 Cranch) 454, 458 (1806) (interpreting the Treaty of Peace to override a conflicting state statute); Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4–5 (1794) (finding that even if a Georgia statute could be construed to confiscate a debt, it would be invalid if in opposition to the Treaty of Peace); see also Delchi Carrier v. Rotorex Corp., 71 F.3d 1024, 1027–28 (2d Cir. 1995) (holding that United Nations Convention on sales preempts state law causes of action); Asante Tech. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1152 (N.D. Cal. 2001) (same); In re Ah Chong, 2 F. 733, 740 (C.C.D. Cal. 1880) (holding that a state law, prohibiting aliens from fishing in public waters, was void due to contravention with Burlingame Treaty).

[32] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

War British creditors.[33] The case created a model of treaty enforcement that courts have applied broadly across subject areas ranging from State inheritance and immigration law to anti-discrimination, trademark, and airline liability.[34] In the famous 1924 case of *Asakura v. City of Seattle*, the Supreme Court enforced a U.S.-Japanese treaty to nullify a Seattle ordinance that discriminated against aliens by allowing pawnbroker licenses to be issued only to U.S. citizens.[35] *Asakura* is a casebook favorite because of its oddly vigorous enforcement of the treaty and the absence of any discussion of the doctrine of non-self-execution by name. History and the deference model show that *Asakura* is in fact no mystery at all but rather a typical, and even routine, case of treaty enforcement against State breach.

In State cases, the Court uses a rule of no deference: it makes no effort to reconcile inconsistent State law and pays no special attention to State interpretation of a treaty. While always the practice, the Court clearly stated the rule in *Nielsen v. Johnson*: "[A]s the treaty-making power is independent of and superior to the legislative power of the States, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with State legislation and when so ascertained must prevail over inconsistent State enactments."[36]

It is also worth mentioning that since 1908 courts have sometimes used a different mechanism for enforcing certain kinds of international agreements against States. In these cases, Executive Agreements (not treaties in the Article II sense, but international agreements made by the President) are at issue. The plaintiff asks the court, under the authority of *Ex parte Young*,[37] to issue an injunction that stops a State official from violating the agreement in question or from violating the Supremacy Clause of the Constitution.[38] Most academics put these cases in a different category from

[33] Id. at 245.

[34] See infra Sections II.C, II.D, III.A, and III.D for a history of the *Ware* rule in U.S. courts.

[35] 265 U.S. 332, 343–44 (1924).

[36] 279 U.S. 47, 52 (1929).

[37] 209 U.S. 123, 167–68 (1908).

[38] Some might argue that it is confusing to equate preemption of state law by treaty with enforcement of a treaty over inconsistent state action, but I think it simpler to see them as the same thing. See generally Curtis A. Bradley & Jack L. Goldsmith,

treaties altogether, but they may provide additional examples of enforcement against State breach of an international agreement. There are far fewer examples of this type of treaty enforcement;[39] the most dramatic was 2003's *American Insurance Association v. Garamendi*, where the Supreme Court found that a series of Executive agreements preempted a California insurance statute, thus preventing even potential inconsistency with an international treaty regime.[40] At a minimum, cases enforcing Executive agreements may reflect the broader patterns of enforcement of international agreements against the States.[41]

That the primary domain of treaty enforcement lies against States should be no surprise. By enforcing treaties against States, courts give effect to the single clearest principle in treaty enforcement: that, in Madison's phrase, "no part of a nation shall have it in its power to bring [international complaints] on the whole."[42] The Supremacy Clause is an obvious affirmation of that principle, arguably giving courts both the power and the duty to prevent States from violating the treaty obligations of the United States.

Over the course of American history and in recent years, various writers have suggested that States should be granted more leeway to express their own foreign policies.[43] Whatever the future may hold, the history of treaty enforcement against States has not given much support for such arguments. Instead, courts show far more concern that allowing State breach might create reciprocity concerns that only courts are in a good position to remedy. As Justice

Foreign Relations Law 328–37 (2d ed. 2006) (discussing treaty preemption of state law).

[39] See, e.g., Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–29 (2003); Dames & Moore v. Regan, 453 U.S. 654, 679, 682–83 (1981); United States v. Pink, 315 U.S. 203, 223, 230 (1942); United States v. Belmont, 301 U.S. 324, 330–31 (1937). For a listing of examples of lower courts using *Ex parte Young* to enforce treaties against states, see David Sloss, *Ex parte Young* and Federal Remedies For Human Rights Treaty Violations, 75 Wash. L. Rev. 1103, 1195 nn.451–53 (2000).

[40] 539 U.S. at 413–29.

[41] It is also certainly worth asking whether courts should be more deferential to state breach of Executive Agreements as opposed to Article II treaties or Congressional-Executive agreements.

[42] 1 The Records of the Federal Convention of 1787, at 316 (Max Farrand ed., rev. ed. 1937).

[43] See, e.g., Ernest A. Young, The Rehnquist Court's Two Federalisms, 83 Tex. L. Rev. 1, 150–54 (2004) (arguing for greater deference to states in matters of foreign relations).

Miller memorably wrote of a California statute banning the immigration of foreign or "lewd" women, "[i]f [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?"[44]

b. Congressional Breach

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

When Congress acts inconsistently with a U.S. treaty obligation, the rule of deference has been clear: the judiciary refuses to enforce the treaty independently.[45] Arguably, in the realm of treaty enforcement, Congress is an alternative, and perhaps predominant, enforcement agency for American treaties. That is not to say that Congress enforces treaties in the usual legal sense of the term but rather that Congress enforces them through implementation. By passing implementing legislation, Congress can decide how it wants a particular treaty to be enforced in the United States. The judiciary, in turn, looks for signs that Congress has taken charge of treaty enforcement in a given area. That can be evidenced most clearly by the passage of implementing legislation, but sometimes the passage of *prior* legislation in a field can demonstrate that

[44] Chy Lung v. Freeman, 92 U.S. 275, 279 (1875); see also The Federalist No. 80, supra note 8, at 439 ("[T]he peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members . . . .").

[45] See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314–15 (1829). These cases are less common because Congress usually implements treaties or passes later-in-time statutes that abrogate them. The first reported case to find the obligation of a treaty to be an obligation of Congress is *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 403–04 (1788); see also Kelly v. Hedden, 124 U.S. 196, 196–97 (1888) (tariff statute); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (same); United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 F. 842, 843–45, 849 (1st Cir. 1907); Rousseau v. Brown, 21 App. D.C. 73, 76–77 (D.C. Cir. 1903) (holding a patent treaty nonbinding absent an act of Congress); Akins v. United States, 407 F. Supp. 748, 756–57 (Cust. Ct. 1976).

Congress has exerted its control over an area of treaty enforcement.[46] In either case (more obviously the former), potential inconsistency with the treaty represents a Congressional choice.

When Congress implements a treaty through a statute, the statutory regime completely replaces the treaty as a basis for direct enforcement. That is, judges do not return to the original text of the treaty as a law they can enforce directly. The Supreme Court has said that "a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute."[47] It would be a mistake, however, to assume that the judiciary does nothing when Congress's implementation of a treaty or later-in-time legislation is at odds with the treaty. Courts instead may turn to the *Charming Betsy* canon or other presumptions by which Congressional ambiguity may be converted into treaty compliance.[48] Nonetheless, where Congress is absolutely clear in its intent to violate the treaty (through, most obviously, passage of directly inconsistent legislation), the judiciary abandons any effort to enforce the treaty in its original form.[49]

Several historical examples of treaty enforcement may help clarify these points. In the nineteenth century, Congress sometimes arguably misimplemented U.S. trade treaties.[50] For example, in 1832 the United States promised Russia Most Favored Nation ("MFN") status—the right to the best tariff rate given any other country. In its 1842 Tariff Act, however, Congress created special tariffs for British- and Spanish-grown hemp, arguably in breach of its treaty with Russia. Even if the courts might have agreed with Russia that

[46] Similar patterns are observed in the tariff, Chinese exclusion, intellectual property, and human rights treaties. See infra Sections II.B, II.C, III.B, and III.C.

[47] Baker v. Carr, 369 U.S. 186, 212 (1962).

[48] See, e.g., Cheung Sum Shee v. Nagle, 268 U.S. 336, 345–46 (1925) (holding that the rights granted by the 1880 Treaty with China survived passage of a subsequent immigration act: "[the Immigration] Act must be construed with the view to preserve treaty rights unless clearly annulled"). Examples of the use of the *Charming Betsy* canon to inform statutory interpretation based on treaties can be found in Ralph G. Steinhardt, The Role of International Law As a Canon of Domestic Statutory Construction, 43 Vand. L. Rev. 1103, 1135–62 (1990). See also Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

[49] See, e.g., infra Section II.C (discussing the Chinese exclusion cases).

[50] See infra Section II.B (discussing nineteenth-century commercial treaty practice).

Congress owed it the best rate, the Supreme Court was unwilling to set Congress straight. It deferred, instead, to Congress's implementation, relying on the judiciary's relative lack of information as to why Congress might have implemented the tariffs the way it did.[51]

Similarly, the United States in 1988 joined the Berne Convention of 1886, which sets minimum international standards of copyright protection,[52] and Congress passed implementing legislation.[53] Despite amendments to the copyright code, the United States arguably still does not comply with some of the requirements of Berne,[54] particularly the provisions demanding protection of "moral rights."[55] Nonetheless, courts have ignored that fact in their decisions and have failed to even attempt to construe federal law to be consistent with U.S. treaty obligations.[56] These two examples reflect broader patterns identified more clearly in Part II.

c. Executive Breach

The President, like Congress, has independent powers that make review of his compliance with treaties challenging. The Executive has the power to create both Executive agreements and treaties in collaboration with Congress, and it assumes the authority to terminate treaties unilaterally.[57] The Executive also engages in inde-

[51] See Taylor v. Morton**,** 23 F. Cas. 784, 784–85, 788 (C.C.D. Mass. 1855) (No. 13,799), aff'd, 67 U.S. (2 Black) 481 (1862).

[52] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (1986), 828 U.N.T.S. 221 [hereinafter Berne Convention].

[53] Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

[54] See Ralph S. Brown, Adherence to the Berne Copyright Convention: The Moral Rights Issue, 35 J. Copyright Soc'y U.S.A. 196, 204–05 (1988); see also Jane C. Ginsburg, The Right to Claim Authorship in U.S. Copyright and Trademarks Law, 41 Hous. L. Rev. 263, 264–66 (2004) (discussing the limited U.S. copyright and trademark protection of the right of attribution).

[55] See Berne Convention, supra note 52, art. 6bis (moral rights protections).

[56] In fact, courts have not even used the *Charming Betsy* canon to avoid arguable breach of the Berne Convention. For example, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31–37 (2003), the Supreme Court effectively eliminated a category of moral rights protection under trademarks law without questioning whether this would put the United States in violation of its treaty obligations.

[57] The exact amount of authority the President has to terminate treaties is debated. See Louis Henkin, Foreign Affairs and the United States Constitution 211 (2d ed. 1996) ("[T]he Constitution tells us only who can make treaties for the United States; it does not say who can unmake them."); see also Goldwater v. Carter, 444 U.S. 996,

pendent interpretation of treaties, sometimes writing implementing regulations and ordering its employees to obey the treaty as interpreted. As an example, U.S. soldiers (with well-known exceptions) are regularly ordered to obey various laws of war, including the Geneva Conventions, as the Executive has interpreted them in its regulations.[58]

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

The problem of Executive breach is properly understood as a cousin to the similarly difficult problem of statutory deference to administrative agencies' interpretations of the statutes they administer, which are generally called *Chevron* problems.[59] Logic suggests that there must be a treaty-law system of deference to the Executive in cases of alleged Executive breach, but if there is one, it is only vaguely referred to in the cases and certainly is not well understood. Statutory deference may therefore serve as a useful analogue to the problem of Executive treaty deference, though there are enough differences to make treaty deference its own creature.

The similarity between statutory and treaty deference analysis comes from the fact that in both kinds of cases, courts sometimes encounter facts that justify what the Court calls *Skidmore* deference—recognition of, but not necessarily absolute deference to, the

1002 (1979) (finding, in a grant of certiorari and immediate remand to the district court for dismissal, that the validity of a Presidential termination of a treaty is either unripe or a nonjusticiable political question).

[58] See, e.g., Dep't of the Army, Field Manual No. 27-10, The Law of Land Warfare 3–14 (1956) ("The purpose of this Manual is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land.").

[59] See Curtis A. Bradley, *Chevron* Deference and Foreign Affairs, 86 Va. L. Rev. 649, 650–53 (2000) (arguing that a "*Chevron* perspective" provides a useful model for deference in foreign affairs cases).

Executive's "specialized experience and broader investigations and information."[60] Beyond expertise, deference in such cases is also premised on the greater political accountability of the Executive as compared with the courts; such accountability may similarly recommend deference to the Executive in treaty interpretation cases.[61] If the Executive has implemented a treaty and the public dislikes the President's approach, courts may reason that voters can seek a democratic remedy. These common factors—expertise, information, and accountability—suggest a baseline level of deference, and in some treaty cases courts grant something like *Skidmore* deference. For example, in taxation treaty cases, while the courts do not hesitate to find the Executive in breach in a clear case, they nonetheless say they will give "great weight" to the Executive's interpretation.[62]

But beyond this *Skidmore* point the comparison with statutory deference becomes complex. In *United States v. Mead Corp.*, the Supreme Court suggested that the appropriate level of deference to an administrative agency can vary.[63] It depends, said the Court, on evidence of Congressional delegation of legislative authority to the agency, most obviously textual delegation in the statute itself.[64] Where Congress has delegated legislative authority to the agency, courts must apply what is known as *Chevron* deference to agency

[60] Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).

[61] Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 866 (1983); see also Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517–18 (arguing that one of the chief virtues of *Chevron* deference is flexibility in the administrative process, flexibility that is properly left to a politically accountable branch).

[62] In tax cases, courts usually directly enforce treaties without even discussing whether they are "self-executing." See, e.g., United States v. Stuart, 489 U.S. 353, 365–70 (1989); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180–90 (1982); Maximov v. United States, 373 U.S. 49, 51–56 (1963); Kimball v. Comm'r, 6 T.C. 535, 537–41 (1946). An international tax issue was also raised in Wodehouse v. Comm'r, 50,161 T.C.M. (P-H) 505 (1950).

[63] 533 U.S. 218 (2001).

[64] Id. at 226–31. Professors Thomas Merrill and Kristin Hickman originally suggested that *Chevron* deference should attach only in clear cases of delegation and actual agency rulemaking. Thomas W. Merrill & Kristin E. Hickman, *Chevron's* Domain, 89 Geo. L.J. 833, 920–21 (2001). However, in practice courts have relied on all sorts of evidence of Congressional intent to delegate. See Adrian Vermeule, Introduction: *Mead* in the Trenches, 71 Geo. Wash. L. Rev. 347, 349–55 (2003) (examining the D.C. Circuit's reaction to *Mead*).

statutory interpretations that were intended to have utilized the delegated legislative authority. *Chevron* deference involves the application of a simple two-step framework. At the first step, the court asks whether Congress has spoken clearly to the interpretive question at hand. If Congress has not, the court then proceeds to the second step, where it inquires as to whether the agency interpretation of the statute is reasonable.[65]

The rule dictated in *Mead* has proven complex for statutes,[66] and what it might mean in the treaty context is oblique. First, explicit delegations or other evidence of intent, such as speeches and treaty-drafting history, only rarely appear in treaties. Treaties, after all, are written to bind two or more governments and therefore do not usually give precise instructions to domestic actors.[67] Second, the relevant intent of a treaty often reflects a joint intent between many treaty partners. Asking whether Russia intended to delegate to the U.S. Secretary of Commerce power to implement a given treaty is a strange question for an American judge to answer. In the absence of implementing legislation, the search for a treaty's intent to delegate legislative power to the Executive often makes little sense.

Instead, in treaty cases there is commonly a different basis for deference that cannot be ignored: the President's independent power not only to enforce treaties, but also to set the foreign policy of the United States. This is the matter of foreign affairs deference (itself sometimes understood as an offshoot of political question deference), and scholars may have overlooked its effects in cases of treaty enforcement.[68]

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[65] See *Chevron*, 467 U.S. at 843–44.

[66] See Vermeule, supra note 64, at 347–49.

[67] The closest approximation is a promise to give the treaty domestic effect, as in this language in the International Covenant on Civil and Political Rights ("ICCPR"): "[E]ach State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes . . . to give effect to the rights recognized in the present Covenant." International Covenant on Civil and Political Rights art. 2(2), Dec. 19, 1966, S. Treaty Doc. No. 95-20 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

[68] Professor Curtis Bradley described foreign affairs deference as, in fact, comprising five overlapping categories of deference: "Political Question," "Executive Branch Lawmaking," "International Facts," "Persausiveness" and "*Chevron*." Bradley, supra note 59, at 660–63.

How can we explain the precise effect of foreign affairs deference in cases of alleged Executive breach of a treaty? One answer comes from Professor Louis Henkin, who in a famous article explained foreign affairs deference in a manner useful here.[69] He suggested that foreign affairs deference is simply the consequence of the constitutional delegation of a legislative power to the Executive. When a court defers on foreign affairs grounds, says Henkin, that may mean "that the President's decision was within his authority and therefore law for the courts."[70] Henkin's approach suggests that perhaps the most relevant issue in treaty deference cases is a search for a constitutional—as opposed to a statutory—delegation of legislative power to the Executive.

Based on Henkin's work and the analogy to statutory deference, we might outline a rough framework for how courts think about the problem of Executive breach. When the Executive is accused of breaching a U.S. treaty, the question for the Court, as in a statutory case, is what deference to accord the Executive's interpretation of the treaty in question. First, based on subject-matter expertise, courts in treaty cases will accord the Executive something like *Skidmore* deference as a matter of course. That is evident, for example, in tax treaty cases. Yet in some cases, courts grant even greater—or total—deference. Unlike in statutory cases, such deference rarely results from the fact that a treaty explicitly delegates legislative authority to the Executive (one path to deference that *Mead* and Professors Thomas Merrill and Kristin Hickman suggested).[71] Instead, courts defer when the Constitution has delegated to the Executive branch a relevant power, such as the power to announce that a treaty has been terminated.[72] The result is a rough two-tiered system of deference to the Executive in treaty cases that might explain why the judiciary defers when it does.

It should be admitted, in closing, that this model for thinking about Executive breach is more aspirational than the rest of this Article. Perhaps the most extreme model of judicial deference to

[69] See Louis Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597, 610–14 (1976).

[70] Id. at 612.

[71] See Merrill & Hickman, supra note 64, at 920–21.

[72] Of course, looking to the Constitution for powers reserved to the Executive might also happen in a statutory case; it is just less likely.

the Executive is the case of *United States v. Alvarez-Machain*.[73] Yet, as discussed in Part III, there seems little special about that case that might have justified strong deference—unless the Court's point was to suggest that the Executive should *always* get complete deference in treaty cases.[74] But that legal conclusion seems implausible in light of the Court's relative lack of deference in other treaty cases. In short, the Court is already offering different levels of deference to the Executive in different types of cases. What is suggested here is simply a more principled way to do so.

d. Types of Breach: A Signaling Model

If we accept that the identity of the breacher is crucial in cases of treaty enforcement, how can a court distinguish instances of Executive, Congressional, and State breach? The answer to this question can make all the difference in an individual case. As we have seen, characterizing a matter as Executive or State breach opens the door to judicial enforcement, as compared with deciding that the fault lies with Congress for failing to implement the treaty in the first place. The question is important, for it provides courts with a means of avoiding the enforcement of a treaty against the Executive or a State. Faced with an apparent breach of a treaty, the court can instead attribute the problem to Congress by calling the treaty non-self-executing and awaiting Congressional action.

The question is hard, and the contribution of Chief Justice Marshall's opinion in *Foster v. Neilson* was the suggestion that this question might sometimes be answerable by the text of the treaty. As he said, "when the terms of the [treaty] stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department."[75] But despite Marshall's intentions, the text of the treaty is at best rarely used by courts to decide to whom the treaty is "addressed." It is true that in some cases, as *Neilson* suggested, the text may be determinative, but such cases are rare.[76] Instead, in most

[73] 504 U.S. 655, 668–69 (1992).

[74] See id.

[75] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

[76] One of the first reported treaty interpretation cases, *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393 (1788), is an example of this. The language in question said that "Congress shall earnestly recommend it to the legislatures of the respective states, to provide for

notable treaty cases the language is indeterminate or is simply ignored. The history of treaty enforcement shows that there is often little relationship between the particular phrasing of a treaty's language and the enforcement of a treaty. History is littered with treaties with direct language that were nonetheless not enforced by the judiciary for want of Congressional action.[77]

Instead of focusing on text, courts search for other evidence. They want to know whether the courts are meant to be the primary enforcers of the treaty in question and look for signals from Congress or the Executive that might show who is meant to be responsible for enforcing a given treaty. One of the clearest examples of such a signal is a Congressional enactment of implementing legislation. But sometimes even *previous* Congressional activity has convinced courts that judicial enforcement of an inconsistent treaty would be unwelcome. Rightly or wrongly, that is how the courts behaved in deciding the commercial and MFN treaties in the nineteenth century,[78] the multinational intellectual property treaties in the early twentieth century,[79] and the human rights conventions of the late twentieth century.[80] In other words, courts have taken the fact that Congress has passed prior legislation in the area as evidence that the failure to implement a treaty is the fault of Congress.

A careful observer will notice that the latter practice contradicts the last-in-time rule, which provides that statutes and treaties are of equal legal power and that the latter in time will prevail in case of conflict.[81] But because non-self-execution or other doctrines of deference can be, and are, used to prevent a later-in-time treaty

the restitution of all estates, rights and properties." Definitive Treaty of Peace, U.S.-Gr. Brit., art. V, Sept. 3, 1783, 8 Stat. 80. The Court had little difficulty finding that this created an obligation for Congress as opposed to the States. *Lockwood*, 1 U.S. (1 Dall.) at 403–04.

[77] Some examples include the ICCPR, supra note 67, the Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11, and the nineteenth-century Commerce and Most Favored Nation treaties.

[78] See discussion infra Section II.B.

[79] See discussion infra Section III.B.

[80] See discussion infra Section III.C.

[81] For classic statements of the last-in-time rule, see, for example, *Reid v. Covert*, 354 U.S. 1, 18 (1957) and *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

from abrogating an earlier statute, the last-in-time rule is not a full or accurate portrayal of judicial practice.[82]

While this point may seem novel, Professor Westel Woodbury Willoughby made it as early as 1910. He wrote:

> [T]here have been few (the writer is not certain that there have been any) instances in which a treaty inconsistent with a prior act of Congress has been given full force and effect as law in this country . . . . Furthermore . . . Congress has explicitly denied that a treaty can operate to modify the arrangements which it, by statute, has provided, and, in actual practice, Congress in every instance succeeded in maintaining this point.[83]

In 1953, Professor Edward Corwin pointed out that *Cook v. United States*[84] is the only important appellate case to have enforced a later treaty in abrogation of an earlier statute.[85]

The reciprocal version of the last-in-time rule, in other words, stands on the authority of a single Supreme Court case, and *Cook* requires further examination, for it is not entirely what it seems. During Prohibition, the Coast Guard raided British ships and seized intoxicating liquors. The United States, after much diplomatic friction, agreed via a 1924 treaty to restrain the Coast Guard somewhat by prohibiting it from boarding ships outside of one hour's steaming from the coast.[86] In 1932, in breach of that treaty (but in compliance with a federal statute), the United States Coast Guard seized Captain Frank Cook's ship, and the Collector of Customs charged him with various violations.[87] The Supreme Court re-

[82] But cf. Julian G. Ku, Treaties as Laws: A Defense of the Last-In-Time Rule for Treaties and Federal Statutes, 80 Ind. L.J. 319, 325–26 (2005) (arguing that despite widespread academic belief that the last-in-time rule is obsolete and unworkable, the rule is structurally and textually sound).

[83] 1 Westel Woodbury Willoughby, The Constitutional Law of the United States 555 (1st ed. 1910).

[84] 288 U.S. 102 (1933).

[85] See The Constitution of the United States of America: Analysis and Interpretation 422 (Edward S. Corwin ed., 1953) [hereinafter Corwin].

[86] *Cook*, 288 U.S. at 118.

[87] Specifically, Frank Cook was fined $14,268.18 for failing to include the ship's liquor in the manifest. Id. at 107–08.

jected the view that the statute was controlling and enforced the treaty, dismissing the violations.[88]

Cook is the only Supreme Court case to explicitly enforce a treaty in the face of an inconsistent federal statute.[89] But a little noticed fact about *Cook* is that the Supreme Court did not disregard the Executive branch's interpretation of the treaty; rather, the Court adopted it. The case was decided against the United States at the request of the United States. In his brief to the Court, Solicitor General Thomas D. Thacher asked for reversal, noting that the Coast Guard had disobeyed the Justice Department's commands: "The Commandant of the U.S. Coast Guard was advised in 1927 that all seizures of British vessels . . . should be within the terms of the treaty . . . ."[90] In short, the importance of *Cook*'s enforcement of a subsequent treaty must be tempered by the fact that the Court may have enforced the treaty in deference to the Executive's interpretation of the treaty.[91] Overall, as Professor Willoughby suggested, it might be clearer and more reflective of treaty practice to say that a later-in-time treaty will override an earlier-in-time statute only when it explicitly does so. This is not meant to diminish the role of treaties in the U.S. system but rather to reconcile judicial doctrine with long-standing judicial behavior.

e. Foreign Breach

The final and least well-documented cases are those where a plaintiff asks the federal judiciary to remedy a foreign nation's breach of a U. S. treaty. There is a limited quantity of cases of this type, most concerning suits for torture or other mistreatment.[92] Of

[88] Id. at 120 ("As the Mazel Tov was seized without warrant of law, the libels were properly dismissed.").

[89] See, e.g., Edwin D. Dickinson, Jurisdiction Following Seizure or Arrest in Violation of International Law, 28 Am. J. Int'l L. 231, 234–36 (1934); see also Henkin, supra note 57, at 210. The Court in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 108 (1801), also enforced a treaty in the face of a contradictory statute, but the Court did not specifically discuss the conflict between treaty and statute in its opinion.

[90] *Cook*, 288 U.S. at 105.

[91] Edward Corwin also contemplated that the decision and the Executive's position were "devised to avoid a diplomatic controversy which in the low estate of Prohibition at that date would not have been worthwhile." Corwin, supra note 85, at 422.

[92] See, e.g., Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 371–73 (7th Cir. 1985) (per curiam); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798, 808–10 (D.C. Cir. 1984) (Bork, J., concurring).

the 148 Supreme Court cases involving the enforcement of treaties surveyed, only one addressed foreign breach.[93] For that reason, this Article does not dwell on foreign breach but instead offers a brief analysis of how foreign breach fits into the deference model and serves to elucidate and strengthen it.

When is it appropriate to order a foreign sovereign to live up to its obligations? Using the self-execution doctrine, the judiciary usually has declined to directly enforce treaties against a foreign nation.[94] In *Tel-Oren v. Libyan Arab Republic*, for example, survivors of a terrorist attack in Israel sued Libya, the Palestine Liberation Organization ("PLO"), and various other defendants.[95] In a concurring opinion on whether the 1907 Hague Conventions created a private cause of action, Judge Robert Bork argued that they must be interpreted not to do so, because otherwise

> [T]he code of behavior the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by the many individuals, including prisoners of war, who might think their rights under the Hague Conventions violated in the course of any large-scale war. . . . [T]he prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations.[96]

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

[93] See "Alleged Treaty Breach" chart infra p. 583.
[94] See, e.g., cases cited supra note 92 and accompanying text.
[95] 726 F.2d at 775 (per curiam).
[96] Id. at 810 (Bork, J., concurring).

cials, rather than non-self-execution, should arguably be the rules to which American courts adhere against foreign nations.[97]

A hypothetical example may better illustrate the point. Suppose that Britain, in violation of treaties with the United States, refuses to grant one American citizen a visa and refuses another American navigation rights in the English Channel. Both American citizens sue Britain under the treaty. To decline to enforce the treaty through the doctrine of non-self-execution is to announce an empty conclusion. Instead, the question should be whether the foreign sovereign enjoys immunity under U.S. law, which it generally does for sovereign but not commercial acts under the Foreign Sovereign Immunities Act.[98] There is little question that granting a visa is a sovereign act, but it might at least be argued that breaking the treaty granting navigation rights, perhaps to protect a British competitor, represents commercial behavior. As it allows such questions to be asked, the Foreign Sovereign Immunities Act is the better calibrated and the Congressionally designed instrument for addressing these problems. It is designed to allow some enforcement of U.S. law against foreign powers while providing immunity for sovereign acts. With regard to foreign nations, meanwhile, non-self-execution is simply a rule of over-deference.

* * *

The goal of this Article is to uproot the theory of self-execution as the dominant mode for understanding treaty enforcement in the United States. The deference theory advances the notion that cases of treaty enforcement often have little to do with the nature of the treaty, as self-execution theory suggests. They are, instead, problems of deference. Courts need to decide whether it would be appropriate to correct an alleged breach by the Executive, a State, Congress, or a foreign government.

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

[97] 28 U.S.C. §§ 1330, 1602–1611 (2000). On official immunities, see generally Bradley & Goldsmith, supra note 38, at 523–35.

[98] See 28 U.S.C. § 1605(a)(2) (providing for the commercial exception to sovereign immunity).

primarily a positive theory. In this Article, therefore, I have not attempted to address the much broader normative questions of when and why a court should owe more or less deference to a State, the Executive, or Congress. Those questions cannot be fully answered in a single article. There are any number of arguments, for example, that enforcement of treaties against States should be more or less aggressive,[99] or that the courts should defer more or less to the Executive's breach of treaties.[100] For too long the dominance of self-execution theory has made it difficult to appreciate how courts make treaty enforcement decisions. In other words, the case for the deference model does not depend on any normative view of when treaties should be enforced. Rather, it depends on elucidating the institutional concerns that drive treaty enforcement, helping to clarify why and when judges decline to enforce "the supreme Law of the Land."

II. PRE-TWENTIETH CENTURY TREATY ENFORCEMENT IN THE UNITED STATES

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

The Article now turns to a survey of the record of treaty enforcement in the United States. The reason for this turn to history is that the patterns discussed here are the best evidence of what the law of treaty enforcement actually is. The method certainly carries certain risks, for surveying such a lengthy period in history risks oversimplification and, inevitably, oversight of some potentially important details. It should be stressed that what follows is not meant to be a contribution to the historical literature but a means of better understanding treaty enforcement. What the approach does reveal is the larger and lengthier trends of treaty enforcement

[99] See Young, supra note 43, at 150–54 (arguing for greater deference to states in matters of foreign relations).

[100] See, e.g., Bradley, supra note 59, at 651–52 (advocating the *Chevron* approach of deference to the Executive).

from over the last two hundred years, in which the structural considerations affecting treaty enforcement cannot be missed. It is from this standing record of how treaties are actually enforced that the model in Part I is derived.

* * *

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

A. Establishing the Basic Principle of No Deference to States Who Breach

"I have no notion of cheating anybody," said John Adams to British negotiators in 1782.[101] This single, impulsive remark might be said to have laid the foundations of federal judicial treaty enforcement in the United States and, in particular, the idea, discussed in Part I, that a primary duty of the federal judiciary is to remedy State breach. Adams's comment must be understood in context: it was made immediately after he joined Benjamin Franklin and John Jay in Paris to negotiate the preliminary Treaty of Peace with Great Britain. Among the most important points in dispute at that time were the debts owed British creditors—debts in excess of £5 million at the beginning of the revolution.[102] Adams's comment was a concession: it was a promise that would bind the United States, as a country, to guarantee the payment of debts, whatever the individual States might think.

Implicit in Adams's statement was an expansive view of national power that would ultimately lead to expansive judicial enforcement of treaties against the States. As Professor John Bassett Moore wrote in 1906, Adams's concession was "remarkable not only as the embodiment of an enlightened policy, but also as the strongest assertion in the acts of that time of the power and authority of the national government."[103]

[101] *Quoted in* Richard B. Morris, The Peacemakers: The Great Powers and American Independence 361 (1965).

[102] Richard B. Morris, The Durable Significance of the Treaty of 1783, *in* Peace and the Peacemakers 230, 239 (Ronald Hoffman & Peter J. Albert eds., 1986).

[103] John Bassett Moore, The Principles of American Diplomacy 29 (1918).

This point becomes clear when we see that the legal expression of Adams's promise was Article IV of the 1783 Treaty, which states that "creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."[104] Because this language creates an individual right—it protects the "creditor" who is granted the right to recover debts notwithstanding "lawful impediment"—enforcing it would require some authority (a court or agency) with the power to give it effect. In the new republic, it would eventually become clear that it was the job of the new federal courts to give legal life to Adams's promise.

Few courts existed in the 1780s to bring the creditors' rights in Article IV to life. Instead, contradictory State law put the United States in substantial violation of its stated obligation. Historians of the period may disagree over much, but they are in agreement over the record of State compliance with Article IV of the 1783 Treaty.[105] Typical was the case of Virginia, the State holding the largest share of debt (over £2.3 million, or about half the national debt). In 1777, Virginia passed a law allowing citizens to pay off their British debt by making an equivalent payment in Virginia's paper currency.[106] As the Virginia pound depreciated, the law became an easy way to discharge British debt, and many did just that—even Thomas Jefferson and George Washington.[107] A second Virginia Act in 1782 simply declared that "no debt or demand whatsoever, originally due to a subject of Great Britain, shall be recoverable in any court in this commonwealth."[108] No Virginia court would hear an action to recover British debt, nullifying Adams's promise to the British.

[104] Definitive Treaty of Peace, supra note 76, art. IV.

[105] See, e.g., Frederick W. Marks III, Independence on Trial: Foreign Affairs and the Making of the Constitution 52, 82–90 (1973) (highlighting Congress's difficulty in eliminating foreign trade barriers due to state sovereignty and its effect on the ability to enter into commercial treaties).

[106] An Act for Sequestering British Property (1777), *in* At a General Assembly, Begun and Held at the Capitol, In the City of Williamsburg 17 (Williamsburg, Alexander Purdie 1778).

[107] See Jean Edward Smith, John Marshall: Definer of a Nation 153–54 (1996).

[108] An act to repeal so much of a former act as suspends the issuing of executions upon certain judgments until December, one thousand seven hundred and eighty-three (1782), *reprinted in* 11 William Waller Hening, The Statutes at Large; Being a Collection of All the Laws of Virginia 76 (Univ. Press of Va. 1969) (1823).

As historian Brinton Coxe wrote in 1893, "[w]hen the Framers met in convention the violation of the treaty of peace by certain of the [S]tates was one of the most pressing anxieties of the political situation of the Union."[109] The history of the framing of the Supremacy Clause is complex and contested, and this Article does not represent original research into its meaning. Rather, it highlights a fact over which there is little disagreement: that the historical evidence shows a *minimum* view of when the Framers believed treaties were enforceable. It shows an intent to create a solution to the problem of State violations of the 1783 Treaty of Peace, to devise some mechanism for enforcing Adams's promise to the British, and to prevent the States from inadvertently plunging the United States into an unwanted war.[110]

This view of the role of treaty enforcement was quickly confirmed by the judiciary in the *Great British Debt Case*,[111] now usually referred to as *Ware v. Hylton*.[112] The adoption of the Constitution and the opening of the federal courts in 1790 brought a flurry of a particular type of lawsuit: British creditors seeking payment of their debts. In Virginia alone, more than two hundred cases were brought in the first year, comprising the vast majority of the federal docket.[113] *Ware* was a test case. It presented exactly the facts that had created trouble during the 1780s: State refusal to enforce the Treaty of Peace.

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[109] Brinton Coxe, An Essay on Judicial Power and Unconstitutional Legislation 274 (Philadelphia, Kay and Brother 1893).

[110] Some of the strongest evidence of this intent includes the comments of James Madison at the 1787 convention, found in 1 The Records of the Federal Convention of 1787, supra note 42, at 316, and his writings in The Federalist No. 42 (James Madison), supra note 8, at 228 (stressing that the new treaty power was "disembarrassed by the plan of the Convention of an exception, under which treaties might be substantially frustrated by regulations of the States . . . ."); The Federalist No. 22 (Alexander Hamilton), supra note 8, at 117 ("[Treaties must be] submitted . . . to one supreme tribunal. . . . The treaties of the United States, under the present Constitution [the Articles of Confederation], are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction . . . . The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.").

[111] See Leonard Baker, John Marshall: A Life in Law 158 (1974).

[112] 3 U.S. (3 Dall.) 199 (1796).

[113] See Charles F. Hobson, The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797, 92 Va. Mag. Hist. & Biography 176, 182 (1984).

The facts were typical. Daniel L. Hylton was a well-off James River merchant who, in 1774, borrowed £1500 from Jones & Farell, a leading British creditor. During the war, Hylton discharged his debts using the Virginia statute described above: he paid the Virginia treasury £953 in Virginia pounds, worth £15 specie.[114] In 1790, when the federal courts opened, Ware sued on behalf of Jones & Farell under Article IV of the Treaty of Peace to recover on the debt.[115] Despite a vigorous defense of Hylton by his lawyer John Marshall, the Supreme Court upheld the rights of creditor Jones & Farell, and along the way, it established the paradigmatic model of judicial treaty enforcement.

Justice Chase, writing the main and longest opinion, held that treaties were enforceable by the judiciary and were supreme to State law. Justice Chase found that "[t]he people of America have been pleased to declare, that all treaties made before the establishment of the National Constitution, or laws of any of the States, contrary to a treaty, shall be disregarded."[116] Federal, as well as State, judges, he said, have a "duty" to "determine any Constitution, or laws of any State, contrary to that treaty (or any other) made under the authority of the United States, null and void."[117]

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

> None can reverence the obligation of treaties more than I do. The peace of mankind, the honour of the human race, the welfare, perhaps the being of future generations, must in no inconsiderable degree depend on the sacred observance of national conventions. . . . [The Definitive Treaty of Peace] presented boundless views of future happiness and greatness, which almost overpower the imagination . . . .
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> . . . .
>
> . . . Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigour of its own authority to be executed in fact. It

[114] See Smith, supra note 107, at 576 n.69 (detailing the facts of *Ware v. Hylton*).

[115] *Ware*, 3 U.S. (3 Dall.) at 199, 204.

[116] Id. at 237.

[117] Id. Other Justices used similar language. See, e.g., id. at 250 (Paterson, J.) ("The act itself is a lawful impediment, and therefore is repealed; the payment under the act is also a lawful impediment, and therefore is made void.").

> would not otherwise be the supreme law in the new sense provided for . . . .[118]

Ware was therefore a bold statement of the role of the judiciary in preventing State violations and was celebrated by many as such.[119] According to turn-of-the-century historian Hampton Carson, the Court found that

> [T]he Treaty of 1783 was the supreme law, equal in its effect to the Constitution itself, in overruling all State laws upon the subject . . . . Happy conclusion! A contrary result would have blackened our character, at the very outset of our career as a nation . . . and would have prostrated the national sovereignty at the feet of Virginia.[120]

Unsurprisingly, those more sympathetic to stronger States' rights have often suggested that *Ware*'s significance is limited. Congressman and later law professor Henry St. George Tucker took the counterintuitive position that *Ware*, despite its text, "did not decide that the Definitive Treaty of Peace of 1783 annulled the Law of Virginia."[121] The law, in his view, was already invalid and could therefore not be nullified by the Supreme Court.[122] Modern day scholars, such as Professor John Yoo, have also done their best to downplay *Ware*'s holding.[123]

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[118] Id. at 270, 277 (Iredell, J.).

[119] Importantly, *Ware* did not make it clear what role the House of Representatives needed to play in the formation of a valid treaty, a question that emerged in the midst of a ferocious debate over the necessity of full Congressional enactment of the Jay Treaty. See 1 Charles Henry Butler, The Treaty-Making Power of the United States §§ 283–293 (1902) (discussing the Jay Treaty debate and, in particular, the House's role therein). While an inconclusive battle, it illustrates the extent of disagreement over the mechanics of the Treaty Power.

[120] 1 Hampton L. Carson, The History of the Supreme Court of the United States 170 (1902).

[121] Henry St. George Tucker, Limitations on the Treaty-Making Power Under the Constitution of the United States 173 (1915).

[122] Id. at 201.

[123] See Yoo, supra note 6, at 2080 ("At best, then, *Ware* can stand for only a very limited form of self-execution."). But see Carlos Manuel Vázquez, Treaty-Based Rights and Remedies of Individuals, 92 Colum. L. Rev. 1082, 1113 (1992) ("*Ware v. Hylton* establishes that, when a treaty creates an obligation of a state vis-à-vis individuals, individuals may enforce the obligation in court even though the treaty does not, as an international instrument, confer rights directly on individuals of its own force.").

From the vantage point of the twenty-first century, *Ware* can be seen as the founding moment of judicial treaty enforcement against the States. The Court would perhaps never perceive itself to be on firmer ground in enforcing treaties than when enforcing the very treaty whose violation had led to the Constitutional Convention. The Supreme Court proceeded to decide more than fifty cases in the image of *Ware* and continues to do so today; the significance of the case thus cannot be overstated.[124] But in no sense did *Ware* answer all of the many treaty questions that were to follow. *Ware* was like a "fat pitch." Its facts were an easy target for the Court to bring to life the core purpose of the federal treaty power: negating violative State laws. A fat pitch, however, only tells you so much about a batter's potential, and similarly, *Ware* left much to be decided.

1. The Flip Side

There is an evident flipside to *Ware*. John Adams's comment—"I have no notion of cheating anybody"—would lead to judicially enforceable rights for British creditors, affirmed finally by the Supreme Court. But the same cannot be said for the British and Loyalist property owners who were greater victims of the Revolutionary War. The final language of the Definitive Treaty of Peace stated that "Congress shall earnestly recommend it to the legislatures of the respective States to provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to real British subjects."[125] State legislatures, meanwhile, did roughly the opposite: rather than restoring estates and rights, they passed punitive statutes that prevented Loyalists from holding office and denied them various rights of citizenship.[126]

[124] See supra note 31 (collecting cases in the model of *Ware*).

[125] Definitive Treaty of Peace, supra note 76, art. V.

[126] In 1779, for example, New York passed a statute declaring that all British Loyalists in the state had forfeited their land to the state government. An Act, for the forfeiture and sale of the estates of persons who have adhered to the enemies of this State, and for declaring the sovereignty of the people of this State in respect to all property within the same (October 22, 1779), *reprinted in* 1 Sec'y of State of N.Y., Laws of the State of New York 173, 174 (Albany, Weed, Parsons & Co. 1886). Similarly, in 1784 the New York legislature passed a statute that prevented Tories from holding office. An Act to preserve the freedom and independence of this State, and

The property-owner story led to the establishment of another fundamental matter in treaty enforcement: that sometimes the text of the treaty will make it clear that the judiciary is not meant to enforce it. That point is made clear by *Camp v. Lockwood*, one of the first cases in the first volume of the U.S. Reports.[127] *Lockwood* featured a Loyalist named Abiathar Camp, whose estate was seized during the Revolutionary War. The Pennsylvania Court of Common Pleas stated that "[i]t is agreed, indeed, by the 5th article, that Congress shall recommend it to the several Legislatures to provide for such a restitution;" however, "no acts for those purposes have been passed by the Legislatures."[128] Absent an act of the State legislature as recommended, no relief would be forthcoming; the treaty could not compel relief on its own. In a way, this case is of limited legal significance, as it was decided by a State court before the adoption of the Constitution. But it already captures a crucial idea: some treaties will be implemented by Congress and others enforced by the Judiciary. In this sense, *Lockwood*, while almost completely ignored today, was the first coherent articulation of the idea that treaties should not always be enforced by the judiciary.

Lockwood relied on the clear text of the treaty to reach this conclusion and is in that sense an easy case for nonenforcement. In fact, in *Lockwood* we find the first text-based finding (predating the more famous 1829 case, *Foster v. Neilson*[129]) that a treaty is not written to be enforced by the judiciary. The very same idea was also expressed in *Ware*. According to Justice Chase, "No one can doubt that a treaty may stipulate, that certain acts shall be done by the Legislature."[130] Justice Chase disagreed that Article IV of the Treaty of Peace was such a stipulation; he instead saw it as a contract binding on the judiciary:

> I consider the 4th article in this light, that it is not a stipulation that certain acts shall be done, and that it was necessary for the legislatures of individual [S]tates, to do those acts; but that it is an express agreement, that certain things shall not be permitted

for other purposes therein mentioned (May 12, 1784), *reprinted in* 1 Sec'y of State of N.Y., supra, at 772, 773.

[127] 1 U.S. (1 Dall.) 393 (Pa. Ct. Com. Pl. 1788).

[128] Id. at 403–04.

[129] 27 U.S. (2 Pet.) 253 (1829).

[130] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 244 (1796).

> the American courts of justice; and that it is a contract, on behalf of those courts, that they will not allow such acts to be pleaded in bar, to prevent a recovery of certain British debts.[131]

In other words, the doctrine of textual non-self-execution, often said to have been enunciated forty years later in *Neilson*,[132] added little to what was already obvious in 1788 and 1795.

* * *

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

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

B. Expanding the Basic Principle and Introducing Deference to Congress as Breacher: Commercial Treaties

According to John Quincy Adams, "[a]s the Declaration of Independence was the foundation of all our municipal institutions, the preamble to the treaty with France [America's first commercial treaty] laid the corner-stone for all our subsequent transactions of intercourse with foreign nations."[133] He said that "[t]he two instruments . . . were parts of one and the same system matured by long and anxious deliberation of the founders of this Union in the ever memorable Congress of 1776."[134]

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[131] Id.
[132] 27 U.S. (2 Pet.) at 314.
[133] *Quoted in* Moore, supra note 103, at 162.
[134] Id.

The significance of the treaties modeled on the 1778 Treaty with France did grow to great prominence. In this, the golden age of judicially enforced treaty law, the federal judiciary did a brisk business using treaties to protect the economic rights of aliens from State incursion. Courts had a ready partner in the United States Department of State. After a slow start, American diplomats went on something of a world-wide sales blitz, signing dozens of commercial treaties with nearly every country of significance in a determined effort to break a colonial trading system that excluded American products. From this era date numerous treaties of "Peace, amity, and commerce," or "Friendship, navigation, and commerce," most of similar content.[135]

The original model for all of these nineteenth-century commercial treaties, as John Quincy Adams suggested, was the 1778 Treaty of Commerce with "His Most Christian King" (the French Sovereign).[136] The 1778 Treaty in fact embodies a principle of equality and legal reciprocity innovative not only as a principle of trade, but also for the judicial role it contemplated. The preamble reads:

> [H]is Most Christian Majesty and the said United States . . . tak[e] for the basis of their agreement, the most perfect equality and reciprocity, and by carefully avoiding all those burthensome preferences which are usually sources of debate, embarrassment and discontent; by leaving also each party at liberty to make, respecting commerce and navigation, those interior regulations which it shall find most convenient to itself; and by founding the advantage of commerce solely upon reciprocal utility, and the just rules of free intercourse; reserving withal to each party the liberty of admitting at its pleasure, other nations to a participation of the same advantages.[137]

An important part of such "perfect equality and reciprocity" was a provision guaranteeing the economic rights of French and U.S. citi-

[135] See United States, Treaties and Conventions Concluded Between the United States of America and Other Powers, since July 4, 1776 (rev. ed., Washington, Gov't Printing Office 1873) (collection of all treaties signed by the United States, mostly commercial).

[136] In fact, much was taken from an early model commercial treaty that France would not accept. Moore, supra note 103, at 8, 12.

[137] Treaty of Amity and Commerce, U.S.-Fr., Preamble, Feb. 6, 1778, 8 Stat. 12.

zens in each others' territories. Article XI declared that Americans in France were to be accorded the economic rights of French citizens.[138] In exchange, French citizens were to enjoy reciprocal economic rights on American territory.[139]

Similar provisions can be found in the many commercial treaties that American diplomats managed to negotiate in the first half of the nineteenth century. In 1829, the United States promised the Austrian Emperor King that Austrian citizens "shall enjoy . . . the same security, protection and privileges as natives of the country wherein they reside."[140] Using almost identical language, in 1845 the United States and the King of Belgium agreed that "the same security and protection which is enjoyed by the citizens or subjects of each country, shall be guarantied on both sides."[141]

As the State Department signed commercial treaties with much of Europe, the federal judiciary enforced these treaty-based rights aggressively, particularly against discriminatory State legislation. Consider, for example, the fairly startling case of *Chirac v. Chirac*.[142] A Maryland land statute, passed in 1780, created special inheritance rules for Frenchmen. It gave them the right to own land and devise it to heirs, but also provided that if a Frenchman died without a will, all of his land would revert to the State unless his legitimate relations were American residents.[143] This affected Jean Baptiste Chirac, a naturalized Frenchman. When he died, Chirac left behind heirs in France, a bastard son in Maryland, and no will to be found. Maryland seized Chirac's land and gave it to the son in America, and the French heirs sued in U.S. court.[144]

The Supreme Court enforced the treaty directly in an opinion that is remarkable in many ways. First, despite the urgings of counsel, the Court made no effort whatsoever to reconcile the treaty

[138] Id. art. XI ("The Subjects and Inhabitants of the said United States, or any one of them, shall not be reputed aubains [aliens] in France . . . .").

[139] Id. ("The Subjects of the Most Christian King [the French] shall enjoy on their part in all the dominions of the said States, an entire and perfect reciprocity relative to the stipulations contained in the present article . . . .").

[140] Treaty of Commerce and Navigation, U.S.-Austria, art. I, Aug. 27, 1829, 8 Stat. 398.

[141] Treaty of Commerce and Navigation, U.S.-Belg., art. I, Nov. 10, 1845, 8 Stat. 606.

[142] 15 U.S. (2 Wheat.) 259 (1817).

[143] Id. at 262–63.

[144] Id. at 261.

and the State statute but instead simply interpreted the treaty as the source of Chirac's rights. This is another example, as discussed in Part I, of the early establishment of the rule of no deference to State law. Second, Chief Justice Marshall paid no attention to the fact that the treaty may have intruded into an area of traditional State prerogative (land ownership and escheat). The opinion gives an impression of a treaty power not only preemptive of State law but insensitive to federalism limits. It also foreshadows the broad scope of the treaty power vis-à-vis the States announced in *Missouri v. Holland*.[145] Finally, the Court enforced the treaty even though it was abrogated before Chirac had died. Chief Justice Marshall reasoned that since Chirac acquired the property when the treaty was in force, he obtained it with all rights immediately vested, including rights of assignment equivalent to a U.S. citizen.[146] There were numerous ways in which the Court could have favored the domestic defendant or softened the effects of the treaty in deference to the State, but the Court declined to do so. Instead, it treated the 1778 Treaty as a broad charter of protection for aliens against discriminatory State law. Dozens of other inheritance cases, including the famous *Fairfax's Devisee v. Hunter's Lessee*,[147] were in the same vein.[148]

1. The Flip Side: Tariffs—When Congress Breaches

These same treaties of Friendship and Commerce, while enforced vigorously against the States, would also be used to first define how the judiciary ought to handle Congressional acts inconsistent with American treaty obligations. The treaties of Friendship were trade treaties, and while they commonly included provisions protecting aliens in the United States, stipulations as to tariffs were (as with modern trade agreements) the *sine qua non* element. Some of the friendship and commerce treaties concluded in the first half of the nineteenth century include an appendix listing the tariffs to be paid on various articles.[149] More common, however,

[145] 252 U.S. 416, 432–35 (1920).
[146] *Chirac*, 15 U.S. (2 Wheat.) at 276–77.
[147] 11 U.S. (7 Cranch) 603 (1812).
[148] See, e.g., Hauenstein v. Lynham, 100 U.S. 483, 486–90 (1879); see also supra note 31 (listing cases enforcing treaties against the States).
[149] See, e.g., Treaty with China, U.S.-China, app., July 3, 1844, 8 Stat. 592.

were Most Favored Nation ("MFN") provisions, obligating the contracting parties to give each other the lowest tariffs charged to any nation.[150]

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

But the importers lost. Despite similar language and circumstances, courts nonetheless treated tariff stipulations differently from P&I stipulations and aliens differently from importers. The only clear difference between the two, however, was who was alleged to have breached. The tariff cases alleged, in essence, wrongful implementation by Congress, while the P&I provisions were violated by the States.

The leading nineteenth-century tariff case, *Taylor v. Morton*, illustrates this difference.[151] In 1832, Russia and the United States signed one of the many Friendship and Commerce treaties characteristic of the era. The United States promised Russia MFN status: it would charge Russian goods the lowest tariff granted any other nation. Later, in the 1842 Tariff Act, Congress set a tariff of forty dollars per ton for all hemp, with an advantageous tariff for Manilla and Bombay hemp of twenty-five dollars per ton.[152] Since Russian hemp, according to the plaintiffs, was the same, or "like" product as Bombay hemp, the treaty suggested that importers of

[150] Many of the MFN provisions during this era, however, were understood as "qualified" MFN provisions, meaning that countries did not automatically get the benefits of negotiated deals without making some concession themselves. See John H. Jackson, The World Trading System: Law and Policy of International Economic Relations 161–62 (2d ed. 1997) (describing the difference between conditional and unconditional MFN).

[151] 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13,799), aff'd, 67 U.S. (2 Black) 481 (1862).

[152] Id. at 784–85.

Russian hemp should also be charged twenty-five dollars per ton. The importers sued for the return of their money.

The *Taylor* case raises two interesting questions. First, the treaty language in question gives no clues as to whether it should be enforced by the judiciary. It reads: "No higher or other duties shall be imposed on the importation into the United States[] of any [Russian] article . . . than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country."[153] This is not language, as in *Lockwood*, that says "Congress shall pass," or even, as in *Neilson*, that uses the future tense. Instead, it stipulates that no tariffs "shall be imposed," which sounds like a direct command.

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

Nonetheless, Justice Curtis, riding Circuit, found the treaty to have no effect cognizable by a court; the treaty was not "a rule of action" for "the courts of justice."[154] He justified his decision not by relying on treaty text or interpretation, but via a matter crucial for informing the model in Part I: institutional deference to Congress. In fact, Justice Curtis did not even quote the language of the treaty in the opinion. Instead, he wrote: "[I]t is quite plain [that] it cannot be competent for the court to go any further than a determination that the case is within the treaty. If [C]ongress legislates in subordination to the treaty, viewed as municipal law, it is not material what its reasons were . . . ."[155] Given Congress's power to terminate

[153] Treaty with Russia, U.S.-Russ., art. VI, Dec. 18, 1832, 8 Stat. 444.
[154] *Taylor*, 23 F. Cas. at 787.
[155] Id. at 786.

treaties and its ongoing role in setting tariffs, he said, there might have been many reasons that Congress wanted to violate the treaty with Russia. According to Justice Curtis, a judge could not ask

> whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party . . . [or] whether the views and acts of a foreign sovereign . . . have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise?[156]

Even if Congress had made a mistake (which may have been the case), the judiciary was unwelcome in the interpretation of the tariff law's standing vis-à-vis the treaty: "[I]t is wholly immaterial to inquire whether [Congress] ha[s], by the act in question, departed from the treaty or not . . . ."[157] For "[i]f by the act in question they have not departed from the treaty, the plaintiff has no case."[158] At the same time:

> If [Congress] ha[s breached the treaty], their act is the municipal law of the country, and any complaint, either by the citizen, or the foreigner, must be made to those, who alone are empowered by the constitution, to judge of its grounds, and act as may be suitable and just.[159]

However, *Taylor* did not give any sense of what should happen to a tariff treaty adopted later than a tariff statute, a question first addressed in the 1888 case of *Whitney v. Robertson*.[160] *Whitney* featured another MFN treaty clause in an 1867 treaty with the Dominican Republic. The tariff statute was amended in 1870 to reflect the treaty. Then, in 1876, when the United States signed a treaty with Hawaii entitling Hawaii to export sugar to the U.S. duty free, Congress failed to amend the tariff laws. This oversight led importers of Dominican sugar to argue that they too were entitled to

[156] Id. at 787.
[157] Id.
[158] Id.
[159] Id.
[160] 124 U.S. 190 (1888); see also Bartram v. Robertson, 15 F. 212 (C.C.S.D.N.Y. 1883) (presenting same facts but Danish treaty), aff'd, 122 U.S. 116 (1886).

duty-free imports because the Hawaiian treaty was the last-in-time law of the United States. Read together with the 1867 treaty, it entitled the Dominican Republic to the same duty-free imports given Hawaii.[161]

The Court rejected the argument. Again, there is no language in the treaty suggesting that it ought not be enforced by the judiciary or that there is an obligation due solely to Congress. Furthermore, the Hawaiian treaty was in fact the last "expressed will of the sovereign." Nevertheless, the Court decided that Dominican sugar was still governed by the 1870 statute. Potential beneficiaries of the 1876 Hawaiian treaty, such as the Dominican Republic, needed to await Congressional action.[162] While the Court could have held the later-in-time treaty supreme to the 1870 statute and of immediate effect, it did not.

By this point some central principles of treaty enforcement had been stated for the States and Congress. These principles were tested and reaffirmed in the last major episode of comparative State and Congressional breach of U.S. treaty obligations—the history of the Burlingame Treaty and Chinese immigration.

C. The Difference Between State and Congressional Breach: Immigration & Chinese Exclusion

In April 1867, the Chinese Empire's first overseas diplomatic mission arrived on the shores of San Francisco, marking China's first effort to join the modern diplomatic system.[163] The Chinese, unusually, had appointed an American to head the mission: Anson Burlingame, Envoy Extraordinary and Minister Plenipotentiary. The trade treaty Burlingame would negotiate on behalf of China would become central to more than two decades of judicial treaty-enforcement controversy.

The story of the Burlingame Treaty and its fate in U.S. courts has enormous relevance for the role of the federal judiciary in the enforcement of treaties. It reestablished and solidified a basic dy-

[161] *Whitney*, 124 U.S. at 191–92; see also *Bartram*, 15 F. at 212–13.

[162] *Whitney*, 124 U.S. at 193–95.

[163] The story is recounted fully in Fredrick Wells Williams, Anson Burlingame and the First Chinese Mission to Foreign Powers (1912); see also Jonathan D. Spence, The Search for Modern China 194–215 (1990) (detailing efforts to reform and modernize the Chinese empire in the late nineteenth century).

namic described in Part I: vigorous enforcement against State breach, and a judicial recognition of Congress's power to breach and subvert a Treaty signed by the United States. Yet the courts did so under difficult conditions, striking down highly popular, yet discriminatory, State laws.

Anson Burlingame negotiated one of the most liberal commerce treaties the United States has ever signed. Among its provisions, the United States agreed to a rule of unlimited and unrestricted immigration between China and the United States.[164] The Treaty recognized a natural right to immigrate[165] and "the mutual advantage of the free migration and emigration" of citizens "for purposes of curiosity, of trade, or as permanent residents."[166]

For Chinese residing in the United States, the Treaty guaranteed rights similar to those placed in European commerce treaties. Chinese citizens, the treaty proclaimed, "shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation,"[167] and also "entire liberty of conscience," and exemption "from all disability or persecution on account of their religious faith."[168] But in contrast to the European commerce treaties, there was immense popular support for blocking Chinese immigration and restricting Chinese economic rights.

The Western states largely ignored the Burlingame Treaty's promises, and by the 1870s had enacted multiple measures to block the immigration of new Chinese workers and to restrict the rights of those already in the United States.[169] The Chinese, as Burlingame's comments show, were at first a curiosity and a source of labor.[170] But by the 1870s the Chinese had become a scapegoat for the West Coast's economic woes, were seen as unwilling to assimi-

[164] As Secretary of State William Seward said at the time, "The essential element of . . . trade and commerce" with China is "[t]he free emigration of the Chinese to the American [continent]." Hon. William H. Seward: His Departure from Hong Kong Reception and Speech at the American Consulate, N.Y. Times, Feb. 25, 1871, at 2.

[165] Burlingame Treaty, U.S.-China, art. V, July 28, 1868, 16 Stat. 740 ("The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance.").

[166] Id.

[167] Id. art. VI.

[168] Id. art. IV.

[169] See Roger Daniels, Asian America 34–39 (1988).

[170] See id. at 15, 19, 33.

late, and were despised for their willingness to work harder for less money. Anti-Chinese signs of the era proclaimed things like "THE COOLIE LABOR SYSTEM LEAVES US NO ALTERNATIVE" and "MARK THE MAN WHO WOULD CRUSH US TO THE LEVEL OF THE MONGOLIAN SLAVE."[171]

In 1879, California ratified a new constitution that denied Chinese residents the right to vote in State elections, permitted placing the Chinese in ghettos, and, most radically, banned all employment of Chinese workers.[172] It reflected the influence of the California Workingmen's Party, whose slogan was "The Chinese must go!"[173] The new California Constitution now read: "No corporation . . . shall . . . employ, directly or indirectly, in any capacity, any Chinese or Mongolian."[174]

But the Chinese immigrants were organized and regarded the federal judiciary and the Burlingame Treaty as their protectors.[175] They "turned to the federal courts at San Francisco . . . and enjoyed remarkable success."[176] Following the model of *Ware*, the federal judiciary repeatedly struck the discriminatory State provisions under the Burlingame Treaty and sometimes under the U.S. Constitution. It was a successful test of the founding principle of treaty supremacy against even highly popular State constitutional provisions.

In 1880, federal judges first struck down the discriminatory provisions of the new California Constitution. In *In re Tiburcio Parrott*, Judge Sawyer, relying on *Ware* and subsequent law, struck down the California constitutional ban on the employment of Chinese workers as a violation of the Burlingame Treaty.[177] He asserted that Burlingame had recognized a "natural right" to labor:

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[171] Id. at 38.

[172] Cal. Const. art. XIX (repealed 1952); see also In re Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880).

[173] Lucy E. Salyer, Laws Harsh as Tigers 12 (1995).

[174] Cal. Const. art. XIX, § 2 (repealed 1952).

[175] See generally Salyer, supra note 173, at xv ("Leaders in the Chinese community spoke with ease and familiarity about the rights owed them under treaties and the Constitution."); Charles J. McClain, Jr., The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870, 72 Cal. L. Rev. 529 (1984) (describing the organization of the Chinese community).

[176] Salyer, supra note 173, at xv.

[177] *Tiburcio Parrott*, 1 F. at 507.

> [T]his absolute, fundamental and natural right [to labor] was guaranteed by the national government to all Chinese . . . . It is one of the 'privileges and immunities' which it was stipulated that they should enjoy . . . . And any legislation or constitutional provision of the state of California which limits or restricts that right to labor to any extent, or in any manner, not applicable to citizens of other foreign nations visiting or residing in California, is in conflict with this provision of the treaty . . . .[178]

In dozens of subsequent cases the federal judiciary struck down numerous other anti-Chinese statutes, including restrictions on fishing in public waters,[179] immigration of "lewd" women,[180] living or operating businesses in San Francisco outside of designated areas,[181] anti-Chinese covenants in deeds,[182] and zoning rules that restricted Chinese laundries.[183] The dictum in *Baker v. Portland*, which suggested that Portland's anti-Chinese employment laws ran contrary to the treaty, was typical.[184] District Judge Deady agreed with the plaintiffs that the Burlingame Treaty was a promise to Chinese immigrants of full privileges and immunities, preemptive of inconsistent municipal regulations.[185] "An honorable man," he wrote, "keeps his word under all circumstances, and an honorable nation abides by its treaty obligations, even to its own disadvantage."[186] Upholding Judge Deady's opinion, Justice Field, though known for his personal contempt for the Chinese race, nonetheless wrote that:

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[178] Id.

[179] In re Ah Chong, 2 F. 733, 734, 737 (C.C.D. Cal. 1880) (holding State law prohibiting aliens from fishing in public waters void due to contravention of the Burlingame Treaty).

[180] Chy Lung v. Freeman, 92 U.S. 275, 277 (1876).

[181] In re Lee Sing, 43 F. 359, 361–62 (C.C.D. Cal. 1890).

[182] Gandolfo v. Hartman, 49 F. 181, 181, 183 (C.C.S.D. Cal. 1892) (striking down covenant not to covey or lease to a "Chinaman").

[183] In re Quong Woo, 13 F. 229, 229–30, 233 (C.C.D. Cal. 1882). On the other hand, Justice Field upheld a law restricting the operating hours of laundries (requiring them to be closed between 10 p.m. and 6 a.m.) as nondiscriminatory. See Barbier v. Connolly, 113 U.S. 27, 30–31 (1885).

[184] 2 F. Cas. 472 (D. Or. 1879) (No. 777).

[185] Id. at 473.

[186] Id.

> [T]he anti-Chinese legislation of the Pacific coast is but a poorly disguised attempt on the part of the [S]tate to evade and set aside the treaty with China, and thereby nullify an act of the national government. Between this and 'the firing on Fort Sumter,' by South Carolina, there is the difference of the direct and indirect—and nothing more.[187]

A particularly bizarre case was that of an anti-Chinese ordinance in San Francisco that mandated immediate haircuts for all jailed persons. At the time, Chinese were filling the jail cells as a result of civil disobedience.[188] Because Chinese law and custom required Chinese men to keep their hair in a long queue, the law selectively punished the Chinese. Justice Field struck the law under the Constitution, calling it "legislation unworthy of a brave and manly people."[189]

But even as the federal judiciary struck State anti-Chinese laws, the national mood and the federal government inclined toward a change in federal policy. As Justice Field (who had personally struck many of the State laws) wrote: "[T]he people of the coast saw, or believed they saw . . . great danger that at no distant day that portion of our country would be overrun by [the Chinese] unless prompt action was taken to restrict their immigration."[190] In his words, "[s]o urgent and constant were the prayers for relief against existing and anticipated evils, both from the public authorities of the Pacific Coast and from private individuals, that Congress was impelled to act on the subject."[191]

After much agitation and petition, Congress in 1879 passed its first Chinese immigration restrictions, H.R. 2423, known as the "Fifteen Passenger Bill."[192] The law would have restricted steamships to fifteen Chinese passengers per voyage to the United States. But President Rutherford Hayes, citing the Burlingame

[187] Id. at 475 (opinion on rehearing of Field, J.).

[188] See Charles McClain & Laurene Wu McClain, The Chinese Contribution to American Law, *in* Entry Denied: Exclusion and the Chinese Community in America, 1882–1943, at 3, 9 (Sucheng Chan ed., 1991).

[189] Ho Ah Kow v. Nunan, 12 F. Cas. 252, 256–57 (C.C.D. Cal. 1879) (No. 6546).

[190] Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 595 (1889).

[191] Id. at 596.

[192] See H.R. 2423, 45th Cong. (1879); 8 Cong. Rec. 791, 791–92 (1879).

Treaty, vetoed the bill ("saving the nation's honor"), arguing that it was his legal obligation.[193] Hayes was of the old school: he believed in diplomatic treaty amendment, not Congressional abrogation, and he promptly sent a commission to China to negotiate changes to the Burlingame Treaty. The result was the 1880 Immigration Treaty, which achieved some of what the exclusionists wanted. It stated that the United States could "regulate, limit or suspend [immigration], but may not absolutely prohibit it."[194] But it also provided rights for Chinese already in the United States, mandating that Chinese residents "be allowed to go and come of their own free will and accord, and . . . be accorded all the rights, privileges, immunities, and exemptions as are accorded to the citizens . . . of the most favored nation."[195]

Despite the efforts of President Hayes and later President Arthur to veto direct Congressional abrogation, the United States would soon breach even the renegotiated treaty. In 1882, the first Chinese Exclusion Act passed Congress with the preamble "the coming of Chinese laborers to this country endangers the good order of certain localities."[196] It was styled as an enactment of the 1880 treaty and suspended Chinese labor immigration for ten years (a suspension later made permanent). In 1888, Congress enacted a clear breach of its treaties with China with the Second Chinese Exclusion Act.[197] The Act made it illegal for Chinese residents who had left the United States to ever return.[198] This time, no Presidential veto came. Instead, President Grover Cleveland justified the exclusion, pronouncing the Chinese "ignorant of our constitution and laws, impossible of assimilation with our people, and dangerous to our peace and welfare."[199]

[193] Rutherford B. Hayes, The Diary of a President 189 (T. Harry Williams ed., 1964) ("As I see it, our treaty with China forbids me to give it my approval."); see also 8 Cong. Rec. at 2215.

[194] Immigration Treaty, U.S.-China, art. I, Nov. 17, 1880, 22 Stat. 826.

[195] Id. art. II.

[196] Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

[197] Act of October 1, 1888, ch. 1064, 25 Stat. 504 (repealed 1943).

[198] Id. ("[It is] unlawful for any chinese [resident] laborer . . . who shall have departed . . . and shall not have returned before the passage of this act, to return to, or remain in, the United States.").

[199] *Quoted in* Michael H. Hunt, The Making of a Special Relationship: The United States and China to 1914, at 92 (1983).

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

The first of the Chinese exclusion cases featured Chae Chan Ping, who had lived in the United States since 1875. He had made a trip to China to see his family after obtaining a prescribed certificate of reentry but was stopped at the border pursuant to the new treaty. He sued. Justice Field denied that any right to return had vested and upheld the statute in its entirety. He conceded that "the act of 1888 is in contravention of express stipulations of the treaty of 1868, and of the supplemental treaty of 1880," but held that "it is not on that account invalid or to be restricted in its enforcement."[200] Other cases were similar, including *United States v. Lee Yen Tai*, which refused to find that a new 1894 treaty had abrogated Congress's 1882 exclusion statute and reinforced the suspicion that later-in-time treaties will only rarely be enforced against inconsistent prior statutes.[201]

The Burlingame era—an era that only really ended in the 1960s, with the normalization of Chinese immigration—teaches much about what the American judiciary will and will not do with its power to enforce treaties. Federal judges feel comfortable defending the rights of aliens against State encroachment. The two San Francisco district court judges, Ogden Hoffman and Lorenzo Sawyer, and Justice Field, in his appearances as a Circuit Justice, were all predisposed to enforce U.S. treaties on behalf of the alien to preempt contrary State law, even in face of virulent popular opinion and their own apparently low regard for the Chinese as a people.[202] By contrast, the exact same judges deferred completely to Congress's expressed desire to break the Chinese treaties. While perhaps the distinction was predictable, the difference made by the

[200] Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 600 (1889).

[201] See United States v. Lee Yen Tai, 185 U.S. 213, 220–23 (1902); see also 2 Charles Henry Butler, supra note 119, §§ 379–81 (describing the remainder of the Chinese exclusion cases).

[202] See Christian G. Fritz, A Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California, 32 Am. J. Legal Hist. 347, 350–52 (1988) (describing Judge Hoffman's and Justice Field's low opinion of the Chinese people).

identity of the breaching institution could not be clearer. It remained unclear, however, how the judiciary would respond to a suit against the Executive for failing to obey a treaty.

D. Enforcement Against the Executive: Extradition

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

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

The small size of the Executive branch in the eighteenth and nineteenth centuries meant few opportunities for the Executive to violate international treaties in a judicially cognizable way. But while small, the Executive branch did employ prosecutors. It was their alleged breaches of international law in matters of extradition that first raised the question of whether the judiciary would order the Executive to obey treaties. While quite involved and confusing, the history of the enforcement of extradition treaties gives the first insights into the hardest question posed in Part I: when does the judiciary enforce treaties against the Executive?

As Professor Ruth Wedgwood wrote, the history of extradition begins with a "revolutionary martyrdom."[203] The first American extradition agreement was in the controversial Jay Treaty of 1794, where, in Article 27, the United States and Great Britain promised to "deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other."[204] In 1798, the British demanded the handover of a mutineer and murder suspect named Jonathan Robbins. As Congress had passed no implementing legislation, the question was whether the treaty alone gave courts enough power to extradite Robbins. Robbins said "no," claiming to be a loyal U.S. citizen, pressed into British navy service, whose mutiny was patriotic. But Judge Thomas Bee, with President Adams's consent, handed over the suspect based solely on the power of the treaty. Robbins was promptly tried and hanged.[205]

The Robbins affair ignited a political firestorm. Judge Bee, said the Aurora newspaper, had held that "A TREATY made by an AGENT of the PEOPLE was PARAMOUNT to the CONSTITUTION under which the agent was chosen."[206] Members of Congress quickly proposed the censure of Adams for his perceived treachery.[207] Adams managed to survive censure—though not the election—thanks in part to an impassioned defense by Congressman John Marshall.[208] But so severe was the political fallout that the United States refused to extradite anyone for any reason for more than forty years.[209]

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

[203] Ruth Wedgwood, The Revolutionary Martyrdom of Jonathan Robbins, 100 Yale L.J. 229 (1990).

[204] Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. XXVII, Nov. 19, 1794, 8 Stat. 116.

[205] See United States v. Rob[b]ins, 27 F. Cas. 825, 833 (D.S.C. 1799) (No. 16,175). Two detailed histories of the Robbins case are John T. Parry, The Lost History of International Extradition Litigation, 43 Va. J. Int'l L. 93, 108–14 (2002), and Wedgwood, supra note 203.

[206] Aurora (Philadelphia), Aug. 12, 1799, at 2, *reprinted in* Wedgwood, supra note 203, at 323.

[207] See Wedgwood, supra note 203, at 334.

[208] See id. at 354.

[209] Parry, supra note 205, at 114.

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

Anglo-American diplomatic tension brought specialty to the forefront. Given today's tendency to sequester the judiciary from worldly affairs, it is interesting to note that the 1842 Treaty's extradition language was drafted by Justice Story (as a favor to Secretary of State Daniel Webster). It enumerated seven specific offenses as grounds for extradition: "murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper."[210] Story purposely excluded any political offenses, as to not "hazard the ratification by our Senate from popular clamour."[211] The treaty also contained no explicit specialty requirement, and for several decades extradition proceeded without regard to whether the crime charged was the crime for which extradition was sought.

That changed as, in the late 1860s, specialty began to gain intellectual favor in Britain. Following several studies in 1870, the British Parliament passed a new Extradition Act.[212] It required the British government to respect the principle of only charging a suspect with the crime for which extradition was sought and to refuse extradition to nations that did not.[213] That law would soon create yet another Anglo-American showdown.

In 1876, the United States requested the extradition of Erza Winslow for the offense of forgery, for which he was wanted in Massachusetts. Britain captured and imprisoned Winslow, but following its new law, it refused to surrender him unless the United States promised to try him for forgery alone and not to indict him for other offenses. On the advice of Secretary of State Hamilton

[210] A Treaty: To settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America; for the final suppression of the African slave trade; and for the giving up of criminals, fugitive from justice, in certain cases, U.S.-Gr. Brit., art. X, Aug. 9, 1842, 8 Stat. 572.

[211] Letter from Joseph Story, Supreme Court Justice, to Daniel Webster, Sec'y of State (Apr. 19, 1842), *in* 1 The Papers of Daniel Webster: Diplomatic Papers, 1841–1843, at 537, 538 (Kenneth E. Shewmaker ed., 1983).

[212] Extradition Act, 1870, 33 & 34 Vict., c. 52 (U.K.).

[213] See id. §§ 3, 19.

Fish, President Ulysses Grant refused. Winslow was let free and never heard from again.[214]

After Winslow's release, an angry President Grant accused Britain of breaching the 1842 Treaty.

> Her Majesty's Government . . . instead of surrendering the fugitive, demanded certain assurances or stipulations not mentioned in the treaty, but foreign to its provisions . . . .
>
> The position thus taken by the British Government, if adhered to, cannot but be regarded as the abrogation and annulment of the article of the treaty on extradition.[215]

Grant announced he was suspending U.S. performance of the treaty unless Britain or Congress gave him reason to change his position.[216]

But the tension was short lived: by the end of 1876, the United States and Britain had settled their differences. While making no formal legal commitment, the United States dropped charges in a prominent case, de facto observing the specialty principle.[217] The Earl of Derby, British Foreign Minister, told the House of Lords that U.S. objections to specialty were now "purely theoretical."[218] Said Derby, "[w]e continued to maintain, and we maintain now, that the construction which we put on the treaty was the correct one."[219] Meanwhile, Britain quietly stopped demanding assurances that specialty would be respected. Extradition under the treaty of 1842 resumed.

Was President Grant correct about the 1842 Treaty? To a modern reader, the lack of any explicit specialty clause combined with

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[214] See Message from the President [Ulysses S. Grant to Congress] in relation to the extradition treaty with Great Britain (June 20, 1876), *in* 2 A Digest of the International Law of the United States 786, 787–88 (Francis Wharton ed., Washington, Gov't Printing Office 1886).

[215] Id.

[216] Id. at 789 ("Should the attitude of the British Government remain unchanged, I shall not, without an expression of the wish of Congress that I should do so, take any action either in making or granting requisitions for the surrender of fugitive criminals under the treaty of 1842.").

[217] See 1 John Bassett Moore, A Treatise on Extradition and Interstate Rendition § 151 (photo. reprint 1996) (1891).

[218] Lord Derby, British Foreign Secretary, Speech to the House of Lords (Feb. 13, 1877), *reprinted in part in* Moore, supra note 217, § 151, at 212 n.1.

[219] Id.

decades of practice would suggest the answer is "yes."[220] But the international law publicists of the late nineteenth century jumped on the question and unanimously pronounced the American position incorrect. Wrote John Bassett Moore in 1891, "[t]he general opinion has been that, while [the United States] was wrong . . . [it] was right in refusing to comply with the demand of the British government."[221] Attacks on the U.S. position came from law professor and Michigan Supreme Court Justice Thomas Cooley, Judge Lowell of the District of Massachusetts, and most vigorously from William Beach Lawrence, editor of Wheaton's *Elements of International Law*.[222] As Lawrence wrote, Grant's position "proposes to take away all safeguards, which would protect our own citizens, when extradited perhaps for the most trifling offenses, from being exposed in a foreign country, without friends, and without counsel, to a trial for the most heinous crimes."[223]

The settlement of the Winslow affair did not, as Lord Derby had promised, end the matter. For while the federal government had its de facto policy, State prosecutors and rogue federal prosecutors continued to charge beyond the indictment. A well-known example was the Kentucky case of *Commonwealth v. Hawes*, where, despite the complaints of the British ambassador, an extradition for forgery was used to charge a suspect for embezzlement.[224] William Beach Lawrence returned to the Albany Law Journal to warn that State extradition practice threatened "dangers in our international relations" and "even menaced hostilities."[225]

It was against this background that the Supreme Court considered the famous case of *United States v. Rauscher* in 1886.[226] William Rauscher, second mate of the USS *J.F. Chapman*, was extradited from Britain on charges of murder. However, the federal prosecutor in the Southern District of New York—apparently

[220] See Jacques Semmelman, The Doctrine of Specialty in the Federal Courts: Making Sense of *United States v. Rauscher*, 34 Va. J. Int'l L. 71 (1993).

[221] Moore, supra note 217, §152, at 212–13.

[222] Judge T. M. Cooley, Extradition, 3 Int'l Rev. 433, 438–40 (1876); William Beach Lawrence, The Extradition Treaty, 14 Alb. L.J. 85, 85 (1876); Winslow's Case, 10 Am. L. Rev. 617, 617–18 (1876) (anonymous, attributed to Judge Lowell).

[223] Lawrence, supra note 222, at 99.

[224] 76 Ky. (13 Bush) 697, 700–01 (1878).

[225] William Beach Lawrence, Extradition, 16 Alb. L.J. 361, 364 (1877).

[226] 119 U.S. 407 (1886).

without permission from the Attorney General—charged him with cruel and unusual punishment, a crime not enumerated in the 1842 extradition treaty. Justice Miller, joined by six Justices, brushed aside the Government's construction of the 1842 Treaty and enforced the treaty directly against the federal government. Drawing on *Neilson*, he found the 1842 Treaty "the supreme law of the land, which the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding."[227]

The 1842 Treaty contained no explicit specialty requirement. Nonetheless, Justice Miller relied on Story's enumeration of seven offenses in the treaty to support an argument that the indictment was illegitimate. "[T]he enumeration of offenses . . . is so specific, and marked by such a clear line in regard to the magnitude and importance of those offenses, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others."[228]

What about President Grant's message and the United States' construction of the treaty? Did not the Supreme Court have some duty to defer to the considered views of the Executive as to the treaty it had negotiated? To a modern reader, the failure of the Solicitor General's brief to press this issue is quite surprising. Indeed, there is a languid and concessionary nature to the brief that may suggest the United States was not particularly concerned about losing.[229] In any case, Justice Miller did acknowledge the dispute over the meaning of the treaty, noting that "[t]he correspondence is an able one upon both sides."[230] Yet, instead of deferring to the Executive, he said that the treaty "presents the question which we are now required to decide."[231]

Justice Miller made far more of the views of the publicists who had suggested that specialty was an established part of customary international law. William Beach Lawrence was called "a very learned authority on matters of international law living in this country."[232] Justice Miller also favored the "learned and careful

[227] Id. at 419.
[228] Id. at 420.
[229] Brief for the United States, *Rauscher*, 119 U.S. 407 (No. 1249).
[230] *Rascher*, 119 U.S. at 415.
[231] Id. at 416.
[232] Id.

work" of Samuel Spear. In Miller's view, Spear's examination of the matter was "so full and careful, that it leaves nothing to be desired in the way of presentation of authorities."[233]

In short, by ordering the breach remedied, the Court in *Rauscher* ignored the President's interpretation of a treaty and arguably went beyond the text of the treaty to find the Executive branch in violation. Secretary of State Hamilton Fish called the decision "all wrong."[234] In a sense, *Rauscher* treated the Executive branch rather like a State, entitled to no particular deference as to the meanings of the treaties it had signed. What might explain this result?

One answer is simply that the Court believed that the Supremacy Clause means that the judiciary should interpret treaties de novo, without particular regard to the views of the Executive. Another explanation comes from Jacques Semmelman, an extradition expert who has studied the history of *Rauscher* extensively. Semmelman believes that the Court was motivated primarily by concerns about State misbehavior and problems with Britain.[235] As he writes:

> A conclusion either that specialty was not implicit within the Treaty, or that it was not enforceable by the courts, would have conferred unfettered discretion upon the [S]tates to decide whether to prosecute for crimes not included in the warrant of surrender. . . . [This] might have led to serious international difficulties for the United States . . . .
>
> Justice Miller believed very firmly that the States should be insulated from any role in international relations.[236]

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

A third explanation builds on the analogy to statutory deference discussed in Part I. *Rauscher* was a criminal case, with a treaty

[233] Id. at 417 (referencing Samuel T. Spear, The Law of Extradition (2d ed. 1884)).

[234] Letter from Hamilton Fish, Sec'y of State, to J. C. Bancroft Davis (Dec. 7, 1887), *reprinted in part in* Charles Fairman, Mr. Justice Miller and the Supreme Court, 1862–1890, at 326 (1939).

[235] See Semmelman, supra note 220, at 132–37.

[236] Id. at 132–33.

raised as a defense. While the judiciary usually defers to Executive constructions in treaty cases, judges have never granted great deference to the Executive in the construction of criminal laws.[237] As Justice Scalia put it in 1990, "[t]he Justice Department, of course, has a very specific responsibility to determine for itself what [a criminal] statute means . . . but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."[238] Just as judicial deference to the Executive is at a minimum in statutory criminal cases, so it is for criminal cases that touch on treaties. On this reasoning, *Rauscher* might stand for a different idea: unless Congress signals otherwise, treaties establishing criminal defenses should be enforced against any government entity, be it State, Executive, or even foreign.

Regardless of the explanation, with *Rauscher* the Supreme Court created the first domain of treaty law enforceable against the Executive. While there is some disagreement over whether foreign nations may waive the specialty defense on behalf of their citizens, judges continue to enforce specialty clauses against State and Federal governments.[239] Justice Miller's opinion, moreover, created a domain that has spread beyond extradition into international criminal procedure generally. Today, in addition to continuing to enforce extradition treaties, judges have directly en-

[237] But see Dan M. Kahan, Is *Chevron* Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469 (1996) (arguing that the federal government should get Chevron deference in its interpretation of criminal laws).

[238] Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring).

[239] See, e.g., United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992) (characterizing an extradition treaty as directly applicable federal law); Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 18 (1936); Terlinden v. Ames, 184 U.S. 270, 288 (1902) ("Treaties of extradition are executory in their character . . . ."); Cheung v. United States, 213 F.3d 82, 95 (2d Cir. 2000) ("[T]he Constitution not only allows, but in fact requires, the courts to treat the Agreement as equal to the federal extradition statue . . . ."); United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 1995) (holding that the extradition treaty between the United States and Uruguay could be enforced directly by the person extradited); United States v. Riviere, 924 F.2d 1289, 1300–01 (3d Cir. 1991); United States v. Levy, 905 F.2d 326, 328 n.1 (10th Cir. 1990); United States v. Thirion, 813 F.2d 146, 151 & n.5 (8th Cir. 1987); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986).

forced prisoner exchange[240] and mutual legal assistance treaties ("MLAT").[241]

* * *

By the turn of the century, the Supreme Court had established several important principles in treaty enforcement practice. The central mission of treaty enforcement, vindicated in dozens of cases, was preventing States from putting the nation in breach. In addition to addressing State breach, though, the Court in the tariff and Chinese exclusion cases had also wrestled with the tricky problem of Congressional inconsistency on treaties, using the last-in-time rule and other means to defer to both Congress's decisions and its mistakes. Furthermore, the Court in *Rauscher* established a beachhead for strong treaty enforcement against the Executive.

III. THE TWENTIETH CENTURY AND THE AGE OF MULTILATERAL TREATIES

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

It is commonplace to say that in the twentieth century judges have changed how they enforce treaties or, more precisely, that enforcement has slowed down.[242] Rather than disputing that assertion, this Article provides a fundamentally different explanation for it. The typical arguments suggest either that the multilateral treaties typical of the post-World War II era have discouraged judges from

[240] See, e.g., Cannon v. U.S. Dep't of Justice, 973 F.2d 1190, 1192 (5th Cir. 1992) (enforcing a treaty on the execution of penal sentences between the United States and Mexico against the U.S. Parole Commission).

[241] See In re Comm'r's Subpoenas, 325 F.3d 1287, 1289–90 (11th Cir. 2003) (enforcing MLAT with Canada); United Kingdom v. United States, 238 F.3d 1312, 1316–17 (11th Cir. 2001) (recognizing MLAT as an enforceable treaty); In re Erato, 2 F.3d 11, 15 (2d Cir. 1993) (enforcing MLAT with the Netherlands).

[242] See Stephan, supra note 13.

treaty enforcement,[243] or that judges have developed a kind of contempt for treaty law and refuse to enforce treaties, even though the Supremacy Clause suggests they should.[244]

The work in this Part of the Article leads to two comments. First, it is not clear that either the multilateral form of treaties or changes in the non-self-execution doctrine have fundamentally changed judicial treaty enforcement practice. As the Sections below demonstrate, the enforcement practices for multilateral treaties are similar to those for bilateral treaties. Indeed, multilateral treaties that displace State law have been enforced vigorously, most notably the Warsaw Convention on aircraft liability and the United Nations Convention on Contracts for the International Sale of Goods. These two conventions affect State tort and contract law, respectively. By contrast, where multilateral treaties might create duties for Congress, courts remain, as in the nineteenth century, reluctant to enforce the treaty and more likely either to defer to Executive construction or to wait for Congressional implementing legislation. As discussed below, this judicial tendency can be seen in cases involving the multilateral intellectual property regimes and the human rights treaties.

This Part suggests that different phenomena have profoundly altered judicial treaty enforcement. The first (and most important) phenomenon is the rise of the Congressional-Executive agreement,[245] which has all but replaced the Article II treaty procedure (treaties signed by the President and approved by two-thirds of the Senate).[246] In the Congressional-Executive procedure, Congress enacts legislation with every treaty, changing domestic law when it thinks it necessary. The result is a flip in the default rule of treaty enforcement. Where Congress automatically gives its opinion on the appropriate domestic meaning of a treaty, the judiciary's role

[243] See, e.g., G. John Ikenberry, Address at Princeton University: America, World Order, and the Rule of Law 3–4 (Mar. 28, 2003), http://www.princeton.edu/~lisd/events/talks/Ikenberry_Lecture.pdf.

[244] See Sloss, supra note 6, at 6–7.

[245] Professor Duncan Hollis made this suggestion first. See Duncan Hollis, Remarks at the Third Annual Workshop of the American Society of International Law's Interest Group on International Law in Domestic Courts (Dec. 13, 2004).

[246] For an overview on the differences between Article II treaties and Congressional-Executive agreements, see Bradley & Goldsmith, supra note 38, at 468–78.

recedes. The predictable result is a large shift in the respective sizes of the Congressional and judicial domains of treaty enforcement.

The second phenomenon is the practice, concurrent with statutory trends, of granting more deference to Executive interpretations of treaties. This development mirrors other trends in American law, most importantly the rise of the Administrative state since the 1930s, which has brought greater levels of Executive and Congressional control over the enforcement of statutes and the common law.[247] Scholars have portrayed the creation of administrative agencies as replacements for the judicial enforcement schemes of the nineteenth century.[248] The rise of the Congressional-Executive agreement is the treaty version of the same phenomenon. It is therefore not surprising that we have seen more Congressional and Executive, as opposed to judicial, control of treaty enforcement.

* * *

Returning to the history of treaty enforcement, we see how courts dealt with the first two major multinational treaty regimes: the intellectual property unions of the late nineteenth century[249] and the aircraft liability regime established in 1929 (the Warsaw Convention).[250] Afterward, we consider how courts have handled the challenge of multinational human rights treaties. Judicial enforcement of these regimes shows the same tendency of courts to consider the identity of the party in alleged breach and to defer to Congress and the Executive as the central influences on treaty enforcement.

[247] See generally Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1216–20 (1982) (discussing the evolution of the control of remedies for administrative beneficiaries).

[248] See Jerry L. Mashaw et al., Administrative Law 4–6 (3d ed. 1992) (discussing agencies as replacements for failed judicial enforcement systems).

[249] Examples of nineteenth-century intellectual property unions are the Paris Union, established in 1893 by the Convention for the Protection of Industrial Property, and the Berne Union, established in 1886 by the Convention for the Protection of Literary and Artistic Work.

[250] Convention for the Unification of Certain Rules regarding International Transport, with Additional Protocol, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

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

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

The Warsaw Convention was the child of two international conferences, held in Paris in 1925 and in Warsaw in 1929, and it built on the work done by the interim Comité International Technique d'Experts Juridique Aériens. The goal was to create a uniform legal framework to govern the fledgling airline industry. As the reporter for the Convention put it, "[w]hat the engineers are doing for machines, we must do for the law."[251]

The most important parts of that legal framework were the standardized limits on carrier liability in domestic courts. Article 17 made carriers liable for personal injury damages sustained during the course of a flight, but Article 22 limited that liability to 125,000 "Poincaré francs," or about $8,300.[252] Other portions limited liability for lost luggage (Article 18) and flight delays (Article 19). The liability limits—particularly for personal damages—were low, even by 1929 standards. The point, however, was to attract investment capital that might otherwise be scared off by fears of liability in the event of a plane crash.[253]

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

[251] II Conférence International de Droit Privé Aérien, 4–12 Octobre 1929, Varsovie 17 (1930), *translated in* Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498 (1967).

[252] Warsaw Convention, supra note 250, arts. 17, 22.

[253] See Lowenfeld & Mendelsohn, supra note 251, at 499–500.

implementing legislation or complementary regulation, yet it is the regime under which most suits for damages occurring in the course of international aviation must be brought.

The exact extent to which the Warsaw Convention limits State causes of action has long been a matter of some dispute. The Supreme Court's most recent pronouncements adopt a broad position of treaty preemption of State tort law. The 1999 case of *El Al Israel Airlines v. Tsui Yuan Tseng* presents a particularly strong vision of judicial preemption of State action.[254] After a plane crash, Tsui Yuan Tseng and other plaintiffs sought damages for pain and suffering under New York tort law. The question was whether the plaintiffs could recover for injuries not explicitly limited by the treaty—namely, emotional, as opposed to physical, suffering. The Supreme Court said "no," creating a sharp limit on State regulation of international airline carriage.

Noting that the purpose of the Convention was to "achiev[e] uniformity of rules governing claims arising from international air transportation," the Court agreed with El Al and the United States Government that the Convention must be read as precluding all personal injury remedies (namely, State remedies) other than those authorized by the Convention itself.[255] In the Court's words: "Given the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations."[256]

The Court assumed without discussion that the relevant portions of the Warsaw Treaty were enforceable by the judiciary. While this is a feature of every Warsaw Convention case, it is not inevitable: the Court could have held the Warsaw Convention of no effect without implementing legislation. But its failure to do so, and indeed the extremely cursory analysis of the self-execution doctrine in *El Al* and other Warsaw Convention cases, suggests a familiar dynamic. The court finds itself once again preventing State law

[254] 525 U.S. 155, 169–76 (1999).
[255] Id. at 169 (quoting Eastern Airlines v. Floyd, 499 U.S. 530, 552 (1991)).
[256] Id. at 169.

from disturbing an international regime, happily implementing the central dogma of treaty enforcement.

B. The Difference Between State and Congressional Breach Continues in the Twentieth Century: International Intellectual Property Regimes

The first major multilateral treaties signed by the United States were the Intellectual Property ("IP") treaties of the late nineteenth century. Both the Berne Convention on Copyright[257] and the Paris Convention on Industrial Property[258] (trademark and patent) were ambitious efforts to create global protection for the rights of authors and inventors, respectively. But unlike the Warsaw Convention, these conventions created federal duties, and the enforcement results track these differences.

While the United States refused to sign the Berne Convention (it was, at the time, one of the world's leading "pirates" of copyrighted works),[259] the ratification of the Paris Convention prompted new questions for the judiciary. On the one hand, the treaties did suggest protection for foreign inventors, similar to some of the treaties that had come before. On the other hand, the Paris Convention touched on areas where Congress was already active, having enacted and reenacted federal patent laws. Once again, the sense that Congress was "seized" with the problem of patents would lead the judiciary to leave implementation of the patent treaties to the legislature.

Article II of the Paris Convention guaranteed equal rights for foreigners in the patent system of Union countries (a "national treatment" provision): "The subjects or citizens of each of the contracting States shall enjoy, in all the other States of the Union . . . the advantages that the respective laws thereof . . . accord to subjects or citizens."[260]

[257] See Berne Convention, supra note 52.

[258] See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 25 Stat. 1372, 828 U.N.T.S. 107 [hereinafter Paris Convention].

[259] See Robert A. Gorman & Jane C. Ginsburg, Copyright 9 (6th ed. 2002) ("During the republic's first hundred years, the U.S. was a 'pirate nation,' with respect to foreign works of authorship.").

[260] Paris Convention, supra note 258, art. II.

The language suggests that a Swiss citizen should have the same rights as an American in the U.S. system, trumping whatever pre-existing discrimination existed in favor of the American. Swiss citizen Ferdinand Bourquin asserted precisely this argument in 1889. The U.S. law at the time included blatant favoritism towards the American filer: it allowed U.S. citizens alone to file a "caveat," or a kind of preliminary patent, prior to filing the full patent application.[261] But despite having a clear later-in-time treaty on his side, Bourquin and others like him lost.

Bourquin's first appeal was to the Patent Office, and consequently the matter was considered first by the Executive. By request, Attorney General Miller wrote an opinion, and he concluded that the Paris Convention gave Bourquin no rights beyond those in the Patent Act.[262] His reasoning is not particularly helpful: he argued that the treaty "is a reciprocal one; each party to it covenants to grant in the future to the subjects and citizens of the other parties certain special rights in consideration of the granting of like special rights to its subjects or citizens."[263] Of course, all treaties are reciprocal—so what made the Paris Union special? It seems much easier to understand this opinion, and the Court decisions, as adopting the rationale of the tariff decisions. In later cases, Congress was accused of misimplementing the treaty; nevertheless, courts held that any "mistakes" in the Patent Act were for Congress to fix.[264] As the First Circuit stated, "the courts would hesitate before giving a treaty an interpretation differing from that solemnly given it by the Executive or by Congress, even if they would ever do it."[265]

Are international IP treaties ever enforced directly? The answer is yes, but only against State breach. The leading case is *Bacardi Corporation of America v. Domenech*, where the Supreme Court struck down discriminatory Puerto Rican trademark laws.[266] In

[261] There was an exception, however, for those in the process of obtaining U.S. citizenship. 18 Revised Statutes of the United States 948–49 (photo. reprint, Dennis & Co. 1972) (2d ed. 1878).

[262] Caveats for Patents for Inventions, 19 Op. Att'y Gen. 273, 274 (1891).

[263] Id. at 278.

[264] See, e.g., United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 155 F. 842, 848–49 (1st Cir. 1907); Rousseau v. Brown, 21 App. D.C. 73, 77 (D.C. Cir. 1903).

[265] *United Shoe Mach. Co.*, 155 F. at 849.

[266] 311 U.S. 150, 167 (1940).

1937, Puerto Rico passed a set of laws subsidizing local liquor; one made it illegal to sell spirits in Puerto Rico under trademarks used outside of Puerto Rico.[267] Bacardi Corporation challenged the law as inconsistent with the General Inter-American Convention for Trade Mark and Commercial Protection.[268] The Court struck the Puerto Rico statute with ease, stating: "This treaty on ratification became a part of our law. No special legislation in the United States was necessary to make it effective."[269] The Puerto Rican statute was nullified on grounds "of repugnance to the treaty."[270]

C. Human Rights Treaties

The trademark late-twentieth century treaty is the human rights convention. The United States, after initial reluctance, has ratified several, including the International Convention on Civil and Political Rights ("ICCPR")[271] and the Convention Against Torture.[272] As we will see, however, direct domestic enforcement of the treaties is scarce. Can deference theory explain that outcome?

The kind of self-execution analysis called for by the Third Restatement, based on the nature or language of the treaty, provides little help. Consider the ICCPR, ratified in 1992. The ICCPR looks like the U.S. Bill of Rights: it provides a list of rights to which everyone is entitled. Article 7 states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[273] That language is not much different in kind from the U.S. Constitution's Eighth Amendment, which states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[274] As for enforcement, the ICCPR reads: "Where not already provided for . . . each State

[267] Spirits and Alcoholic Beverages Act, No. 149, § 44, 1937 P.R. Laws 394.

[268] General Inter-American Convention for Trade Mark and Commercial Protection, Feb. 20, 1929, 46 Stat. 2907, 124 L.N.T.S 357.

[269] *Bacardi*, 311 U.S. at 161.

[270] Id. at 167.

[271] See ICCPR, supra note 67.

[272] See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; see also International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195.

[273] ICCPR, supra note 67, art. 7.

[274] U.S. Const. amend. VIII.

Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes . . . to give effect to the rights recognized in the present Covenant."[275] There is, in short, little from the agreement that would seem to preclude judicial enforcement. From textual analysis alone, the lack of judicial enforcement of the ICCPR, and of human rights treaties in general, is something of a mystery.

While raw political explanations of nonenforcement are common, the results can also be explained using the deference model. The Senate alone, Congress, or the Executive have signaled to the courts that either they already have implemented or will implement the human rights treaties that the United States has signed. In short, Congress or the Senate has instructed the judiciary that enforcement of human rights treaties is not their business, and the judiciary has respected this instruction.

Several of these signals stand out. In some cases, Congress has passed implementing legislation. The implementing legislation for the Genocide and Torture Conventions specify how Congress thinks the treaty should be enforced domestically.[276] Less obvious (and more controversial) are the Senate's declarations and conditions in its consent to the human rights treaties. In the case of the ICCPR, the Senate states that "the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein."[277] It adds that "the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."[278] The Senate appears to be signaling that, in effect, the rights in the ICCPR are already provided for.

Judges, in other words, treat the ICCPR exactly as they would a treaty ratified with implementing legislation. That is, the courts treat the Bill of Rights, Fourteenth Amendment, and legislation like the Civil Rights Act of 1964 as the implementing legislation of the ICCPR. That suggests independent enforcement is inappropri-

[275] ICCPR, supra note 67, art. 2.

[276] Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091, 2340A (2000).

[277] U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. 8068, 8071 (1992).

[278] Id.

ate, even if Congress (or the courts) have deviated from the text of the ICCPR in its "implementation."

Of course, courts do not state these matters explicitly. But when they address the enforcement of the ICCPR or other human rights treaties, courts have justified nonenforcement based on the signals from the Senate and the presence of adequate domestic remedies.[279] For example, Chief Judge Young of the Massachusetts U.S. District Court explained his refusal to enforce the ICCPR directly as follows: "[T]he United States Senate declined to pass legislation (similar to the Torture Victim Protection Act of 1991) which would have created a new private right of action enforcing the rights recognized in the Covenant because 'existing United States Law is adequate to enforce those rights.'"[280]

While deference to implementing legislation (as with the Genocide Convention) is standard, deference to such "pre-implementation" is novel, as is deference to the Senate acting alone. Some academics have suggested on these grounds that courts should ignore the signals in the reservations and enforce human rights treaties directly.[281] Whether courts would actually do so is an open question.

[279] See, e.g., Beazley v. Johnson, 242 F.3d 248, 266 (5th Cir. 2001); Igartua De La Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (holding that a right to vote under Article 25 of ICCPR is not a privately enforceable right under U.S. law); Heinrich v. Sweet, 49 F. Supp. 2d 27, 43 (D. Mass. 1999) (finding that plaintiffs have adequate domestic remedies for claims of "crimes against humanity"); Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999) (holding that the ICCPR does not create a right of private action under which the plaintiff can successfully state a claim); White v. Paulsen, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (reasoning that "the United States Senate expressly declared that the relevant provisions of the ICCPR were not self-executing when it addressed this issue in providing advice and consent to the ratification"); In re Extradition of Cheung, 968 F. Supp. 791, 803 n.17 (D. Conn. 1997) (stating that the ICCPR cannot support an extradition defense); Domingues v. Nevada, 961 P.2d 1279, 1280 (Nev. 1998) (holding that the Senate's express reservation to impose juvenile executions negates a claim under the ICCPR).

[280] *Heinrich*, 49 F. Supp. 2d at 43 (quoting S. Exec. Rep. 102-23, at 14–15 (1992)).

[281] See Henkin, supra note 6, at 346–48 (arguing that "[t]he pattern of non-self-executing declarations threatens to subvert the constitutional treaty system"); Quigley, supra note 14, at 582–85 (arguing that "[t]o the extent [treaties] do not infringe on individual rights guaranteed by the Bill of Rights, there is no inherent reason they should rest only on par with an Act of Congress as far as the courts are concerned"); see also Sarah H. Cleveland, Our International Constitution, 31 Yale J. Int'l L. 1, 118–20 (2006).

A more moderate course of action is the one suggested by the Supreme Court in *Hamdi v. Rumsfeld*.[282] In that case, an American citizen named Yaser Hamdi was detained during the invasion of Afghanistan and was held in the United States as an "enemy combatant." His father petitioned for habeas corpus, and the Supreme Court agreed that holding Hamdi without giving him a chance to contest the factual basis underlying his classification as an unlawful combatant was a violation of due process.[283]

The *Hamdi* majority did not explicitly address the enforceability of the Geneva Convention. But, as Professor Sarah Cleveland suggested, the convention's requirements arguably colored its interpretation of the "pre-implementation"—the Due Process clause of the Fifth Amendment.[284] That may be right as a matter of judicial consideration—certainly many of the Justices had the convention in mind when they interpreted the Constitution. Yet, in truth, the *Hamdi* opinion says little on the relevance of the treaty to the constitutional interpretation adopted, so overinterpretation is not warranted.

We might more usefully consider, beyond the *Hamdi* scenario, conditions under which courts might in fact consider enforcing a human rights agreement like the ICCPR. As the model suggests, the most likely scenario would be a case of egregious State breach. Imagine, for example, that a State passed a series of laws neutral on their face yet discriminatory in practice against the practice of Islam, such as a facially neutral ban on all broadcast calls to prayer. Under the Federal Constitution and *Employment Division v. Smith*, the laws might be constitutional.[285] Yet in this scenario, where the State threatens to put the Union into significant tension with Islamic countries, a federal court might find it appropriate to strike down the State law using Article 18 of the ICCPR, the guarantee to religious freedom.[286]

[282] 542 U.S. 507 (2004).

[283] See id. at 524–39.

[284] Cleveland, supra note 281, at 118–19.

[285] 494 U.S. 872 (1990) (holding that facially neutral laws do not violate the establishment clause).

[286] Enforcement, moreover, need not be direct but could come as an *Ex parte Young* suit. See David Sloss, *Ex Parte Young* and Federal Remedies for Human Rights Treaty Violations, 75 Wash. L. Rev. 1103 (2000).

A final set of data with respect to these questions comes from the cases regarding judicial enforcement of the Vienna Convention on Consular Relations.[287] Article 36 of the Vienna Convention states that when a foreign national in any signatory country is arrested, his or her consulate shall be notified, and the suspect is to be informed without delay of his right to communicate with his consulate.[288] In the United States, in various cases, state police have failed to inform foreign nationals of their rights as stipulated by the treaty. When defendants are convicted without the required notice and complain in court, there is a question of treaty enforcement. Does the treaty language give rise to an enforceable right in American courts, and, if so, what might the remedy be?

The Supreme Court has, so far, continued to leave undecided the question of whether Article 36 creates a judicially enforceable right. In the 2006 case of *Sanchez-Llamas v. Oregon*, the Court assumed the existence of an enforceable right, and it decided the case by looking at remedies and procedural bars.[289] The Court held that even if Article 36 contained an individual right, it could not be read to create an exclusionary rule that would mandate the removal of tainted evidence.[290] The Court also held that, notwithstanding the opinion of the International Court of Justice,[291] the "normal" rules of state procedural default would apply when a defendant fails to raise a breach of Article 36.[292] Thus, in both *Sanchez-Llamas* and the earlier case of *Breard v. Greene*,[293] the Court, in effect, said that whatever rights treaties might create, they will not be given an exemption from procedural default rules that statutory and constitutional rights do not enjoy.

[287] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[288] Id. art. 36(1).

[289] 126 S. Ct. 2669, 2677–78 (2006).

[290] See id. at 2678–82; see also Mapp v. Ohio, 367 U.S. 643 (1961) (establishing that the exclusionary rule for evidence obtained in violation of constitutional rights applies in state courts).

[291] The International Court of Justice, in an earlier opinion, held that application of American procedural default rules would create a violation of Article 36 of the Convention. See LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 490–492, 494, 497–98 (June 27).

[292] *Sanchez-Llamas*, 126 S. Ct. at 2682–87.

[293] 523 U.S. 371, 375 (1998) (per curiam) (finding that federal rules of procedural default apply to Vienna Convention rights).

It is true that a Court highly sensitive to the prevention of State breach, or more attentive to the opinions of the International Court of Justice, might have crafted a set of remedies for violations of Article 36 and might even have used its judicial power to ensure that violations overcome any state procedural default rules. But the main lesson we learn from these cases is one that relates to the avenue of treaty enforcement. Most of the treaty enforcement against States seen in this Article occurs when parties call for the nullification or preemption of state law, sometimes to be replaced with the treaty as the rule of decision—the model of *Ware*.[294] The *Sanchez-Llamas* and *Breard* litigations pursue a slightly different tack—they attempt to raise the treaty rights in a fashion similar to *Miranda* rights, and they ask for both an implied remedy and an exception to the normal rules of procedural default. As such, the cases may have less to do with the status of treaty enforcement in the United States and more to do with the current jurisprudence of defendants' rights on federal review. Today, the federal remedies available against State violation of defendants' rights often fall short of dramatic, and in *Sanchez-Llamas* the Court decided that the limits placed on remedies exist regardless of whether the right in question comes from a treaty, statute, or the Constitution.[295] It is also important to notice that the Court—by avoiding the question of whether the treaty creates an enforceable right at all—has continued to reserve to itself the power to counter egregious State behavior in this area should it find the right vehicle.[296]

We have seen now that the enforcement patterns for multilateral treaties have been similar in pattern to those for bilateral treaties of similar purposes. The paradigm created for bilateral treaties, targeting State breach, has been mostly translated to the multilateral treaty context. Human rights treaties have raised new questions about how courts know whether to leave treaty implementation to Congress and whether treaty rights are subject to the same procedural limits as statutory and constitutional rights.

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[294] 3 U.S. (3 Dall.) 199, 236–37 (1796).

[295] See 126 S. Ct. at 2688 ("It is no slight to the Convention to deny petitioners' claims under the same principles we would apply to an Act of Congress, or to the Constitution itself.").

[296] See id. at 2688–90 (Ginsburg, J., concurring) (noting that the treaty rights might be important in other settings).

D. Further Developments in Enforcement Against the Executive

Late in the nineteenth century the Supreme Court displayed a willingness to enforce treaties against the Executive and in the process showed little deference to the Executive's interpretations of the treaty's language. Since that time, while it will still consider cases against the Executive, the Supreme Court has begun to grant more attention and deference to Executive branch interpretation of treaties. David Bederman, for example, argued that the deference given the Executive is "the single best predictor of interpretative outcomes in American treaty cases."[297]

That trend has affected enforcement of treaties against the Executive. That fact can be clearly seen by looking to the two important and recurrent areas where judges are asked to enforce treaties against the Executive branch: taxation and international criminal procedure, including extradition.[298]

Perhaps the leading area of judicial treaty enforcement against the Executive is taxation. The United States ratified its first bilateral double taxation treaty with France in 1932,[299] and what appears to be the first direct enforcement of that treaty came in the 1946 Tax Court case of *Kimball v. Commissioner*.[300] In that case, after reviewing the history of bilateral double taxation conventions, the court proceeded to enforce the treaty directly without discussion of whether the treaty was "self-executing" or whether it owed deference to the Executive.[301] Later courts have explicitly stated that tax treaties are directly enforceable in suits against the Commissioner of the IRS.[302] In tax cases, the Supreme Court has said that

[297] David J. Bederman, Revivalist Canons and Treaty Interpretation, 41 UCLA L. Rev. 953, 1015 (1994).

[298] See Section II.C.

[299] Convention and Protocol between the United States of America and France concerning Double Taxation, U.S.-Fr., Apr. 27, 1932, 49 Stat. 3145.

[300] 6 T.C. 535 (1946). An international tax issue was also raised in Wodehouse v. Comm'r, 50,161 T.C.M. (P-H) (1950).

[301] See *Kimball*, 6 T.C. at 535.

[302] See, e.g., Lidas, Inc. v. United States, 238 F.3d 1076, 1081 (9th Cir. 2001) (holding that the information exchange provisions in the U.S. and France Double Taxation Treaty were a valid basis for the issuance of an IRS summons); Samann v. Comm'r, 313 F.2d 461 (4th Cir. 1963) (exploring consistency between Tax Treaty and IRS regulation). The Supreme Court has also decided several tax treaty cases. See, e.g., United States v. Stuart, 489 U.S. 353 (1989); O'Connor v. United States, 479 U.S. 27 (1986); Maximov v. United States, 373 U.S. 49 (1963).

"[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."[303]

Yet in the latter parts of the twentieth century, the Court appears to have increased its deference to the Executive's interpretation of tax treaties. An illustrative case is *O'Connor v. United States*.[304] That case turned on a treaty granting certain American workers in Panama an exemption from payment of "any taxes." As the language suggests, and as lower courts concluded, the phrase "any taxes" might be thought to mean both United States and Panamanian taxes. But Justice Scalia, writing for the Supreme Court, went outside of the plain text of the tax treaty and instead deferred to the Executive's construction of the treaty, which was that "any taxes" does not include U.S. taxes.[305] While the record is not uniform, other tax cases have also featured deference.[306]

Second, as discussed above, the 1886 case of *United States v. Rauscher*[307] established a tradition of enforcement of treaties against the Executive in extradition and other criminal procedure cases, and there are cases that follow its model.[308] But since 1886, the lack of deference afforded the Executive's views of the treaty in *Rauscher* has changed.

The high water mark of judicial deference to the Executive's interpretation of extradition treaties was surely the 1992 case of *United States v. Alvarez-Machain*.[309] Here, United States agents kidnapped a suspect residing in Mexico, who promptly argued that his abduction violated the 1978 extradition treaty with Mexico. Alvarez-Machain made the straightforward argument that the whole point of the extradition treaty was to preclude kidnappings, and the Mexican authorities announced that his understanding of the treaty

[303] *Stuart*, 489 U.S. at 369 (quoting Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982)).

[304] 479 U.S. 27.

[305] Id. at 32–33.

[306] See, e.g., *Stuart*, 489 U.S. at 369; *Sumitomo*, 457 U.S. at 184–85; Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933).

[307] 119 U.S. 407 (1886).

[308] See, e.g., Grin v. Shine, 187 U.S. 181 (1902); Terlinden v. Ames, 184 U.S. 270 (1902); Rice v. Ames, 180 U.S. 371 (1901).

[309] 504 U.S. 655 (1992).

was also their interpretation.[310] The Executive, however, advanced what seemed the rather extreme view that ignoring the procedures specified by the extradition treaty was not a violation of it. The Supreme Court, though it did not claim to be deferring totally to the Executive, nonetheless accepted the Executive's interpretation of the treaty and held Alvarez-Machain's abduction to be no violation.[311]

The degree of effective deference in *Alvarez-Machain* is high, yielding a result that looks more like strong *Chevron* deference or arguably nonenforcement of the treaty.[312] One possible explanation is that the courts have changed their approach since the *Rauscher* days and today believe that they owe the United States' interpretation of its treaty far greater deference—perhaps any reasonable interpretation need be deferred to. That may be true—yet it is worth pointing out that, in contrast to *Rauscher*, the Court was announcing a rule for the Executive alone and therefore had no need to formulate a rule that would prevent State breach. If *Alvarez-Machain* were a case where California had seized a Japanese citizen in breach of a U.S.-Japan extradition treaty, the results may have been different.

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

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

In the fifty years from 1789 to 1839, the United States entered into eighty-seven international agreements, or fewer than two each year. Sixty, or sixty-nine percent, were enacted as Article II trea-

[310] Id. at 671 n.1 (Stevens, J., dissenting).

[311] Id. at 668–70.

[312] See also Bederman, supra note 297, at 1014 (noting that *Alvarez-Machain* represents the ultimate repudiation of the canon of good faith and liberal interpretation).

ties,[313] with the advice and consent of two-thirds of the Senate.[314] From 1939 to 1989, the United States entered into 12,400 international agreements, or on average about 250 per year. Of those, 11,698, or ninety-four percent, were *not* Article II treaties.[315] Rather, the great majority were "Congressional-Executive" agreements, which were passed through both houses of Congress like normal legislation, instead of receiving a vote of two-thirds of the Senate.[316]

The shift to Congressional-Executive agreements has attracted much scholarly attention. A healthy debate exists over whether the Congressional-Executive agreement is a constitutional or legitimate means of making an international agreement.[317] Political scientists are also interested in the change of forms and ask what might motivate the government to choose one form over another.[318] But while most observers have focused on the constitutional significance of the use of Congressional-Executive agreements, few have appreciated the importance of the change for the judiciary's role in treaty enforcement.

When a treaty is entered into through the Congressional-Executive process, the simultaneous passage of any necessary implementing legislation is a natural consequence. When a treaty is simply approved, as in the Article II treaty process, the treaty's text, joined possibly by statements by the Executive or the Senate,

[313] U.S. Const. art. II, § 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

[314] Cong. Research Serv., supra note 2, at 39.

[315] Id.

[316] A study of the time period 1946 to 1972 found that 88.3% of the U.S. international agreements made during that time were entered into as Congressional-Executive agreements. See id. at 41.

[317] See Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995) (arguing that Congressional-Executive agreements can be used to pass laws beyond the reach of the enumerated powers); Joel R. Paul, The Geopolitical Constitution: Executive Expediency and Executive Agreements, 86 Cal. L. Rev. 671 (1998); Peter J. Spiro, Treaties, Executive Agreements, and Constitutional Method, 79 Tex. L. Rev. 961 (2001); Lawrence Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221 (1995) (arguing that some Congressional-Executive agreements are unconstitutional).

[318] See, e.g., Lisa L. Martin, The President and International Commitments: Treaties as Signaling Devices, 35 Presidential Stud. Q. 440 (2005).

are the only relevant expressions of intent. But when a treaty is both approved and implemented by Congress simultaneously, a new document enters the picture: the enacting and implementing legislation. In that legislation the full Congress has the opportunity, if it wants, to specify how much or how little it wants a treaty to be enforced. By making this determination, as the deference model predicts, Congress will usually displace independent and direct judicial enforcement of a treaty.

This dynamic can be seen in what are so far the most important Congressional-Executive agreements: the treaties creating the World Trade Organization ("WTO") in 1994. After the President signed the agreement, Congress passed legislation, named the Uruguay Round Agreements Act of 1994, which the President then signed.[319] That bill did two things at once. It approved the Uruguay Round agreement, making it binding on the United States as a matter of international law.[320] But it also enacted changes to U.S. law that were required (or even suggested) by the treaty. Approval and implementation were a single step, leaving the judiciary with a statute containing the domestic substance of the treaty.

So what about judicial enforcement of the WTO agreements? The WTO has its own dispute resolution system, and the implementing legislation declares the WTO agreement itself to be non-self-executing.[321] In practice, no judge has directly enforced the agreement or decisions made under it.[322] As for areas where the agreements mandate changes in domestic law, the existence of implementing legislation has in practice made that legislation, and not the treaty, the center of judicial attention. For example, the Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property suggested that members of the WTO create a law against bootlegging, or unauthorized recording of music concerts.[323] Congress took that suggestion seriously and illegalized bootlegging in a

[319] Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 17 U.S.C. § 1101 (2000)).

[320] Id. § 103.

[321] Uruguay Round Trade Agreements, 19 U.S.C. § 3512(a)(1), (b)(2)(A) (2000).

[322] See, e.g., Turtle Island Restoration Network v. Evans, 284 F.3d 1282, 1303 (Fed. Cir. 2002) (Newman, J., dissenting) ("[N]o party asserts that WTO decisions have controlling status as United States law.").

[323] Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, art. 14, Dec. 15, 1993, 33 I.L.M. 81, 1202–03.

new chapter of the Copyright Code.[324] The result is seen in cases enforcing the new law, which focus on the legislation and not the original agreement.[325]

As the above studies show, most treaty regimes are now implemented via Congressional-Executive agreement. That does not mean that there is no room for independent judicial enforcement. It still leaves older regimes, like the Warsaw Convention, along with older Article II treaties. But what this does mean is that the relative size of the Congressional, as opposed to judicial, domain of treaty enforcement has changed, with Congress's domain now much larger. That development, rather than changing standards of the doctrine of non-self-execution, may explain the apparent decrease in the judicial enforcement of treaties. Furthermore, as the ratio of Article II treaties to Congressional-Executive agreements continues to decrease, direct judicial enforcement of treaties, as opposed to implementing legislation, may slowly become a rarity.

CONCLUSION

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

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

Over the coming years, problems of treaty enforcement will continue to be raised, and the judiciary's appropriate role will always be a question. We might hope, at a minimum, that we can begin facing those problems by asking the right questions. All we need to

[324] See Uruguay Round Agreements Act § 512.
[325] See, e.g., United States v. Moghadam, 175 F.3d 1269, 1276–77 (11th Cir. 1999).

ask is this: in a treaty case, when should a court owe more or less deference to the State, Executive, or Congress, and for what reasons? Such questions are really those created by the American system of divided government and should play a starring role in future considerations of treaty enforcement.