

Treaties' Domains

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When and why do American judges enforce treaties? The question, always important, has become pressing in an age of treaties. During the fifty years from 1939 to 1989, the United States entered into 12,400 international agreements, or on average, nearly 250 treaties per year.² Around the world, by 2004, there were more than 50,000 treaties in force, available in a 2000+ volume set.³ Treaties like the Kyoto protocol and the Geneva Conventions have become part of the American vocabulary. But what should judges do when asked to enforce these agreements?

Article VI of the United States Constitution declares “all treaties” the “supreme Law of the Land.” Justice Story said it meant treaties would have “the obligation and force of a law, be executed by the judicial power, and be obeyed like other laws.”⁴ American Judges have the potential power, under the Constitution, to act as a grand treaty enforcement agency for the United States and even perhaps the world. But judges don't enforce treaties this way: they stay far shy of any theoretical limit. Instead, judicial treaty enforcement seems unpredictable, erratic and confusing, creating the puzzle this paper addresses.

This paper advances a theory of judicial treaty enforcement in the American system called the breach model.⁵ Mainstream doctrine suggests

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

³ United Nations Treaty Series Overview (2003), available at <http://untreaty.un.org/English/overview.asp>.

⁴ Joseph Story, *3 Commentaries on the Constitution of the United States* §1832 (1833)

⁵ The model can also be generalized to other legal systems, but that project is not undertaken here.

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that the propriety of judicial enforcement of treaties is and should be deduced from the nature of the treaty: whether it is “self-executing” or not.⁶ Some treaties, this theory suggests, are written so as to have direct domestic effects, while others are meant to be binding only as a matter of international law. Academics have long criticized the doctrine as of little predictive value.⁷ The study of treaty enforcement over the history of the United States confirms this suspicion and suggests a different analysis. It suggests, instead, that the decision to directly enforce treaties has turned on a prior question: who the treaty is to be enforced against, or who is charged as the party in breach.

The U.S. judiciary is not the only entity that enforces U.S. treaties: it shares the job with Congress and the Executive. This tripartite nature of treaty enforcement has shaped the growth of distinct domains of judicial, Congressional and Executive treaty enforcement. The breach theory describes the mechanism that judges have used to sketch and enforce the borders between these different means of treaty enforcement. As stated above, it suggests that the principal determinant of judicial treaty enforcement is structural: whether the courts are asked to remedy breach by a State, Congress, or the Executive. Two centuries of practice have established subject matter precedent that forms the best guide to judicial treaty enforcement in the American system.

At the epicenter of judicial treaty enforcement is a long tradition of enforcing treaties against the States. Beginning in 1795 with the *Great British Debt Case* courts have acted zealously to prevent States from placing the United States in breach of its treaties.⁸ They have done so in service of what has long been the central dogma of judicial treaty enforcement: that “the peace of the whole not be left at the disposal of a part.”⁹

On the other hand, when faced with Executive or Congressional breach of treaty obligations, judicial enforcement practice is more complex and deferential. As the Executive and Congress both have the power to independently implement treaties and conduct foreign policy, the judiciary faces a difficult question: is an apparent breach is an unwarranted violation of the law or is the exercise of a legitimate authority? In reaction, the

⁶ See Restatement (Third) of Foreign Relations §111.

⁷ See *infra* notes __ to __ (collecting criticism of non-self-execution doctrine).

⁸ *Ware v. Hylton*, 3 U.S. 199 (1796).

⁹ The Federalist No. 80 (Alexander Hamilton).

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judiciary has sometimes been willing to enforce treaties as against Executive breach, particularly against lower ranking officials,¹⁰ but never provided for breaches attributable to Congress. Instead, it has limited itself to indirect enforcement through interpretative presumptions (most notably, the *Charming Betsy* canon).¹¹ The judiciary uses rules like *Charming Betsy* to interpret legislation so as not to conflict with treaty obligations, and thereby prevent congressional or judicial breach of international obligations.

Stated doctrinally, the study here shows that self-execution doctrine has been used to create rules of deference for treaty enforcement and interpretation. Using the doctrine courts have created *de facto* deference regimes for alleged Congressional, State, Executive, and Foreign inconsistency with treaties. Those rules, not always clearly stated, can be nonetheless be clearly observed over the history of treaty enforcement.

These observations suggest a rethinking of the law of treaties in the American legal system. Mainstream doctrine suggests that treaties are equivalent to statutes and enforceable in court unless the treaty, by its terms is “non-self-executing.”¹² A revisionist position, born in the 1790s, holds that as a matter of original intent, treaties may have rarely been intended to be enforced directly.¹³ In the words of present-day champion John Yoo, “the Framers believed that treaties could not exercise domestic legislative power without the consent of Congress.”¹⁴ But both accounts are sharply inconsistent with the record in U.S. courts. The mainstream position cannot explain the failure of judges to enforce treaties when the plain language suggests direct judicial enforcement. This leaves many academics in the position of accusing judges of disobeying the Constitution, by failing to treat treaties as the “Law of the Land.”¹⁵ The revisionist position, if anything

¹⁰ See *infra* Part II.B.

¹¹ The *Charming Betsy* canon, in its original form, states that “An Act of Congress ought never be construed to violate the law of nations, if any other possible construction remains.” *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804). The rule is also reflected in the Restatement (Third) of Foreign Relations §115.

¹² See Restatement (Third) of Foreign Relations §111.

¹³ See Henry St. George Tucker, *Limitations on the Treaty-Making Power* §101-183 (1915) (describing views of those who agree with the revisionist position).

¹⁴ John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 *Colum. L. Rev.* 1955, 1955 (1999).

¹⁵ See, e.g., David Sloss, *Non-Self-Executing Treaties: Exposing A Constitutional Fallacy*, 36 *U.C. Davis L. Rev.* 1, 4 (2002); Jordan Paust, *Self-Executing Treaties*, 82 *Am. J.*

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fares worse: judges for more than 200 years *have* enforced treaties, including many that fall squarely within Congress's power to legislate.

To make doctrine consistent with longstanding practice, two changes should be made. First, the usage of self-execution doctrine should be limited to cases where the text of the treaty clearly indicates a duty for Congress rather than the Executive or State. Second, where the treaty is unclear, courts should employ clearly stated deference rules to explain why it is or is not enforcing a treaty. Following current practice, that would mean (1) no deference to state law, (2) complete deference to Congressional implementing legislation or inaction, and (3) a *Chevron*-like deference scheme for cases of Executive breach.¹⁶

An improved doctrine of treaty enforcement would help with a number of puzzles that have haunted the law of treaties for some time. First, scholars and courts have long struggled to understand the judicial use of non-self-execution. This doctrine, as scholars have pointed out,¹⁷ seems to have been stretched beyond recognition in the 20th century, into a loose rule that blocks judicial enforcement of treaties on an *ad hoc* basis. I agree here that the doctrine of non-self-execution has been used for purposes different than those purported. The doctrine is widely used as a judicial device to enforce political and structural policies. Recognizing that the identity of the breaching party drives treaty enforcement decisions could either relieve the need to discuss the issue of self-execution at all, or confine it to a much narrower class of cases.

Second, many have argued that treaties have been under-enforced in the post-World War II era, or that judges have embarked on an extra-constitutional program of treaty nullification.¹⁸ One argument is that judges sometimes defer unnecessarily to the Executive's interpretation of treaties which is not without merit. But what scholars have missed is a different phenomenon that accounts for much of the change in the judicial role in treaty enforcement. Over the 20th century the default procedure for treaty enactment has changed from Article II's "advice and consent" to a procedure known as the "congressional-executive agreement." Congress now

Int'l L. 760, 760 (1988); Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 A.J.I.L. 341 (1995).

¹⁶ For an elaboration, see Part IV.

¹⁷ See *supra* n. 14.

¹⁸ See *supra* n. 14.

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concurrently passes legislation specifying how it wants the treaty to be enforced. That development has made Congressional, instead of judicial implementation of treaties the norm and may account for the perception of a reduced judicial role.¹⁹

More important than solving these theoretical puzzles are the practical benefits of a better understanding of the law of treaty enforcement. Courts may be clearer about their deference to Congress, including their deference to implementing legislation and the historic tendency to refuse to enforce later-in-time treaties given an inconsistent earlier-in-time statute.²⁰ Similarly, the judiciary can with confidence continue to use treaty-law to prevent States from putting the United States in violation of its international obligations. Finally, a clearer law of treaty enforcement gives tells us more about the likely domestic impact of the thousands of international agreements to which the United States is a party.

Part I introduces the breach theory of treaty enforcement. Part II outlines the origins of the breach model in the 18th and 19th centuries. Part III discusses its application to the problems of the 20th century, and Part IV describes doctrinal and normative implications of the theory presented here.

Part I

A. The Trouble with Treaties

A first-time reader of the United States Constitution might consider the intended role of treaties in the American system fairly straightforward. Article VI of the Constitution declares in one breath that treaties and statutes are the “supreme Law of the Land.” The text suggests a rough equivalence in the legal status of the two, and the simple equivalence view is supported by much, particularly early, Supreme Court writing. According to Chief Justice John Marshall, when a treaty “affects the rights of parties litigating in court ... [it is] as much to be regarded by the court as an Act of Congress.”²¹

¹⁹ I am indebted to Duncan Hollis, formerly at the State Department and now at Temple University, for this insight.

²⁰ See *infra* text accompanying notes __ to __ for a description of this tendency.

²¹ *United States v. The Schooner Peggy*, 1 Cranch 103, 110. See also, Restatement (Third) of Foreign Relations §115 comment a (1987) (“An act of Congress and a self-executing treaty are of equal status in United States law, and inconsistency the later in time prevails.”).

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The equivalence view leads also to the “last-in-time rule,” that treaties trump prior statutes and vice versa. As the Supreme Court says, “A treaty may supercede a prior act of Congress, and an Act of Congress may supersede a prior treaty.”²²

The equivalence theory suggests that treaty language, when raised in court, ought usually have effects no different than the exact same language found in the United States Code. Yet it isn't so. Lawyers of experience know that a sentence out of the treaty series will rarely be as useful, as the following example shows.

In September of 1976, the United States Coast Guard twice boarded a small sailboat off the coast of Florida. By the second boarding, the officers' suspicions were aroused, for Captain Robert Postal and his crew were obviously stoned.²³ “He's reading us our rights. Gather around,” suggested Postal, before leading the officers to his marijuana stash.²⁴ But there was a complication: by the second boarding the sailboat had drifted out of territorial waters to the “high seas,” 16 miles off the coast.²⁵ The 1958 Convention on the High Seas, which the United States has signed and ratified, places “exclusive jurisdiction” in the nation whose flag the vessel flies, and Postal flew the flag of the Grand Cayman Islands.²⁶ The language of the Convention is unambiguous: “[On the high seas] Ships shall sail under the flag of one State only, and ... shall be subject to its exclusive jurisdiction.”²⁷

Were this statutory language – were there a statute stripping the federal courts of jurisdiction over defendants captured on the high seas – the case would have been simple. No one denies that Congress may strip the federal courts of jurisdiction over certain territory or defendants. A statute can easily deny a court subject-matter jurisdiction over extra-territorial conduct,²⁸ or deny the court jurisdiction over a foreign sovereign.²⁹ On the

²² *The Schooner Peggy*, 1 Cranch at 110.

²³ *United States v. Postal*, 589 F.2d 862, 877 (5th Cir. 1979)

²⁴ *Id.*

²⁵ 589 F.2d at 877.

²⁶ *The Convention on the High Seas*, Opened for signature April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, art. 6 (entered into force Sept. 30, 1962).

²⁷ *Id.*

²⁸ See *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (on the power of Congress to define the geographical reach of a statute).

²⁹ See *Foreign Sovereign Immunities Act*, 28 U.S.C. §§1330, 1602-11.

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view that treaties and statutes are of the same power, Captain Postal should have been able to raise the treaty language and deny the court jurisdiction over his case. But despite the treaty and its clear language, the Fifth Circuit upheld Postal's conviction. The court, in other words, was relying on something else – some other theory that denied the treaty the effect its language and the equivalence thesis would suggest.

Typically that “something else” used to deaden the legal effects of treaties is the doctrine of non-self-execution.³⁰ The doctrine, usually (and misleadingly) said to have originated in the 1829 case *Foster v. Neilson*,³¹ recognizes that treaties sometimes by design require further legislative action. 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.”³²

Yet this doctrine – at least as described in *Foster* or the Restatement cannot explain *Postal* and the many cases like it. The Convention of the High Seas has no language suggesting a Congressional obligation to take further action. It says, “ships ... shall be subject to its [the flag-state's] exclusive jurisdiction.” This is not language with a lot of wiggle-room. Even the Fifth Circuit agreed that “on its face, this language would bear a self-executing construction”³³ But the court still refused to give the plain language effect, suggesting some different rationale behind the label “non-self-execution.” In its opinion, the court relied on a mixed-bag of reasons.

For one thing, the court noted that the convention was a multilateral treaty.³⁴ For another, it felt its enforcement in various other countries was unclear.³⁵ But most of all the court focused on pre-existing statutes that granted the Coast Guard the power to raid vessels off-shore even beyond the 12 mile limit. It described “the consistent policy of the United States in asserting jurisdiction for limited purposes beyond even the 12-mile limit and

³⁰ 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)

³¹ *Foster & Elam v. Neilson*, 27 U.S. 253 (1829). It was recognized by a state court as early as *Camp v. Lockwood*, 1 U.S. 393 (1788), 40 years before *Neilson*.

³² Restatement (Third) of Foreign Relations §111.

³³ 589 F.2d at 877.

³⁴ *Id.* at 878.

³⁵ *Id.*

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even in the absence of treaty.”³⁶ To enforce the treaty, said the court, would “eviscerate many of these provisions” and therefore be “wholly inconsistent with the historical policy of the United States.”³⁷ That was enough to reach a result in tension with the plain language of the treaty and the Constitution.

But not all treaty cases are like *Postal*, and for every case of curious non-enforcement there is a counterexample of vigorous enforcement. Consider the story of Dr. Hanson and Olympic Airlines. In December of 1997, Dr. Abid Hanson and his wife Rubina Husain flew Olympic on a family vacation to Cairo.³⁸ Hanson, an asthmatic sensitive to cigarette smoke, requested seating far away from the plane’s smoking passengers. He was nonetheless seated three rows in front of the smoking section.³⁹ Upon boarding Husain asked that her husband be reseated but the flight attendant refused. After takeoff, the cabin soon began to fill with cigarette smoke. Husain urgently asked again that her husband be moved, explaining that he was “allergic to smoke.” The flight attendant replied that the plane was “totally full” and she was “too busy” to help.⁴⁰ As the smoke increased, Dr. Hanson began to have trouble breathing. In search of fresh air he got up began walking down the galley, and then collapsed. By the time the plane landed, Hanson was dead.⁴¹

The Warsaw Convention was created in 1929, and is designed to govern the liability of airline carriers for accidents and lost baggage. Like the Convention of the High Seas, it is a multilateral convention designed to bring international uniformity to an area of potential international disagreement. So when Husain brought a wrongful death action against Olympic under California state law, an important prior question was this: would the Warsaw Convention or state law provide the relevant rules for liability? It was the same question as in *Postal*: would a multilateral treaty of uncertain enforcement elsewhere act as a rule of decision for U.S. parties?

³⁶ 589 F.2d at 881.

³⁷ *Id.* at 880.

³⁸ *Olympic Airways v. Husain*, 124 S.Ct. 1221, 1224 (2004).

³⁹ *See id.*

⁴⁰ *Id.*

⁴¹ *See id.* at 1225. The record later revealed that “There were 11 unoccupied passenger seats, most of which were in economy class, and 28 ‘non-revenue passengers,’ 15 of whom were seated in economy class rows farther away from the smoking section than Dr. Hanson’s seat.” *Id.* at 1225 n. 2.

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Yet the Court reached the conclusion opposite to *Postal* in *Olympic Airways v. Husain*.⁴² It had already concluded without analysis, in another Warsaw Convention case that “[T]he Convention is a self-executing treaty.”⁴³ What was most surprising was the absence of any discussion of whether the treaty was a judicially cognizable law of the United States. The Court instead began its analysis by assuming the Convention was binding law. In the words of Justice Thomas, “We begin with the language of Article 17 of the Convention”⁴⁴ The Court, interpreting the treaty, found the death of Dr. Husain an “accident” under the meaning of the Convention, and therefore subject to its limits.⁴⁵

International lawyers and academics rightly struggle to understand what can explain the outcomes of cases like *Husain* and *Postal*: or why similar treaties are enforced in some cases and sidestepped in others. One approach is to treat *Husain* as the rule and declare *Postal* an aberration. As Jordan Paust wrote in 1988, “[t]he distinction found in certain cases between ‘self-executing’ and ‘non-self-executing’ treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution.”⁴⁶ A different kind of response is descriptive: to take decisions like *Postal* at face-value, and accept the idea that there are a number of reasons that a treaty can be adjudged as intended by either the U.S. or perhaps all ratifying parties to be non-self-executing. This is roughly the approach taken by the Third Restatement,⁴⁷ and with more nuance, Professor Carlos Vazquez.⁴⁸ Finally, you can say that *Husain* was mistaken,

⁴² 124 S.Ct. 1221 (2004).

⁴³ *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).

⁴⁴ 124 S.Ct. at 1225.

⁴⁵ *Id.* at 1228.

⁴⁶ Jordan Paust, *Self-Executing Treaties*, 82 *Am. J. Int'l L.* 760, 760 (1988); see also, Lori Damrosch, *The Role of the United States concerning Self-Executing and Non-Self-Executing Treaties*, 67 *Chi. Kent. L. Rev.* 515 (1991); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 *Yale J Int'l Law* 129 (1999).

⁴⁷ See Restatement (Third) of Foreign Relations, §111.

⁴⁸ Vazquez has identified four different reasons courts may be using the non-self-execution doctrine. He suggests (1) the treaty spoke to the legislature and asked for further legislation, (2) because the treaty provision is by its nature non-judicial (for example, as hortatory or indeterminate), (3) because the treaty provision exceeds constitutional limits, or (4) because the treaty provision in question does not create a cause of action. Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 *AM. J. INT'L L.* 695 (1995).

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and argue that what courts like *Postal* are doing is closer to the original intent of the Constitution.⁴⁹ Both argued, in Yoo's words, that "the Framers believed that treaties could not exercise domestic legislative power without the consent of Congress."⁵⁰ A problem with Yoo's approach is that it, like Paust's, is inconsistent with two centuries of practice. It has also been challenged on grounds of historical accuracy, most prominently by Martin Flaherty.⁵¹

These theories are all helpful in different ways. But they do not give us much insight into why judges are reaching such strikingly different results with similar-sounding treaties. They don't tell us why judges aren't enforcing treaties as written. And unless you happen to be an originalist, they present little normative basis for evaluating a court's treaty enforcement decisions.

The goal of the breach theory of enforcement is to provide a new and better explanation for what drives judicial treaty enforcement. I argue that government structure is the primary driver of treaty enforcement decisions. Understood through the breach model, the difference between *Postal* and *Husain* boils down to the willingness of the courts to enforce treaties against Congress, or a state, respectively. *Postal* was ultimately a case about the failure of Congress, who legislates in the area, to actually implement the Law of the Sea Convention. It left its own laws in place, and neglected to make the changes that the convention requires. While that cannot be described as attractive behavior on the part of Congress, it was unclear if it would be appropriate for the court to fix it. Conversely, *Husain* and the other Warsaw Convention cases concern the displacement of state tort law with uniform international rules, a situation where a State could potentially place the United States in breach of its treaty obligations. Judicial confidence is at its zenith in such a case, when the court brings to life Hamilton's maxim that "the peace of the whole not be left at the disposal of a part."⁵²

To understand these points completely we must introduce the breach theory in full form.

⁴⁹ John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 *Colum. L. Rev.* 1955 (1999).

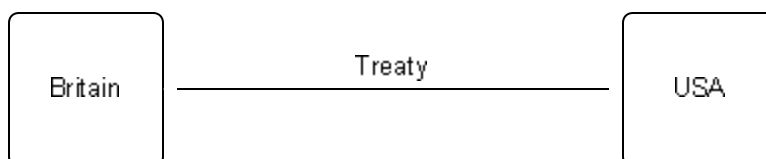
⁵⁰ *Id.* at 1955.

⁵¹ See Martin Flaherty, *History Right? Historical Scholarship, Original Understanding, and the "Supreme Law of the Land,"* 99 *Colum. L. Rev.* 2095 (1999).

⁵² *The Federalist* No. 80 (Alexander Hamilton).

B. The Breach Model of Treaty Enforcement

The breach model of treaty enforcement begins from the proposition that treaties are agreements between nations. Graphically this can be pictured as follows:



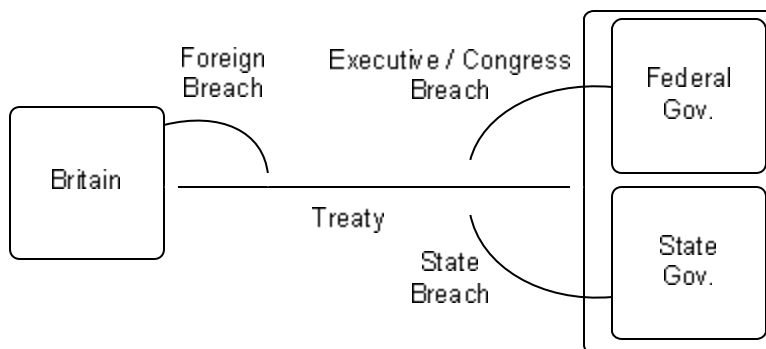
Treaties, of course, are negotiated, signed, and ratified by the federal government, and typically create a series of obligations for both nations. The American judiciary enters the picture when an individual complains of some breach of the obligations that the United States has agreed to. I suggest here (and defend later) that it is useful to view every request for judicial treaty enforcement as a claim of *breach*. That is, every time a litigant asks a judge to enforce a treaty, he must necessarily be complaining that some entity has acted in a manner inconsistent with the promises undertaken in the treaty. As discussed in a moment, alleged breach may be harder to see in some cases than others.

Consider four actors who might be accused of breach: the Executive, Congress, the states, and a foreign nation. Actions by each of these actors may lead to breach. Say the United States and Britain agree by treaty to eliminate visa requirements for citizens who want to enter either country. If Congress changes the immigration law yet forgets to include the exception for Britons it might be accused of inconsistency with the treaty, a case of *Congressional Breach*. If the Federal customs officials continue to demand a visa, a tourist might argue that the Executive branch is breaching the treaty, creating *Executive Breach*.⁵³ If the British government continues to demand a visa of American citizens, you or I might charge that Britain has breached its treaty, a case of *foreign breach*. Finally, if Illinois demands a proof of visa to enter the state it may be accused of *state breach*: that Illinois is placing the Union in breach of its treaty.

The resulting pattern of obligations can be pictured as follows:

⁵³ Cf. *Taylor v. Morton*, 23 F.Cas. 784 (Cir. C. Mass. 1855) affirmed 67 U.S. 481 (1862), discussed *infra* Part II.

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The reason for drawing the distinction between these types of breach is that federal judges treat them differently. For each party, the court has created a *de facto* jurisprudence of deference (or lack thereof) for treaty breach. The rules, in fact, are clearer in practice than we might expect. Let's look at each type in turn.

State Breach. Courts vigorously enforce treaties to remedy state breach. Enforcement against states is the primary and historically most significant type of treaty enforcement in the United States, with more than 100 examples in the Supreme Court alone.⁵⁴ The foundational case of state

⁵⁴ A samples includes: *Georgia v. Brailsford*, 3 U.S. 1 (1794) (3 U.S. 1, 4 (1794) (even if an act of the State of Georgia could be construed to confiscate a debt, it would be invalid if in opposition to the Treaty of Peace); *Hopkirk v. Bell*, 7 US 454 (1806) (interpreting Treaty of Peace to override conflicting state statute); *Hannay v. Eve*, 7 US 242 (1806) (state contract law yields to treaty law); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1807) (treaty relevant source of law for property dispute); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817) (State inheritance law displaced by treaty with France); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453 (1819) (Treaty with Britain protects inheritance as against Virginia law); *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828)(on treaty that ceded Florida from Spain, the "treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States"); *United States v. Percheman*, 7 Pet. 51 (1833) (Spanish-America treaty trumps state property law); *Pollard's Heirs v. Kibbe*, 39 U.S. 353 (1840) (same); *Haver v. Yanker*, 76 U.S. 32. 34-35 (1869) (displacing Kentucky inheritance law); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *In re Ah Chong*, 6 Sawyer 451 (1880) (State law prohibiting aliens from fishing in public waters void due to contravention with Burlingame treaty); *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (state ban on immigration of lewd women violates Burlingame treaty); *De Geofroy v. Riggs*, 133 U.S. 258 (1890) (French commerce treaty supercedes inconsistent D.C. law); *Maiorano v. Baltimore & O. R. Co.*, 213 U.S. 268 (1909) (Treaty with Italy not inconsistent with Pennsylvania law); *Asakura v. City of Seattle*, 265 U.S. 332 (1924) (Treaty with Japan trumps

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enforcement is the 1796 *Great British Debt Case* (also known as *Ware v. Hylton*).⁵⁵ There the Supreme Court enforced the 1783 Treaty of Peace to nullify inconsistent State laws that released debtors from their pre-War British creditors.⁵⁶ The *Ware* model has been followed across subject areas ranging from state inheritance law, immigration law, anti-discrimination, trademark, and airline liability.⁵⁷

In these cases the Court uses a rule of no deference: it makes no effort to reconcile inconsistent state law, and pays no special attention to state interpretation of a treaty. While always the practice, the court put the rule clearly in *Nielsen v. Johnson*: “as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments.”⁵⁸

Since 1908 courts have sometimes used a different mechanism for enforcing treaties against states by issuing an injunction preventing a state official from violating the treaty in question or the Constitution.⁵⁹ The difference is in form: a state official is sued under the authority of *Ex Parte Young*.⁶⁰ There are fewer examples of this type of treaty enforcement.⁶¹

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

⁵⁵ *Ware v. Hylton*, 3 U.S. 199 (1796).

⁵⁶ *Id.*

⁵⁷ See Part II & III for a history of the *Ware* rule in U.S. Courts.

⁵⁸ 279 U.S. 47, 52.

⁵⁹ Some might argue that its confusing to say preemption of state law by treaty is the same thing as enforcing a treaty over inconsistent state action but I think it simpler to see them as the same thing. Accord Curtis Bradley & Jack Goldsmith, *Foreign Relations* (2003) (chapter on treaty preemption of state law).

⁶⁰ 209 US 123 (1908).

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Perhaps the most dramatic was 2003's *America Insurance Association v. Garamendi*,⁶² where, facing a California insurance statute and a series of executive agreements the Supreme Court showed it would preempt State law to prevent even potential inconsistency with an international treaty regime.⁶³

It is no surprise that the primary domain of treaty enforcement lies against State breach. It effects the clearest principle in treaty enforcement, this time in Madison's phrase, that "no part of a nation shall have it in its power to bring [international complaints] on the whole."⁶⁴ The Supremacy Clause is an obvious affirmation of that principle, giving courts both the power and duty to prevent states from violating the treaty obligations of the United States. As Justice Miller memorably wrote of a California statute banning the immigration of "lewd" women, "If (the United States) should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?"⁶⁵

Congressional Breach. Congressional (and Executive) breach pose more complicated problems for the judiciary. The general challenge is this. Unlike with respect to the States, the courts do not have a clear command from the Supremacy clause to prevent Congressional or Executive breach of treaties. Instead, the judiciary *shares* the job of treaty enforcement with the President and Congress. As a result, an alleged breach could be one of two very different things: (1) an illegal act that should be corrected, or (2) a deliberate policy decision to which deference is appropriate.

When a treaty breach can be attributed to Congress the rule of deference is clear: the judiciary refuses to enforce the treaty independently.

⁶¹ Examples include *America Insurance Association v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U. S. 654 (1981); *United States v. Pink*, 315 U. S. 203 (1942); *United States v. Belmont*, 301 U. S. 324 (1937); and for examples of lower court usage see David Sloss, *Ex Parte Young And Federal Remedies For Human Rights Treaty Violations*, 75 Wash. L. Rev. 1103 (2000).

⁶² 539 U.S. 396.

⁶³ *Id.* at 400-403.

⁶⁴ 1 *The Records of the Federal Convention of 1787*, at 316 (Max Farrand ed., rev. ed. 1937).

⁶⁵ *Chy Lung v. Freeman*, 92 U.S. at 279. See also *Federalist No. 80* (Alexander Hamilton) "The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."

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That was the rule suggested most clearly in *Neilson v. Foster*, and followed in cases thereafter.⁶⁶ The policy is understandable. In the realm of treaties, Congress is an alternative and perhaps predominant enforcement agency for American treaties. That isn't to say that Congress actually enforces treaty in the usual legal sense of the term. It enforces thorough 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 is in charge of treaty-enforcement in a given area. That can be evidenced most clearly by the passage of implementing legislation, but sometimes, as we have already seen in *Postal*, the passage of prior legislation in that field. In either case (more obviously the former) potential inconsistency with the treaty represents a Congressional choice.

When Congress implements a treaty, history shows the statutory replacement of the treaty as a basis for direct enforcement is complete. That is to say, judges do not return to the original text of the treaty as a law they can enforce directly. As stated in *Baker v. Carr*, "a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute."⁶⁷ It would be a mistake, however, to assume that the judiciary does nothing when Congress's implementation of a treaty or later-time-legislation is at odds with the treaty. Courts often turn to the *Charming Betsy* canon or other presumptions by which Congressional ambiguity may be converted into treaty compliance.⁶⁸ Yet conversely where Congress is absolutely clear in its intent to violate the treaty (through, most obviously, passage of directly

⁶⁶ *Foster & Elam v. Neilson*, 27 U.S. 253 (1829). These cases are less common, because Congress usually implements treaties or passes later-in-time statutes that abrogate them. The first reported case to find the obligation of a treaty an obligation of Congress is *Camp v. Lockwood*, 1 US 393 (1788); others include *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (tariff statute); *Kelly v. Hedden*, 124 U.S. 196 (1888); *Rousseau v. Brown*, 21 App. D.C. 73 (1903) (Failure to obey patent treaty fault of Congress); *United Shoe Co. v. Duplessis Shoe Co.*, 155 Fed. 842, 84 C.C.A. 76 (1st Cir. 1907);

⁶⁷ *Baker v. Carr*, 369 U.S. 186, 212 (1962).

⁶⁸ See, e.g., *Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925) (interpreting 1880 Treaty with China as containing rights that survive passage of new immigration act: the "act must be construed with the view to preserve treaty rights unless clearly annulled."). Examples of the use of the *Charming Betsy* canon to inform statutory interpretation based on treaties can be found in Ralph G. Steinhardt, *The Role Of International Law As A Canon Of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103 (1990). See also Restatement (Third) of Foreign Relations § 114.

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inconsistent legislation), the judiciary abandons any effort to enforce the treaty in its original form.⁶⁹

Two examples from the history of treaty enforcement may clarify these points. In the 19th century Congress sometimes arguably mis-implemented U.S. trade treaties with other nations.⁷⁰ For example, in 1832 the United States promised Russia Most Favored Nation status – the right to the best tariff rate given any other country. In its 1842 Tariff Act, however, Congress created special tariffs for British and Spanish-grown hemp, in arguable breach of its treaty with Russia. Even if the courts might have agreed with Russia that Congress owed it the best rate, the Supreme Court was unwilling to set Congress straight. It deferred, instead, to Congress's implementation, relying on the judiciary's relative lack of information as to why Congress might have implemented the tariffs the way it did.⁷¹

In a second example, the United States in 1988 joined the Berne Convention of 1886, which sets international, minimal standards of copyright protection,⁷² and Congress passed implementing legislation.⁷³ Despite amendments to the copyright code, the United States arguably does not comply with the some of the requirements of Berne,⁷⁴ particularly the provisions demanding protection of “moral rights.”⁷⁵ Yet nonetheless courts have ignored that fact in their decisions, and in fact have failed to even construe American law to be consistent with U.S. treaty obligations.⁷⁶ These

⁶⁹ See, e.g., Part II.C (The Chinese Exclusion cases).

⁷⁰ See Part II.B (discussing 19th century treaty practice.)

⁷¹ *Taylor v. Morton*, 23 F.Cas. 784 (Cir. C. Mass. 1855) affirmed 67 U.S. 481 (1862).

⁷² See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971 (amended 1979), S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986), 828 U.N.T.S. 221

⁷³ See The Berne Convention Implementation Act of 1989, Pub. L. 100-568, 102 Stat. 2853 (1988).

⁷⁴ See Ralph S. Brown, *Adherence to the Berne Copyright Convention: The Moral Right Issue*, 35 *J. Copyright Soc'y* 196, 205 (1987-88); see also Jane Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, *University of Houston Law Review*, 2004 (discussing right of attribution).

⁷⁵ See Berne Convention, *supra* n. __, Art. 6bis (moral rights protections).

⁷⁶ In fact Courts have not even used the Charming Betsy canon to avoid arguable breach of Berne. For example, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 537 US 1099 (2003), the Supreme Court effectively eliminated a category of moral rights protection without questioning whether this would put the United States in violation of its treaty obligations.

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two examples are indicative of broader patterns identified in the history in Part II.

Executive Breach. The Executive, like Congress, has independent powers that make review of its compliance with treaties challenging. The President has the independent power to make treaties by itself or with Congress, and it assumes the authority to terminate treaties unilaterally.⁷⁷ The Executive also engages in independent interpretation of treaties, and directly enforces many—probably most—of the U.S.'s treaties itself. 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.⁷⁸

What should courts do when facing a lawsuit alleging Executive breach of a treaty? This turns out to be the hardest problem in the study of treaty enforcement. The de facto rule of deference in Executive breach cases is mixed and more than any other has changed over time. Courts do, 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 that can sometimes look like not independently enforcing the treaty.

A helpful way to understand what's going on is to notice (as Curtis Bradley has) that Courts face a problem analogous to a *Chevron* problem.⁷⁹ As Dan Kahan writes, "the Chevron doctrine is a device for allocating lawmaking power between the judiciary and the executive."⁸⁰ This is what the court needs in treaty cases. It needs to decide when the Executive's implementation of a treaty falls within its legitimate authority, and when it amounts to an *ultra vires* act.

⁷⁷ The exact amount of authority the President has to terminate treaties is debated. See Louis Henkin, *Foreign Affairs and the United States Constitution* 211 (2d ed. 1996) ("[T]he Constitution tells us only who can make treaties for the United States; it does not say who can unmake them."); see also *Goldwater v. Carter*, 444 U.S. 996 (1979) (finding validity of Presidential termination of treaty a political or unripe question).

⁷⁸ See U.S. Army Field Manual 27-10, *The Law of Land Warfare* (international law rules for soldiers).

⁷⁹ See Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 Va. L. Rev. 649 (2000).

⁸⁰ See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 489 (1996).

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Unfortunately Treaty cases compounds the complications surrounding a regular *Chevron* case. *Chevron* deference is premised on the superior expertise and greater political accountability of an expert agency.⁸¹ That's reasoning that can apply in a Treaty interpretation case too: for if the Executive has implemented a treaty, it may have done so based on subject-matter expertise, and if people don't like the President's approach to treaties they can vote against him. But in a treaty interpretation case there is at least one additional basis for deference to the Executive that draws not upon expertise but upon political authority.⁸² This is the President's independent not only to enforce treaties, but also to set the foreign policy of the United States. And as Louis Henkin has explained, this second kind of deference, often called political question deference, is best understood to reflect a power reserved to the President, and resulting in a rule binding for a court.⁸³

What final level of deference all this should yield when the Executive is accused of breach is difficult to say. A *Chevron* system, however, while not a perfect fit, is not a bad starting point. The advantage of a *Chevron*-style jurisprudence is that makes clear its evaluation of the relative strengths and weakness of the Executive and the Judiciary. It accepts that court interpretation of treaties is excellent but inexpert. And it accepts that the Executive branch sometimes both forgets duties to Congress and other nations in the face of short-term goals (like winning a case). So while the Executive may in certain cases have the authority to terminate or violate treaties if it must, it arguably must be forced to make clear that it really wants to do so. These assumptions, at least, can be made clear.

Based on considerations like these the Supreme Court has at times come close to devising something like *Chevron* for treaty interpretation. In *Baker v. Carr*, for example, the Court remarked on this difference between the termination and violation of a treaty. It differentiated between "government action" to which it owes deference, and its absence, whereupon "a court can

⁸¹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1983).

⁸² Curtis Bradley describes foreign affairs deference as, in fact, comprising four distinct types of deference, "Political Question," "Executive Branch Lawmaking," "International Facts," "Persuasiveness" and "Chevron." See Bradley, *Chevron Deference*, supra n. __ at 61-77.

⁸³ See Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 *Yale L.J.* 597, 610-614 (1976).

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construe a treaty and may find it provides the answer.”⁸⁴ Nonetheless there remains much room for development of the doctrine.

Leaving aside what courts should do, when, descriptively, do courts enforce treaties as against the Executive? A trend over the last several decades, lamented by scholars has been the growth of a generous deference to the Executive’s interpretation and enforcement of treaties, often at the expense of the views of treaty-partners.⁸⁵ But history shows that such deference is not invariable. Courts do in distinct circumstances issues orders to the Executive to obey its treaty obligations. When? The only answer lies in a subject-specific study of treaties’ domains. For a limited number of subjects and types of cases the judiciary has decided it will regularly order the executive to obey treaties even when the executive claims a different interpretation.

Surprisingly, or not, the leading domain of treaty enforcement against the executive is taxation. There are dozens of cases that assess the Executive’s compliance with U.S. tax treaties. While giving “great weight” to the Executive’s interpretation, courts will not hesitate to find the Executive in breach in clear case.⁸⁶ Outside of taxation, there are two additional domains of judicial enforcement of treaties against the Executive branch: (1) international criminal procedure, including extradition, and (2) federal court jurisdiction.⁸⁷ Interestingly, outside of the taxation cases the Supreme Court has only clearly found Executive breach in two cases. Given their relevance to the difficult question of deference to the Executive, both are discussed below.

The 1886 case of *United States v. Rauscher* is perhaps the most important and exceptional example of the conditions under which a Court

⁸⁴ 369 U.S. 186, 212.

⁸⁵ Depicted in David Bederman, *Revivalist Canons and Treaty Interpretation*, 41 *UCLA L. Rev.* 953, 1000-1018 (1994); see also Michael J. Glennon, *Constitutional Diplomacy* 316 (1990); Thomas M. Franck, *Political Questions / Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* 4-5 (1992).

⁸⁶ In tax cases, treaties are usually enforced directly by courts without even discussion of whether they are “self-executing.” See, e.g., *Maximov v. United States*, 373 U.S. 49 (1963); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982); *United States v. Stuart*, 489 U.S. 353 (1989); *Kimball v. Commissioner*, 1946 WL 269 (Tax Ct. 1946); An international tax issue was also raised in *Pelham G. Wodehouse*, 1950 WL 8022, T.C.M. (P-H) P 50,161, 1950 PH TC Memo 50,161, Tax Ct., Jun 30, 1950.

⁸⁷ See Part II.C.

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will enforce a treaty against the Executive branch.⁸⁸ William Rauscher was extradited pursuant to treaty from England on charges of “murder on the high seas.”⁸⁹ The U.S. Attorney, however, indicted him on a charge of “cruel and unusual punishment.”⁹⁰ Rauscher argued that indictment beyond his extradition would place the United States in breach of a 1842 extradition treaty with England. His brief claimed the U.S. construction would “frustrate the very purpose of the treaty.”⁹¹ The Executive, however, had on its side an authoritative interpretation of the 1842 Treaty, written by Secretary of State Hamilton Fish and formerly announced by President Grant. It was an interpretation not only faithful to the text, but also announced some seven years previous during a heated diplomatic dispute with Britain.⁹² The Supreme Court, nonetheless, adopted Rauscher’s interpretation over the President’s. It enforced the treaty against the United States, and threw out the indictment.

Rauscher established a tradition of enforcement of treaties against the executive in extradition and other criminal procedure cases. But the case also provides two insights into when a court might be more willing to disregard the Executive’s interpretation of a treaty. First, the history of *Rauscher* shows a link to the central problem in treaty enforcement: state misbehavior. Jacques Semmelmen, an extradition expert who has written on the history of *Rauscher* argues that the primary concern in *Rauscher* was actually the prospect of state prosecutors violating U.S. extradition treaties.⁹³ Whatever rule the Court created for extradition in *Rauscher* would necessarily serve also as a rule for state prosecutors: as Semmelman writes, “to empower the federal courts to deprive the states of the ability to embroil the country in a dispute with a foreign government over the principle of specialty, Miller needed to find specialty implicit within the Treaty.”⁹⁴

A second insight comes from the fact that William Rauscher raised the treaty as a defense in a criminal trial: this arguably changes the deference

⁸⁸ *United States v. Rauscher*, 119 U.S. 407 (1886).

⁸⁹ *Rauscher*, 119 U.S. at 409.

⁹⁰ *Id.*

⁹¹ Brief for Defendant in *United States v. Rauscher*, 119 U.S. 407, at 25.

⁹² Brief for the United States in *United States v. Rauscher*, 119 U.S. 407, at 11-14.

⁹³ See Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of United States v. Rauscher*, 34 Va. L. Rev. 71 (1993).

⁹⁴ *Id.* at 135.

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calculus. Courts have never deferred to the Executive's constructions of the criminal law or criminal defenses.⁹⁵ As the D.C. Circuit has put it, criminal law is "far outside Chevron territory."⁹⁶ The Court and subsequent courts in extradition and other criminal procedure cases⁹⁷ may feel it is their duty to independently consider the Executive branch's treaty interpretations when offered in the course of imprisoning a U.S. or foreign citizen. While never formally stated, the enforcement of treaties in extradition cases may suggest courts are more likely to enforce treaties against the executive when raised as a defense in a criminal case.

But to be sure, *Rauscher's* degree of deference to the views of the Executive is today relatively rare.⁹⁸ Perhaps unsurprisingly the Executive Branch has taken the position since the 1980s that "deference [to the executive branch] is the rule even when the treaty partner takes a view different from that taken by the United States."⁹⁹ As David Bederman writes, the "extraordinary" deference afforded the executive "is the single best predictor of interpretative outcomes in American treaty cases."¹⁰⁰

We can see some evidence of a change in the flip side to *Rauscher*, 1992's *United States v. Alvarez-Machain*.¹⁰¹ 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 seemingly reasonable argument that the whole point of the extradition treaty was to preclude kidnappings, with the Mexican government in agreement.¹⁰² The Supreme Court nonetheless acceded to

⁹⁵ See *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."); but see Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (arguing that courts should defer grant Chevron deference in criminal cases).

⁹⁶ *United States v. McGoff*, 831 F.2d 1071, 1077 (DC Cir. 1987).

⁹⁷ See *infra* n. 257 (listing cases enforcing extradition and other criminal procedure cases).

⁹⁸ See, e.g., *United States v. Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933) ("of weight").

⁹⁹ Brief for the United States in *O'Connor v. United States*, 486 U.S. 27 (1986).

¹⁰⁰ David Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. Rev. 953, 1015-1016 (1994)

¹⁰¹ 504 U.S. 655 (1992).

¹⁰² 504 U.S. 655, 671 n. 1 (Stevens J., dissenting).

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Executive's tortured interpretation of the treaty and held Alvarez-Machain's abduction no violation.

The degree of deference in *Alvarez-Machain* and other cases is extreme, and arguably non-enforcement of the treaty.¹⁰³ Such deference has no counterpart in other breach cases, like state breach, and is further evidence of the difference made by the identity breacher in treaty cases.

Types of Breach. There is one last challenge that faces the judiciary in treaty enforcement cases. How can it distinguish instances of Executive, Congressional, and State Breach? If the Executive or a State appears to have breached a treaty that fault might be Congress's 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 what looks like the breach of a treaty, the court can, instead, attribute the problem to Congress by calling the treaty non-self-executing and awaiting Congressional action. That is in essence what the court did in *Postal*.¹⁰⁴ The best argument that *Postal* was wrongly decided is that the 5th Circuit incorrectly blamed Congress for failing to pass a new statute.

The question is hard, and the contribution of Chief Justice Marshall's opinion in *Foster v. Nielson* is to suggest that this question may 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."¹⁰⁵ But despite Marshall's intentions, the text of the treaty is at best rarely used by courts to decide who the treaty is "addressed" to. It is true that in some cases, as *Nielson* suggested, the text may be determinative, but such cases are rare.¹⁰⁶ Instead, in most notable treaty cases, including *Foster* itself, the language is indeterminate or just ignored. The history of

¹⁰³ See also Bederman, *Revivalist Canons and Treaty Interpretation*, supra n. __ at 1014 ("Alvarez Machain represents the ultimate repudiation of the canon of good faith and liberal interpretation.")

¹⁰⁴ 589 F.2d 862.

¹⁰⁵ 27 U.S. at 314.

¹⁰⁶ One example is one of the first reported treaty interpretation cases, *Camp v. Lockwood*, 1 U.S. 393 (1788). The language in question said "Congress shall earnestly recommend it to the legislatures of the respective states to provide for the restitution." The Definitive Treaty of Peace Article V. The Court had little difficulty finding this created an obligation for Congress as opposed to the States.

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treaty enforcement shows little relationship between the particular phrasing of a treaty's language and the enforcement of a treaty. It is littered with treaties bearing direct language that were nonetheless left unenforced by the judiciary for want of Congressional action.¹⁰⁷

Instead of a focus on text, the history shows courts searching for signals: indications of who is meant to be in charge of enforcing a given treaty. The role of Congress is central to this question, and the most important question is whether Congress has implementation in hand. Of that, the clearest signal is the passage of implementing legislation. But sometimes even *previous* Congressional activity can convince a court that judicial enforcement of an inconsistent treaty would be unwelcome. Rightly or wrongly that's the behavior of the *Postal* court, as well as the courts hearing the commercial and MFN treaties in the 19th Century¹⁰⁸ and the multinational intellectual property treaties in the early 20th century,¹⁰⁹ and the Human Rights conventions of the late 20th century.¹¹⁰ In other words, courts occasionally take 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 this latter practice contradicts the last-in-time rule (the rule that statutes and treaties are of equal legal power, and the latter law will prevail in cases of conflict.)¹¹¹ That is correct. Since non-self-execution or other doctrines of deference can be and are used to prevent a later-in-time treaty from abrogating an earlier statute, the last-in-time rule is not a full or accurate portrayal of judicial practice.¹¹²

While this may seem a novel point it was realized much earlier. Professor Westel Woodbury Willoughby made the point in 1910. He wrote "There have been few (the writer has is not sure there has been any) instances in which a treaty inconsistent with a prior Act of Congress has been

¹⁰⁷ Some examples include the 1958 Convention on the High Seas, the International Convention on Civil and Political Rights, and the 19th century Commerce and Most Favored Nation treaties.

¹⁰⁸ See Part II.C.

¹⁰⁹ See Part III.B.

¹¹⁰ See Part III.C.

¹¹¹ For classic statements of the last in time rule, see, e.g., *Reid v. Covert*, 354 U.S. 1, 18 (1957); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

¹¹² But cf. Julian Ku, *Treaties as laws: A Defense of the Last in Time Rule*, 80 *Indiana L. J.* (forthcoming Spring 2005).

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given full force and effect as law in this country. ... Furthermore ... Congress has specifically denied that a treaty can operate to modify the arrangements which it, by statute, has provided, and in actual practice, has in every instance succeeded in maintaining this point.”¹¹³ And in 1953, Edward Corwin revisited the matter, pointing out that the case *Cook v. United States* is the only important appellate case to have enforced a later treaty in abrogation of an earlier statute.¹¹⁴

The reciprocal version of last-in-time, 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.¹¹⁵ During prohibition it was the habit of the Coast Guard to raid British ships and seize intoxicating liquors. The United States, after much diplomatic friction, had agreed via a 1924 Treaty to restrain the Coast Guard somewhat—it agreed not to boarding ships outside of one hour’s steaming from the Coast.¹¹⁶ In 1932, in breach of that treaty (but in compliance with a federal statute) the Federal Coast Guard seized Captain Cook’s ship and the Collector of Customs charged him with various violations.¹¹⁷ The Supreme Court rejected the view that the statute was controlling and enforced the treaty, dismissing the violations.¹¹⁸

Cook is the only Supreme Court case to explicitly enforce a treaty in face of an inconsistent federal statute, and also one of the Supreme Court’s few non-taxation cases of treaty enforcement against the Executive.¹¹⁹ But a little noticed fact about *Cook* is that the Supreme Court did not actually disregard the Executive Branch’s interpretation of the treaty, but rather adopted it. The case was decided against the United States at the request of

¹¹³ 1 Westel Willoughby, *On the Constitution of the United States* §306 at 555 (1910).

¹¹⁴ The Constitution of the United States, *Analysis and Interpretation* 422 (Corwin, ed. 1953).

¹¹⁵ 288 U.S. 102 (1933).

¹¹⁶ See 288 U.S. at 118.

¹¹⁷ See 288 U.S. at 108. Frank Cook was fined \$14,268.18 for failing to include liquor in the manifest. See *id.*

¹¹⁸ See 288 U.S. at 120 (“As the *Mazel Tov* was seized without warrant of law, the libels were properly dismissed.”).

¹¹⁹ The court in *United States v. Schooner Peggy*, 1 Cr. 103 (1801) also enforced a treaty in face of a contradictory statute, but the conflict was not discussed. See, e.g., Edwin Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 *Am. J. Int’l L.* 231, 234-237 (1934); see also Louis Henkin, *Foreign Affairs and the Constitution* 164 (1972).

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the United States. In his brief to the Court, Solicitor General Thomas D. Thacher asked for reversal, noting that the Coast Guard had disobeyed Justice Department's commands. "The Commandant of the Coast Guard was advised in 1927 that all seizures of British vessels ... should be within the terms of the treaty."¹²⁰ In short, the importance of *Cook's* enforcement of a subsequent treaty must be tempered by the fact that the Court may have done so in deference to the Executive's interpretation of the treaty.¹²¹

Foreign Breach. The final and least well-documented cases are those where a plaintiff asks the federal judiciary to remedy a foreign nation's breach of a United States treaty. There is a limited quantity of cases of this type, most concerning suits for torture or other mistreatment.¹²² When is it appropriate to order a foreign sovereign to live up to its obligations? The judiciary has usually, using the self-execution doctrine, declined to directly enforce treaties against a foreign nation.¹²³ For example, in *Tel-Oren v. Libyan Arab Republic*,¹²⁴ survivors of a terrorist attack in Israel sued Libya, the PLO and various other defendants. In a concurring opinion on whether the 1907 Hague Conventions created a private cause of action, Judge Robert Bork argued that they must be interpreted not to, because:

... the code of behavior the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by the many individuals, including prisoners of war, who might think their rights under the Hague Conventions violated in the course of any large-scale war. ... [T]he prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations.¹²⁵

¹²⁰ *Id.* at 105.

¹²¹ Edward Corwin also contemplated that the decision and the Executive's position was "devised to avoid a diplomatic controversy that the low estate of Prohibition at that date would not have been worthwhile." *The Constitution of the United States* 422 (Corwin, ed., 1953).

¹²² 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).

¹²³ See, e.g., cases described *supra* n. ____.

¹²⁴ 726 F.2d 774.

¹²⁵ *Id.* at 808.

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This is a rule of strong deference. As Judge Bork suggested there are obvious reasons for reluctance to enforce a treaty against another country, as doing so may too closely resemble the judicial exercise of foreign policy. But should deference to foreign nations be really be achieved the use of the non-self-execution doctrine? Breach theory suggests that the U.S. judiciary may be overusing non-self-execution as a rule of deference, and wrongly replacing Congressional or common-law regimes of foreign sovereign immunity. The Foreign Sovereign Immunities Act and the common-law immunities for foreign officials should arguably be the rules for U.S. law and courts as against foreign nations, not non-self-execution.¹²⁶

An example may make the point clear. Say that Britain, in violation of treaties with the United States, refuses to grant one American citizen a visa and refuses another navigation rights in the English Channel. Both American citizens sue Britain under the treaty. To decline to enforce the treaty through the doctrine of non-self-execution is to announce an empty conclusion. Instead, the question should be whether the foreign sovereign enjoys immunity under U.S. law, which it generally does for sovereign but not commercial acts under the Foreign Sovereign Immunities Act.¹²⁷ There is little question that granting a visa is a sovereign act, but it might at least be argued that breaking the treaty granting navigation rights, perhaps to protect a British competitor, represents commercial behavior. As it allows such questions to be asked, the Foreign Sovereign Immunities Act is both the better calibrated and also Congressionally designed instrument for these problems. It is designed to allow some enforcement of U.S. law against foreign powers, while providing immunity for sovereign acts. As regards foreign nations non-self-execution, meanwhile, is simply a rule of over-deference.

* * *

The Breach model can be restated quickly. The enforcement of treaties has largely depended less on actual construction of the treaty, but on the identity of the party in breach. Non-self-execution doctrine has been used to recreate rules of deference: the judiciary is willing to order the State and some Executive officials to obey treaties, but also defers to Executive

¹²⁶ See the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602-11. On official immunities, see generally Curtis & Goldsmith, *Foreign Relations Law*, supra n. __ at 635-55.

¹²⁷ See 28 U.S.C. §1605(a)(2) (specifying the commercial exception to sovereign immunity.)

interpretations to treaties and is unwilling to order Congress to live up to a treaty obligation. All of these observations have doctrinal implications discussed in Part IV. But first we turn to the history of Treaty enforcement from which the breach model is derived.

Part II: A History of Treaty Enforcement in the United States

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

To understand where this practice came from and how it is evolved it is crucial to study the history of treaty enforcement. Over decades and centuries, the sharing of enforcement responsibility and deference to other enforcers has created distinct patterns of treaty enforcement. Through decided cases or other means, the three branches have worked out who, roughly, will be primary or first enforcer of the treaties in a given subject matter area. These decisions and history have mapped the borders between Congressional, Executive, and Judicial enforcement of the treaties of the United States.

A. The Early Period, 1780-1865

“I have no notion of cheating any Body,”¹²⁸ said John Adams in 1772, to surprised and delighted British negotiators. This single, “impulsive” remark might with little exaggeration be said to have laid the foundations for the unusual system of judicial treaty enforcement in the United States. Adams’ comment must be understood in context: it was made right after he joined Benjamin Franklin and John Jay in Paris to negotiate the preliminary treaty of Peace with Great Britain. At the time among the most important points in dispute were the debts owed British creditors—debts in excess of £5 million at the beginning of the revolution.¹²⁹ Adams’ comment was a concession: it was a stipulation that would bind the United States to guarantee the payment of debts.

¹²⁸ Richard Morris, *the Peacemakers* 361 (1965).

¹²⁹ Richard Morris, *the Durable Significance of the Treaty of 1783*, in *Peace and the Peacemakers*, 230, 239 (Ronald Hoffman and Peter Albert, eds. 1986).

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While a concession to the British, Adams' statement was in another sense no concession at all, but an expression of an expansive view of national power. As John Bassett Moore wrote in 1906, Adams' concession was "remarkable not only as the embodiment of an enlightened policy, but also as the strongest assertion in the acts of that time of the power and authority of the national government."¹³⁰ The concession would come to have a disproportionate impact on the evolution of the American judicial treaty power, and even lead to the primary role of judicial displacement of problematic state law.

The legal expression of Adams' statement was Article 4 of the 1783 Treaty, which reads, "Creditors on either side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted."¹³¹ Notice something about the treaty provision just quoted. To a lawyer it is obvious that enforcing such language will require some authority (a court or agency) with the power to give effect to such language. The language creates an individual right. It protects the "Creditor" who is granted the right to recover debts notwithstanding "lawful Impediment." At the same time it is equally obvious that other parts of the treaty do not create individual rights. Article 7, for example, reads: "There shall be a firm and perpetual peace between his Brittanic Majesty and the said states" When on various occasions the possibility of war arose between the United States and Britain, there was never a hint or suggestion that the judiciary might try to prevent it by enforcing the terms of the treaty. But the direct language of the debt provisions created an enforcement vacuum which the Federal Courts, ultimately, were to fill.

Few courts existed in the 1780s to bring the Creditors' rights in Article 4 to life. Instead contradictory state law put the United States in substantial violation of its stated obligation. Historians of the period may disagree over much, but not over the record of State compliance with the Fourth Article of the 1783 Treaty.¹³² Typical was the case of Virginia, the state holding the

¹³⁰ John Bassett Moore, *Principles of American Diplomacy* (1906).

¹³¹ *The Definitive Treaty of Peace, Signed at Paris, September 3, 1783 Art. IV.*

¹³² See, e.g., Butler, Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* 52-95 (1973) (highlighting Congress's difficulty in eliminating foreign trade barriers due to state sovereignty and its effect on the ability to enter into commercial treaties).

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largest share of debt (over £2.3 million, or about half the national debt). In 1777 Virginia passed a law allowing citizens to pay off their British debt by making an equivalent payment in Virginia's paper currency. As the Virginia pound depreciated the law became an easy way to discharge British debt, and many did – even Thomas Jefferson and George Washington.¹³³ A second Virginia Act in 1782 simply declared that, “no debt or demand whatsoever, originally due a subject to Great Britain, shall be recoverable in any court in this commonwealth.”¹³⁴ No court would hear an action to recover British debt, nullifying Adams's promise to the British.

As historian Brinton Coxe wrote in 1893, “when the Framers met in convention the violation of the treaty of the peace by certain of the states was one of the most pressing anxieties of the political situation of the Union.”¹³⁵ The history of the framing of the Supremacy clause is complex and contested, and I do not claim special insight. But I do claim that the evidence shows a *minimum* view of when the framers believed treaties were enforceable. It shows an intent to create a solution to the problem of state violations of the 1783 Treaty of Peace; an intent to create some mechanism for enforcing Adams' promise to the British, and preventing the States from inadvertently plunging the United States into an unwanted war.

The evidence supporting this minimal claim as to the intended role of treaty enforcement is strong, and also confirmed by later judicial action. James Madison, in his comments on the New Jersey plan, asked whether it would address the “constant tendency in the States . . . to violate national Treaties,” noting that “The files of Congs. contain complaints already, from almost every nation with which treaties have been formed.”¹³⁶ He argued that the new constitution must “effectually” provide that “no part of a nation shall have it in its power to bring them on the whole.”¹³⁷ This and other comments led to language in the original draft of the Constitution, which granted the federal government the power to “call forth the militia” as

¹³³ See Jean Edward Smith, John Marshall, Definer of a Nation 153-154 (1996).

¹³⁴ 9 Hening's Statutes at Large of Virginia 75-76.

¹³⁵ Brinton Coxe, An Essay on Judicial Power and Unconstitutional Legislation (1893).

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

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

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against the states to “enforce ... treaties.”¹³⁸ After the adoption of the Supremacy clause, the “militia” provision was removed as superfluous.

Contemporary materials also suggest an intention to prevent state violations of treaties. James Madison used the Federalist No. 42 to introduce and explain the federal treaty power. He explained that the treaty power in the Constitution was similar to the treaty power in the Articles of Confederation, but with one crucial difference. The power, he said, is “comprised in the articles of Confederation, with this difference only, that the former is disembarassed, by the plan of the convention, of an exception, under which treaties might be substantially frustrated by regulations of the States.”¹³⁹ In other words, he saw the point of the Convention of making it impossible for States to “frustrate” the treaty obligations of the United States.¹⁴⁰ Similarly, Alexander Hamilton, in No. 22, argued for treaty enforcement as follows:

“The treaties of the United States, under the present Constitution [the Articles of Confederation], are liable to the infractions of thirteen different legislatures and as many courts of final disposition... the faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and interests of every member of which it is composed. ... [Treaties must be] submitted to one SUPREME TRIBUNAL.”¹⁴¹

This is only a sample of the materials suggesting an intention to make treaties enforceable as against state violations. They come together to provide a clear rationale for what we have called the central animating principle of judicial treaty enforcement: that the part not put the whole in breach of its obligations.

This view of the role of treaty enforcement was quickly confirmed by the judiciary in the *Great British Debt Case*,¹⁴² now usually called *Ware v. Hylton*.¹⁴³ The adoption of the Constitution and the opening of the federal courts in 1790 brought a flurry of a particular type of lawsuits: British creditors seeking their debts. In Virginia alone, more than 200 cases were

¹³⁸Charles Butler, *The Treaty Making Power of the United States* (1902), at § 186.

¹³⁹The Federalist No. 42 (Madison).

¹⁴⁰Id.

¹⁴¹The Federalist No. 22; see also Federalist no. 81.

¹⁴²See Leonard Baker, *John Marshall, A Life in the Law* 158 (1974).

¹⁴³*Ware v. Hylton*, 3 U.S. 199 (1796).

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brought in the first year, comprising the vast majority of the federal docket.¹⁴⁴ *Ware v. Hylton* emerged as a test case. It was brought to present exactly the facts that had created trouble during the 1780s: state refusal to enforce the Treaty of Peace.

The facts were typical. Daniel L. Hylton was a well-off James River merchant, who in 1774 borrowed £1500 from Jones & Farell, 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.¹⁴⁵ In 1790, when the federal courts opened, Ware on behalf of Jones sued under the Article IV of the Treaty of Peace to get the money back. Despite a vigorous defense of Hylton by his lawyer John Marshall, the Supreme Court upheld the rights of creditor Jones, and along the way established the paradigmatic model of judicial treaty enforcement.

Justice Chase, writing the main and longest opinion, held treaties enforceable by the judiciary, and supreme to state law. First, “The people of America have been pleased to declare, that all treaties made before the establishment of the National Constitution, or laws of any of the States, contrary to a treaty, shall be disregarded.”¹⁴⁶ Federal judges, he said, have a “duty” to “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.”¹⁴⁷ 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 ...Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigour

¹⁴⁴ See Charles Hobson, “The Recovery of British Debts in the Federal Circuit Courts of Virginia, 1790 to 1793,” 92 *Virginia Magazine of History and Biography* 189 (1984).

¹⁴⁵ See Edwards, 576 n. 69 (detailing facts of *Ware v. Hylton*).

¹⁴⁶ 3 U.S. 199, 237.

¹⁴⁷ *Id.* Other Justices used similar language. Justice Paterson (“The act itself is a lawful impediment, and therefore is repealed; the payment under the act is also a lawful impediment, and therefore is made void.”);

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of its own authority to be executed in fact. It would not otherwise be the supreme law in the new sense provided for.¹⁴⁸

Ware has inspired disagreement, sometimes dramatically, over its meaning.¹⁴⁹ According to 19th century historian Hampton Carson the Court found:

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

Happy conclusion! A contrary result would have blackened our character at the very outset of our career as a nation ... and prostrated the national sovereignty at the feet of Virginia.¹⁵⁰

Conversely, Congressman and later law professor Henry St. George Tucker took the counterintuitive position that *Ware*, despite its text, “did not decide that the definitive treaty of peace annulled the Law of Virginia.”¹⁵¹ The law, in his view, was already invalid and could therefore not be nullified by the Supreme Court.¹⁵² Modern day scholars similarly take sides.¹⁵³

From the vantage point of the 21st century, *Ware* can be seen as the founding moment for judicial treaty enforcement against the states. The Court would perhaps never feel on firmer ground enforcing treaties than when enforcing the very treaty whose violation had led to the Constitution

¹⁴⁸ 3 U.S. 199, 271-272.

¹⁴⁹ Importantly, *Ware* did not make it clear what role the House of Representatives needed to play in the formation of a valid treaty, a question that emerged in the midst of a ferocious debate over the necessity of full Congressional enactment of the Jay Treaty. See 1 Butler, *The Treaty Making Power of the United States* §§279-293 (1902) (discussing the Jay Treaty debate). While an inconclusive battle, it showed the extent of disagreement over the mechanics of the Treaty Power.

¹⁵⁰ History of the celebration of the one hundredth anniversary of the promulgation of the Constitution of the United States 170 (Hampton L. Carson, ed.).

¹⁵¹ See Henry St. George Tucker, *Limitations on the Treaty-Making Power* §154-183 (1915).

¹⁵² See Henry St. George Tucker, *Limitations on the Treaty-Making Power* §154-183 (1915).

¹⁵³ Compare Manuel Vasquez, *Treaty-based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, at 1113 (as a general rule, “individuals may enforce the [treaty] obligation in court even though the treaty does not, as an international instrument, confer rights directly on individuals of its own force.”); with John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, supra n. ___ at 2080 (“At best, then, *Ware* can stand for only a very limited form of self-execution.”).

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Convention. The Supreme Court proceeded to decide more than 100 cases in the image of *Ware*, and continues to do so today: its significance cannot be overstated.¹⁵⁴ But in no sense did *Ware* answer all of many treaty questions that were to follow. *Ware* was like a “fat pitch.” Its facts were an easy target for the Court to bring to life the core purpose of the federal treaty power, negating violative State laws. But a fat pitch only tells you so much about a batter’s potential, and similarly *Ware* left much undecided.

The Flip Side

There is an evident flip-side to *Ware*. John Adams’ comment – “I have no notion of cheating anybody” -- in effect created judicially enforceable rights for British creditors, affirmed finally by the Supreme Court. But the same cannot be said for the British and Loyalist property-owners who were, if anything, greater victims of the Revolutionary War. The final language of the definitive Treaty of Peace stated that, “Congress shall earnestly recommend it to the legislatures of the respective states to provide for the restitution of all estates, rights, and properties, which have been confiscated belonging to real British subjects.”¹⁵⁵ Legislatures, meanwhile, did roughly the opposite: rather than restoring estates and rights, they passed punitive statutes that prevented loyalists from holding office, and denied various rights of citizenship. For example, in 1779 New York passed “An Act for the Forfeiture and Sale of Estates of Persons who have adhered to the Enemies of this State, and for declaring the Sovereignty of the People of this State, in respect to all Property within the Same.”¹⁵⁶ And in 1783 it passed “An Act to preserve the freedom and independence of this state” which prevented Tories from holding office.¹⁵⁷

Unlike the parallel world of creditors, efforts by landowners to recover restitution for seized property were unavailing. An illustrative example is *Camp v. Lockwood*,¹⁵⁸ one of the first cases in the first volume of the U.S. Reports. It featured a loyalist by the name of Abiathar Camp, whose estate was seized during the war. The Pennsylvania court of common pleas said “It is agreed, indeed, by the 5th article, that Congress shall recommend it to the several Legislatures to provide for such a restitution;” however, “no

¹⁵⁴ See supra n. __ (collecting cases in the model of *Ware*).

¹⁵⁵ The Definitive Treaty of Peace Article V.

¹⁵⁶ Reprinted in part in the *Memoirs of Aaron Burr*, Chapter III (1836).

¹⁵⁷ *Id.*

¹⁵⁸ 1 US 393 (1788).

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acts for those purposes have been passed by the Legislatures.”¹⁵⁹ Absent an act of the state legislature as recommended, no relief would be forthcoming; the treaty on its own could not compel relief. The case is in a sense of limited legal significance, as it was decided by a state court before the adoption of the Constitution. But it already captures a crucial idea: that some treaties will be implemented by Congress, and others enforced by the Judiciary.

That same idea is also in *Ware*. According to Justice Chase: “No one can doubt that a treaty may stipulate, that certain acts shall be done by the Legislature.”¹⁶⁰ 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 fourth article in this light, that it is not a stipulation that certain acts shall be done, and that it was necessary for the legislatures of individual states, to do those acts; but that it is an express agreement, that certain things shall not be permitted the American courts of justice; and that it is a contract, on behalf of those courts, that they will not allow such acts to be pleaded in bar, to prevent a recovery of certain British debts.”¹⁶¹ In other words, the doctrine of non-self-execution, formally enunciated 40 years later in *Foster v. Nielson*,¹⁶² adds only a little to what was already obvious in 1795.

* * *

Part B demonstrates how the model of treaty-enforcement born in *Ware* was extended to a range of new commercial treaties that were the main business of the State Department in the early 19th century. It also shows, conversely, how tariff agreements (although often part of commercial treaties) were left for Congressional implementation.

B. Commercial Treaties, 1800-1860

For John Quincy Adams, America’s first commercial treaty had a significance comparable to the Declaration of Independence. In his words: “As the Declaration of Independence was the foundation of all our municipal institutions, the preamble to the treaty with France laid the corner-stone for

¹⁵⁹ 1 U.S. 393 (1788).

¹⁶⁰ 3 U.S. 199, at 244.

¹⁶¹ *Id.*

¹⁶² *Foster & Elam v. Neilson*, 27 U.S. 253 (1829).

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all our subsequent transactions of intercourse with foreign nations.”¹⁶³ “The two instruments,” he believed “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.”¹⁶⁴

The significance of the treaties modeled on the 1778 Treaty with France did grow to great prominence. In this, the golden age of judicially-enforced treaty law, the federal judiciary did a brisk business using treaties to protect the economic rights of aliens from state incursion. It had a ready partner in the United States State Department. For after a slow start, American diplomats went on something of a world-wide sales blitz, signing dozens of commercial treaties with nearly every country of significance in a determined effort to break a colonial trading system that excluded American products. From this era date numerous treaties of “Amity and Commerce,” or “Peace, Friendship and Navigation,” most of similar content.¹⁶⁵

The original model for all of these 19th century commercial treaties, as John Quincy Adams suggested, was the 1778 Treaty of Commerce with “His Most Christian King” (the French Sovereign).¹⁶⁶ The 1778 Treaty in fact embodies a principle of equality and legal reciprocity not only innovative as a principle of trade, but also for the judicial role contemplated. The preamble reads:

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

¹⁶³ John Quincy Adams, quoted in John Bassett Moore, *Principles of American Diplomacy* (1906).

¹⁶⁴ *Id.*

¹⁶⁵ See, United States, *Treaties and conventions concluded between the United States of America and other powers, since July 4, 1776 (1873)* (collection of all treaties signed by the United States, most commercial).

¹⁶⁶ In fact, much was taken from an early model commercial treaty that France would not accept. See John Bassett Moore, *Principles of American Democracy* (1906).

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reserving withal to each Party the Liberty of admitting at its pleasure other Nations to a Participation of the same Advantages.¹⁶⁷

An important part of such “perfect Equality and Reciprocity” was a provision guaranteeing the economic rights of French and U.S. citizens in each others’ territories. Article XI declared that “The Subjects and Inhabitants of the said United States, or any one of them, shall not be reputed Aubains [aliens] in France.”¹⁶⁸ In other words, Americans in France were to be accorded the economic rights of French citizens. In exchange “The Subjects of the most Christian king [the French] shall enjoy on their Part, in all the Dominions of the sd. States, an entire and perfect Reciprocity relative to the Stipulations contained in the present Article.”¹⁶⁹ Translated into modern language, French citizens were to enjoy reciprocal economic rights on American territory.

Similar provisions can be found in the many commercial treaties that American diplomats managed to negotiate in the first half of the 19th century. The United States promised the Austrian King in 1829 that Austrian citizens “shall enjoy ... the same security, protection and privileges as natives of the country wherein they reside.”¹⁷⁰ Using almost identical language, the United States and King of Belgium agreed that, “the same security and protection which is enjoyed by the citizens or subjects of each country shall be guaranteed on both sides” in 1845.¹⁷¹

As the State Department signed commercial treaties with much of the Europe, their counterparts in the federal judiciary enforced these treaty-based rights aggressively, particularly as against discriminatory State legislation. Consider, for example, the fairly startling case of *Chirac v. Chirac*.¹⁷² A Maryland land statute, passed in 1780, created special inheritance rules for Frenchmen. It gave them the right to own land and devise it to heirs, but also provided if a Frenchman died without a will, all

¹⁶⁷ Treaty of Amity and Commerce Between the United States and France, February 6, 1778, Preamble.

¹⁶⁸ 1778 Treaty, Art. XI.

¹⁶⁹ *Id.*

¹⁷⁰ Treaty of Commerce and Navigation between the United States of America and His Majesty the Emperor of Austria, signed August 27, 1829, ratified February 10, 1831; Article I.

¹⁷¹ Belgian-American Treaty of Commerce and Navigation, November 10, 1845; Article I.

¹⁷² 15 U.S. (2 Wheat.) 259 (1817).

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land would revert to the State unless his legitimate relations were residents.¹⁷³ This affected Jean Baptiste Chirac, a naturalized Frenchman. When he died Mousier Chirac left behind heirs in France, a bastard son in Maryland, and no will to be found. Maryland seized Chirac's land and gave it to the American, and the French heirs sued in U.S. court.

The Supreme Court enforced the treaty directly in an opinion that is remarkable in many ways. First, despite the urgings of counsel, the Court made no effort whatsoever to reconcile treaty and state statute, but instead simply interpreted the treaty as the source of Chirac's rights. This is an early establishment of the rule of no deference to State law discussed in Part I. Second, Chief Justice Marshall paid no attention to the fact that the treaty may have intruded into an area of traditional State prerogative (land ownership and escheat). The opinion gives an impression of a treaty power not only preemptive of state law, and also insensitive to federalism limits. It foreshadows the broad scope of the treaty power vis-à-vis states announced in *Missouri v. Holland*.¹⁷⁴ And finally, the Court enforced the treaty even though it was abrogated before Chirac had died! Chief Justice Marshall reasoned that since Chirac acquired the property when the treaty was in force, he obtained it with all rights immediately vested, including rights of assignment equivalent to a U.S. citizen. There were numerous ways in which the Court could have favored the domestic defendant or softened the effects of the treaty in deference to the State, but the court declined to do so. Instead it treated the 1778 Treaty as a broad charter of protection for aliens against discriminatory State law. Dozens of other inheritance cases including the famous *Fairfax's Devisee v. Hunter's Lease*, were in the same vein.¹⁷⁵

The Flip Side: Tariffs

The treaties of Friendship & Commerce typical to the 19th century were primarily trade treaties. And while it was common to include provisions protecting aliens in the United States, stipulations as to tariffs were (as with modern trade agreements) the sine qua non. Some of the friendship and commerce treaties concluded in the first half of the 19th century include an appendix listing the tariffs to be paid on various

¹⁷³ 15 U.S. 259.

¹⁷⁴ *Missouri v. Holland*, 252 U.S. 416 (1920).

¹⁷⁵ See, e.g., *Hauenstein v. Lynham*, 100 U.S. 483 (1879); see also, supra n. ___, (list of cases enforcing treaties against the states).

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articles.¹⁷⁶ More common, however, are “most favored nation” provisions, obligating the contracting parties to give each other the lowest tariffs charged.¹⁷⁷

But what legal status did such stipulations have in the United States? The tariff stipulations were in the exact same treaties as the vigorously enforced privilege and immunity (P&I) provisions, seen in *Chirac v. Chirac*. Their language was no more or less obviously meant for judicial enforcement. And overcharging on imports could surely create the same kind of international tension that the mistreatment of aliens might. And so importers argued in court, many times and in many different ways, that stipulated tariffs should be directly enforceable as the “supreme Law of the Land.”

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

The leading 19th century tariff case is 1855's *Taylor v. Morton* is illustrative.¹⁷⁸ In 1832 Russia and the United States signed one of the many Friendship and Commerce treaties characteristic of the era. The U.S. promised Russia Most Favored Nation (MFN) status—that it would charge Russian goods the lowest tariff any other nations. Later, in the 1842 Tariff Act, Congress set a tariff of \$40 per ton for all hemp, with an advantageous tariff for Manilla and Bombay hemp, which was to enjoy a \$25 tariff. Since Russian hemp, according to the plaintiffs, was the same, or “like” product as Bombay hemp, the importers of Russian hemp claimed that by operation of the treaty the tariff charged should be \$25 per ton. They sued for the return of their money.

¹⁷⁶ See, e.g., Treaty with China, concluded July 3, 1844, ratified December 31, 1845, appendix.

¹⁷⁷ Many of the most favored nation provisions during this era, however, were understood as “qualified” MFN provisions, meaning that countries did not automatically get the benefits of negotiated deals without making some concession themselves. See Jackson, Trade, qualified MFN explanation.

¹⁷⁸ *Taylor v. Morton*, 23 F.Cas. 784 (Cir. C. Mass. 1855) affirmed 67 U.S. 481 (1862).

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The *Taylor* case raises interesting questions. First, the treaty language in question, not even quoted by the Court, is not what modern doctrine would call textually non-self-executing. 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.”¹⁷⁹ This is not language that says ‘Congress shall pass,’ or even, as in *Foster v. Nielson*, uses the future tense. It stipulates that no tariffs “shall be imposed” which sounds like a direct command.

Second, the Tariff Act and the Russian treaty are not clearly in conflict, nor is it obvious that the 1842 Act was intended to abrogate the treaty stipulation. The plaintiffs argued, for example, that the meaning of Congress’ distinction between Bombay and other forms of hemp should have been read to give Russian hemp the benefit of the lowest tariff rate. And it seems 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 treaty.

Nonetheless Justice Curtis, riding Circuit, found the language of the treaty to have no effect cognizable by a court: it was not “a rule of action” for “the courts of justice.” He justified his decision not by text or interpretation but institutional competence: arguing that given Congress’s role in tariffs, evaluation of breach was difficult. How can a judge ask, for example: “whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party ... [or] whether the views and acts of a foreign sovereign ... have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise?”¹⁸⁰

Even if Congress had made a mistake (which may have been the case) the judiciary was unwelcome in the interpretation of the Tariff laws: “It is wholly immaterial to inquire whether they [Congress] have, by the act in question, departed from the treaty or not” For “[i]f by the act in question they have not departed from the treaty, the plaintiff has no case. “ On the other hand, “If they [Congress] have [breached the treaty], their act is the

¹⁷⁹ Treaty of December 18, 1832 with Russia, Art. [x].

¹⁸⁰ 23 F. Cas. 784, at 787.

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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.”¹⁸¹

The *Morton* court puts forth several important ideas. The first is that active Congressional interpretation of a treaty – as reflected in pre-existing or subsequent legislation on the topic—could preempt or preclude subsequent judicial interpretation of treaty language. Second, *Morton* indicated, for the first time, that the doctrine of non-self-execution could be premised not on the language of a treaty (as in *Nielson*) but the bare fact of Congressional activity. And, finally, *Morton* obviously breaks with the simple idea that a later-in-time-treaty will always trump an earlier-in-time statute, for it suggests that if Congress is seized of the matter, the courts should wait.

An important suggestion in *Morton* -- that a tariff treaty adopted later than a tariff statute will also not be law in court – was addressed in the 1888 case *Whitney v. Robertson*.¹⁸² *Whitney* featured another MFN treaty clause, in a treaty with the Dominican Republic, ratified in 1867. The tariff statute was amended in 1870 to reflect the treaty. Then, in 1876, the United States signed a treaty with Hawaii entitling Hawaii to export sugar to the U.S. duty-free, but the tariff laws were not amended by Congress. This led importers of Dominican sugar to argue that they too were entitled to duty-free imports. The premise was that the Hawaii treaty was the last-in-time law of the United States, and read together with the 1867 treaty, it entitled the Dominica Republic the same duty-free imports given Hawaii.¹⁸³

The Court rejected the arguments. Again, there is no language in the treaties suggesting the treaty ought not be enforced directly, or that there is an obligation due solely to Congress. Furthermore, the Hawaii treaty was in fact the last “expressed will of the sovereign.” But the Court ignored the problem, and using the last-in-time rule, it held that Dominican sugar was still governed by the 1870 statute. Potential beneficiaries of the 1876 Hawaii treaty, such as the Dominican Republic, needed to await Congressional action. The court could have easily held the later-in-time treaty supreme to the 1870 statute, and of immediate effect. But it didn't.

¹⁸¹ *Id.*

¹⁸² 124 U.S. 190 (1888). See also *Bartram v. Robertson* 15 Rep. 212 (1888) (presenting same facts but Danish treaty).

¹⁸³ 124 U.S. 190 (1888). See also *Bartram v. Robertson* 15 Rep. 212 (1888) (presenting same facts but Danish treaty).

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There is a sharp contrast in the role the Courts' played in the protection of the rights of aliens, and importers, respectively. The former was concluded, on the model of *Ware*, to be the job of the judiciary, and led to the direct enforcement of treaty obligations with great gusto. The later, regardless of treaty language, was a matter of active Congressional involvement, and led to the Courts staying far away.

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. Immigration & Chinese Exclusion, 1860-1945

In April 1867, the Chinese Empire's first overseas diplomatic mission arrived on the shores of San Francisco, marking China's first effort to join the modern diplomatic system.¹⁸⁴ 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 come to center more than two decades of judicial treaty-enforcement controversy.

Anson Burlingame was a former Congressman, part of the free-soil movement, and an abolitionist, nationally famous for his denouncement of Charles Sumner's beating in Congress. President Lincoln made him the American Minister to China in 1860, where made a strong impression on the Chinese Court. At his farewell banquet in 1867, Prince Regent Kung made the unusual request to have Burlingame serve as China's champion in the West: "Will your Excellency represent us officially as well as non-officially at the Courts of the Treaty Powers?"¹⁸⁵ Said Sir Rutherford Alcock, "It is the greatest complement ever paid to any man, and Mr. Burlingame deserves it."¹⁸⁶

Burlingame aggressively promoted the Chinese cause in his cross-country tour: "The present enlightened Government of China has advanced steadily along the path of progress," he told audiences. "She says now:

¹⁸⁴ The story is recounted fully in Fredrick Wells Williams, *Anson Burlingame and the First Chinese Mission to Foreign Powers* (1912); see also Jonathan Spence, *The Making of Modern China* Ch. 9, 194-215 (1990)(detailing efforts to reform and modernize the Chinese empire in the late 19th century).

¹⁸⁵ *Harper's Weekly*, May 30, 1868, at 344.

¹⁸⁶ *Id.*

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'Send us your wheat, your lumber, your coal, your silver, your goods from everywhere We will give you back our tea, our silk, free labor which we have sent so largely out into the world."¹⁸⁷ He negotiated the treaty which bears his name: the Burlingame treaty of 1868. To Justice Stephan Field, it was "the harbinger of a new era in the history of China ... the belief was general, and confidently expressed, that great benefits would follow to the world generally, and especially to the United States."¹⁸⁸

The story of Burlingame Treaty and its fate in U.S. Courts has enormous relevance for the role of the federal judiciary in the enforcement of treaties. The Burlingame treaty would once again put the federal judiciary and State power at loggerheads, and later measure the relative power of treaty and federal statute.

What Anson Burlingame negotiated in the 1868 treaty was among the most liberal of commerce treaties the United States has ever signed. Among its provisions, the United States agreed to a rule of unlimited and unrestricted immigration as between China and the United States. As Secretary of State William Seward said at the time, "The essential element of ... commerce and trade" with China, is "the free emigration of the Chinese to the American [continent]."¹⁸⁹ The treaty recognized a natural right to immigrate, stating "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."¹⁹⁰ It recognized "the mutual advantage of the free migration and emigration" of citizens "for purposes of curiosity, of trade, or as permanent residents."¹⁹¹

For Chinese residing in the United States the Treaty guaranteed rights similar to those placed in European commerce treaties. Chinese citizens, the treaty proclaimed, "shall enjoy the same privileges, immunities or exemptions in respect to travel or resident as may there be enjoyed by

¹⁸⁷ Quoted in Johnathan Spence, *The Search for Modern China* 214 (1990).

¹⁸⁸ *Chae Chan Ping v. U.S.*, 130 U.S. 581, 592 (1889).

¹⁸⁹ Quoted in Henry Tsai, *China and the Overseas Chinese* 25 (1983).

¹⁹⁰ Additional Articles to the Treaty Between the United States and Tsa Tsing Empire of the 18th of June, 1858, Signed July 28, 1868, ratified November 23, 1869, Art. V [hereinafter, Burlingame Treaty].

¹⁹¹ Additional Articles to the Treaty Between the United States and Tsa Tsing Empire of the 18th of June, 1858, Signed July 28, 1868, ratified November 23, 1869, Art. V [hereinafter, Burlingame Treaty].

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citizens of the most favored nation,” and also “entire liberty of conscience,”¹⁹² and exemption “from all disability or persecution on account of their religious faith.”¹⁹³ Unlike the European commerce treaties the interest restricting Chinese immigration and economic rights was overwhelming.

The Burlingame treaty was inspired and sought to fortify the great Chinese immigration waves of the 1850s-1870s.¹⁹⁴ But Western states, ignoring the Burlingame Treaties' promises, soon tried to block the immigration of new Chinese workers. The Chinese, as Burlingame's comments show, were at first welcomed both as a curiosity and source of labor. By the 1870s the Chinese became a scapegoat for the West Coast's economic woes, seen as unwilling to assimilate, and despised for their willingness to work harder for less money. Anti-Chinese signs of the era read “THE COOLIE LABOR SYSTEM LEAVES US NO ALTERNATIVE” and “MARK THE MAN WHO WOULD CRUSH US TO THE LEVEL OF THE MONGOLIAN SLAVE.”¹⁹⁵ As a stereotyped Chinese character in Henry Grimm's play *The Chinese Must Go* explained his thinking:

White man damn fools; keep wifee and children – cost plenty money;
Chinaman no wifee no children save plenty money. By and by, no
more white workingman in California, all Chinaman – sabee?¹⁹⁶

In 1879 the Californian constitution was amended to deny Chinese the right to vote in State elections, to permit placing Chinese in ghettos, and most radically, to ban all employment of Chinese workers.¹⁹⁷ It reflected the influence of the California's Workingman Party whose slogan was “The Chinese Must Go!”¹⁹⁸ The new California Constitution now read: “No

¹⁹² Burlingame Treaty Art. VI.

¹⁹³ Burlingame Treaty Art. IV.

¹⁹⁴ Between 1850 and 1880 the number of Chinese in the United States increased from 7,520 to 105,465. Mary Coolidge, *Chinese Immigration* 425 (1969).

¹⁹⁵ Roger Daniels, *Asian America* 38 (1988).

¹⁹⁶ As quoted in Ronald Takaki, *Iron Cages: Race and Culture in 19th-Century America* (2000).

¹⁹⁷ *In re Tirburcio Parrott* 6 Sawyer 349.

¹⁹⁸ Sayler, *Laws Harsh as Tigers* (1995).

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corporation shall ... employ, directly or indirectly, in any capacity, any Chinese or Mongolians.”¹⁹⁹

But the Chinese immigrants were organized and regarded the federal judiciary and the Burlingame Treaty as their protectors.²⁰⁰ As historian Lucy Saylor writes, “leaders in the Chinese community spoke with ease and familiarity about the rights owed them under treaties and the Constitution.”²⁰¹ They “turned to the federal courts at San Francisco ... and enjoyed remarkable success.”²⁰² Following the model of *Ware v. Hylton*, the federal judiciary repeatedly struck the discriminatory state provisions under the Burlingame treaty. It was a successful test of the founding principle of treaty supremacy as against even a highly popular state constitution.

In 1880 federal judges first struck down the California constitution. In *In re Tiburcio Parrott*,²⁰³ district 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.²⁰⁴ He asserted that Burlingame had recognized a “natural right” to immigrate:

This absolute, fundamental and natural right [to immigrate] was guaranteed by the national government to all Chinese.... It is one of the 'privileges and immunities' which it was stipulated that they should enjoy.... And any legislation or constitutional provision of the state of California which limits or restricts that right to labor to any extent, or in any manner, not applicable to citizens of other foreign nations visiting or residing in California, is in conflict with this provision of the treaty.²⁰⁵

In dozens of subsequent cases the federal judiciary struck numerous other anti-Chinese statutes, including restrictions on fishing in public waters,²⁰⁶

¹⁹⁹ California Constitution of 1879, Article 19, §2.

²⁰⁰ See generally, Lucy E. Saylor, *Laws Harsh as Tigers* xv (1995) (the Chinese who immigrated Charles McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 *California L. Rev.* 529 (1984) (describing the organization of the Chinese community).

²⁰¹ Saylor, *Laws Harsh as Tigers* xv.

²⁰² Saylor, *Laws Harsh as Tigers* xv.

²⁰³ 1 F. 481 (1880).

²⁰⁴ *In re Tiburcio Parrott*, C.C., 1 F. 481 (1880).

²⁰⁵ *Id.*

²⁰⁶ *In re Ah Chong*, 6 Sawyer 451 (1880) (State law prohibiting aliens from fishing in public waters void due to contravention with Burlingame treaty).

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immigration of “lewd” women,²⁰⁷ operating businesses in San Francisco,²⁰⁸ anti-Chinese covenants in deeds,²⁰⁹ and zoning rules for Chinese laundries.²¹⁰ The rhetoric of *Baker v. Portland*,²¹¹ which invalidated Portland’s anti-Chinese employment laws, was typical. Oregon district judge Deady agreed with the plaintiffs that the Burlingame Treaty was a promise to Chinese immigrants to full privileges and immunities, preemptive of inconsistent municipal regulations.²¹² “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.”²¹³ Upholding Deady’s opinion, Justice Field commented that, “the anti-Chinese legislation of the Pacific coast is but a poorly disguised attempt on the part of the state to evade and set aside the treaty with China, and thereby nullify an act of the national government.” “Between this and ‘the firing on Fort Sumter,’ by South Carolina, there is the difference of the direct and indirect—and nothing more.”²¹⁴

A particularly bizarre case was that of an anti-Chinese ordinance in San Francisco that mandated immediate haircuts for all jailed persons. At the time, apparently, Chinese were filling the jail cells as a form of civil disobedience.²¹⁵ Since Chinese law and custom required that Chinese men to keep their hair in a long queue, the law selectively punished the Chinese. Justice Field struck the law, calling it “legislation unworthy of a brave and manly people.”²¹⁶

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: toward a repudiation of Burlingame and new restrictions on

²⁰⁷ *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

²⁰⁸ *In re Lee Sing*, 43 Fed 359 (1890).

²⁰⁹ *Gandolfo v. Hartman*, 49 Fed. 181 (1892) (striking down covenant not to convey or lease to a Chinaman).

²¹⁰ *In re Quong Woo*, 49 Fed. 181 (1892). On the other hand, Justice Field upheld a law restricting the operating hours of laundries (requiring them to be closed between 10pm and 6am) was upheld as non-discriminatory. See *Barbier v. Conolly*, 113 U.S. 27 (1885).

²¹¹ 2 F.Cas. 472, 475 (D. Oregon 1879)

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Baker v. Portland*, 2 F.Cas. 472, 475 (D. Oregon 1879).

²¹⁵ See Charles McLain & Laurene Wu McClain, *The Chinese Contribution to American Law*, in *Entry Denied: Exclusion and the Chinese Community in America 1882-1943*, 3, 9 (Sucheng Chan, ed)

²¹⁶ *Ho Ah Kow v. Nunan*, 5 Sawyer 552, 564 (1879).

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Chinese immigration. As Justice Field (who had personally struck many of the state laws) wrote: “The people of the coast saw great danger that at no distant day that portion of our country would be overrun by [the Chinese], unless prompt action was taken to restrict their immigration.”²¹⁷ In his words “So urgent and constant were the prayers for relief against existing and anticipated evils, both from the public authorities of the Pacific coast and from private individuals, that congress was impelled to act on the subject.”²¹⁸

After much agitation and petition, Congress in 1879 wrote its first Chinese immigration restrictions, H.R. 2423, known as the “Fifteen Passenger Bill.” The law would have restricted steamships to fifteen Chinese passengers per voyage to the United States. But President Rutherford Hayes, citing the Burlingame Treaty, vetoed the bill (“saving the nation’s honor”), arguing that it was his legal obligation.²¹⁹ Hayes was of the old school: he believed in diplomatic treaty amendment, not Congressional abrogation and he promptly sent a commission to China to negotiate changes to the Burlingame Treaty. The result was the 1880 Immigration Treaty, which achieved some of what the exclusionists wanted. It stated that the United States could “regulate, limit or suspend [immigration] ... but not absolutely prohibit it.”²²⁰ But it also provided, in Article II, rights for the Chinese already in the United States, mandating that Chinese residents “be allowed to go and come of their own free will and accord, and ... be accorded all the rights privileges and immunities ... of the most favored nation.”²²¹

Despite the efforts of Presidents Hayes and later President Arthur to veto direct Congressional violations, 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.”²²² It was styled an enactment of the 1880 treaty and suspended Chinese labor immigration for ten years (a

²¹⁷ The First Chinese Exclusion Case, 130 U.S. 581, 596 (1889).

²¹⁸ *Id.*

²¹⁹ Shirley Hune, *Politics of Chinese Exclusion: Legislative-Executive Conflict 1876-1882*, 9 *Amerasia* 5, 15 (1982) (“As I see it, our treaty with China forbids me to give it my approval.”).

²²⁰ Immigration Treaty of 1880, signed November 17, 1880, ratified July 19, 1881, Art. I.

²²¹ Immigration Treaty of 1880, signed November 17, 1880, ratified July 19, 1881, Art. II.

²²² Act of May 6, 1882, 47th Cong. 1st Sess.

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suspension later made permanent). And in 1888 Congress enacted a clear breach of its treaties with China with the Second Chinese Exclusion Act.²²³ The Act made it illegal for Chinese residents who had left the United States to ever return again.²²⁴ This time, no Presidential veto was forthcoming. 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.”²²⁵

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

The first of the *Chinese Exclusion Cases* featured Chae Chan Ping, who had lived in the United States since 1875. He had made a trip to China to see his family after obtaining prescribed certificate of reentry, but was stopped at the border pursuant to the new treaty, and 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.”²²⁶ Other cases were similar; including *United States v. Lee Yen Tai* which refused to find that a new, 1894 treaty had abrogated Congress’ 1882 exclusion statute, and reinforcing the suspicion that later-in-time treaties will only rarely be enforced as against inconsistent prior statutes.²²⁷

The Burlingame era – an era that only really ended in the 1960s, with normalization of Chinese immigration – teaches much about what the American judiciary will and will not do with its power to enforce treaties. It feels comfortable defending the rights of aliens against State encroachment.

²²³ Act of May 6, 1888, 25 U.S. Stat p. 504.

²²⁴ Act of May 6, 1888, 25 U.S. Stat p. 504 (“ “[It is] unlawful for any Chinese [resident] laborer ... who shall of departed ... and not returned before the passage of this act, to return to, or remain in, the United States.”).

²²⁵ Quoted in Michael Hunt, *The Making of a Special Relationship: The United States and China to 1914*, 92 (1983).

²²⁶ *The First Chinese Exclusion Case*, 130 U.S. 583, 628 (1889).

²²⁷ See *United States v. Lee Yen Tai*, 185 U.S. 213, 220-223 (1902); See also 2 Butler, *The Treaty Making Power of the United States* §§279-293 (1902) (describing the remainder of the Chinese exclusion cases).

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The two San Francisco district court judges, Ogden Hoffman and Lorenzo Steward, and Justice Field, in his appearances as Circuit Justice, were all predisposed to enforce U.S. treaties on behalf of the alien to preempt contrary state law, even in face of virulent popular opinion and their own apparently low regard for the Chinese as a people.²²⁸ On the other hand, the exact same judges were unwilling to thwart Congress' expressed desire to break the Chinese treaties, or refuse to enforce "implementations" inconsistent with the treaty's text. The difference made by the institution in breach could not be clearer.

D. Enforcement Against the Executive

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

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

Extradition

The small size of the Executive branch in the 18th and 19th centuries meant few opportunities for the Executive to violate international treaties in a judicially cognizable way. But while small, the Executive branch did employ prosecutors, and it was their alleged breaches of international law in

²²⁸ See Christian Fritz, A Nineteenth Century Habeas Corpus Mill: The Chinese Before the Federal Courts in California, 32 *American Journal of Legal History* 347, 350-351 (1988) (describing Field's opinion of the Chinese people).

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matters of extradition that first raised the question of whether the judiciary would order the executive to obey treaties.

The history of extradition begins with a “revolutionary martyrdom.”²²⁹ The first American extradition agreement was in the controversial Jay Treaty of 1794, where in Article 27 the United States promised to “deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other....”²³⁰ 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 Adam’s consent, handed over the suspect based solely on the power of the treaty. Robbins was promptly tried and hung.²³¹

The Robbins affair ignited a political firestorm typical of the 1790s. Judge Bee, said the Aurora newspaper, had held “A TREATY made by an AGENT of the PEOPLE was PARAMOUNT to the CONSTITUTION under which the agent was chosen.” Members of Congress quickly proposed the censure or impeachment of Adams for his perceived treachery.²³² Adams managed to survive censure (though not the election) thanks in part to an impassioned defense by Congressman John Marshall.²³³ But so severe was the political fallout that the United States refused to extradite anyone for any reason for more than 40 years.

It was not until 1842 that a new extradition treaty with Britain was signed, and not until the late 1870s that the question of executive breach arose. When it did, the question was linked closely to a familiar problem: state misbehavior placing the Union in breach of its treaties. The issue was

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

²³⁰ *Treaty of Amity, Commerce and Navigation Between His Britannic Majesty and the United States of America*, art. 27, Nov. 19, 1794, 8 Stat. 116, 129, T.S. 105.

²³¹ *United States v. Robins*, 27 F. Cas. 825, 827-33 (D.S.C. 1799) (No. 16,175). Two detailed histories of the Robbins case are Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *Yale L.J.* 229 (1990), and John T. Parry, *The Lost History Of International Extradition Litigation*, 43 *Va. J. Int'l L.* 93 (2002).

²³² See Wedgwood, *supra* n. __, at 323, 334.

²³³ See Wedgwood, *supra* n. __ at 325.

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“specialty” – the principle that it is unlawful to charge an extradited subject for offenses different than the specific crime for which extradition is requested and granted.

Anglo-American diplomatic tension brought specialty to the forefront. 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 that were grounds of extradition: “murder, or assault ... or piracy, or arson, or robbery, or forgery, or the utterance of forged paper...”²³⁴ Story purposely excluded any political offenses, as to not “hazard the ratification by our Senate from popular clamour.”²³⁵ The treaty also contained no explicit specialty requirement, and for several decades, extradition proceeded without regard to whether the crime charged was the crime of extradition.

That changed as, in the late 1860s, specialty began to gain intellectual favor in Britain. Following several studies in 1870 the British Parliament passed a new Extradition Act.²³⁶ It required the British government to respect specialty principles, and refuse extradition to states did not. The law would soon create yet another Anglo-American showdown.

In 1876 the United States requested the extradition of Erza Winslow, wanted in Massachusetts for forgery. Britain captured and imprisoned Winslow, but following its new law it refused to surrender him unless the United States agreed to try him for no offense other than forgery. On the advice of Secretary of State Hamilton Fish, President Ulysses Grant refused. Winslow was let free and never heard from again.

After Winslow’s release, an angry President Grant sent a message to Congress accusing 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

²³⁴ Treaty of Aug. 9, 1842, to settle and define the boundaries between the territories of the United States and the possessions of her Britannic Majesty in North America; for the final suppression of the slave trade; and for the giving up of criminals, fugitive from justice, in certain cases, 8 Stat. 572 art. 10.

²³⁵ Letter from Justice Joseph Story to Secretary of State Daniel Webster (Apr. 19, 1842), in 1 *The Papers of Daniel Webster: Diplomatic Papers, 1841-1843*, at 537 (Kenneth E. Shewmaker ed., 1983).

²³⁶ Extradition Act, 1870, 33 & 34 Vict., ch. 52 (Eng.).

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to, cannot but be regarded as the abrogation and annulment of the article of the treaty of extradition.”²³⁷ Grant announced he was suspending U.S. performance of the treaty unless Britain or Congress gave him reason to change his position.²³⁸

But the tension was short-lived: by the end of 1876 the Executive and Britain had settled their differences. While making no formal legal commitment, the United States dropped charges in a prominent case, *de facto* observing the specialty principle.²³⁹ The Earl of Derby, British Foreign Minister told the House of Lords that U.S. objections to specialty were now “purely theoretical.”²⁴⁰ Said Derby “We continued to maintain, and we maintain now, that the construction we placed on the treaty was the correct one.”²⁴¹ Meanwhile Britain quietly stopped demanding assurances that specialty would be respected. Extradition under the treaty of 1842 resumed.

Was President Grant correct about the 1842 treaty? To a modern reader, the lack of any explicit specialty clause combined with decades of practices would suggest the answer is “yes.”²⁴² But the international law publicists of the late 19th Century jumped on the question and unanimously pronounced the American position incorrect. Wrote John Bassett Moore in 1891, “The general opinion has been that [the United States] was wrong ... yet right in refusing to comply with the demand of the British government.”²⁴³ 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 by William Beach Lawrence,

²³⁷ Message from President Ulysses Grant to the Congress in Relation to the Extradition Treaty with Great Britain (June 20, 1876), in 2 Francis Wharton, *Digest of the International of the United States* 786, 787-88 (1886).

²³⁸ *Id.* at 789 (“Should the attitude of the British Government remain unchanged, I shall not, without an expression of the wish of Congress that I do so, take any action either in making or granting requisitions for the surrender of fugitive criminals under the Treaty of 1842.”).

²³⁹ See John Bassett Moore, 1 *Treatise on Extradition and Interstate Rendition*, §151 (1891).

²⁴⁰ See Lord Derby, British Foreign Secretary, Speech to the House of Lords (Feb. 13, 1877), reprinted in part in Moore, *supra* n. __ §151 (1891).

²⁴¹ Lord Dendy,

²⁴² See Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of United States v. Rauscher*, 34 *Va. L. Rev.* 71 (1993).

²⁴³ John Bassett Moore, 1 *Treatise on Extradition and Interstate Rendition*, §152 (1891).

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editor of Wheaton's *Elements of International Law*.²⁴⁴ As Lawrence wrote, Grant's position "proposes to take away all safeguards, which we would protect out own citizens, when extradited perhaps for the most trifling offenses from being exposed in a foreign country, without friends, and without counsel, to a trail for the most heinous crimes..."²⁴⁵

The settlement of the Winslow affairs did not, as Lord Derby had promised, end the matter. For while the federal government had its *de facto* policy, state prosecutors and rogue federal prosecutors continued to charge beyond the indictment. A well known example was the Kentucky case of *Commonwealth v. Hawes*, where, despite the complaints of the British ambassador, an extradition for forgery was used to charge Hawes for embezzlement.²⁴⁶ 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."²⁴⁷

It was with this background that the Supreme Court considered the famous case of *United States v. Rauscher* in 1886. William Rauscher, second mate of the U.S.S. J.F. Chapman, was extradited from Britain on charges of murder. However in the Southern District of New York the federal prosecutor (apparently without permission from the Attorney General) charged him with cruel and unusual punishment, a crime not enumerated in the 1842 extradition treaty. Justice Miller, joined by six Justices, brushed aside the Government's construction of the 1842 Treaty, and enforced the treaty directly against the federal government. Quoting from *Foster v. Nielson* 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."²⁴⁸

The 1842 Treaty contained no explicit specialty requirement. Nonetheless Justice Miller seized on Story's enumeration of seven offenses in the treaty. "The enumeration of offenses ... is so specific, and marked by such a clear line in regard to the magnitude and importance of those

²⁴⁴ Judge Thomas Cooley, Extradition, 3 Int. Review 438 (1876); Extradition, 10 Amer. Law Rev. 617 (1875-76) (anonymous, attributed to Judge Lowell), William Beach Lawrence, The Extradition Treaty, 14 Alb. L. J. 85 (1876);

²⁴⁵ Lawrence, The Extradition Treaty, supra n. ___ at ___.

²⁴⁶ 76 Ky. 697 (1878).

²⁴⁷ William B. Lawrence, Extradition, 16 Alb. L. J. 361, 364 (1877).

²⁴⁸ 119 U.S. at 419.

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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.”²⁴⁹

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 in a languid and concessionary nature to the brief that may suggest the United States was not particularly concerned about losing. In any case Justice Miller did note the dispute over the meaning of the treaty, saying “the correspondence is an able one on both sides,” yet instead of deferring, he said it “presents the question we are now required to decide.”²⁵⁰ Justice Miller made far more of the views of the publicists who had suggested that specialty was an established part of customary international law. William Beach Lawrence was called “a very learned authority on international law living in this country”; Justice Miller also favored the “learned and careful work” of David Dudley Spears. In Miller’s view, their examination of the matter was “so full and careful, that it leaves nothing to be desired in the way of presentation of authorities.”²⁵¹

In *Rauscher*, the Court ignored the President’s interpretation of a treaty, found the executive branch in violation, and ordered the breach remedied. Hamilton Fish called the decision “all wrong.”²⁵² What might explain this result? Jacques Semmelman, an extradition expert who has studied the history of *Rauscher* extensively, believes that the Court was motivated primarily by concerns about state misbehavior and problems with Britain.²⁵³ As he writes:

A conclusion either that specialty was not implicit within the Treaty, or that it was not enforceable by the courts, would have conferred unfettered discretion upon the states to decide whether to prosecute for crimes not included in the warrant of surrender. ... [and] serious international difficulties for the United States. Justice Miller

²⁴⁹ 119 U.S. at 420.

²⁵⁰ 119 U.S. at 416.

²⁵¹ *Id.* at 417.

²⁵² Letter from Hamilton Fish to J.C. Bancroft Davis (Dec. 7, 1887), reprinted in part in Charles Fairman, *Mr. Justice Miller and the Supreme Court* 326 (1939).

²⁵³ See Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of United States v. Rauscher*, 34 *Va. L. Rev.* 71 (1993).

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believed very firmly that the states should be insulated from any role in international relations.²⁵⁴

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

But as discussed in Part I, another familiar reason may help explain the Court's enforcement of the treaty. *Rauscher* was a criminal case, with a treaty raised as a defense. While the judiciary usually defers to Executive constructions in treaty cases, judges have never granted great deference to the Executive in the construction of criminal laws.²⁵⁵ As Justice Scalia put it in 1990, "The Justice Department, of course, has a very specific responsibility to determine for itself what [a criminal] statute means ... but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."²⁵⁶ *Rauscher* might then also stand for a different idea: unless Congress signals otherwise, treaties establishing criminal defenses should be enforced against *any* government, state, Executive, or even foreign.

In any case, with *Rauscher* the Supreme Court created the first domain of treaty-law enforceable against the executive. While there is some disagreement over whether foreign nations may waive the specialty defense on behalf of their citizens, judges continue to enforce specialty clauses against State and Federal governments.²⁵⁷ Justice Miller's opinion, moreover, created a domain that has spread beyond extradition into

²⁵⁴ Id. at 132-134.

²⁵⁵ But see Kahan, supra n. ____ (arguing that the Federal Government should get Chevron deference in its interpretation of criminal laws).

²⁵⁶ *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment).

²⁵⁷ See, e.g., *Valentine v. Neidecker*, 299 US 5 (1936); *Alvarez-Machain*, 504 U.S. 655, 667 (1992) (applying an extradition treaty as directly applicable federal law); *Terlinden v. Ames*, 184, U.S. 270, 288 (1902) ("Treaties of extradition are executory in their character..."); *United States v. Thirion*, 813 F.2d 146, 151 & n.5 (8th Cir. 1987); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), cert. denied, 479 U.S. 1009 (1986); *United States v. Levy*, 905 F.2d 326, 328 n.1 (10th Cir. 1990); *United States v. Riviere*, 924 F.2d 1289, 1300 - 01 (3rd Cir. 1991); *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995) (holding that the extradition treaty between the United States and Uruguay could be enforced directly by the person extradited); *Cheung v. U.S.* 213 F.3d 82, 95 (2nd Cir. 2000) "the Constitution not only allows, but in fact requires, the courts to treat the Agreement as equal to the federal extradition statute").

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international criminal procedure generally. Today, in addition to extradition, judges have directly enforced prisoner exchange²⁵⁸ and mutual legal assistance (MLAT) treaties.²⁵⁹

* * *

By the turn of the century the Supreme Court had established several important matters in treaty enforcement practice. The central mission, upheld in dozens of cases, was preventing States from putting the Union in breach. But the Court in the tariff and Chinese Exclusion cases had also wrestled with the tricky problem of Congressional inconsistency with treaties, using the last-in-time rule and other means to defer to Congress's mistakes and decisions. And the Court in *Rauscher* established a narrow beachhead of enforcement as against the executive. In the 20th century the greatest challenge came not from foreign affairs, but dramatic changes in the nature of treaties and their enactment.

Part III:

The Twentieth Century and the Age of Multilateral Treaties

How did the rise of multilateral treaties in the 20th century affect the nature of treaty enforcement?²⁶⁰ The general though not uniform consensus is that in the 20th century, particularly after World War II, judges changed the way they enforce treaties, or more precisely slowed down. One theory is that the new multilateral treaties caused the slowdown.²⁶¹ Another alleged culprit is the doctrine of non-self-execution. As David Sloss writes, "the modern doctrine of non-self-executing treaties, created by courts and

²⁵⁸ See, e.g., *Cannon v. United States Department of Justice*, 973 F.2d 1190, 1192 (5th Cir. 1992)(enforcing treaty on the execution of penal sentences between the United States and Mexico as against United States parole commission.)

²⁵⁹ See *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1291 (11th Cir. 2003) (enforcing MLAT with Canada); *United Kingdom v. United States*, 238 F.3d 1312, 1317 (11th Cir. 2001)(enforcing MLAT with the United Kingdom); *In re Erato*, 2 F.3d 11, 15 (2nd Cir. 1993) (enforcing MLAT with the Netherlands).

²⁶⁰ On the changes in international law over the 20th century, see Paul B. Stephan, *The New International Law – Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. Colo. L. Rev. 1555, 1557 (1999).

²⁶¹ See., e.g., G. John Ikenberry, *America, World Order, and the Rule of Law* (2003).

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commentators in the latter half of the twentieth century, distorts [proper treaty enforcement.]”²⁶²

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

Instead, I agree with Duncan Hollis’s suggestion that a different phenomenon has profoundly treaty enforcement: the rise of the congressional-executive agreement.²⁶³ The Article II treaty procedure (treaties approved by two-thirds of the Senate) has been all but replaced by a different procedure, known as the congressional-executive agreement.²⁶⁴ 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 recedes. The predictive result is a large shift in the respective sizes of the Congressional and judicial domains of treaty enforcement.

Nor is it surprising that we have seen more Congressional as opposed to judicial control of treaty enforcement. That development mirrors other

²⁶² David Sloss, *Non-Self-Executing Treaties: Exposing A Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1, 4 (2002).

²⁶³ This is as yet an unpublished suggestion. See Duncan Hollis, Remarks, Foreign Relations Internet Group Conference, Dec. 13, 2004.

²⁶⁴ For an overview on the differences between Article II Treaties and congressional-executive agreements, see Curtis Bradley & Jack Goldsmith, *Foreign Relations Law*, 409-421 (2003).

trends in American law, most importantly the rise of the Administrative state since the 1930s, which has brought greater levels of Congressional control over the enforcement of statutes and the common law.²⁶⁵ Scholars have portrayed the creation of Congressional agencies as replacements for judicial enforcement schemes of the 19th century.²⁶⁶ The rise of the Congressional-executive agreement is the treaty version of the same phenomenon.

* * *

Returning to the history of treaty enforcement, we see how courts dealt first with the first two major multinational treaty regimes: the intellectual property unions of the late 19th century²⁶⁷, and the aircraft liability regime established in 1929 (the Warsaw Convention). Afterward we consider how courts have handled the challenge of multinational human rights treaties. These regimes show the same tendency to regard the identity of the party in alleged breach and deference to Congress and the Executive as the central influences on treaty enforcement.

A. The Warsaw Convention

The Warsaw Convention²⁶⁸ is familiar to travelers from the fine print on the back of airline tickets. But it is the clearest example of a contemporary, judicially enforced treaty regime, in the traditional of *Ware v. Hylton*. It offers important insight into what kind of treaties the judiciary will enforce directly, and why.

The Warsaw Convention was the child of two international conferences held in Paris in 1925 and Warsaw in 1929, and of the work done by the interim Comité International Technique d'Experts Juridique Aériens (CITEJA). The goal was the creation of a uniform legal framework to govern

²⁶⁵ See generally Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1216-1219 (1982) (discussing the evolution of the control of public remedies).

²⁶⁶ See Jerry Mashaw et al, Administrative Law 4-6 (3d ed. 1992) (discussing agencies as replacement for failed judicial enforcement systems).

²⁶⁷ For example, the Paris Union, established in 1893 by the Convention for the Protection of Industrial Property and the Berne Union, established in 1886 under the Convention for the Protection of Literary and Artistic Work.

²⁶⁸ 137 L.N.T.S. 11 (1929).

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the fledging airline industry. As the reporter for the Convention put it, “What the engineers are doing for machines, we must do for the law.”²⁶⁹

The most important parts of that legal framework were the standardized limits on carrier liability in domestic courts. A key article, Article 17, made carriers liable for personal injury damages sustained during the course of a flight, but limited that liability (in Article 22) to 125,000 “Poincaré francs,” or about \$8,300. Other portions limited liability for lost luggage (Article 18), and flight delays (Article 19). The liability limits – particularly for personal damages—were low even by 1929 standards. The point, however, was to attract investment capital that might otherwise be scared off by fears of plane crash liability.²⁷⁰

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

The exact extent to which the Warsaw convention limits State causes of action has long been a matter of some dispute. The Supreme Court’s most recent pronouncements adopt a broad position of Treaty preemption. The 1999 case *El Al v. Tsui Yang Tseng*²⁷¹ presents a particularly strong vision of judicial preemption of State action. After a plane crash Tsui Yang Tseng and other plaintiffs sought damages for pain and suffering under New York tort law. The question was whether plaintiffs could recover for injuries not explicitly limited by the treaty—namely, emotional, as opposed to physical,

²⁶⁹ Translation quoted in Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498 (1967), original source 2 Conference International De Droit Prive Aerien, 4-12 Octobre 1929, Varsovie 17 (1930).

²⁷⁰ See Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499-500 (1967)

²⁷¹ *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 161 (1999).

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suffering. The Supreme Court said “no,” creating a sharp limit on State regulation of international airline carriage.

Noting that the purpose of the Convention is to “achiev[e] uniformity of rules governing claims arising from international air transportation,” the Court agreed with *El Al* and the United States Government that the Convention must be read as precluding all personal injury remedies (namely, state remedies) other than those authorized through the Convention itself. In the Court’s words: “Given the Convention’s comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations.”²⁷²

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

B. International Intellectual Regimes

The first major multilateral treaties signed by the United States were the Intellectual Property (IP) treaties of the late 19th century. Both the Berne Convention on Copyright and the Paris Convention on Industrial Property (trademark and patent) were ambitious efforts to create global protection for the rights of authors and inventors, respectively.²⁷³ 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)²⁷⁴ the

²⁷² 525 U.S. 155, at 169 (199).

²⁷³ The Paris Convention for the Protection of Industrial Property 1883 to 1983. Geneva: WIPO, 1983.

²⁷⁴ See Gorman & Ginsburg, *Copyright* 9 (6th ed. 2003) (“During the republic’s first 100 years, the U.S. was a ‘pirate nation’ with respect to foreign works of authorship.”).

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ratification of the Paris Union prompted new questions for the judiciary. On the one hand, the treaties did suggest protection for foreign inventors – similar to some of the treaties that had come before. But the Paris Treaty touched on areas where Congress was already active, having enacted and reenacted federal patent laws. Once again, the sense that Congress was “seized” with the problem of patents would lead the judiciary to leave implementation of the Patent treaties to the legislature.

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

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

The language suggests a Swiss citizen should have the same rights as an American in the U.S. system, trumping whatever pre-existing discrimination existed in favor of the American. That’s exactly what Swiss citizen Ferdinand Bourquin claimed in 1889. U.S. law at the time included blatant favoritism in favor of the American filer: it allowed U.S. citizens alone to file a “caveat,” or a kind of preliminary patent, prior to filing the full patent application.²⁷⁵ But despite having on his side a clear later-in-time treaty, Bourquin and others like him lost.

Bourquin’s first appeal was to the Patent Office and consequently the matter was considered first by the Executive. By request, Attorney General Miller wrote an opinion, and he concluded the Paris Convention gave Bourquin no rights beyond those in the Patent Act.²⁷⁶ His reasoning is not particularly helpful: he argues that the treaty “is a reciprocal one; each party to it covenants to grant in the future to the subjects and citizens of the other parties certain special rights in consideration of the granting of like special rights to its subjects or citizens.”²⁷⁷ But of course all treaties are reciprocal: what made the Paris Union special? It seems much easier to understand this opinion, and the Court decisions as adopting the rationale of the Tariff decisions. In later cases Congress was accused of mis-implementing the

²⁷⁵ Except those in the process of obtaining U.S. citizenship. §4902 Revised Statutes, 1889.

²⁷⁶ 19 U.S. Op. Atty. Gen. 273.

²⁷⁷ *Id.* at 278-279.

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treaty: but courts held that any “mistakes” in Patent Act were for Congress to fix.²⁷⁸ 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.”²⁷⁹

Are International IP treaties ever enforced directly? The answer is yes, but only as against State breach. The leading case is *Bacardi Corporation of America v. Domenech*,²⁸⁰ where the Supreme Court down discriminatory Puerto Rican trademark laws. Puerto Rico in 1936 passed a set of laws subsidizing local liquor, and one made it illegal to sell spirits in Puerto Rico under trademarks used outside of Puerto Rico.²⁸¹ Bacardi Corporation challenged the law as inconsistent with the General Inter-American Convention for Trade Mark and Commercial Protection.²⁸² The Court struck the Puerto Rico statute with ease. It stated “this treaty on ratification became a part of our law. No special legislation in the United States was necessary to make it effective.”²⁸³ The Puerto Rican statute on grounds “of repugnance to the treaty” was nullified.²⁸⁴

C. Human Rights Treaties

The trademark late-20th century treaty is the human rights convention. The United States, after initial reluctance, has ratified several including the International Convention on Civil and Political Rights, the Convention on the Elimination of Discrimination Against Women, and the Convention Against Torture.²⁸⁵ As we will see, however, direct domestic enforcement of the treaties is scarce. Can breach theory explain that outcome?

A *Foster v. Nielson* analysis based on the nature or language of the human rights treaties provides little explanation. Consider the ICCPR,

²⁷⁸ E.g., *Rousseau v. Brown*, 21 App.D.C. 73 (1903), *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, 155 F. 842 (1st Cir. 1907).

²⁷⁹ 155 F. 842, 849.

²⁸⁰ 311 U.S. 150 (1940).

²⁸¹ Spirits and Alcoholic Beverages Act, No. 149 of May 15, 1937 §44(b).

²⁸² General Inter-American Convention for Trade Mark and Commercial Protection, signed February 20, 1929, ratified February 11, 1931, 46 Stat. 2907.

²⁸³ 311 U.S. 150, 161.

²⁸⁴ 311 U.S. 150, 167.

²⁸⁵ International Covenant on Civil and Political Rights (1961); International Convention on the Elimination of All Forms of Racial Discrimination (1967); Convention on the Elimination of All Forms of Discrimination Against Women (1975).

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ratified in 1992. The ICCPR looks like the U.S. Bill of Rights: it provides a list of rights to which everyone is entitled. Article 7 states “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁸⁶ That’s not language different in kind from the U.S. 8th Amendment, which states “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²⁸⁷ As for enforcement, it says “Where not already provided for ... each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes ... to give effect to the rights recognized in the present Covenant.”²⁸⁸ There is, in short, little from the agreement that would seem to preclude judicial enforcement. The lack of judicial enforcement of the ICCPR (and of human rights treaties in general) is from textual analysis alone something of a mystery.

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

Several signals stand out. In some cases, Congress has passed implementing legislation. That’s the case of the Genocide and Torture Conventions, which specify how Congress thinks the treaty should be enforced domestically.²⁸⁹ Less obvious (and more controversial) are the Senate’s declarations and conditions in its consent to the human rights treaties. In the case of the ICCPR, the Senate states “the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered herein.”²⁹⁰ It adds that “the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-

²⁸⁶ ICCPR Art. 7.

²⁸⁷ U.S. Constitution Amend. VIII.

²⁸⁸ ICCPR Art. 2.

²⁸⁹ 18 U.S.C. §1091 (genocide); §18 U.S.C. §2340A (torture).

²⁹⁰ U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

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executing.”²⁹¹ What the Senate appeared to be signaling is that, in effect, the rights in the ICCPR are already provided for.

Judges, in other words, are treating the ICCPR exactly as they would a treaty ratified with implementing legislation. That is, the courts are treating the Bill of Rights, 14th Amendment, and legislation like the Civil Rights Act of 1964²⁹² as the implementing legislation of the ICCPR. For that reason independent enforcement is inappropriate, even if Congress (or the Courts) have deviated from the text of the ICCPR in its “implementation.”

Of course courts do not state these matters explicitly. But when they address the enforcement of the ICCPR or other human rights treaties, it is based on the signals from the Senate and the presence of adequate domestic remedies that courts have justified non-enforcement.²⁹³ For example, Chief Judge Young of the Massachusetts District Court explained, “[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.’”²⁹⁴

While deference to implementing legislation (as with the Genocide Convention) is standard, deference to such “pre-implementation” is novel, as is deference to the Senate acting alone. Some academics have on these grounds suggested that courts should ignore the signals in the reservations

²⁹¹ U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

²⁹² 42 USC §2000e et seq.

²⁹³ See, e.g., *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (right to vote under Article 25 of ICCPR is not a privately enforceable right under U.S. law); *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001); *Domingues v. Nevada*, 961 P.2d 1279 (Nev. 1998) (ICCPR no defense to juvenile execution); *Heinrich v. Sweet*, 49 F. Supp. 2d 27, 43 (D. Mass. 1999) (plaintiffs have adequate domestic remedies for claims of “crimes against humanity”); *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999) (holding that defendant's civil rights claim under the ICCPR invalid); *White v. Paulsen*, 997 F. Supp. 1380, 1386 (E.D. Wash. 1998) (“the United States Senate expressly declared that the relevant provisions of the [Covenant] were not self-executing when it addressed this issue providing advice and consent to the ratification”); *In re Extradition of Cheung*, 968 F. Supp. 791, 803 n.17 (D. Conn. 1997) (stating that the ICCPR cannot support extradition defense).

²⁹⁴ See 49 F. Supp. 2d at 43.

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and enforce Human Rights treaties directly.²⁹⁵ Without commenting on what should happen, breach theory can predict conditions under which courts might in fact consider enforcing a human rights agreement like the ICCPR. The most likely scenario would be a case of egregious state breach. Imagine, for example, that a State passed a series of laws neutral on their face yet discriminatory in practice against the practice of Islam. An example might be laws that forbid any “noisy” calls to prayer. Under the federal constitution and *Employment Division v. Smith*, the laws might be Constitutional.²⁹⁶ 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.²⁹⁷

We have seen now that the enforcement patterns for multi-lateral treaties have been roughly the same as for bilateral treaties of similar purposes. The paradigm created for bilateral treaties, targeting state breach, has simply been translated, while human rights treaties have raised new questions about how courts know whether to leave treaty implementation to Congress. But we now turn to a development that has dramatically affected treaty enforcement in the United States: the rise of the Congressional-Executive Agreement.

D. The Rise of the Congressional-Executive Agreement

In the fifty years from 1789 to 1839, the United States entered into 87 international agreements or less than two each year. Sixty or 69% were enacted as Article II treaties,²⁹⁸ with the advice and consent of two thirds of the Senate.²⁹⁹ From 1939-1989 the United States entered into 12,400 international agreements, or on average about 250 per year. Of those, 94%

²⁹⁵ See, e.g., Jordan Paust, *Avoiding Fraudulent Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DePaul L. Rev. 1257, 1283 (1993).

²⁹⁶ 494 US 872 (1990) (holding facially neutral laws no violation of the establishment clause).

²⁹⁷ Enforcement, moreover, need not be direct, but could come as *Ex Parte Young* suit. See David Sloss, *Ex Parte Young And Federal Remedies For Human Rights Treaty Violations*, 75 Wash. L. Rev. 1103 (2000).

²⁹⁸ 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.”).

²⁹⁹ Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, S. Prt.106-71, 10th Cong. 2d Sess., 39 (2001).

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or 11,698 were *not* Article II treaties. Instead the great majority were “congressional-executive” agreements, or agreements that instead of receiving a vote of two thirds of the Senate, were passed through both houses of the Congress like normal legislation.³⁰⁰

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.³⁰¹ Political scientists are also interested in the change of forms, and ask what might motivate the government to choose one form over another.³⁰² 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, and joined possibly by statements by the Executive or the Senate, are the only relevant expressions of intent. But when a treaty is both approved and implemented by Congress simultaneously, a new document enters the picture: the enacting and implementing legislation. In that legislation the full Congress has the opportunity, if it wants, to specify how much or how little it wants a treaty to be enforced. By making this determination, as the breach model predicts, Congress will usually displace independent and direct judicial enforcement of a treaty.

³⁰⁰ 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.

³⁰¹ See Lawrence Tribe, *Taking Text and Structure Seriously*, 108 *Harv. L. Rev.* 1221 (1995) (arguing that some congressional executive agreements are unconstitutional); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 *Harv. L. Rev.* 799 (1995) (arguing that Congressional-Executive agreements can be used to pass laws beyond the reach of the enumerated powers); Peter Spiro, *Constitutional Method and the Great Treaty Debate*, 79 *Tex. L. Rev.* 961 (2001); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 *Cal. L. Rev.* 671 (1998).

³⁰² See, e.g., Lisa L. Martin, *The United States and International Commitments: Treaties as Signaling Devices*, Harvard University Department of Government Working Paper, Sept. 2003.

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This dynamic can be seen in what are so far the most important Congressional-Executive agreements: the treaties creating the World Trade Organization in 1994. After the President signed the agreement, Congress passed legislation, named the Uruguay Round Amendments Act of 1994, which the President then signed.³⁰³ 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.³⁰⁴ 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 courts, and the implementing legislation declares the WTO agreement itself non-self-executing.³⁰⁵ In practice, no judge has directly enforced the agreement or decisions made under it.³⁰⁶ As for areas where the agreements mandate changes in domestic law, the existence of implementing legislation has in practice made that legislation, and not the treaty, the center of judicial attention. For example, The Uruguay round agreement on intellectual property (TRIPS, or Trade Related Intellectual Property) suggested that members of the WTO create a law against bootlegging, or unauthorized recording of music concerts.³⁰⁷ Congress took that suggestion seriously, and legalized bootlegging in a new chapter of the Copyright Code.³⁰⁸ The result are cases enforcing the new law, which focus on the legislation and not the original agreement.³⁰⁹

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

³⁰³ Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809

³⁰⁴ Uruguay Round Agreements Act, Pub. L. No. 103-465, §103.

³⁰⁵ 19 U.S.C.A. §3512(a)(1), (b)(2)(A).

³⁰⁶ See, e.g., *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1303 (Fed. Cir. 2002) (Newman, J., dissenting) (“no party asserts that WTO decisions have controlling status as United States law”).

³⁰⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS -- RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994).

³⁰⁸ See Uruguay Round Agreements Act Title III; see also 17 U.S.C. §1101 et seq.

³⁰⁹ See, e.g., *United States v. Moghadam*, 175 F.3d 1269, 1276-77 (11th Cir. 1999).

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

With this development, we leave behind the history of judicial treaty enforcement and turn to the final part which asks what the breach theory should mean for present-day doctrine.

Part IV: Normative and Doctrinal Implications

What the breach model of treaty enforcement teaches is that the difficult cases of treaty enforcement are primarily cases of deference. Courts need to decide whether it would be appropriate or not correct an alleged breach by the Executive, State, Congress or a foreign government. As the history of Treaty enforcement shows, *de facto* deference practice have arisen for treaty cases involving each of these actors.

Unfortunately, that fact is muddled by the law of treaties, particularly the non-self-execution doctrine. That doctrine focuses on the idea, contradicted by two centuries of practice, that whether a treaty should be enforced or not can be determined by the treaty itself. The result is treaty decisions that accomplish deference goals through non-self-execution conclusions. The tests used for self-execution betray that fact. For example, consider, the test used by the Seventh Circuit to deciding whether a treaty is self-executing:

[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.³¹⁰

³¹⁰ *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir.1985).

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This is the kind of a test that can yield any result desired. It does not explain why, given two similar treaties, one is enforced directly and another declared of no legal effect.

But how might the insights of the breach model become part of judicial practice? What courts should do is two things: restrain their use of non-self-execution to its original meaning, and replace it with clearly articulated rules of deference. Let's discuss each suggestion in turn.

There is such a thing as a true non-self-executing treaty stipulation. That is a treaty provision that in its text explicitly states that it creates an obligation for the legislature, and not the judiciary or the executive. We have a clear example from the history of treaty practice: Article V of the Definitive Treaty of Peace. Again: "Congress shall earnestly recommend it to the legislatures of the respective states to provide for the restitution ..." ³¹¹ By the text of the Treaty, Congress is obligated, and not the judiciary, executive, or states. Such a provision is truly non-self-executing, and should not be independently enforced by the judiciary, even as against State breach.

This is where non-self-execution analysis should begin and end. Absent clear treaty language creating an obligation for Congress, treaty enforcement becomes an open question, and what should now matter now are rules of deference. The judiciary should consider several questions. First, and most important, has Congress passed implementing or interpretative legislation? If so, the court owes deference to Congress's idea of what the treaty says. Second, if not, is an Executive act at issue, and has the Executive undertaken independent interpretation or enforcement? If so, its interpretation gets some level of deference, perhaps, as suggested in Part I, on a *Chevron* model. Finally, is this a case where a State's acts or laws are inconsistent with a treaty? If so, the Court should offer no deference at all. It should, as it always has, preempt the state law in the service of preventing the part from putting the whole in breach.

Adopting this framework would not actually be a deviation from present practice, merely an articulation of it. More importantly, it focuses attention on the most important question: how much deference is due? While I don't, one could argue that the courts are not deferential enough to the States on the argument that states might help generate foreign policy. Many have already argued that the Court is far too deferential to the

³¹¹ The Definitive Treaty of Peace Article V.

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Executive or to Congress. These deference debate are in general well rehearsed and important, but the argument for the breach model and replacing non-self-execution does not depend on their outcome. Rather, it depends on making clearer the institutional concerns that drive treaty enforcement, helping us understand why and when judges decline to enforce “the supreme Law of the Land.”

Breach theory cannot eliminate all of the hard problems posed by the evolving status of treaties in American system. But it provides a framework for answering some of these questions, and reconciling the record of judicial enforcement of treaties with the structure of the United States government. In this respect it is hoped it provides an improvement over current theories of treaty interpretation and enforcement.

Conclusion

This article describes the breach model of treaty enforcement. It has identified and described a dynamic that underlies existing patterns of treaty enforcement and yet is not part of standard statements of the law of treaties. That dynamic is the tendency for judicial enforcement of treaties to depend on the identity of the breaching party. There is generous evidence of the effects of this dynamic in the history of treaty enforcement. Many of these cases and history are far from unknown to international law scholars. The principal goal of this paper has been to analytically consolidate these scattered results to create a better legal description and normative framework for understanding the law of treaty enforcement.