Treaties’ Domain

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You don’t have to be the Ghost of Senator Bricker to know that the stated scope of international law has grown enormously over the last several decades. There are today over 50,000 treaties in force (available in a 2000 volume set), many covering what was once thought to be the preserve of domestic laws, such as individual rights, foreign investment, intellectual property, environmental regulation, and more. But the unlike, say, the growth of the United States Code to its present dimensions, the meaning of international law’s growth in paper coverage is far more ambiguous. International law may have plenty to say about everything; but predicting its effects is a nicer, and more complex question.

The 50,000 treaties have created the greatest descriptive question facing international law scholars today: the understanding of “internalization,” or of how (if at all) international law leads to domestic effect. There is an enormous and bitter divide between scholars on this essentially empirical question. Skeptics, including many international relations theorists, believe that international law has little effect on state behavior, and is at best a parlor game for people who might otherwise be dangerous. International law optimists maintain that international law is obeyed by nation-states, or at least most of it, most of the time. Asked exactly how that might be, scholars have advanced numerous theories, such as theories stressing rational cooperation among nation-states, and theories of a transnational legal process, which imagine a sort of international norm-making process that ultimately converts national elites into international law believers.

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4 See LOUIS HENKIN, HOW NATIONS BEHAVE 320-21 (2d ed. 1979).

5 See, e.g., Robert Keohane, After Hegemony (1984) (claiming that nations may find it rational to cooperate even in the absence of a hegemon).

Yet in the American context there has always been an easier way to begin understanding the effects on state behavior of international laws. For the question has always had a much more direct, and (in American fashion) legalistic answer, given by Article VI of the United States constitution, declaring "all treaties" the "supreme Law of the Land." The American Supremacy clause was the first in the history of the nation-state to give judges the power to enforce treaties directly. Justice Story said it meant treaties would have "the obligation and force of a law [and] be executed by the judicial power, and be obeyed like other laws." In the United States, much is meant to turn on what judges actually think of international law, and when they decide to use the judicial power to enforce treaties.

Understanding the judicial pattern of treaty enforcement created by the self-execution doctrine is a different way of thinking about the question of domestic effect and internalization. Only a true curmudgeon would say statutes do not create an outcome different than what would occur in their absence; to give a crude example, they may represent a wealth transfer from the masses to an organized group. When enforced, treaties may similarly reflect an outcome different than what might otherwise prevail, reflecting a victory of one set of interests over another. Conversely, refusals to enforce international law may support the thesis that international law is little more than window-dressing.

The international law literature has an answer: there is a perception that the original intent of Supremacy clause has become blocked by modern developments, and that international law consequently has been walled off from its rightful place in the Republic. Another view, with less support, agrees, but suggests that such is a return to the original intent. In both cases the active agent is something known as the doctrine of "self-execution." A present-day federal judge presented with a treaty will usually make a threshold decision

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7 Joseph Story, 3 Commentaries on the Constitution of the United States §1832 (1833)
8 Cf. Politians and the legislature (wealth-transfer model of federal statutes).
10 See, e.g., Jordan Paust, Self-Executing Treaties, 82 Am. J. Int'l L. 760 (1988) ("The 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 affirming that 'all Treaties shall be the supreme Law of the Land.' Indeed, such a distinction may involve the most glaring of attempts to deviate from the specific text of the Constitution."); 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).
11 John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955 (1999);
whether a treaty is judicially enforceable, by asking whether the treaty (or a particular provision) was meant to be self-executing. If non-self-executing, the judge will suggest that the litigant will need see another branch of Government. By declaring treaties non-self-executing, judges can deaden the effect of international law and fulfill the skeptic’s prophecy.

Study of the self-execution doctrine shows that it has been misconceived as a general or extra-constitutional bar to international law’s effects in the United States. In practice the doctrine, in the hands of the judiciary, does something different: it effects a rough parity in the treatment of treaties and their cousins, federal statutes. With respect to both sources of law, judges face the same problem. Many modern laws do not explicitly create judicially enforceable rights. Instead, they declare principles, create duties for governments or government subunits, or do nothing at all. The general growth in standing to bring suits challenging official action (or even inaction)\textsuperscript{12} has forced judges to ask what they might do with legal language that does not clearly give judges an enforcement role. In the statutory context they have, since the 1970s, relied on various doctrines that limit private actions to enforce public duties. They’ve done so arguably out of respect for the intent of modern statutory schemes, but also clearly to avoid writing orders that will not be followed. Judges confronted with treaties have replicated the effect of these doctrines, using an invigorated non-self-executing doctrine. Like long-lost identical twins, the analysis of statutes and treaties emerge as turns out to be far more similar in federal courts than one might imagine.

The fact that judges generally enforce treaties and statutes in similar ways tells us something important about the process of internalization. In operation the enforcement of international law by American courts seems to have nothing to do with, as some theories might suggest, the interests of the United States as whole, or of prevailing views of whether international law is in fact law. Instead, its effects are an imprint of the particular practices and domestic limits of the judicial power in the United States. We know from the domestic experience that the judicial power is not unlimited: for example, the judiciary has never been able to stop the executive branch from conducting warfare or foreign policy. Why then should anyone expect interpretation of international law to produce any different results? The federal courts will enforce international law that is presented in the right fashion, yielding domestic effects only for the areas that courts have domestic power. In short, the limits of international law on government action end up looking a lot like the limits of law itself.

A benefit of this study is that it makes the confusing doctrine of non-self-execution much easier for courts and others to understand. Non-self-execution or something like it is necessary in a dual system of lawmakers. To maintain consistent principles of judicial restraint or separation-of-powers across both statutes and treaties, some substitute for the restraints placed on statutory interpretation must be found for the treaty context.\(^{13}\) The non-self-execution doctrine is today playing that role. This principle of equality also be in part driven by the political economy of American law-making. If the identical treaty provision gives a judge greater common-law powers than its statutory cousin, the result favors interest groups better positioned to take advantage of the treaty process. Whether that is the intended result of the Supremacy Clause is obviously hard to say; but judges seem to have regarded some rough parity as an appropriate outcome.

Another overlooked fact is that the doctrine actually can, like its statutory cousins, not just conserve judicial power but actually effectuate the purposes of certain treaties. International law scholars, perhaps based on their personal experience,\(^{14}\) have a tendency to equate vindication of international law with its enforcement in United States courts. While true for certain types of treaties, there are many areas, such as international trade law, where the avoidance of judicial involvement promotes the goals of treaty schema. Were, for example, federal courts seized with interpretation of the 1994 General Agreement on Tariffs and Trade, the results could lock the United States into positions inconsistent with the rulings of the Appellate Body of the World Trade Organization. Such a problem could be difficult to unwind; it could also muck up the political calculus that animates the WTO’s carefully designed enforcement system.\(^{15}\) The problems judicial enforcement can create are well understood in the statutory context;\(^{16}\) It turns out that for statutes too sometimes courts need to restrain themselves to make international legal systems work, and the non-self-execution doctrine comes in handy.

In short, there are clear reasons for the judicial doctrine of non-self-execution to exist, having little to do with international law but rather important

\(^{13}\) Not, obviously, in all ways; treaties are still immune to certain federalism limits, see Missori v. Holland,

\(^{14}\) See Koh, Haiti Cases.

\(^{15}\) See Jide Paper; Mark M. Paper.

\(^{16}\) See Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193 (1982).
domestic or treaty-specific concerns. This leads to simple suggestion: it would eliminate much confusion and yield the same results if courts were simply to say that treaties, like statutes, are the law of the land, yet also like statutes, do not always create judicially enforceable rights. With such an understanding courts could proceed with their usual methods of deciding whether given language provides a judicially enforceable right, and, if necessary, an implied cause of action. So doing would eliminate much of the judicial confusion in this area, or at least convert it to more familiar brand of judicial confusion.

Part I examines judicial behavior with respect to treaties by comparing the operation of the non-self-execution doctrine with the behavior of judges with respect to similar statutes. Part II examines the pattern of judicial power expressed by their treatment of treaties and statutes, respectively.

**Part I: What the Self-Execution Doctrine Does**

The doctrine of non-self-execution requires further introduction. In a typical definition, a treaty is defined as self-executing if the language may be enforced in the courts directly, without intervening action by Congress or the Executive. Conversely, non-self-executing provisions are defined as treaty language that cannot be so enforced. In practice, the question arises when litigants bring treaty language to court, the same way they might bring statutory language, hoping that the court will rely on the language to command some action, or (when a treaty is used as a defense) find reason not to. The treaty might say, for example, “non-citizens shall be given equal treatment in the United States in their conduct of business,” or, “The United States shall compensate victims for harm caused by its soldiers.” The non-self-execution doctrine arises because the party disfavored by the treaty’s language will insist that the treaty cannot be relied on by the court as a rule of decision, because it was not intended to be judicially enforceable. Hence the doctrine of non-execution is by nature a doctrine of judicial restraint or avoidance. When a federal judge rules a treaty provision non-self-executing, she stops herself from using the treaty language as a rule of decision for that case, whatever outcome the treaty language might favor.

So what reasons compel judges not to recognize treaties as rules of decision, particularly when the Constitution makes “all treaties” the Supreme law of the land? Professor Carlos Vanquez has made an important effort to try and answer this question. He points out that in practice courts have been relying

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17 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)
18 Cf. Akoshi.
19 Cf. Argentina.
on different reasons not to enforce treaties, while using the same terminology (“non-self-executing”). To summarize a rather complex set of reasons, he argues that courts have declined to enforce a treaty either because (1) the treaty spoke to the legislature and asked for further legislation, (2) because the treaty provision is by its nature non-judiciable (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.

The accuracy of Vanquez’s four doctrines, as reflected in the case law cannot be contested. But I think there is a more general and perhaps more useful explanation for what judges are doing in their findings of non-self-execution. Federal judges, of course, interpret statutes as their daily bread, and have been forced to develop judgment and instincts that suggest that given statutory language cannot be relied upon as a rule of decision. It is therefore easiest to understand the findings of non-self-execution as an application of statutory interpretation measures to treaties, an effort that keeps the treaty power in rough parity with the power of statutes.

But why do judges even need to ask questions about judicially enforceable? Why not just fully enforce all treaties (and statutes?) Before getting to the comparison of how judges have treated statutes and treaties, we need first look at the role of judges in modern legal systems.

The Role of the Judges in Modern Legal Systems

There was perhaps once a time when laws could be distinguished from moral exhortations and described with some accuracy as commands directed at the population, enforced by the judiciary, backed by threats of force. But modern legal systems have become full of laws that do nothing that matches this description. Laws, instead, tend toward indirect operation. In the post-New Deal era an enormous number of statutes are intra-governmental commands: they tell Government agencies what to do and how to do it, and put the judiciary in a limited oversight role. Related are the laws that are commands to other

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20 The only problem with Vanquez’s “four doctrines” is that while he thinks of them separately, judges cannot help but think of at least three of his four doctrines as asking the same question: whether the treaty was intended to create judicially enforceable rights or not (as discussed later, they do the same for statutes, too). The answer can be “no” for any of the reasons he describes. It is true that constitutional limits are a separate question, yet courts have only rarely stated that constitutional limits as part of the non-self-executing treaty doctrine.

21 Not, obviously, in all ways; treaties are still immune to certain federalism limits, see Missori v. Holland, 252 U.S. 416.


23 Cf. Daryl Levinson, Collective Sanctions.
governments, like the many federal statutes that tell the states how to run federally funded programs, or boss around the states for other reasons. A third means of indirect regulation are the federal statutes that tell large intermediaries what to do. Title IX, for example, require universities to fund mens’ and womens’ sports programs equally as condition of federal funding, and it isn’t hard to think of other examples. All of these laws speak to some kind of intermediary, governmental or otherwise, to achieve their results, as opposed to speaking to individuals directly.

In addition to the indirect statutes, there are many other types of modern statutes that are really more like contracts: they enact deals between interest groups and in practice have force only as between the concerned parties. To round things out, there have also always been many laws with a mainly symbolic value, like the federal ban on impersonating Smokey the Bear, and the declaration of the principles of the Civilian Marksmanship Program. And as in any human endeavor, statute-books also contain generous amounts of meaningless junk, out-of-date rubbish, and provisions of no discernable import.

The 50,000 treaties, to put it mildly, have not been immune from the tendency to depart from the classic model of judicial enforcement. Indirect effect is the norm than the exception. Many treaties effectively represent deals between Government agencies, such as the treaties between Justice Departments on mutual aid in the collection of evidence. Related are treaty systems designed to harmonize laws between nations in specific area, such as the Berne Convention on Copyrights. Certain treaties system include their own interpretation and enforcement mechanisms, such as, of course, the United Nations, and the various treaties make up the World Trade Organization system. There, finally, are many treaties that are meant to be almost entirely symbolic or expressive, like the Universal Declaration of Human Rights, or the preamble of the United Nations Charter.

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24 See, e.g., Driver’s Privacy Protection Act.
25 An example are the many the provisions of the copyright law that specify how much one industry must pay another to access the copyrights it needs to run its business. See 17 U.S.C. §111 et seq.; see generally, Tim Wu, Copyright’s Communications Policy (forthcoming 2004).
26 18 U.S.C. §711 (“Whoever [except with authorization] ... uses the character “Smokey Bear” shall be fined under this title or imprisoned.”).
29 Swiss MLATs. Such treaties have rapidly been replaced by MOUs, pushing the judiciary even further out of the picture. See Anne-Marie Slaughter.
30 Berne Convention.
In short, both treaties and statutes exist for reasons multifangled and only sometimes related to judges. For some of these schemes, the judiciary is like something of embarrassing old friend, invited to make an appearance, but warned not to make trouble. Unsurprisingly, judges have been forced to react to these changes in the nature of the laws they encounter. Courts no longer presume that they’re the protagonist of given legal arrangement: they have created for themselves a variety of doctrines to decide when they’re wanted to help enforce the law, and when they’d do better to stay out. As we’ll discuss later, this comes partially out of respect for the legislature and partially a device of self-preservation. While arising out of a number of doctrines, the legal process in question can generally be described as the search for judicially enforceable rights.

The Question of Judicially Enforceable Rights

Judges are probably at their most comfortable when enforcing the legally-defined rights of an individual against some infringing party. This can be very easy: some federal statutes, like the patent or copyright law, create rights in individuals and correlative duties in the population at large. But as we’ve seen, a great number of the federal statutes that American courts deal with today do not give courts this luxury. Among the most difficult are those that create inter-governmental commands (commands to States), intra-governmental commands (commands to agencies), and commands to intermediaries (like universities). Such statutes by their terms tend to create public duties and a beneficiary class, not individual rights. Treaties, similarly, are often commands to Congress, the Executive, or the United States as a whole. Judges for both kinds of law must decide whether the law is meant also as a command to them (the judiciary) to help enforce the statutory scheme or not; whether the private beneficiary of the law can sue to enforce public duties. Both for statutes and the treaties, courts have arrived at roughly the same answer: that they’ll usually only do so if the statute or treaty can be fairly read as intending to create a scheme of private rights.

Consider first inter-governmental command statutes, which present a problem particularly similar to that faced in the treaty context. Using the spending power, the federal government will often specify what states must do in their administration of funded programs. States who accept federal educational funding, for example, agree to protect the privacy of their records in educational institutions.31 The Court has analogized such laws, like treaties, to contracts: “legislation enacted pursuant to the spending power is much in the

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nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.”

32 Spending statutes, while containing detailed instructions for the states, are often ambiguous as to whether they are meant to create privately enforceable rights, requiring the judiciary to decide whether it is needed before it acts.

Similar problems are created by intra-governmental commands and commands to intermediaries. Perhaps most of the United States code consists of Congressional instructions to agencies or intermediaries of one form or another. For example, 42 U.S.C. §191-194, enacted in 1912, creates the federal “Children’s Bureau.” The bureau is directed it to “investigate and report to the Secretary … upon all matters pertaining to the welfare of children and child life among all classes of our people.”

33 The natural question in this and other contexts is whether, when Congress has not been clear about the matter, the beneficiaries of the Act may use the judicial system to force an agency or other intermediaries to live up to its commitments. The answer lies in complex doctrine of implied rights of action.

34 The format of many treaties creates the same kind of problems for courts, and have led courts to the non-self-execution doctrine. The text of a treaty, like a funding statute, is often phrased as a command to the signatories to undertake further action, as opposed language creating individual rights. For example, Article 4 of the Convention Against Torture stipulates that “Each State Party shall ensure that all acts of torture are offenses under its criminal law.”

35 When the State fails to live up to its commitments, the natural question is whether an individual meant to be a beneficiary of the treaty can sue and have a court order compliance with the treaty.

Figure: Self-Execution and Similar Problems

32 Pennhurst State School and Hospital v. Halderman


34 See Cort v. Ash, etc.

35 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, SEN. TREATY DOC. NO. 20, 100th Cong., 2d Sess. (1988), 23 I.L.M.
So what have the courts done with when private beneficiaries try to enforce statutes creating public duties? Whether a command to States, agencies, or intermediaries, the Supreme Court has generally come to view the public duties created by spending instructions judicially unenforceable by individuals, absent some explicit or implicit creation of individual rights. In the intergovernmental context, the Court stated in \textit{Pennhurst State School and Hospital v. Halderman}, “the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.”\textsuperscript{36} The “fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action,”\textsuperscript{37} rather, plaintiffs must “assert the violation of a federal right, not merely a violation of federal law.”\textsuperscript{38} In other words, the Court in every one of these areas has asked whether the statutes in question, in addition to imposing duties on states, agencies or intermediaries, can be interpreted to have intended to create individual rights meant to be judicially enforced.\textsuperscript{39} That does occasionally happen: in cases like

\textsuperscript{36} 451 U. S. 1, 28 (1981).
\textsuperscript{37} Cannon v. University of Chicago, 441 U.S. 677, 689 (1979) (Title IX).
\textsuperscript{38} Blessing v. Freestone, 520 U. S. 329, 340 (1997).
\textsuperscript{39} There are some differences in the finding of private enforcement rights with respect to intergovernmental commands, intra-governmental commands, and commands to intermediaries. But the similarities outnumber the differences. Indeed \textit{Gonzaga}, in dicta, suggested that the standards for finding a judicially enforceable right with respect to commands to states (under §1983) were exactly the same as with respect to intermediaries (implied right of action). \textit{Gonzaga}. ("if
Wright v. Roanoke Redevelopment and Housing Authority,\textsuperscript{40} and Wilder v. Virginia Hospital Assn., 496 U. S. 498 (1990), the Supreme Court found in funding statutes, namely the Public Housing Act and the Medicaid Act, efforts by Congress to create rights enforceable against States who failed to live up to statutory instructions. Similarly, the Court has historically (but not often in recent years) found a great number statutes judicially enforceable against intermediaries, most famously with respect to public corporations regulated by the Securities Exchange Act in \textit{J.J. Case Co. v. Borak}.\textsuperscript{41}

In the treaty context the Court has faced similar problems, albeit a little earlier, and has ultimately created a similar requirement for plaintiffs wishing to enforce a public duty. The most important example is the case usually credited giving birth to the self-execution doctrine, Chief Justice Marhsall’s \textit{Foster v. Nielson}.\textsuperscript{42} What \textit{Foster} really did was force courts to ask whether a treaty, like a statute, actually meant to make the judiciary part of the enforcement scheme for the treaty, or whether judicial involvement would simply amount to a nuisance.

\textit{Foster} was a dispute over property ownership. The question was alleged to be controlled by several treaties, including a 1819 “Treaty of Amity, settlement and Limits between the United States of American and the King of Spain.” The plaintiffs were beneficiaries of the eighth article of that treaty, which seemed to protect those granted land by the Spanish Crown. It read that:

“all the grants of land made before the 24th of January 1818, by his catholic majesty, &c. shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty.”\textsuperscript{43}

The reason the case was at all difficult was the question of whether “all the grants of land … shall be ratified and confirmed” meant that the grants were in fact ratified, or whether the language was a command obliging Congress to ratify and confirm land grants. In other words, the Court had to decide whether the law commanded the judiciary to handle land claims, or had commanded Congress to set up a process to benefit the plaintiff. As Marshall put it: “Do these words act directly on the grants so as to give validity to those not otherwise

\textsuperscript{40} 479 U. S. 418 (1987).
\textsuperscript{41} 377 U.S. 426 (1964).
\textsuperscript{42} Foster & Elam v. Neilson, 27 U.S. 253 (1829).
\textsuperscript{43} Id. at
valid, or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?”44

In answering this question, Chief Justice Marshall adopted an analysis similar to that in found in today’s statutory cases. He looked first to the language, noting the ambiguity created by the use of the future tense in “shall.” “It does not say that those grants are hereby confirmed.” He suggested that a clearer statement would have had direct effect, “Had such [hereby confirmed] been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c.”45

Then, in an often overlooked passage, Marshall noted that Congress had already begun the process of ratification required by the treaty, and in fact set up an alternative adjudication process for title conflicts. He stated that

“Congress appears to have understood this article as it is understood by the Court. Boards of commissioners have been appointed for East and West Florida, to receive claims for lands; and on their reports titles to lands not exceeding _____ acres have been confirmed, and to a very large amount. ....”

He also noted that Congress had set up a separate judicial process for challenges to claims: “On the 23d of May 1828, an act was passed supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida; the 6th section of which enacts, that all claims to land within the territory of Florida, embraced by the treaty between Spain and the United States of the 22d of February 1819 ... shall be received and adjudicated by the judge of the superior court of the district within which the land lies, upon the petition of the claimant,’ &c.”

Scholars have also overlooked the degree to which Justice Marshall’s interpretation avoided separation of powers problems and thereby bears indicia of judicial prudence. In addition to the Congressional action based on the 1819 Treaty, judicial enforcement of the treaty would have (according to Marshall) thrown into question a host of other Congressional legislation based on its interpretation of other treaties, including, for example, the creation of the State of Alabama.46 In addition, the King of Spain had adapted, in his ratification of the

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44 Nielson, 27 U.S. at 314.
45 Nielson, 314-315 (emphasis added).
46 Nielson 310-313.
treaty, a position on the 8th Article that contradicted that that held by the United States; if the Court applied the 8th Article it would need to choose sides.\textsuperscript{47} In short, Marshall’s device, was like many of his rulings, a clever escape from a judicial pickle.

The themes in \textit{Nielson} are commonplace in statutory interpretation. In cases like \textit{Middlesex County Sewerage Authority v. National Sea Clammers},\textsuperscript{48} and \textit{Smith v. Robinson},\textsuperscript{49} the Supreme Court has found the presence of an existing, comprehensive enforcement scheme reason to find the non-existence of a statutory right enforcement by private plaintiffs. And in the Court search for judicially enforceable causes of action, it is commonplace for the Court to say it wants to avoid invading the province of the legislature. “Congress rather than the court controls the availability of remedies for the violations of statutes.”\textsuperscript{50}

The \textit{Nielson} approach is invariably cited by courts who decide to find a treaty non-self-executing. But as time has passed courts have added other rationales for finding a lack of judicially enforceable rights that mimicking statutory themes. One important example is the idea that even if treaty language might seem to create rights in individuals, it must be language of a nature that can be enforced by a court, and not simply aspirational, hortatory, lip-service kind of language. This idea, not found in \textit{Nielson}, is often sourced to dicta from the \textit{Head Money Cases}.\textsuperscript{51} But its most memorable incarnation was in the case of \textit{Sei Fuji v. State}, which represented the first effort to make use of the United Nations Charter in an American Court.\textsuperscript{52}

Article 1 of the United Nations Charter states that the purpose of organization is, inter alia, “to achieve international cooperation ... in the promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”\textsuperscript{53} Sei Fuji, a Japanese citizen, sought to use this language along with a few other provisions to strike down a discriminatory California Alien Land Law. The California Supreme Court, while striking down California’s law under the 14th Amendment, held the cited articles of the Charter non-self-executing and judicially unenforceable. The Charter language, the Court observed stated

\begin{itemize}
  \item \textsuperscript{47} Nielson at 314.
  \item \textsuperscript{48} 453 U.S. 1 (1981).
  \item \textsuperscript{49} 468 U.S. 992 (1984).
  \item \textsuperscript{50} \textit{Wilder}, 496 U.S. at 509, n. 9.
  \item \textsuperscript{51} 112 U.S. 580, 598 (1885) (“A treaty, then, is a law of the land an Act of Congress is, whenever its provisions proscribe a rule by which the rights of the private citizen or subject may be determined.”).
  \item \textsuperscript{52} 242 P.2d 617 (Cal. 1952).
  \item \textsuperscript{53} United Nations Charter, Art. 1.
\end{itemize}
“general purposes and objectives and did not purport to impose legal obligations on the individual member nations.” 54 The United Nations framers, the Court noted, knew how to create individual rights in treaty language when they needed to, noting that the Charter’s clearer immunity provisions had been already given effect in an American Court. 55 But here, the language lacked “the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons ....”

The problem of Congressional indefiniteness is a common theme in statutory searches for enforceable rights. In Pennhurst, for example, the Supreme Court was asked to find enforceable rights in a statutory “bill of rights” for persons with developmental disabilities in 42 U.S.C. §6010. That section including a finding, inter alia, that “Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.” Despite the use of the word “right” the Court held that §6010 was too indefinite to be judicially enforceable: it “does no more than express a Congressional preference for certain forms of treatment.” It concluded that the “closest one can come to giving §6010 meaning is that it justifies and supports Congress’ appropriation of money ... and guides the State in his review of State applications for federal funds.” 56

Yet none of this should be taken to mean that courts will not find judicially enforceable rights in treaties. Tellingly, Courts have done so in dozens of cases without even mentioning the doctrine of non-self-execution. The question may be obvious, as in the 1924 case of Asakura v. City of Seattle, which enforced on behalf of a Japanese citizen a treaty prohibiting discrimination against Japanese citizens. 57 The same is been true of recent Supreme Court cases interpreting the Warsaw Convention, which limits the liability of international airlines. The 1999 case El Al Israel Airlines v. Tseng, for example, asked whether the Convention precluded a tort action under New York law. In the treaty interpretation that followed the court did not bother to ask whether the treaty language was non-self-executing or not; its creation of rights in airlines is obvious. 58 As with statutes, courts will find treaties judicially enforceable when the matter is obvious.

54 242 P.2d 617, 620, 622.
55 Id. at 621. The immunity provisions were given legal effect in Curran v. City of New York, 77 N.Y.S.2d 206, 212.
56 451 U.S. at 19
57 265 U.S. 332, 341 (1924)
58 In Franklin Mint, the Court interpreted the following language from the Warsaw Convention: “(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires....
Interestingly, by the 1980s and 1990s, courts were suggesting that nearly identical factors should drive the finding of whether a statute or treaty can be interpreted to create judicially enforceable rights.59 While perhaps not too much can be read into such multi-factor “tests,” the fact that courts state the same standards might suggest that they are conducting the same analysis.

**Reasons for Non-Enforcement.**

Most agree that rules for finding a judicially enforceable right in the statutory context are driven by a concern for restraint of the judiciary. The most common argument is a separation of powers argument: that the creation of remedies not specified by statute is an invasion of the province of the legislature.60 If Congress wants the judiciary to enforce a statute it certainly knows how to make it happen. But where Congress passes a statute that entrusts enforcement to an agency or a State courts need to be careful not to go beyond what the legislature intended.

There are several reasons a legislature may intend limited enforcement of a statute.61 The legislature may intend enforcement to be expert and centrally

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   “First, Congress must have intended that the provision in question benefit the plaintiff.
   Second, the plaintiff must demonstrate that the right assertedly protected by the statute is
   not so “vague and amorphous” that its enforcement would strain judicial competence.
   Third, the statute must unambiguously impose a binding obligation on the States [it]…
   must be couched in mandatory, rather than precatory terms. … [Finally,] Congress may
   forbid recourse to §1983 in the statute itself, or impliedly, by creating a comprehensive
   enforcement scheme that is incompatible with individual enforcement.”

60 with Frolov v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985):
   [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.

61 See, e.g., Cannon, 441 U.S. at 730-731 (Justice Powell, dissenting) (“As the legislative branch,
   Congress should determine when private parties are to be given causes of action under
   legislation it adopts … When Congress chooses not to provide a private civil remedy, federal
   courts should not assume the legislative role of creating such a remedy and thereby enlarge their
   jurisdiction.”).

   1996) (arguments for and against implying private causes of action).
coordinated, both of which court-based enforcement is not.\textsuperscript{62} Congress sometimes wants to “achieve the expertise, uniformity, wide-spread consultation, and resulting administrative guidance that can accompany agency decision-making and to avoid the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action.”\textsuperscript{63} Similarly, the statute may intend only weak or occasional enforcement, perhaps as part of a deal among relevant groups; a court that turns up the volume may be meddling.\textsuperscript{64} The legislature, even though bossing around a State, may sometimes not want its commands to States to be enforced by federal courts, out of some idea of respect for State officials. Finally, a statute may even be passed for purely symbolic reasons, and have never been intended to be enforced at all.

Even when the separation of power concerns are not paramount, there are related set of reasons that the judiciary might not want to find judicially enforceable rights in a law. In certain instances the court might preserve its own power and dignity by avoiding the enforcement of laws that would put the court in an uneasy position. Enforcing rights in language not clearly intended to create them can create “the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.”\textsuperscript{65}

So much for statutes. What motivates courts’ findings of treaty non-self-execution? While courts have done less to explain themselves here, all signs point to reasons stemming from similar, domestic concerns.

One simple fact is that a great number of treaty actions have brought language no court at all concerned with its reputation would think to enforce. The main example are the repeated efforts to convince federal courts to enforce language in the United Nations charter that makes the Declaration of Independence look like the tax code.\textsuperscript{66}

\begin{itemize}
\item \textsuperscript{62} Cf. Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193 (1982).
\item \textsuperscript{63} Gonzaga, (Breyer, J. concurring).
\item \textsuperscript{65} Alexander Bickel, the Least Dangerous Branch, 126 (1962).
\item \textsuperscript{66} In particular, on four occasions courts have been asked to enforce the following:
\begin{quote}
“The United Nations shall promote:
\begin{itemize}
\item a. higher standards of living, full employment, and conditions of economic and social progress and development;
\item b. solutions of international economicm social, health, and related problems; and international cultural and educational cooperation;
\item c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”
\end{itemize}
\end{quote}
\end{itemize}
When faced with slightly harder cases, courts have expressed concerns that mainly mirror their concerns with respect to statutes. A respect for separation of powers is common. The D.C. Circuit’s *Diggs v. Richardson*, held a resolution of the United Nations concerning South Africa not judicially enforceable against the United States. Its decision was based on the fact that the resolution called on “states” and said nothing about the rights or obligations on citizens, it pointed out that “the provisions deal with the conduct of our foreign relations, an area traditionally left to executive discretion,” and enforcement of such matters “is foreign to the general experience and function of American courts.”

Another parallel to the statutory context is the concern that judicial enforcement will produce an enforcement pattern unintended by the drafters of the treaty. For example, in *Tel-Oren v. Libyan Arab Republic*, 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 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.

What is absent from the self-execution decisions is hostility or special treatment for treaties *per se*, or their effect in the United States. Returning to *Nielson*, Justice Marshall stated, “Had [the treaty confirmed ratification of the property grants,] it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c.” As seen most recently in the *Franklin Mint* case, Courts and the Supreme Court routinely enforce treaties that specify judicially enforceable rules and do not give outrageous results.68

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67 726 F.2d 774
The overall point is that courts’ enforcement of treaties reflects a reflection of evolving views of the courts’ role in enforcing laws that do not specify clear rights. They are more accurately positions on the limits placed on courts in the post-Borak era. It is difficult to maintain that courts are failing to treat treaties improperly under the Supremacy clause when statutes are subject to the same limits.

[Removed: Defensive Use of Statutes and Treaties]

A Suggested Clarification

There is little or no difference in the general kinds of reasons that lead courts to refuse to judicially enforce treaties and statutes. The difference is that while the statutory reasons are sometimes separately identified, courts have tended to lump everything together and called it reasons to find statutes non-self-executing.

It would be far clearer if courts were, as some courts have intimated, agree that they are simply searching for judicially enforceable rights using the familiar standards for doing so in the statutory context. There, the question is a question of statutory interpretation, which may not always be a simple process but is at least familiar. In the treaty context the court is faced with the parallel question of treaty interpretation. Recognizing that this is the case should eliminate the weird questions that arise, such as the question of what the legal effect of a non-self-executing treaty is. For there is no idea that statute without judicially enforceable rights somehow does not exist; the question is limited to what the judiciary can do with it.

This may not always make individual cases easier, either in the statutory or treaty context. As Justice Breyer recently stated with respect to statutes, “The ultimate question, in respect to whether private individuals may bring a lawsuit to enforce a federal statute … is a question of congressional intent. … But the

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statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer more than general guidance.”

The same will be true of the many forms of treaties in force today. But if courts are aware that they are solving essentially the same problem, and considering essentially the same factors, the judicial search for enforceable rights in treaties will lose its now-unfortunate aura of mystery.

Part II:

[The thesis of the second part is that the ability of judicially-enforced treaties to control state behavior has not been different in its pattern from other forms of American law. Roughly, judges have exercised restraint, both in the interpretation of treaties and of statutes, in areas of law deemed “political,” such as the conduct of war and foreign relations, etc. But judges have been perfectly happy to enforce treaties regulating a host

The explanation relies on a familiar model of judicial behavior. Judges will act to maximize their own scope of decision, and applying international law give judges more rules of decision on which to draw. Yet judges recognize that self-restraint particularly in areas of questionable authority may produce long-run benefits, and so will often not decide cases where the odds of being ignored are considerable.

This delivers a complicated, but strangely familiar model for understanding the effects of those 50,000 treaties. In short, treaties can be used, like domestic law, to promote the interests of some groups over others, and hence have domestic effects. Yet at least in the hands of the judiciary they will not produce any effects outside of the judiciary’s usual areas of competence.]

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69 Gonzaga, U.S. (Breyer, concurring).