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Abstract

This Article argues that the approach to treaties taken early in the history of the Republic is more consistent with the intended meaning of the Supremacy Clause than the approach reflected in recent judicial practice.

TOWARD MORE EFFECTIVE JUDICIAL IMPLEMENTATION OF TREATY-BASED RIGHTS

John Quigley+

INTRODUCTION

The Framers of the Federal Constitution inserted a mention of treaties into the Constitution's Article VI, Clause 2, which has come to be called the Supremacy Clause (the "Clause"). The clause proclaims the supremacy of federal statutes, treaties, and the Constitution itself over the laws of the constituent states.[1] The Framers wrote treaties into the Supremacy Clause in order to ensure that state courts would not interfere with the obligations the federation had already assumed, and would in the future assume, towards other nations of the world.[2] Arguing in favor of including a reference to treaties in Article VI, Clause 2, as the Constitution was being approved in Virginia, James Madison said that if state laws were supreme over a treaty, this "would bring on the Union the just charge of national perfidy."[3]

As of the late eighteenth century, the range of obligations States assumed by treaty was modest. In the nineteenth century, treaties came to be used more frequently. As communication and transportation increased internationally, so too did the need

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1. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

2. *See* Hines v. Davidowitz, 312 U.S. 52, 62-63 (1940) ("[T]he supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution, was pointed out by the authors of The Federalist in 1787, and has since been given continuous recognition by this Court.").

3. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 515 (Jonathan Elliot ed., J. B. Lippincott & Co. 2d ed. 1881) (1836).

to regulate relations between nations. States concluded agreements with one another to regulate commercial relations and the rendition of criminal suspects.[4]

Beginning in the mid-twentieth century, treaties of a multilateral type entered the scene as part of a concerted effort to codify international law,[5] which to that point had taken principally the form of customary law. The United Nations ("U.N.") General Assembly set up a commission to draft treaties for this purpose.[6] Since then, numerous multilateral treaties have been concluded under U.N. auspices, resulting in a substantial displacement of customary law by treaty law. For example, the law relating to the use of maritime space, which had developed over centuries as customary law, was codified in treaty form.[7] In the third quarter of the twentieth century, human rights entered the international scene as a topic of regulation, and treaties were the mechanism whereby States agreed to observe rights.[8]

All this treaty activity opened the possibility that the Supremacy Clause might involve U.S. courts in a broad range of issues. In particular, if the many rights and obligations the United States has assumed by human rights treaties were to fall under the Supremacy Clause as binding on judges, then a whole new body of federally-generated norms would bind both the federal government and the states.

Expansion has, however, been modest. As will be explained

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4. *See* Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1, 18-21 (1999) (citing CHARLES R. RITCHESON, AFTERMATH OF REVOLUTION 19 (1969)).

5. *See, e.g.*, Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention]; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

6. *See* Establishment of an International Law Commission, G.A. Res. 174(II), at 105, U.N. Doc. A/519 (Nov. 21, 1947).

7. *See generally* Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 387.

8. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 117 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (guaranteeing a "broad spectrum of civil and political rights, rooted in basic democratic values and freedoms," and obligating each State Party to respect and ensure these rights through legislative or other necessary means).

more fully below, the three branches of the U.S. federal government have combined to minimize the range of treaty-based rights that are to be applied by U.S. courts under the Supremacy Clause. The courts, in particular, have declined to read the Supremacy Clause to apply to treaty-based rights that, by the intent of the drafters of the Clause, would seem legitimately to fall within its reach. This approach by the courts in recent decades contrasts with that of our nineteenth-century courts, which more readily interpreted the Supremacy Clause to apply to rights identified in a treaty. This Article argues that the approach to treaties taken early in the history of the Republic is more consistent with the intended meaning of the Supremacy Clause than the approach reflected in recent judicial practice.

I. *THE ORIGIN OF THE SUPREMACY CLAUSE*

It was precisely the rights of individuals as specified in treaties that prompted the Constitution's drafters to include the treaty reference in the Supremacy Clause.[9] British subjects had been disadvantaged by the colonies during the revolt against British rule in North America.[10] The property of British nationals, as well as debts owed to them, had been confiscated by some of the colonies.[11] When it came to negotiating a settlement, the British insisted that the property rights of their subjects be restored.[12] John Jay, Benjamin Franklin, and John Adams, negotiating for the United States in Paris, acceded to this British demand.[13] In the Treaty of Paris, by which Britain recognized the independence of the United States, the United States pledged to restore rights to these British subjects.[14] Specifically, Article IV

9. *See* Carlos Manuel Vàzquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1104 (1992).

10. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (describing Virginia's sequestration of British property during the American Revolution).

11. *See id.*

12. *See Ware*, 3 U.S. (3 Dall.) at 218 (noting that British Commissioners were particularly insistent regarding the security of British debts during the negotiation of the Treaty of Paris).

13. *See* Treaty of Paris art. V, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80 ("It is agreed that the 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, and also of the estates, rights and properties of persons resident in districts in the possession of his Majesty's arms, and who have not borne arms against the said United States.").

14. *See id.*

of the treaty proclaimed "that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."[15]

In Virginia, British creditors encountered impediments: unable to collect on a debt that the U.S. debtor had paid to the government of Virginia, one British creditor sued, and the case went to the U.S. Supreme Court (the "Supreme Court," or the "Court").[16]

Before the Supreme Court, the lawyers for the British creditor were the first, after adoption of the Constitution, to ask a U.S. court to implement the Supremacy Clause in favor of a litigant.[17] They asserted that the creditor had a right to a judicial remedy, arguing that:

> The words that "creditors shall meet with no lawful impediment in the recovery of all such debts," mean, that when the creditors apply to a court of justice, no law shall be pleaded in bar to a judgment for their debts. What else, indeed, could reasonably be the object of the British Minister, who was bound to protect the commercial interests of his nation, and who insisted on the insertion of the fourth article?[18]

In giving its decision, the Supreme Court referred to the Supremacy Clause, found the Treaty of Paris' Article IV language to apply, and granted recovery to the creditor.[19] Importantly, the Court read the Supremacy Clause as creating affirmative rights, and as providing a right of access to the courts. Justice Paterson read Article IV as directly prescribing the case's result: "This article reinstates the parties; the creditor and debtor before the war, are creditor and debtor since; as they stood then, they stand now."[20] Chief Justice Chase read Article IV as giving a creditor a cause of action in a court of law. He construed the phrase "[t]o the recovery" to mean "to the right of action, judgment, and execution, and receipt of the money, without impediments in courts of justice, which could only be by plea, (as in the present case) or by proceedings, *after judgment*, to compel receipt

15. *Id.* art. IV.
16. *See generally Ware*, 3 U.S. (3 Dall.) 199 (1796).
17. *See id.* at 204.
18. *Id.* at 218.
19. *See id.* at 284-85.
20. *See id.* at 256 (Paterson, J.).

of paper money, or property, instead of sterling money."[21] The court in effect voided the Virginia statute to protect the creditor's treaty-based right.[22]

A. *Nineteenth-Century Supremacy Clause Cases*

These two propositions—that a treaty can give rights, and that, if it does, the relevant courts must give a remedy—became the accepted meaning of the Supremacy Clause. In 1819, for example, Spain ceded territory in the American South to the United States, and Spain and the United States agreed in the treaty of cession that the property rights of persons holding land grants from the Spanish Crown would be respected.[23] Local authorities, however, did not uniformly recognize Spanish land grants.[24] The Supreme Court vindicated the rights of the grantees, over and against the action of the local authorities, based on the treaty's cession clause.[25] The Court read the clause to provide for a continuity of title after the transfer of sovereignty.[26] Without seeing the need to explain why a remedy flows from the right thus conferred, the Court gave a judicial remedy to the person holding the Spanish grant.[27]

The courts of the constituent states likewise protected treaty-based rights, in keeping with their obligations under the Supremacy Clause. The issue arose in extradition situations. Extradition is a treaty-based practice, typically on the basis of a bilateral treaty.[28] In one case, a man was extradited from Canada to Kentucky to be tried for forgery under an 1842 U.S.-British treaty that included an extradition provision.[29] The man was acquitted of forgery, but the public prosecutor then instituted pro-

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21. *Id.* at 241 (Chase, C.J.) (emphasis added).

22. *See id.* at 235-37 (Chase, C.J.).

23. *See generally* Treaty of Amity, Settlement and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252.

24. *See, e.g.*, United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

25. *See id.* at 98.

26. *See id.* at 88.

27. *See id.* at 98.

28. *See* Terlinden v. Ames, 184 U.S. 270, 289 (1902) ("In the United States, the general opinion and practice have been that extradition should be declined in the absence of conventional or legislative provision.").

29. *See* Commonwealth v. Hawes, 76 Ky. (13 Bush) 697 (1878) (citing the Treaty on Boundary, Slave Trade, and Extradition, U.S.-Gr. Brit., Aug. 9, 1842, 8 Stat. 572 [hereinafter U.S.-British Treaty]).

ceedings against him for embezzlement.[30] The man challenged the propriety of preferring a new charge, on the grounds that extradition law only entitles the receiving State to try the extraditee on the charge for which extradition was sought and granted.[31]

The principle relied on, called the rule of specialty,[32] was not even stated in the U.S.-British treaty, nor did the treaty say anything about remedies for violations.[33] It did not refer to an individual subject to extradition as bearing rights of any kind.[34]

The Kentucky Court of Appeals, the state's highest court, nonetheless enforced the restriction as requested by the extraditee:

> When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."[35]

The Kentucky court extrapolated from the obligation to extradite only for named offenses the proposition that an extraditee was protected as a matter of right from being charged with other offenses, and that the extraditee was entitled to a remedy to ensure that protection.[36]

In another case, two men were extradited from Canada to Ohio on an offense specified as extraditable in the same U.S.-British treaty.[37] After their arrival, the county prosecutor tried to

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30. *See id.* at 700-01.

31. *See id.* at 701.

32. By a principle of extradition law, called the rule of specialty, the requesting State may try only for the offense on which extradition was sought. *See, e.g.*, United States v. Rauscher, 119 U.S. 407, 424 (1886) ("[The right conferred upon persons brought from a foreign country into this under such proceedings]. . .is that he shall be tried only for the offense with which he is charged in the extradition proceedings , and for which he was delivered up.").

33. *See* U.S.-British Treaty, *supra* note 29, art. X.

34. *See id.*

35. *Hawes*, 76 Ky. at 702-03.

36. *See id.* at 712-13.

37. *See* State v. Vanderpool, 39 Ohio St. 273 (1883).

take them to trial for an additional offense.[38] The Ohio trial court read the treaty to give the accused a right to raise the treaty violation. The trial judge said that "the obligations of this treaty created a personal right in favor of the person extradited."[39]

At the time, a federal court and one state supreme court had held that, in such situations, the violation of a treaty, and any additional, related charges, could only be raised by the other party to the treaty, and not by the accused.[40] The Ohio Supreme Court, however, found more persuasive the view of the Kentucky Supreme Court and dismissed the additional charge.[41] Referring to the Supremacy Clause, the Ohio Supreme Court said that:

> [The] treaty is . . . the law of the land, and the judges of every state are as much bound thereby as they are by the constitution and laws of the Federal or State governments. It is therefore the imperative duty of the judicial tribunals of Ohio to take cognizance of the rights of persons arising under a treaty to the same extent as if they arose under a statute of the state itself.[42]

The court said, "if the courts cannot intervene . . . [the treaty] is of little or no value as a protection to the person extradited."[43]

The Ohio Supreme Court considered the fact that another remedy was potentially available, namely, that Britain could complain to the United States by way of a diplomatic protest;[44] but the court viewed that remedy as inadequate.[45] It wrote, "if it be true, that the abuse of extradition proceedings, under this treaty, is an offense for which the surrendering government alone can complain, the remedy is totally inadequate, and the treaty itself

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38. *See id.* at 274.

39. *Id.* (recounting the decision of the Ohio trial court).

40. *See* United States v. Caldwell, 25 F. Cas. 237 (C.C.S.D.N.Y. 1871) (No. 14,707); *see also* United States v. Lawrence, 26 F. Cas. 879 (C.C.S.D.N.Y. 1876) (No. 15,573); Adriance v. Lagrave, 59 N.Y. 110 (1874).

41. *See Vanderpool*, 39 Ohio St. at 279-80 ("[W]e think it clear that the court below did not err in refusing to put the accused on trial for a crime for which they were not extradited.").

42. *Id.* at 276-77.

43. *Id.* at 277.

44. *See id.* at 276.

45. *See id.*

may be rendered nugatory."[46]

The Ohio court rationalized that one aim of the treaty was to protect each contracting party in its right to grant asylum to persons persecuted for religious or political reasons: "The sole object of the treaty was to enable each government to protect its citizens and inhabitants in the right of asylum."[47] The treaty made no mention of a right of asylum,[48] so the court was reading quite a bit into the treaty to discern a right for an individual.

A federal trial court in another case similarly said that the U.S.-British treaty could be set up by the individual as a bar to prosecution:

> For the [demanding] government to detain such person for trial on any other charge would be not only an infraction of the contract between the parties to the treaty, but also a violation of the supreme law of this land in a matter directly involving his personal rights. A right of person or property, secured or recognized by treaty, may be set up as a defense to a prosecution in disregard of either, with the same force and effect as if such right was secured by an act of congress.[49]

The court viewed the extradition treaty as providing an extraditee with a personal right for which the courts must give a remedy.[50]

This same extradition issue reached the Supreme Court in *United States v. Rauscher*.[51] At issue was the extradition of a murder suspect under the U.S.-British extradition treaty.[52] At the request of the United States, the United Kingdom extradited Rauscher to the United States to stand trial for murder, the federal government seeking to prosecute for an act that occurred on the high seas.[53] After Rauscher arrived in the United States, the federal prosecutor did not proceed with a murder charge, but instead charged Rauscher with another federal offense—infliction

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46. *Id.* at 277.

47. *Id.* at 279.

48. *See* U.S.-British Treaty, *supra* note 29, art. X (providing for the mutual recognition of extradition requests, notwithstanding an extraditee's request for asylum, wherever evidence of criminality sufficient to justify apprehension in the Receiving State has been found).

49. *Ex parte* Hibbs, 26 F. 421, 431 (D.C. Or. 1886).

50. *See id.*

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

52. *See id.* at 409.

53. *See id.*

of cruel and unusual punishment.[54]

The federal trial court certified the following question to the Supreme Court: "Did or not the prisoner, under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, acquire a right to be exempt from prosecution upon the charge set forth in the indictment . . . ?"[55]

The Supreme Court reviewed the conflicting case law and concluded that trial on a charge other than that on which the person was surrendered was impermissible.[56] The Court cited approvingly the Kentucky and Ohio cases.[57] Citing the Supremacy Clause, the Court referred to "[t]he treaty of 1842" as "the supreme law of the land, of which the courts are bound to take judicial notice, and to enforce in any appropriate proceedings the rights of persons growing out of that treaty."[58] The Court concluded that the extraditee had enforceable rights even though the treaty concerned, in the first instance, only the two States party to the extradition treaty:[59]

> [I]t can hardly be supposed that a government which was under no treaty obligation, nor any absolute obligation of public duty, to seize a person who had found an asylum within its bosom, and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offence of a character which justified the government in depriving the party of his asylum.[60]

In the text of the treaty, the rights and obligations ran only between the two States. Each was obliged to extradite for certain specified offenses if the requesting State made out a sufficient case showing that the person had committed one of these offenses within its jurisdiction.[61] Nothing was said in the treaty about the rights of an extraditee. Nonetheless, the Court found a right and provided a remedy. It inferred from the text of the treaty the proposition that trial could be had on no offense

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54. *See id.*

55. *Id.*

56. *See id.* at 430.

57. *See id.* at 427-29 (citing Com v. Hawes, 76 Ky. (13 Bush) 697 (1878) and State v. Vanderpool, 39 Ohio St. 273 (1883)).

58. *Id.* at 419.

59. *See id.*

60. *Id.*

61. *See id.* at 421.

other than that on which extradition had been granted, and further, that a right in this regard existed on the part of the person extradited, and that such a person could raise that matter before a court.[62]

The Supreme Court focused on the purpose of the treaty, which it said was to allow trial for certain specified crimes.[63] From that aspect of the treaty the court inferred an obligation on the part of the demanding State to refrain from trying for other offenses, and a right of the extraditee not to be tried for other offenses:

> Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offence, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place.[64]

II. *CURRENT JUDICIAL PRACTICE*

A. *The Vienna Convention on Consular Relations*

The Supreme Court's approach to treaty-based rights in *Rauscher* contrasts sharply with that of courts in recent cases.[65] The issue has arisen with some frequency in cases involving the consular access provision (Article 36) of the Vienna Convention on Consular Relations ("Vienna Convention").[66]

The Vienna Convention, like the treaty at issue in *Rauscher*, provides rights, in the first instance, between nation states. It requires States to facilitate the activity of consuls accredited to them from other States,[67] and to allow consuls of the so-called sending State to carry out activities in aid of their co-nationals

62. *See id.* at 430.

63. *See id.* at 422-23.

64. *Id.* at 421.

65. *See, e.g.*, State v. Tuck, 766 N.E.2d 1065 (Ohio Ct. App. 2001) (concluding that individual rights under the Vienna Convention on Consular Relations, if they existed, would not require the suppression of evidence obtained in connection with an Article 36 violation).

66. Vienna Convention, *supra* note 5, art. 36.

67. *See id.* art. 36(1)(b).

who are present in the territory of the so-called receiving State.[68]

One such activity is assistance to co-nationals charged with criminal offenses, or committed to incarceration upon a criminal conviction.[69] The receiving State must allow a consul access to a person held in police custody, so that the consul can provide advice and material assistance to the co-national.[70]

The Vienna Convention views assistance by a consul as critical to a foreigner in ensuring the fairness of the proceedings, to avert discrimination against the foreigner, to ensure that the foreigner understands the proceedings, and to ensure that the foreigner's life circumstances are understood by the court.[71] According to instructions issued by the U.S. Department of State (the "State Department") to U.S. consuls stationed abroad, consuls are to maintain lists of local attorneys to recommend to detained U.S. nationals.[72] They are to provide instruction on judicial procedures in the receiving State, they are to check whether a detainee has been physically abused while in custody, and they are to ensure the adequacy of the physical conditions of detention.[73]

As a way of ensuring implementation, the Vienna Convention requires the arresting authorities to inform the foreign national that the foreign national may contact a consul.[74] Unlike the 1842 U.S.-British treaty, the Vienna Convention expressly refers to the individual and invests that individual with certain rights:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
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> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with

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68. *See id.*

69. *See id.* art. 36(1)(c).

70. *See id.*

71. *See* Vienna Convention, *supra* note 5, art. 5.

72. *See* U.S. Dep't of State [State Dep't], *Foreign Affairs Manual & Foreign Affairs Handbooks, Judicial Assistance Abroad*, 7 FAM Consular Affairs, at 990 (2005), *available at* http://foia.state.gov/masterdocs/07fam/07m0990.pdf.

73. *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 124-29 (2d ed. 1991) (outlining services a consul may provide to a detainee); *see also id.* at 166-67 (outlining U.S. Department of State ("State Department") instructions to U.S. consuls).

74. *See id.* at 164.

> respect to communication with and access to consular officers of the sending State;
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph[.][75]

The International Court of Justice ("ICJ") reads this provision as conferring a right on the foreign national.[76] This language speaks clearly of a right to the foreign national, thus rendering the provision self-executing under the analysis of that issue set by the Supreme Court early on in the history of the republic.[77]

Additionally, the Vienna Convention contains a provision on judicial implementation of the right thus defined.[78]

In a sub-paragraph immediately following, the Vienna Convention states:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[79]

This sub-paragraph is addressed to courts carrying out criminal proceedings against a foreign national. Thus, the Vienna Convention not only characterizes the foreign national as a bearer of a right, but specifies that this right should be implemented by the courts, in a way that gives "full effect" to the right.[80] The ICJ

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75. Vienna Convention, *supra* note 5, art. 36, ¶ 1.

76. *See* LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 494 (June 27).

77. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829); *see also* United States v. Percheman, 32 U.S. (7 Pet.) 51, 88-89 (1833).

78. *See* Vienna Convention, *supra* note 5, art. 36, ¶ 2.

79. *Id.*

80. *See, e.g.*, Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31), available at http://www.icj-cij.org/icjwww/idecisions.htm (noting the requirement that "full effect" be "given to the purposes for which the rights accorded under [Article 36] are intended.").

reads this second paragraph to mean that a judicial remedy is required when Article 36 is violated.[81]

Despite the apparent clarity of Article 36, federal and state court judges have shown reluctance to recognize that the foreign national is a bearer of a right, or has a remedy in court.[82] Foreign nationals have moved to suppress incriminating statements made by them before they had been informed by police authorities of their right to contact a consul.[83] If being informed of the right of consular access is a right that adheres to the individual foreign national, and if a judicial remedy is mandated by the Vienna Convention, one would expect suppression as a judicial remedy. Nonetheless, in *United States v. Lombera-Camorlinga*, the U.S. Court of Appeals denied suppression as a remedy, saying that "the Vienna Convention is silent and therefore ambiguous, at best on whether or not suppression is an appropriate remedy."[84] Most other state and federal courts that have addressed the issue have reached the same result, namely, that suppression is not required.[85] Courts have said that even if Article 36 can be read to create a right, no remedy is required in the event of breach.[86]

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81. *See* LaGrand, 2001 I.C.J. at 497-98.

82. *See, e.g.*, United States v. Lombera-Camorlinga, 206 F.3d 882, 888 (2000) (holding that a foreign national's post-arrest statements should not be excluded solely because he made them before being told of his Article 36 right to consular notification).

83. *See, e.g., id.* at 884.

84. *Id.*

85. *See, e.g.*, United States v. Minjares-Alvarez, 264 F.3d 980, 986 (10th Cir. 2001) (stating that "suppression is not an appropriate remedy for a violation of Article 36 of the Vienna Convention," and that nothing in Vienna Convention text requires suppression as a remedy); United States v. Felix-Felix, 275 F.3d 627, 635 (7th Cir. 2001) (stating that suppression of a statement is not a proper remedy for an Article 36 violation); United States v. Carrillo, 269 F.3d 761, 771 (7th Cir. 2001) (stating that suppression of a statement is not a proper remedy); United States v. Cowo, 22 F. App'x 25, 26 (1st Cir. 2001) (stating that neither suppression of an incriminating statement nor dismissal of an indictment is an appropriate remedy); Lopez v. State, 558 S.E.2d 698, 700 (Ga. 2002) (noting that "nothing in [the Vienna Convention] text requires the suppression of evidence," and concluding that, by its terms: the text does not require application of the exclusionary rule; such a judicially-created remedy cannot be imposed absent a violation of a constitutional right; and any rights created by the Vienna Convention do not rise to the level of a constitutional right); State v. Issa, 752 N.E.2d 904, 914-15 (Ohio 2001) (stating that a treaty based right is on a par with a statutory right, and that the exclusionary rule is used only for constitutional violations).

86. *See, e.g.*, State v. Tuck, 766 N.E.2d 1065, 1067 (Ohio Ct. App. 2001) (finding that even if Article 36 gives a right to the individual, that right does not rise to the level of a constitutional right); *see also supra* note 85.

The reluctance of modern U.S. courts to implement the Supremacy Clause in the Vienna Convention cases stands in marked contrast to the willingness of the Supreme Court in *Rauscher* to read a treaty provision to discern an individual right where none is mentioned, and to provide a remedy even though that matter too is not addressed in the treaty provision.[87]

In nineteenth-century practice, courts that found a right in a treaty provision never asked themselves whether a judicial remedy need be given.[88] To those judges, the answer was obvious. The Supremacy Clause said that treaties were binding on the courts.[89] No additional analysis was required.

It is, moreover, accepted in the law that when one has a right, one is entitled to a remedy. The Latin maxim *ubi jus, ibi remedium* ("where there is a right, there is a remedy") expresses a fundamental notion of the rule of law and of the role of courts in ensuring compliance with the law. Courts hearing Vienna Convention cases have raised the issue of a judicial remedy as a matter divorced from that of a right, and have thereby subverted the Supremacy Clause.[90]

B. *The Role of the Federal Executive*

The failure of the courts to implement the treaty-based right of consular access has been facilitated by the executive branch. In the positions it has taken before international tribunals, in policy statements it has published, and in representations made directly to federal courts, the State Department has maintained, contrary to the clear text of the Vienna Convention, that the right of consular access relates only to the two States involved—the receiving State and the sending State—but not to a foreign national detainee.[91]

In a letter addressing questions posed by the First Circuit Court of Appeals, the State Department said: "The right of an individual to communicate with his consular officials is derivative of the sending state's right to extend consular protection to its

87. *See* United States v. Rauscher, 119 U.S. 407, 419 (1886).

88. *See, e.g., id.*

89. *See id.*

90. *See supra* note 85.

91. *See* Letter from David Andrews, Legal Adviser, U.S. Dep't of State, to James K. Robinson, Assistant Att'y Gen. (Oct. 15, 1999), *available at* http://www.state.gov/documents/organization/7111.doc.

nationals," and therefore the Vienna Convention does not establish "rights of individuals."[92]

In concluding that the Vienna Convention creates no rights for an individual, the State Department focused on language in the Vienna Convention preamble that, it said, negated consular access as a right of the individual. The preamble phrase reads: "Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States."[93]

The Solicitor-General of the United States, also citing this preamble language, told the Supreme Court that consular access is not a right that adheres to a detained foreign national.[94] Even after the ICJ had construed Article 36 as providing a right to an individual, the Solicitor-General again cited the preamble language and told the Supreme Court that it need not follow the ICJ's view.[95] The Solicitor-General repeated that Article 36 created no justiciable right, and that courts need not provide review of a conviction in the event of a violation.[96] "Nothing in the Vienna Convention," he wrote, "provides that the 'rights' specified in Article 36(1)(b) may be privately enforced in a criminal proceeding."[97] Additionally, "a foreign national does not have a private right to seek to have his conviction or sentence overturned."[98]

The reliance of the State Department and the Solicitor-General on the preamble language of the Vienna Convention distorted the meaning of the treaty to avoid the remedy the treaty clearly requires. The preamble language is an obvious reference to the privileges of consuls, and to the several provisions of the Vienna Convention that exempt consuls from judicial process so that that they may carry out their consular tasks. Those privi-

92. *Id.* at Attachment A (Department of State Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li*).

93. Vienna Convention, *supra* note 5, at pmbl.

94. *See* Brief for the United States as Amicus Curiae at 19 n.3, 37, Breard v. Greene, 523 U.S. 371 (1998) (No. 97-1390 (A-738) and No. 97-8214 (A-732)).

95. *See id.*

96. *See* Brief for the United States as Amicus Curiae Supporting Respondent, Medellin v. Dretke, 125 S. Ct. 2088 (2005) (No. 04-5928), 2005 WL 504490, at *18 [hereinafter Medellin Brief for the United States].

97. *Id.* at *20.

98. *Id.*

leges are given to consuls, not to benefit the individual consul, although the effect may be a benefit, but to benefit the government in whose service the consul works. It is in this sense that the preamble clause states that the purpose of the Vienna Convention is not to benefit individuals. The preamble clause has no relation to the right afforded in Article 36 to a foreign national.[99] The Inter-American Court of Human Rights ("Inter-American Court") stated as much in a case involving the Vienna Convention.[100] The State Department had made its preamble argument to the court, after the court was asked to issue an advisory opinion on the topic of consular access. The Inter-American Court considered the State Department's argument, but rejected it, concluding to the contrary that the term "individuals" in the Vienna Convention preamble refers only to consular officers.[101]

C. *The* Medellin *Litigation*

In 2004, the Supreme Court for the first time granted certiorari in a case that would have required it to decide whether the Vienna Convention gives a right to a foreign national, and whether a judicial remedy flows from such a right.[102] The case also presented the question of whether U.S. courts must follow the conclusion on these points as made in a then recently decided case of the ICJ.[103] Mexico had sued the United States for disregarding the Vienna Convention in the cases of Mexican nationals convicted on capital charges in various U.S. state courts, and the ICJ had found the United States in default of its obligations for failing to review convictions when consular access had not been explained at the time of arrest to Mexican nationals.[104]

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99. *See* The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 74 (1999) ("Having examined the *travaux préparatoires* for the preamble of the Vienna Convention on Consular Relations, the Court finds that the 'individuals' to whom it refers are those who perform consular functions, and that the clarification cited above was intended to make it clear that the privileges and immunities granted to them were for the performance of their functions.").

100. *See id.*

101. *See id.*

102. *See* Medellin v. Dretke, 125 S. Ct. 686 (2004) (granting certiorari).

103. *See* Medellin v. Dretke, 125 S. Ct. 2088, 2089 (2005).

104. *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

President George W. Bush intervened to avert Supreme Court resolution of the matter.[105] The President ordered the state courts that had convicted the Mexican nationals to provide those nationals with the review found necessary by the ICJ.[106] He then asked the Supreme Court to reject the case, even after having granted certiorari, to let the state courts review Medellin's conviction, and those of the other Mexican nationals named by Mexico in the *Avena* case.[107] The courts of the states on whose death rows these Mexican nationals sat would inquire whether the violation of the obligation to inform about consular access had caused prejudice.[108]

Following upon that presidential memorandum, Medellin's lawyers filed a habeas corpus petition with the Texas Court of Criminal Appeals, and the Supreme Court decided that, given that filing and the President's memorandum, it did not need to hear the case.[109] It decided that it had granted certiorari improvidently.[110] By this stratagem, the President was able to avert a decision on the merits that may well have gone against the U.S. government's position. The views expressed by the justices as the court's majority deciding that certiorari had been improvidently granted suggested that the Court was sharply divided on the question of whether Vienna Convention Article 36 affords a justiciable right to a foreign national, and whether judicial review is required when Article 36 is violated.[111]

In further action to avert an implementation of the Supremacy Clause with respect to the Vienna Convention, President Bush withdrew the U.S. ratification of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes in 2005.[112] This proto-

105. *See Medellin*, 125 S. Ct. at 2090.

106. *See id.*

107. *See id.* (citing Medellin Brief for the United States, *supra* note 96, app. 2, 2005 WL 504490, at *1aa).

108. *See id.*

109. *See id.*

110. *See id.*

111. *See generally id.*

112. *See generally* Frederic L. Kirgis, *President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights* (Mar. 2005), *in* AM. SOC'Y OF INT'L L. [ASIL] INSIGHT, *available at* http://www.asil.org/insights/2005/03/insights050309a.html (describing the United States' decision to withdraw from the Optional Protocol and outlining the possible domestic and international legal consequences of this withdrawal).

col allows States Parties to the Vienna Convention to sue each other in the ICJ for breach of the convention.[113] In a letter to the U.N. Secretary-General, the United States declared its withdrawal as follows: "This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the ICJ reflected in that Protocol."[114]

The *Avena* decision had left open the important question of what kind of harm, if any, must befall a foreign national who was not informed about consular access in the processing of the case before judicial relief must be granted.[115] Precluding future cases limited the possibility that the ICJ might find lacking whatever standard might be used by U.S. courts.

Contrary to the position of the State Department and Solicitor-General, States party to the Vienna Convention read Article 36 to provide a justiciable right. Forty-nine European States submitted an amicus curiae brief to the Supreme Court in *Medellin* to urge the Court to find that a right is created and that violation of that right requires a judicial remedy.[116]

D. *Cases Properly Implementing the Vienna Convention on Consular Relations*

Some lower court judges have taken an approach more consistent with the Supremacy Clause and with that of the Supreme Court in *Rauscher.* A federal district judge in Illinois found that a judicial remedy is required for a consular access violation and ruled that the ICJ decision in *LaGrand* "conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts . . . have left open."[117]

An Oklahoma court ordered review of a foreign national's

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113. *See* Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 596 U.N.T.S. 487.

114. Kirgis, *supra* note 112.

115. *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

116. *See* Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, Medellin v. Dretke, 125 S. Ct. 2088 (2005) (No. 04-5928), 2005 WL 152924 at *7.

117. U.S. *ex rel.* Madej v. Schomig, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002) (citing LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 494 (June 27)).

conviction, citing a Vienna Convention violation.[118] Osbaldo Torres, a Mexican national named by Mexico in the *Avena* litigation, sought a stay of his execution, citing the ICJ ruling in *Avena*.[119] The Oklahoma Court of Criminal Appeals granted a stay and ordered a hearing to determine whether the Article 36 violation had prejudiced Torres' defense.[120] One judge in a concurring opinion said that the Oklahoma court was required to comply with the decision of the ICJ in *Avena*, and thus to read the Vienna Convention as providing an individual right and a remedy.[121]

E. *The Geneva Prisoners of War Convention*

Another example of a treaty that is not receiving proper implementation is the Geneva Convention Relative to the Treatment of Prisoners of War ("Third Geneva Convention").[122] The Third Geneva Convention requires that a prisoner of war, if tried for a criminal offense, must be tried in the same procedure that would be used by the relevant State to try its own military personnel.[123] Further, if doubt arises as to whether a person in custody is a prisoner of war, a determination on that issue must be made by "a competent tribunal."[124]

These issues arose in the case of Salim Hamdan, who was captured by U.S. forces in Afghanistan and transported to the U.S. detention facility at Guantanamo Bay, Cuba.[125] The President ordered that he be tried for various offenses before a military commission that the President had established.[126] In a U.S. district court, Hamdan challenged this procedure as not being the procedure whereby U.S. military personnel would be tried for criminal offenses, and the court agreed.[127] When the gov-

118. *See* Torres v. State, 120 P. 3d 1183 (2005); *see also* Torres v. State, No. 2004-442, slip op. (Okla. Crim. App. May 13, 2004) (Order Granting Stay of Execution and Remanding Case for Evidentiary Hearing).

119. *See id.*

120. *See id.*

121. *See id.* (Chapel, J., specially concurring).

122. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

123. *See id.* art. 102.

124. *Id.* art. 5.

125. *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

126. *See id.*

127. *See id.* at 160.

ernment replied that it did not consider Hamdan a prisoner of war, the court relied on the Geneva Convention provision requiring that in case of doubt the determination must be made by a competent tribunal.[128] The court said that no such determination had been made.[129]

The government then replied that the relevant provisions of the Third Geneva Convention are not self-executing.[130] The court responded that the statute providing for the possibility of trial by military commission limited such proceedings to "offenders . . . triable under the law of war," and thus that the statute referenced the law of war, which includes the Third Geneva Convention.[131] The court found, moreover, that the relevant provisions of the Third Geneva Convention were self-executing and therefore were to be applied under the Supremacy Clause.[132] To reach that conclusion, the court cited the Supreme Court's *Head Money Cases*, in which the Supreme Court said that treaty provisions providing rights fall under the Supremacy Clause to be implemented by the courts.[133] The court said that the Geneva Conventions "were written to protect individuals," and that nothing in the Convention "manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation."[134] The court, therefore, granted Hamdan's petition that he not be tried before a military commission.[135]

The district court's analysis reflected appropriate implementation of the Supremacy Clause. On appeal, however, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit reversed.[136] The panel did so in an opinion that cites, but misuses, nineteenth-century Supreme Court case law on the Supremacy Clause.[137] The opinion is the more worrying because

128. *See id.* at 161.

129. *See id.* at 162.

130. *See id.* at 163-64.

131. *Id.* at 164.

132. *See id.*

133. *See id.* at 164-65 (citing Head Money Cases v. Robertson, 112 U.S. 580, 598-99 (1884)).

134. *Id.* at 165.

135. *See id.* at 173-74.

136. Hamdan v. Rumsfeld, 415 F.3d 33, 44 (D.C. Cir. 2005), *cert. granted*, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05-184).

137. *Id.* at 38-39.

one panel member was Judge Roberts, who shortly thereafter became Chief Justice of the Supreme Court.[138]

Rejecting the district court's conclusion regarding the Third Geneva Convention, the panel said "that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court."[139] In reaching this conclusion, the panel quoted language from the *Head Money Cases*, writing that a "treaty is primarily a compact between independent nations," and that in the event of a violation, this "becomes the subject of international negotiations and reclamation, not the subject of a lawsuit."[140]

The panel's quotation from the *Head Money Cases*, while accurate, was misleading. The panel omitted the language immediately following what it quoted, in which the Supreme Court made clear that many treaty provisions are justiciable.[141] Specifically, the Supreme Court had written:

> But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts . . . . A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.[142]

In such a situation, the Supreme Court continued, a court "resorts to the treaty for a rule of decision for the case before it as it would to a statute."[143] By quoting the *Head Money Cases* so selectively, the panel turned the Supreme Court's meaning on its head. Any treaty violation may lead a contracting State to protest, but this fact is irrelevant to the question of whether one or another treaty provision is self-executing.

In resolving the Third Geneva Convention issue against Hamdan, the panel relied on a footnote in *Johnson v. Eisentrager*, in which the Supreme Court discussed not the Third Geneva

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138. *Id.* at 34.

139. *Id.* at 40.

140. *Id.* at 38-39 (quoting Head Money Cases v. Robertson, 112 U.S. 580, 598 (1884)).

141. *See Head Money Cases*, 112 U.S. at 598-99.

142. *Id.*

143. *Id.* at 599.

Convention, but an earlier prisoner convention of 1929, and in which it said that the parties to the 1929 convention contemplated enforcement at the inter-governmental level, rather than by courts.[144] However, the Supreme Court in *Eisentrager*, despite this statement, considered in detail the merits of the individual's arguments that his rights under the 1929 convention had been violated and found them wanting.[145] The 1929 convention, moreover, had no provision comparable to Article 5 of the 1949 convention, which states that, in case of doubt about whether a person is a prisoner of war, the issue must be resolved by a competent tribunal.[146]

The panel did not analyze Article 5 to determine whether it is self-executing. Nonetheless, the panel said, "This aspect of *Eisentrager* is still good law and demands our adherence."[147] This statement appears to consider the footnote in *Eisentrager* to be binding precedent.[148] The panel did not mention the Supreme Court decision in *Hamdi v. Rumsfeld*, in which both a four-member plurality and a two-judge concurring group discussed the Third Geneva Convention as relevant to determining the status of a person who was challenging that status in a judicial forum.[149]

F. *Human Rights Treaties and Self-Execution*

The U.S. federal executive has also facilitated non-implementation of treaty-based rights by promoting the inclusion of so-called "non-self-execution" clauses when the Senate gives consent to the ratification of human rights treaties.[150] The aim is to

144. *See Hamdan*, 415 F.3d at 39 (citing Johnson v. Eisentrager, 339 U.S. 763, 789 n.14 (1950)).

145. *See Eisentrager*, 339 U.S. at 789.

146. *Compare* Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S 343, *with* Third Geneva Convention, *supra* note 122, art. 5 ("[S]uch persons shall enjoy protection of the present Convention until such time as their status has been determined by a competent tribunal.").

147. *Hamdan II*, 415 F.3d at 39.

148. *See id.* (citing *Eisentrager*, 339 U.S. at 789 n.14).

149. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 520, 538 (2004) (O'Connor, J., plurality opinion) ("[M]ilitary regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention."); *see also id.* at 549 (Souter, J., joined by Ginsburg, J., concurring in judgment) ("[Hamdi] would therefore seem to qualify for treatment as prisoner of war under the Third Geneva Convention.").

150. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of*

ratify, but to avoid applying the treaties as domestic law.

The United States criticized many governments for human rights violations but was itself frequently criticized for not having ratified human rights treaties.[151] By the 1980s, "United States foreign policy required U.S. support for, if not leadership in, the international human rights movement, and required U.S. adherence to international human rights conventions."[152] It was in this posture that President George H.W. Bush took major human rights treaties to the Senate, seeking its consent to ratification.[153] The United States would ratify, but the Senate would declare that the operative provision were not self-executing.[154] When the Senate gave consent to ratification of the International Covenant on Civil and Political Rights ("ICCPR"), the

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Senator Bricker, 89 AM. J. INT'L L. 341, 347-48 (1995) (noting that the Reagan, George H.W. Bush, and Clinton administrations requested non-self-executing declarations or failed to seek implementing legislation in relation to human rights covenants).

151. *See, e.g., id.* at 343-44:

> Even friends of the United States have objected that its reservations are incompatible with that object and purpose and are therefore invalid. By adhering to human rights conventions subject to these reservations, the United States, it is charged, is pretending to assume international obligations but in fact is undertaking nothing.

Id.

152. *Id.* at 349.

153. *See International Covenant on Civil and Political Rights: Hearing Before the Senate Comm. on Foreign Relations*, 102d Cong. 4-5, 16 (1991) (statement of Assistant Sec'y of State Richard Schifter) (quoting Letter on the [International Covenant on Civil and Political Rights] from President George H.W. Bush to the Senate Comm. on Foreign Relations (Aug. 8, 1991)) ("[R]atification would also strengthen our ability to influence the development or appropriate human rights principles in the international community, and provide an additional and effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world."); *see also Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 5, 8 (1990) (statement of Hon. Abraham Sofaer, Legal Adviser, Dep't of State) ("[W]e must stand with other nations in pledging to bring to justice those who engage in torture . . . and this why we support this convention.").

154. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S 85, *available at* http://www.ohchr.org/english/countries/ratification/9.htm [hereinafter Torture Convention]; *see also* ICCPR; Henkin, *supra* note 150, at 347-48 (noting that the International Covenant on Civil and Political Rights ("ICCPR") and the International Convention Against All Forms of Racial Discrimination ("Race Convention") (*opened for signature* Dec. 12, 1965, 60 U.N.T.S 195) have both been ratified with non-self-executing declarations); Jordan Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993) (noting that the Senate accepted George H.W. Bush's recommendation that the ICCPR be non-self-executing).

Convention Against Torture, and the International Convention on the Elimination of All Forms of Racial Discrimination, it declared that their rights-guarantee provisions were not to be self-executing.[155]

The legal significance of these declarations remains unclear. In one of very few relevant precedents, the U.S. Court of Appeals for the D.C. Circuit held that a Senate statement that was part of a resolution of consent was of no effect.[156] The case concerned a treaty with Canada that provided for joint production of electrical power at the U.S.-Canadian border.[157] In its resolution of consent to the treaty, the Senate provided that the U.S. share of the power to be generated would be allocated only by an act of Congress.[158] New York applied to the Federal Power Commission for a license for a project that would use all the water that, under the treaty, fell to the United States for its use.[159] The Federal Power Commission objected to New York's action, asserting, on the basis of the Senate statement, that only the federal government might allocate the power.[160] The Court of Appeals sided with New York.[161] In doing so, the court noted that the Senate's statement was outside the text of the treaty.[162] The court said that the statement was not a reservation because it did not affect relations between Canada and the United States under the treaty.[163] Hence, the Senate statement was of no effect in domestic law. The court remanded the matter to the Federal Power Commission, which, in the court's view, was authorized to act on New York's application.[164]

The Constitution does not grant the Senate power to impose a condition that affects the implementation of a treaty.

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155. *See* 140 CONG. REC. 14326 (June 24, 1994) (stating recommended declarations to the Race Convention); *see also* 138 CONG. REC. 8071 (Apr. 2, 1992) (stating recommended declarations to the ICCPR); 136 CONG. REC. 36198 (Oct. 27, 1990) (stating recommended declarations to the Torture Convention).

156. *See* Power Auth. of N.Y. v. Fed. Power Comm'n, 247 F.2d 538, 543 (D.C. Cir. 1957).

157. *See id.* at 539 n.1, 540 (citing Niagara River, Water Diversion art. VI, Feb. 27, 1950, U.S.-Can., 1 U.S.T 694, 697 [hereinafter Niagara River Treaty]).

158. *See id.* at 539 (citing Niagara River Treaty, *supra* note 157, at 699).

159. *See id.*

160. *See id.* at 539-40.

161. *See id.* at 544.

162. *See id.* at 543.

163. *See id.* at 541-42.

164. *See id.* at 544.

The Senate may make suggestions prior to giving consent, and if the President declines the suggestions the Senate may refuse its consent.[165] Senate statements accompanying acts of consent are, however, not binding on the courts.[166] The power to make treaties is that of the President: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ."[167]

To date, U.S. courts have mainly allowed the Senate and the President to keep rights specified in ratified human rights treaties out of court. The courts have been reluctant to view ratified human rights treaties as relevant to deciding issues of rights. No case has squarely presented to the Supreme Court the issue of the domestic applicability of ratified human rights treaties encumbered by a "non-self-execution" clause. In one case, the Court made passing reference to the ICCPR, saying that the Senate had "declined to give the federal courts the task of interpreting and applying human rights law, as when its ratification of the [ICCPR] declared that the substantive provisions of the document were not self-executing."[168]

In making this statement, the Court mischaracterized the treaty process by inaccurately referring to the Senate as the body that ratified the ICCPR.[169] Under the Constitution, it is the President who ratifies a treaty.[170] The Senate merely gives consent to the President, who may then ratify but is not required to.[171] Thus, whatever the Senate may have intended by the declaration, the Senate's action was not an act of ratification.

More important than this mistake about the treaty ratification process, it is not obvious that the Senate, by virtue of its declaration on non-self-execution, intended that the courts not

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165. *See generally* 14 DIG. INT'L L. 138 (Marjorie M. Whiteman ed., 1970).

166. *See* Paust, *supra* note 58, at 1266-67; *see also* David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 67-69 (1978) (noting that non-self-executing declarations remove the question of whether or not treaties are self-executing from the courts).

167. U.S. CONST. art. II, § 2, cl. 2.

168. Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004) (citing 138 CONG. REC. S8071 (1992)).

169. *See id.*

170. *See* U.S. CONST. art. II, § 2, cl. 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.").

171. *See id.*

interpret or apply the substantive provisions of the ICCPR. It may have meant, more modestly, that a federal cause of action not be created by the ICCPR, given that one already exists in federal courts for violation of a treaty. United States district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[172]

In its report on the ICCPR, the Senate Foreign Relations Committee said, "[t]he intent [behind the declaration about self-execution] is to clarify that the [ICCPR] will not create a private cause of action in U.S. courts."[173] Under federal statutory law, a private cause of action already exists for a suit based on a treaty provision.[174]

Whatever the situation regarding suits in which a plaintiff claims a right based on a treaty, the Senate expressed no intent to preclude a person from invoking rights-guarantee provisions defensively, to avert adverse governmental action. The existence of a cause of action is irrelevant when a party seeks to invoke a treaty provision defensively.[175] Although the contrary position has been argued,[176] there appears to be no bar, arising from the Senate declaration or any other source, against relying on a pro-

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172. *See id.* art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ."); *see also* 28 U.S.C. 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

173. Comm. on Foreign Relations, U.S. Senate, S. Exec. Rep. No. 102-23, at 19 (1992), *reprinted in* 31 I.L.M. 645, 648 (1992).

174. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809-810 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985) (rejecting suits based on five treaties on grounds that the treaty provisions were not self-executing, and thereby implying that the suits could have been maintained if based on self-executing treaty provisions); Saipan v. U.S. Dep't of the Interior, 502 F.2d 90 (9th Cir. 1974) (allowing private parties to base action on trusteeship agreement between United States and U.N. Security Council); Handel v. Artukovic, 601 F. Supp. 1421, 1425-26 (C.D. Cal. 1985) (rejecting suits based on two treaties on grounds that the treaty provisions were not self-executing, and thereby implying that the suits could have been maintained if based on self-executing treaty provisions); *cf.* Xuncax v. Gramajo, 886 F. Supp. 162, 194 (D. Mass. 1995) (suggesting in dictum that a cause of action exists under a treaty only if an act of Congress creates one for the particular treaty).

175. *See* Vázquez, *supra* note 9, at 1143; *see also* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 451 n.185 (1997).

176. *See* Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1224-25 (1991).

vision of the ICCPR from a defensive posture, as when a person is accused of crime, or is contesting extradition.

Many lower court judges have referred to the Senate declaration as if it were binding, although these references have typically been in passing, with no analysis.[177] The U.S. Court of Appeals for the First Circuit said in one case that the ICCPR does not create privately enforceable rights for a plaintiff, because of the Senate's declaration.[178] In that case, however, the court analyzed the ICCPR provision on which the plaintiff relied and found that it did not aid the plaintiff's cause.[179]

G. *Reasons for the Shift in Court Practice*

The question arises: why would the implementation of the Supremacy Clause for treaty-based rights seem axiomatic to a nineteenth-century judge yet problematic to many judges today? One possible reason is that in the nineteenth century the United States was a new nation, seeking respectability after its unorthodox separation from the British empire.[180] Nineteenth-century judges seemed at pains to show that the United States respected the rules of the international community.[181] The United States was a renegade for having raised arms to liberate itself from Britain, but having done so, it needed the consent of nations in order to function.[182]

By the twentieth century, that sense had dissipated. The United States had developed a sense of superiority over the Old World.[183] It no longer needed to prove itself. The United States

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177. *See, e.g.*, Naoum v. Attorney Gen. of U.S., 300 F. Supp. 2d 521, 527 (N.D. Ohio 2004).

178. *See* Igartua de la Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994).

179. *See id.*

180. *See* Robert Kagan, *Power and Weakness*, 113 POL'Y REV. 3, 6 (2002), *available at* http://www.policyreview.org/JUN02/kagan.html (characterizing U.S. foreign policy in the early nineteenth century as defined by weakness relative to European powers); *cf.* Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction Over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1769 (2004) (suggesting that the "young, weak Republic" was threatened by individual state defections and the possibility of war with a foreign power).

181. *See supra* Part I.A.

182. *See* Kagan, *supra* note 180.

183. *Cf.* Lee, *supra* note 180, at 1770 (noting change in Supreme Court jurisprudence after 1934, "when the great-power status of the United States in the world balance was incontestable").

was the land of democracy, a land where one rose by merit. This perception may have overlooked some unpleasant realities of the late nineteenth-century United States, where electoral politics were something less than the ideal of legislators representing the people and working for the public good, and where the aftermath of slavery hardly equated with democracy.[184] Nonetheless, the self-image of the United States was changing.

World War II reinforced this new perception. The United States had saved the world, at a time when the Old World powers were on their knees. The United States promoted human rights in the world.[185] The United States advocated adoption of the Universal Declaration of Human Rights by the United Nations,[186] but international protection of human rights was not to be used against the United States to inquire into race segregation.[187] When it was proposed to the U.N. Human Rights Commission to study U.S. racial segregation, the United States resisted.[188]

Nonetheless, the United States promoted the adoption of human rights instruments, in part in reaction to the World War II atrocities, and in part to demonstrate the inferiority of the socialist bloc powers.[189] When it came to ratification of human rights treaties, the racial situation in the United States proved to be an obstacle. In the 1950s, the Senate refused ratification, fearing that the dirty laundry of segregation might be aired on a world stage.[190] As tens of nations ratified human rights treaties,

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184. *See generally* PAUL LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN (1998); CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955 (2003).

185. *See* Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 301-06 (2002) (narrating the evolution of U.S. human rights policy).

186. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 14 U. PA. L. REV. 399, 410-12 (2000) (narrating U.S. involvement in the creation of the Universal Declaration of Human Rights).

187. *See* Natsu Taylor Saito, *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 YALE HUM. RTS. & DEV. L.J. 53, 76-81 (1998) (describing history of slavery-related international law prohibitions in the United States).

188. *See, e.g.*, LAUREN, *supra* note 184, at 226-27 (discussing U.S. resistance to United Nations ("U.N.") study of racial segregation); ANDERSON, *supra* note 184, at 75-112 (discussing same).

189. *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

190. *See id.* at 43-64.

the United States balked.[191]

One factor inhibiting proper implementation of treaty-based rights is that the Supremacy Clause limits the rights of the states over and against the federal government. Treaties are federal law, and to the extent that rights provisions in treaties require states to change their practices, federal power rises and state power diminishes. Judges may be reluctant to reduce the power of the states, even if that is what the Framers contemplated when they inserted a reference to treaties in the Supremacy Clause.

Law schools do not focus on the Supremacy Clause's mention of treaties, in constitutional law courses. When a judge is told by an attorney that the Supremacy Clause requires implementation of a treaty provision, the judge may have no experience from which to assess the argument.

III. *PROPER JUDICIAL IMPLEMENTATION OF THE SUPREMACY CLAUSE*

While the Supreme Court has not promoted proper implementation of the Supremacy Clause in regard to U.S.-ratified treaties, it has shown interest in the positions adopted in human rights treaties as it construes rights protections in the U.S. Constitution. To be sure, like the question of implementing the Supremacy Clause, this matter has also been controversial for the Court. In finding that the U.S. Constitution prohibits the execution of juveniles, however, the Court recently referred to a number of treaties that outlaw juvenile execution: the U.N. Convention on the Rights of the Child, the ICCPR, the American Convention on Human Rights, and the African Charter on the Rights and Welfare of the Child.[192]

Some state and federal judges have used ratified human rights treaties as if they generate domestically applicable law, despite the declarations against self-execution. One federal judge

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191. *See generally*, Henkin, *supra* note 150.

192. *See* Roper v. Simmons, 544 U.S. __, 125 S. Ct. 1183, 1199 (2005) (citing Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 43 (entered into force Sept. 2, 1990); *see also* ICCPR, *supra* note 8; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143 (entered into force July 18, 1978); African Charter on the Rights and Welfare of the Child, *adopted* July 11, 1990, OAU Doc. CAB/LEG/TSG/Rev.1 (entered into force Nov. 28, 1999), *available at* http://www.africa-union.org.

used provisions of the ICCPR on family reunion, on prohibiting cruel, inhuman, or degrading treatment, and on the right of aliens to present reasons against their expulsion in deciding against the deportation of an alien.[193]

In one Ohio case, a dissenting judge of the Ohio Supreme Court was presented with the case of foreigner convicted of capital murder, but who was not informed at the time of arrest of his rights under Article 36 of the Vienna Convention.[194] The judge recited her personal history as the child of missionaries and her residency abroad in that context.[195] She noted the importance of the role that U.S. officials may be able to play to protect U.S. nationals arrested abroad.[196] She wrote, in her dissent, that she would reverse a capital murder conviction for the Article 36 violation:

> Our best way to ensure that other nations honor the treaty by providing consular access to our nationals is to demand strict adherence to the right to consular access for foreigners in *our* country. . . . If the United States fails in its responsibilities under the convention, then other member countries may choose to do unto us as we have done unto them.[197]

A. *The Courts as Implementer of International Obligations*

The rights norms contained in ratified treaties are, moreover, norms which the United States has pledged to follow. Non-implementation by the U.S. courts puts the United States in violation of its obligation towards the other States that have ratified. Treaties may contain provisions that require that the courts of a ratifying state provide remedies to protect the defined rights.[198]

Courts, as agencies of government, act in ways that are relevant to implementation by a state of its international obligations. Action or non-action by courts can place the United States in violation of obligations and even subject it to international sanctions. In settlement of the 1979 hostage-taking episode in Iran,

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193. *See* Maria v. McElroy, 68 F. Supp. 2d 206, 231-32 (E.D.N.Y. 1999).

194. *See* State v. Issa, 752 N.E.2d 904, 931 (Ohio 2001) (Lundberg Stratton, J., dissenting).

195. *See id.* at 935.

196. *See id.*

197. *Id.* (emphasis in original).

198. *See* ICCPR, *supra* note 8, art. 2, 999 U.N.T.S. 171; *see also* Vienna Convention, *supra* note 5, art. 36, ¶ 2.

the United States and Iran established a claims tribunal for mutual financial claims.[199] Under the terms of the agreement, if the tribunal gives an award, the courts of either Iran or the United States must enforce it.[200] In one case, an Iranian party won a tribunal award against a U.S. corporation and then sued in U.S. district court to enforce it.[201] The district court declined to enforce the award, whereupon the Iranian party appealed to the U.S. Court of Appeals for the Second Circuit, but that court also denied enforcement.[202] The Iranian party then brought a claim before the tribunal against the United States, arguing that the U.S. courts' failure to enforce the award constituted a violation by the United States of its obligation under the U.S.-Iranian agreement.[203] Agreeing with the Iranian party, the tribunal awarded it damages to be paid by the United States.[204]

If a treaty requires a remedy and a court with appropriate jurisdiction fails to provide it, the State may be in violation of its international obligations. In international law, a State is responsible for its obligations regardless of which particular branch of government is charged with meeting those obligations.[205] As stated in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions."[206]

B. *The Constitutional Rank of a Treaty*

One hurdle is that the courts frequently refer to treaties as

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199. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, art. 2, Jan. 19, 1981, *reprinted in* 20 I.L.M. 230.

200. *See* Islamic Republic of Iran v. United States, Award No. 62-A21-FT, ¶ 15 (May 4, 1987).

201. *See* Iran Aircraft Indus. v. AVCO, 980 F.2d 141, 142 (2d Cir. 1992).

202. *See id.* at 146.

203. *See* Islamic Republic of Iran v. United States, Award No. 586-A-27-FT (June 5, 1998).

204. *See id.*

205. *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 4, *in* Report of the International Law Commission of the General Assembly on its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 84, U.N. Doc. A/56/10 (2001).

206. *Id.*

being on a par with statutes, rather than occupying a rank that more properly accords with a treaty's position in the constitutional order.[207] Based on this equation, courts have, for example, declined to afford post-conviction relief to a person convicted of a crime, on the rationale that post-conviction relief requires an allegation of a constitutional violation.[208]

This equation of treaty and statute finds support in the Supreme Court decision in *Whitney v. Robertson*, an opinion that is widely cited for the proposition that a treaty has no greater constitutional rank than a statute.[209] The Court's rationale was that the Supremacy Clause refers to both statutes and treaties as the law of the land, therefore, they must be equal in rank.[210] "By the Constitution," said the Court, "a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other."[211]

That logic falls apart, however, when one analyzes the text of the Supremacy Clause, to which the Court is referring. The Supremacy Clause states: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[212] The Supremacy Clause thus refers not simply to statutes and treaties as law of the land, but to the Constitution as well.[213] By the Court's logic, the Constitution, treaties, and statutes all enjoy the same rank—an impossible result. Arguably, the Supremacy Clause subordinates statutes to the Constitution by referring to the laws of the United States as being made pursuant to the Constitution. But it does not expressly subordinate treaties, since one aim of the Clause was to make clear that the supreme law of the land included not only treaties made after the date of the Constitution, but also those made previously under the Articles

207. *See, e.g.*, State v. Loza, 1997 Ohio App. LEXIS 4574 (Ohio Ct. App. 1997).

208. *See id.*

209. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 376 (1998) (citing Whitney v. Robertson, 124 U.S. 190 (1888)) (noting that as between a statute and a treaty, the one "last in date" controls).

210. *See Whitney*, 124 U.S. 190.

211. *Id.* at 194.

212. U.S. CONST. art. VI, cl. 2.

213. *See id.*

of Confederation.[214] In that sense, not all treaties were "pursuant" to the Constitution, though the Supreme Court decided nonetheless that personal liberties protected by the Bill of Rights could not be infringed by the conclusion of a treaty.[215]

In a later case, the Supreme Court, without indicating it was backing off the position it took in *Whitney v. Robertson*, suggested that treaties might be different from statutes, at least in regard to the scope of what they might regulate.[216] There the issue was whether the federal government could, by treaty, intrude on the rights of the constituent states, even in a situation in which Congress would not be entitled to do so.[217] A treaty regulated the killing of migratory birds passing through the United States.[218] The Court had already held void an Act of Congress that purported to effect such regulation.[219] Then, by treaty, the federal government provided for federal authority in the matter.[220] Contrasting a treaty with an Act of Congress in this regard, the Court explained "qualifications" on the federal treaty-making authority as follows:

> We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.[221]

While the issue in that case was the scope of what might be covered by a treaty as opposed to an Act of Congress, the Court was nonetheless intimating that treaties might occupy a rank a step above that of an Act of Congress.[222] This hint has not, how-

214. *See* Reid v. Covert, 354 U.S. 1, 16-17 (1957).

215. *See id.* at 17 ("The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.").

216. *See* Missouri v. Holland, 252 U.S. 416, 433 (1920).

217. *See id.* at 432.

218. *See id.* at 431.

219. *See id.* at 432.

220. *See id.* at 431.

221. *Id.* at 433.

222. *See id.* at 435.

ever, been developed in subsequent cases.

In any event, treaties represent a commitment of the nation to other nations of the world. To the extent they do not infringe on individual rights guaranteed by the Bill of Rights, there is no inherent reason they should rest only on a par with an Act of Congress as far as the courts are concerned. Courts have, in fact, shown some sympathy for according treaties a higher status in cases in which statutes and treaties appear to conflict. Although *Whitney v. Robertson* says that the two are on a par, and that the later in time prevails, when a later statute appears to conflict with a treaty, courts have gone to great lengths to construe the statute in a way that does not conflict with the treaty.[223]

C. *Deference to the Executive as a Canon of Construction*

It is ultimately to the courts to decide what role to accord treaties, as they construe the Supremacy Clause. So, too, is it for courts to construe treaties, just as they construe statutes and the Constitution. Courts have deferred to the executive when treaty provisions are ambiguous.[224] That practice is being questioned. Perplexed over what he found to be an insupportable reading of the Vienna Convention by the State Department, First Circuit Judge Torruella pointed out that finding the meaning of a treaty is a task that falls to the courts under the Supremacy Clause.[225] "We are no longer merely considering international agreements to be administered or enforced at the discretion of the State Department, in which its interpretation as to applicability is entitled to special expertise or deference," he wrote.[226] The Vienna Convention, after being ratified, he said, "became the municipal law of the United States pursuant to the Supremacy Clause, and its provisions enforceable in the courts of the United States at the behest of affected individuals without the need for additional legislative action."[227]

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223. *See, e.g.*, United States v. Palestine Liberation Org., 695 F. Supp. 1456 (S.D.N.Y. 1988).

224. *See, e.g.*, Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

225. *See* United States v. Nai Fook Li, 206 F.3d 56, 69 (2000) (Torruella, J., dissenting).

226. *Id.* at 69-70.

227. *Id.*

If the proposition that treaties are the law of the land is to be taken seriously, it is the courts who bear the burden of construing and applying them. If a treaty affects only private parties, like the U.N. Convention on Contracts for the International Sale of Goods,[228] the executive branch may be neutral on an issue before the court. Where, however, the issue before the court is whether the executive has violated the treaty, deference to the executive may simply deny a plaintiff recovery.[229]

In Hamdan's suit challenging the action of the President under the Third Geneva Convention, the U.S. Court of Appeals for the D.C. Circuit said it would defer to the President's construction of the Convention.[230] The panel said that "his construction and application of treaty provisions is entitled to 'great weight.'"[231] Deferring to the executive in that situation jeopardizes due process. Courts are to be neutral arbiters, and if, upon suit against the executive branch, the judicial branch—another branch of the same government—accepts the executive's construction over the plaintiff's, the court will not be seen to be doing justice.

CONCLUSION

In a piece she prepared for a book on implementation of treaties, former Supreme Court Justice Sandra Day O'Connor wrote: "I think domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations."[232] Contrary to Justice O'Connor's plea, today's judges often seem at pains to find a way around implementing the Supremacy Clause when a treaty-based right is asserted before them.

Early in the history of the Republic, rights based on a treaty

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228. *See* Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

229. *See, e.g., Hamdan II*, 415 F.3d 33, 41 (D.C. Cir. 2005) (deferring to the President's interpretation of the Third Geneva Convention).

230. *See id.* at 41-42.

231. *Id.* at 41 (stating that "[the President's] construction and application of treaty provisions is entitled to 'great weight'").

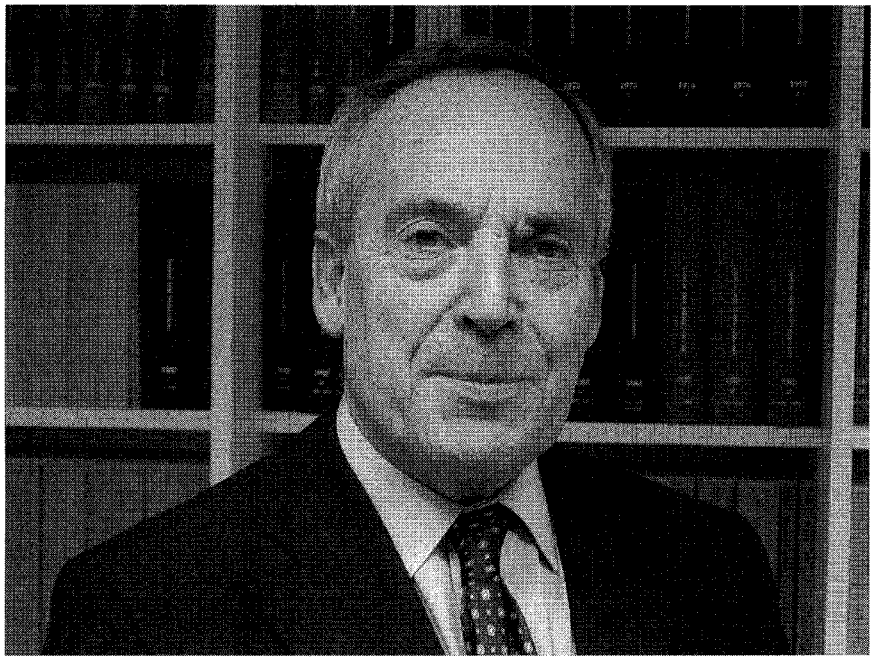
232. Sandra Day O'Connor, *Federalism of Free Nations*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996).

commitment were respected by the courts. If the courts do not implement treaty-based rights, we are open to the charge of "national perfidy" about which James Madison warned.[233] We are subscribing to principles in a commitment to other nations but then failing to follow them. To comply with Justice O'Connor's recommendation, judges need not find new legal principles. They need only look at their own history.

233. *See* United States v. Belmont, 301 U.S. 324, 331 (1937):

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective. 'To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war.'

Id.



The Editorial Board of the *Fordham International Law Journal* dedicates Volume 29, Book 4 to former Advocate General FRANCIS JACOBS

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