COMMENT

The Jurisprudence of Treaty Interpretation

INTRODUCTION

The interpretation of treaties[1] has been the dispositive question in cases both sacred and profane: from litigation over fundamental human rights[2] to litigation over payroll taxes;[3] from debate over anti-ballistic missile systems[4] to debate over capitalist ethics.[5] Unfortunately, such

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[1] Technically, treaties are international agreements ratified following Senate consent. U.S. CONST. art. II, § 2. Other international agreements originate through other processes. *See infra* notes 36-39 and accompanying text. For three reasons this Comment uses the term "treaties" generically to denote any international agreement. First, Supreme Court interpretations generally do not distinguish between the two. *See* Weinberger v. Rossi, 456 U.S. 25, 29 (1982). Only if litigants challenge the international agreement on constitutional grounds does a court examine the agreement's genesis. *See infra* notes 92-148 and accompanying text. Second, under international law, a treaty is any international agreement concluded between sovereigns, regardless of the manner in which the sovereigns bring it into force. *Weinberger*, 456 U.S. at 29. Finally, as a matter of euphony, "treaty" is a less distracting term than "international agreement."

[2] *See* Sei Fujii v. California, 38 Cal. 2d 718, 242 P.2d 617 (1952) (United Nations Charter provision barring racial discrimination not law of the land without congressional action).

[3] *See* O'Connor v. United States, 107 S. Ct. 347 (1986) (Panama Canal Agreement creates no special tax treatment for American employees of Panama Canal Commission).

[4] Recently, State Department Legal Advisor Abraham Sofaer reinterpreted the Anti-Ballistic Missile Treaty, May 26, 1972, United States-Union of Soviet Socialist Republics, 23 U.S.T. 3435, T.I.A.S. No. 7503, (ABM Treaty) to allow development of Strategic Defense Initiative components. SENATE COMM. ON FOREIGN RELATIONS, THE ABM TREATY INTERPRETATION RESOLUTION, S. REP. NO. 164, 100th Cong., 1st Sess. 26 (1987) [hereafter ABM REPORT]. Allegedly, this reinterpretation is based on secret negotiating records that contradict Nixon Administration assurances given to the Senate at the vote for consent to ratification. *Id.* at 27. In response, Senator Joseph

interpretation is not easily predictable. For treaty interpretation cases are among the few types of cases that regularly expose courts to international law principles.[6] Moreover, domestic principles of interpretation have affected the process of treaty interpretation.

From this amalgam of international and domestic law, three possible treaty classifications arise. One may think of treaties as (1) legislation, (2) contracts, or, unlike any other legal document, (3) sui generis. The manner in which the Supreme Court classifies a particular treaty implies which of several interpretive norms[7] the Court will apply. Traditionally, United States courts have used all three classifications and the six related norms in treaty interpretation.[8] Recently, however, the *Restatement (Revised) of the Law of Foreign Relations* (*Restatement (Revised)*) chose just three norms to include in its section dealing with

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Biden introduced a resolution, S. Res. 167, 100th Cong., 1st Sess. (1987), that expresses the Senate's "advice" to the President on the ABM Treaty's proper interpretation. Briefly, the resolution maintains that the ABM Treaty should be interpreted consistently with the intent of the contracting parties, thus barring development and deployment of Strategic Defense Initiative components. *Id.* § 7. The resolution provides that the parties' intent will be determined from 1) their prior consistent practice, 2) the testimony of the ABM Treaty negotiators and other officials given to the Senate prior to Senate consent to ratification, and 3) the plain meaning of the text. *Id.* § 2(2)(A)-(E). *See infra* notes 66-70 and 227 and accompanying text.

The gravity of this problem is apparent; many felt that uncertainty over major facets of the law of treaties, including treaty interpretation, facilitated the breakdown of the 1919 peace settlements. Rosenne, *Vienna Convention on the Law of Treaties*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 525, 526 (1984).

[5] For discussion of interpretations of the Andean Investment Code and the Organization for Economic Cooperation and Development Code for Multinational Enterprises, see R. WALDMANN, REGULATING INTERNATIONAL BUSINESS THROUGH CODES OF CONDUCT 28-41 (1980).

[6] Other cases regularly exposing the judiciary to international law principles include those involving jurisdiction over extraterritorial activity and foreign expropriation. *See* R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 21-52, 64-115 (1964).

[7] This Comment uses the term "norm" to mean principles that interpreters should apply to determine the meaning of a treaty in the context of American law.

[8] For a list of five of the interpretive norms, see *infra* Part III. The sixth norm is discussed in text accompanying *infra* notes 243-81. Treaties should be classified as legislation, contracts, or sui generis only as a guide to identifying potential interpretive norms. Inasmuch as some treaties can actually be catagorized as either legislation or contracts, E. BODENHEIMER, JURISPRUDENCE 280-86 (1962), strict application of the norms for interpreting legislation or contracts is appropriate. However, treaties may contain both legislative and contractual attributes or may be difficult to fit into any conventional classification. For this reason interpreters should not rigidly apply only the norms concomitant with a particular classification, rather they should apply all the norms identified in this Comment simultaneously.

treaty interpretation.[9] Unfortunately, these norms do not accurately reflect customary international law nor do they adequately describe current United Steates law.[10]

This Comment is comprised of four parts. Part I outlines some preliminary observations about the nature of the jurisprudence of treaty interpretation. Part II describes and applies jurisprudential analysis to the three classification schemes and their accompanying interpretive norms.[11] Part III proposes changes to the *Restatement (Revised)* to reflect past and current practice in treaty interpretation. This Comment concludes that the proposed changes to the *Restatement (Revised)* will aid lawyers, judges, and other parties in interpreting treaties.

I. PRELIMINARY OBSERVATIONS

Supreme Court opinions and section 325 of the *Restatement (Revised)* are the two main sources of treaty interpretation norms.[12] Unfortunately, Supreme Court treaty interpretation opinions often seem unclear or fact bound.[13] Often, only upon close reading of scores of cases

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[9] RESTATEMENT (REVISED) OF THE LAW OF FOREIGN RELATIONS § 325 (Tent. Draft No. 6 1985) [hereafter RESTATEMENT (REVISED)]. *Restatement (Revised)* § 325 promotes the following norms: (1) courts should interpret treaties liberally and in good faith; (2) courts should interpret treaties according to the ordinary meaning of their terms; and (3) courts should give substantial weight to the parties' practical construction of the treaty. Section 325 reads:

> (1) An international agreement is to be interpreted in *good faith* in accordance with the *ordinary meaning* to be given to its terms in their context and in light of its objects and purpose.
>
> (2) Any subsequent agreement between the parties regarding the interpretation of the agreement, or *subsequent practice* between the parties in the application of the agreement is to be taken into account in interpreting the agreement.

Id. (emphasis added).

[10] *See infra* note 24.

[11] This Comment does not promote a "canons" approach to treaty interpretation. Such an approach presents many problems. The most serious problem is that this approach presumes that treaty interpretation is an easy matter of applying fixed rules to fixed text to reach a predictable result. *See generally* Stone, *Fictional Elements in Treaty Interpretation — A Study in the International Judicial Process*, 1 SYDNEY L. REV. 344 (1954).

[12] Since the American Law Institute does not represent any sovereign law making body, courts are free to ignore *Restatements of Foreign Relations Law*. *See* RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS, introduction at xi (1965) [hereafter RESTATEMENT (SECOND)]. *See infra* note 21.

[13] *See* Weinberger v. Rossi, 456 U.S. 25, 28 (1982) ("Simply because the question presented is entirely one of statutory construction does not mean that the question nec-

does a consistent framework become apparent. To avoid leading the reader through case specific fact patterns, this Comment sets out the Court's treaty interpretation norms as distilled from treaty interpretation cases dating from 1795.[14]

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essarily admits of an easy answer."); *see also* M. McDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 5-12 (1967).

[14] This Comment results, in part, from analysis of over sixty-five Supreme Court treaty interpretation cases. *See* Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, S. Dist. of Iowa, 107 S. Ct. 2542 (1987) [hereafter Aerospatiale Case]; O'Connor v. United States, 107 S. Ct. 347 (1986); Air France v. Saks, 470 U.S. 392 (1985); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982); Weinberger v. Rossi, 456 U.S. 25 (1982); Dames & Moore v. Regan, 453 U.S. 654 (1981); Maximov v. United States, 373 U.S. 49 (1963); Ioannou v. New York, 371 U.S. 30 (1962); Kolovrat v. Oregon, 366 U.S. 187 (1961); Reid v. Covert, 354 U.S. 1 (1957); Warren v. United States, 340 U.S. 523 (1951); Vermilya-Brown Co., Inc. v. Connell, 335 U.S. 377 (1948); Clark v. Allen, 331 U.S. 503 (1947); United States v. Pink, 315 U.S. 203 (1942); Bacardi Corp. of Am. v. Domenech, 311 U.S. 150 (1940); Perkins v. Elg, 307 U.S. 325 (1939); Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); United States v. Belmont, 301 U.S. 324 (1937); Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936); Factor v. Laubenheimer, 290 U.S. 276 (1933); Cook v. United States, 288 U.S. 102 (1933); Santovincenzo v. Egan, 284 U.S. 30 (1931); Todok v. Union State Bank, 281 U.S. 449 (1930); Nielsen v. Johnson, 279 U.S. 47 (1929); Karnuth v. United States *ex rel.* Albro, 279 U.S. 231 (1929); Jordan v. Tashiro, 278 U.S. 123 (1928); Ford v. United States, 273 U.S. 593 (1927); Asakura v. City of Seattle, 265 U.S. 332 (1924); Terrace v. Thompson, 263 U.S. 197 (1923); Yee Won v. White, 256 U.S. 399 (1921); Sullivan v. Kidd, 254 U.S. 433 (1921); Missouri v. Holland, 252 U.S. 416 (1920); Rainey v. United States, 232 U.S. 310 (1914); Charlton v. Kelly, 229 U.S. 447 (1913); Rocca v. Thompson, 223 U.S. 317 (1912); Vilas v. City of Manila, 220 U.S. 345 (1911); United States v. American Sugar Ref. Co., 202 U.S. 563 (1906); French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427 (1903); Wright v. Henkel, 190 U.S. 40 (1903); Terlinden v. Ames, 184 U.S. 270 (1902); Tucker v. Alexandroff, 183 U.S. 424 (1902); De Lima v. Bidwell, 182 U.S. 1 (1901); United States v. Texas, 162 U.S. 1 (1896); Kinkead v. United States, 150 U.S. 483 (1893); *In re* Ross, 140 U.S. 453 (1891); Geofroy v. Riggs, 133 U.S. 258 (1890); Chae Chan Ping v. United States, 130 U.S. 581 (1889); Whitney v. Robertson, 124 U.S. 190 (1888); Wildenhus's Case, 120 U.S. 1 (1887); Edye v. Robertson, 112 U.S. 580 (1884); Chew Heong v. United States, 112 U.S. 536 (1884); Hauenstein v. Lynham, 100 U.S. 483 (1879); Doe v. Braden, 57 U.S. (16 How.) 635 (1853); Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852); The Passenger Cases, 48 U.S. (7 How.) 283 (1849); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842); The Amistad, 40 U.S. (15 Pet.) 518 (1841); Strother v. Lucas, 37 U.S. (12 Pet.) 410 (1838); United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); United States v. Arredondo, 31 U.S. (6 Pet.) 690 (1832); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829); Society for the Propagation of the Faith v. City of New Haven, 21 U.S. (8 Wheat.) 464 (1823); The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821); Orr v. Hodgson, 17 U.S. (4 Wheat.) 453 (1819); The Pizarro, 15

These norms are considered rebuttable presumptions of how the treaty parties intended courts to interpret the treaty.[15] The Court has never given an exhaustive list of treaty interpretation norms, nor expressed a preference for one form of treaty interpretation evidence over another.[16] Possibly, then, treaty interpretation is merely a question of what evidence a court will admit.[17]

In contrast to Supreme Court opinions, Restatements lay out succinct statements of "black letter law,"[18] supplemented with clarifying comments and reporters' notes.[19] Lawyers, government officials, and judges rely heavily on the *Restatement of Foreign Relations Law* as a summary of current American law.[20] Thus, first a Restatement should tell

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U.S. (2 Wheat.) 227 (1817); The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); United States v. Lawrence, 3 U.S. (3 Dall.) 42 (1795).

[15] Viewing interpretive norms as rebuttable presumptions explains why court interpretation may seem haphazard or contradictory. In one case, a court may apply a norm consistent with the view that the treaty most closely resembles a contract. In another case, the court may apply a norm consistent with the view that the treaty is sui generis. However, the treaties may appear fundamentally similar. The difference may be found in the intent or purpose of the treaty signatories. *See, e.g.*, *O'Connor*, 107 S. Ct. at 352 (drawing identical interpretations from contradictory language found in different treaties).

[16] *See* Y. CHANG, THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNALS 139 (1933).

[17] *See id.* at 185 ("[W]ith the function of treaty interpretation properly understood, the whole problem becomes a question of evidence, the presentation of which calls for and also permits the simplest methods of proof.").

[18] "Black letter law. An informal term indicating the basic principles of law generally accepted by the courts and/or embodied in the statutes of a particular jurisdiction." BLACK'S LAW DICTIONARY 154 (5th ed. 1979).

[19] RESTATEMENT (SECOND), *supra* note 12, introduction at ix.

[20] One commentator has counted twenty-eight trial and appellate court cases and forty-eight law review articles citing the *Restatement (Revised)*. Houck, *Restatement of the Foreign Relations Law of the United States (Revised): Issues and Resolutions*, 20 INT'L LAW. 1361, 1379-82 (1986). Since 1960 the Supreme Court has cited various editions of the *Restatement of Foreign Relations Law* at least seven times. *See, e.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 n.23 (1984); Dames & Moore v. Regan, 453 U.S. 654, 680 (1981); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 703 (1976); Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 501 (1971); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429 n.30 (1964) (citing RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (Proposed Official Draft, 1962)) [hereafter RESTATEMENT (1962 Draft)]; Ioannou v. New York, 371 U.S. 30, 31 (1962) (dissent); United States v. Louisiana, 363 U.S. 1, 34 n.60 (1960). The Department of State also relies on the Restatement of Foreign Relations Law. *See, e.g.*, 1978 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 643 (hereafter 1978 DIGEST).

what the law is.[21] Of secondary importance, a Restatement should describe how the law is changing and suggest the direction the change should take.[22] If the user of a Restatement cannot distinguish between statements of current law and proposals for the future, the litigation risks can be substantial.[23]

Restatement (Revised) section 325 provides:

> (1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its objects and purpose.
>
> (2) Any subsequent agreement between the parties regarding the iterpretation of the agreement, or subsequent practice between the parties in the application of the agreement is to be taken into account in interpreting the agreement.[24]

Restatement (Revised) section 325 does not accomplish its first goal; it is admittedly only a proposal.[25] Moreover, the *Restatement (Revised)*

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[21] The Reporter of the *Restatement (Second)* stated: "This work has no official standing as a statement of the position of the United States. *Nor does it propose rules of law for adoption.* It is an attempt to state and clarify existing law, international and domestic, in the areas indicated above." RESTATEMENT (SECOND), *supra* note 12, preface at xi (emphasis added).

[22] "Restatement of Law. A series of volumes authored by the American Law Institute that tell what the law in a general area is, how it is changing, and what direction the authors think this change should take . . . ." BLACK'S LAW DICTIONARY 1180 (5th ed. 1979).

[23] *See, e.g.*, Coplin v. United States, 6 Cl. Ct. 115 (1985): "At least 42 lawsuits, involving perhaps hundreds of plaintiffs, have presented the issue [of the proper interpretation of the Panama Canal Agreement] to this and other courts. . . . The cost borne by the plaintiffs, the defendant and the judicial system in resolving this issue through piecemeal litigation has been, and will continue to be, substantial." *Id.* at 140 n.27. If the *Coplin* plaintiffs had relied on a clearer *Restatement*, perhaps they would not have sought their remedy in court.

[24] RESTATEMENT (REVISED), *supra* note 9, § 325.

[25] As RESTATEMENT (REVISED), *supra* note 9, § 325 comment a indicates, § 325 is not an accurate summary of current international law, let alone United States law. The *Restatement (Revised)* states:

> *a. Customary international law of interpretation.*
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> Customary international law has not developed rules and modes of interpretation having the definiteness and precision, even as guidelines, to which this section aspires. Unless the Vienna Convention comes into force for the United States, then, this section probably does not strictly govern interpretation by the United States or by the courts in the United States. But it represents what states generally accept and the United States has also appeared willing to accept it regardless of differences of nuance and emphasis.

does not accurately restate the current American law of treaty interpretation. The *Restatement (Revised)* concedes that neither American law nor customary international law has developed rules of interpretation with the definiteness and precision of section 325.[26] Without explana-

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RESTATEMENT (REVISED), *supra* note 9, § 325 comment a.

[26] *See supra* note 25. The current international law of treaty interpretation is contained in the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF 39/27, *reprinted in* 63 AM. J. INT'L L. 875 (1969) [hereafter Vienna Convention]. Vienna Convention article 31 reads:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement of the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement between the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

Vienna Convention, *supra*, at art. 31. In accordance with its terms, the Vienna Convention entered into force internationally with the ratification of the thirty-fifth state on January 27, 1980. Rosenne, *Vienna Convention on the Law of Treaties* in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 525 (1984).

American representatives signed the Vienna Convention on May 23, 1969. For over 15 years, the Senate Foreign Relations Committee has refused to favorably report the Vienna Convention. As a result, the treaty is presumed dead. Since the Senate must consent to ratification of Article II treaties before they become valid, judicial observance of the Vienna Convention's terms would effectively subvert clear constitutional requirements. However, to the extent that the Vienna Convention merely deals with the mechanics of diplomacy, and diplomacy is a plenary presidential power, a President might insist that ratification without Senate consent is within executive power. *See infra* notes 117-19 and accompanying text.

Customary international law and Vienna Convention article 18 require that states not act contrary to the terms of signed but unratified treaties. Thus, rejection of the *Restatement (Revised)* formulation may appear to violate international law. For two reasons, this cannot be true. First, the Senate's continued refusal to consent to ratification is effectively a rejection of the treaty. The Vienna Convention is no longer pending ratification, for ratification is highly unlikely. International law cannot reasonably re-

tion, section 325 is patterned after a treaty the Senate has refused to approve, the Vienna Convention on the Law of Treaties (Vienna Convention).[27] To find the restated current law governing treaty interpretation in the United States, the reader must wade through several pages of comments and reporters' notes only to be referred to a previous edition of the *Restatement*.[28] Because the reporters' notes and comments to *Restatement (Revised)* section 325 do not adequately explain the practical significance of the section, this Comment analyzes section 325 in the context of the Vienna Convention's interpretive methodology.[29]

In light of the Supreme Court's consistent patterns of interpreting treaties, the American Law Institute should carefully re-examine its adoption of section 325 of the *Restatement (Revised)*. That re-examination should focus on the desirability of including in the *Restatement (Revised)* the Supreme Court-developed interpretive norms it largely ig-

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quire adherence to a signed but tacitly rejected treaty. For if it did, few states with ratification requirements would sign treaties.

Second, judicial rejection of the *Restatement (Revised)* formulation does not affect international law. As will be explained later, United States courts do not interpret treaties to enforce the international obligations of treaty signatories. *See infra* notes 74-86 and accompanying text.

[27] *Compare* Vienna Convention, *supra* note 26, at art. 31 *with* RESTATEMENT (REVISED), *supra* note 9, § 325.

[28] RESTATEMENT (REVISED), *supra* note 9, § 325 reporters' note 5. The reporters wrote:

> By way of contrast [to the *Restatement (Revised)*], the U.S. tradition (compare previous Restatement § 146) makes the attempt to "ascertain the meaning intended by the parties" the primary object of interpretation; "the ordinary meaning of the words of the agreement" (previous § 147) was one of the factors to be taken into account in the interpretive process, as were the preparatory materials. The previous Restatement reflected the strong tendency in American case law to reject literal-minded interpretation of statutes, a tendency that is not dominant in the jurisprudence of many other countries.

Id.

[29] The Vienna Convention's interpretive methodology is set out in articles 31, *supra* note 26, and 32. Article 32 states:

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

Id. at art. 32. For a guide to the legislative history of the Vienna Convention, see generally S. ROSENNE, THE LAW OF TREATIES (1970).

nores. Description and jurisprudential analysis of the Supreme Court and *Restatement (Revised)* norms follows.

II. INTERPRETIVE NORMS

A. Treaties as Legislation

1. Notion

Primary rules and rules of recognition compose most modern legal systems.[30] Legislation or primary rules are rules of law a legislative sovereign creates.[31] The validity of all primary rules is determined by a rule of recognition.[32] For example, the Constitution is the United States' rule of recognition: it is the supreme law of the land.[33] Federal law exists only under the authority of the Constitution, created through congressional processes that the Constitution prescribes.

The Supreme Court has viewed treaties as closely related to legislation:[34] treaties are rules of law. The United States Constitution remains supreme in the face of a conflict with a treaty.[35] Further, valid treaties result only from one of four constitutionally permissible legislative processes. Treaties obtain validity through (1) ratification following Senate advice and consent,[36] (2) presidential promulgation pursuant to

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[30] H.L.A. Hart has devoted great energy to discerning the essential nature of rules of law. *See* H.L.A. HART, THE CONCEPT OF LAW 89-96 (1961).

[31] *Id.* at 56-57, 97.

[32] *Id.* at 91-93. Those who regard law a merely the sum of governmental commands regardless of their substantive content place order above justice as the overriding goal of law. E. BODENHEIMER, *supra* note 8, at 223-24. However, law is more accurately a synthesis of order and justice such that obedience to unjust laws is not required. In the United States order and justice are synthesized through judicial review. This institution allows disobedience to laws that do not meet the constitutional requirements of reasonableness, equality, or "due process." *Id.* at 225. Treaties are subject to judicial review. U.S. CONST. art III, § 2. Thus treaties are rules of law requiring obedience only to the extent that they meet basic requirements of justice as embodied in the Constitution. *See infra* notes 92-148 and accompanying text.

[33] U.S. CONST. art. VI, cl. 2.

[34] *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) ("Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision."); *see, e.g., In re* Ross, 140 U.S. 453, 475 (1891); Geofroy v. Riggs, 133 U.S. 258, 270 (1890); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson, 112 U.S. 580, 599 (1884).

[35] *See, e.g.*, Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); Missouri v. Holland, 252 U.S. 416, 432 (1920); Doe v. Braden, 57 U.S. (16 How.) 635, 656 (1853); *see infra* notes 92-148 and accompanying text.

[36] U.S. CONST. art. II, § 2, cl. 2.

a congressional delegation of power,[37] (3) presidential promulgation pursuant to a plenary or concurrent executive power,[38] or (4) consent of both Houses of Congress in the form of implementing legislation.[39] Once one concludes a treaty is legislative in nature, certain concomitant interpretive norms may be applied.

2. Interpretive Norms

a. Courts Should Give Effect to Negotiators' Purpose Derived from Textual and Extrinsic Evidence.

Evidence of treaty negotiators' purpose[40] falls into two categories: evidence in the writing itself — the treaty text in its context[41] — and evidence outside the text — extrinsic evidence.[42] Context in this setting means the treaty's preamble, other clauses, annexes, and any other writing within the four corners of the treaty.[43] The *Restatement (Re-*

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[37] Such delegations may arise from previously approved treaties. *See, e.g.*, Agreement for Implementation of Article III of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, 33 U.S.T. ___, T.I.A.S. No. 10,031. Or, such delegations take the form of legislation. *See, e.g.*, 19 U.S.C. § 2503(b) (1988) (authorizing President to accept for the United States certain types of international trade agreements).

[38] *See infra* text accompanying notes 117-48.

[39] *See* Dames & Moore v. Regan, 453 U.S. 654, 680 (1981). Whether a treaty provision requires further legislation to give it effect is a matter of treaty interpretation. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

[40] This Comment uses the term negotiators' purpose instead of negotiators' intent for one of the most fundamental but elusive concepts in interpretation is that of legislative intent. Dickerson, *Statutory Interpretation: A Peek into the Mind and Will of a Legislature*, 50 IND. L.J. 206 (1975) (hereafter Dickerson, *Statutory Interpretation*). The concept presumes that groups of people can develop and maintain the subjective attitudes of individuals. *Id.* at 206. The validity of this presumption has been attacked for decades. *See, e.g.*, Radin, *Statutory Interpretation*, 43 HARV. L.R. 863 (1930). A more favored concept is that of negotiators' or legislative purpose. Dickerson, *Statutory Interpretation*, *supra* at 224. This concept overlaps "intent" in that it includes both the narrow specific purposes of the statute or treaty and the broader goals the statute or treaty was designed to address. *Id.* at 224-25.

[41] *See, e.g.*, Hauenstein v. Lynham, 100 U.S. 483, 487-88 (1879).

[42] *See, e.g.*, Wright v. Henkel, 190 U.S. 40, 57-69 (1903) (applying evidence of international law and subsequent treaty party practice to interpret treaty).

[43] *See, e.g.*, Maximov v. United States, 373 U.S. 49, 52 (1963); Warren v. United States, 340 U.S. 523, 526 (1951); Clark v. Allen, 331 U.S. 503, 508, 513 (1947); Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 163-64 (1940); Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 11 (1936); Santovincenzo v. Egan, 284 U.S. 30, 35-36 (1931); Ford v. United States, 273 U.S. 593, 610 (1927); Rocca v. Thompson, 223 U.S. 317, 330 (1912); Vilas v. City of Manila, 220 U.S. 345, 359-60 (1911); French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427, 439 (1903); Geofroy v.

vised) recommends,[44] and courts tend to follow,[45] a methodology that first analyzes the treaty text for dispositive evidence of intent. If unsuccessful, the court then resorts to extrinsic evidence. The same principle holds in statutory construction.[46]

The methodology of *Restatement (Revised)* is inconsistent with Supreme Court's view of the degree of ambiguity required to shift from study of the treaty text alone to admission of extrinsic evidence.[47] Courts sometimes find textual ambiguity only after reviewing the extrinsic evidence whose admission the *Restatement (Revised)* would discourage.[48] Extrinsic evidence includes the treaty negotiators' preparatory works,[49] legislative history,[50] executive practices and interpretations,[51] the circumstances surrounding the treaty negotiation,[52]

Riggs, 133 U.S. 258, 271 (1890); The Pizarro, 15 U.S. (2 Wheat.) 227, 245-46 (1817); *see* Y. CHANG, *supra* note 16, at 93-94.

[44] *See supra* note 28 and accompanying text.

[45] *See, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 294-95 (1933); Cook v. United States, 288 U.S. 102, 112 (1933); United States v. Texas, 162 U.S. 1, 23-27 (1896); Kinkead v. United States, 150 U.S. 483, 486 (1893); Chew Heong v. United States, 112 U.S. 536, 540 (1884). *But compare* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982) ("Interpretation of the . . . treaty . . . must, of course, begin with the language of the treaty itself.") *with* Aerospatiale Case, 107 S. Ct. 2542, 2548 (1987) ("Before discussing the text of the Convention, however, we briefly review its history.").

[46] J. SUTHERLAND, STATUTORY CONSTRUCTION § 47.01 (4th ed. 1984).

[47] *See supra* note 28 and accompanying text.

[48] *See, e.g., Aerospatiale Case*, 107 S. Ct. at 2548.

[49] *See, e.g.*, O'Connor v. United States, 107 S. Ct. 347, 350 (1986); Air France v. Saks, 470 U.S. 392, 400 (1985); *Sumitomo*, 457 U.S. at 181 n.6; Kolovrat v. Oregon, 366 U.S. 187, 196 (1961); Warren v. United States, 340 U.S. 523, 527 n.4 (1951); *Cook*, 288 U.S. at 112; Nielsen v. Johnson, 279 U.S. 47, 52 (1929); *Kinkead*, 150 U.S. at 486; Doe v. Braden, 57 U.S. (16 How.) 635, 654 (1853). Courts sometimes refer to preparatory works by their French term, *travaux preparatoires*. *See Air France*, 470 U.S. at 400.

[50] *See, e.g.*, Maximov v. United States, 373 U.S. 49, 54 n.2 (1963); United States v. Pink, 315 U.S. 203, 227 (1942); Yee Won v. White, 256 U.S. 399, 401 (1921); United States v. American Sugar Ref. Co., 202 U.S. 563, 576-77 (1906); United States v. Texas, 162 U.S. 1, 62-90; *In re* Ross, 140 U.S. 453, 468 (1891); Chae Chan Ping v. United States, 130 U.S. 581, 597 (1889); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 308 (1829).

[51] *See, e.g., O'Connor*, 107 S. Ct. at 351; Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 245-59 (1984); *Maximov*, 373 U.S. at 55; *Kolovrat*, 366 U.S. at 194; Reid v. Covert, 354 U.S. 1, 64 (1957) (Frankfurter, J., concurring); *Warren*, 340 U.S. at 527 n.5; Vermilya-Brown Co., Inc. v. Connell, 335 U.S. 377, 380 (1948); Clark v. Allen, 331 U.S. 503, 513 (1947); *Pink*, 315 U.S. at 227; United States v. Belmont, 301 U.S. 366, 324 (1937) (Stone, J., concurring); Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 13-16 (1936); Factor v. Laubenheimer, 290 U.S.

evidence of international law,[53] and textual and extrinsic evidence relating to similar treaties.[54] For example, similar treaties may show that the drafters of the disputed treaty omitted certain terms. Courts use this evidence in two ways: to verify that the text's plain meaning conforms with the negotiators' purpose,[55] or to determine whether an omission was deliberate[56] or unintentional.[57]

Application of the norm that courts should give effect to the negotiators' purpose as indicated by textual and extrinsic evidence presents certain problems. For several reasons, legislative intent normally should not be substituted for negotiators' purpose. First, the actual intent of Senators voting for the treaty may be unknowable. Individual legislators may form their intentions toward a treaty from an array of sources available at any point in the advice and consent process. At what particular point, and for what particular reason, two-thirds of the Senators voting decide to support a treaty may be empirically unverifiable.

Senate advice and consent to ratification of Article II treaties follows a two stage process similar to that followed to enact other legislation. First, the Senate executes its advice function through Foreign Relations

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276, 295 (1933); Cook v. United States, 288 U.S. 102, 119-20 (1933); Sullivan v. Kidd, 254 U.S. 433, 442 (1921); Charlton v. Kelly, 229 U.S. 447, 468 (1913); Rocca v. Thompson, 223 U.S. 317, 328-29 (1912); Wright v. Henkel, 190 U.S. 40, 59 (1903); Terlinden v. Ames, 184 U.S. 270, 285 (1902); *Texas*, 162 U.S. at 61-90; *Ross*, 140 U.S. at 467; *Chae Chan Ping*, 130 U.S. at 606-07; *Foster*, 27 U.S. (2 Pet.) at 309.

[52] *See* Y. CHANG, *supra* note 16, at 72-73.

[53] *See, e.g.*, *Nielsen*, 279 U.S. at 55-57; Geofroy v. Riggs, 133 U.S. 258, 268 (1890); *Chae Chan Ping*, 130 U.S. at 603-04; Wildenhus's Case, 120 U.S. 1, 11-14 (1887); The Amistad, 40 U.S. (15 Pet.) 518, 594-95 (1841); United States v. Percheman, 32 U.S. (7 Pet.) 51, 86-87 (1833); The Pizarro, 15 U.S. (2 Wheat.) 227, 245 (1817); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 258 (1796).

[54] *See, e.g.*, O'Connor v. United States, 107 S. Ct. 347, 352 (1986); Kolovrat v. Oregon, 366 U.S. 187, 193 (1961); *Vermilya-Brown Co., Inc.*, 335 U.S. at 383-85; *Clark*, 331 U.S. at 512-13; *Valentine*, 299 U.S. at 12-13; Santovincenzo v. Egan, 284 U.S. 30, 36-37 (1931); *Rocca*, 223 U.S. at 332; *Chae Chan Ping*, 130 U.S., at 601; *Wildenhus's Case*, 120 U.S., at 14; Chew Heong v. United States, 112 U.S. 536, 540 (1884); The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 73-74 (1821).

[55] *See, e.g.*, Maximov v. United States, 373 U.S. 49, 54 (1963); Warren v. United States, 340 U.S. 523, 526-27 (1951); Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 158-64 (1940); *Valentine*, 299 U.S. at 13; *Santovincenzo*, 284 U.S. at 37; *Rocca*, 223 U.S. at 331-32; French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427, 438-39 (1903); *Geofroy*, 133 U.S. at 269, 271; *The Pizarro*, 15 U.S. (2 Wheat.) at 245-46.

[56] *See, e.g.*, *Santovincenzo*, 284 U.S. at 39; Terrace v. Thompson, 263 U.S. 197, 223 (1923); Charlton v. Kelly, 229 U.S. 447, 467-68 (1913); *The Amiable Isabella*, 19 U.S. (6 Wheat.) at 73; *The Pizarro*, 15 U.S. (2 Wheat.) at 244-45.

[57] *See, e.g.*, *O'Connor*, 107 S. Ct. at 350.

Committee examination of witnesses and the treaty itself.[58] The Committee staff prepares a report on the treaty, typically summarizing and excerpting important testimony and explaining the treaty provisions.[59] Courts regard committee reports as the most reliable evidence of legislative purpose.[60]

Second, the Senate consents when two-thirds of the Senators present vote favorably for the treaty.[61] The full Senate considers the treaty as a Committee of the Whole.[62] The lawmaker's knowledge of a treaty may come from reading the document's text and the committee reports, listening to debate, perhaps actually speaking to a committee member. All of these modes of communication are intrinsically defective.[63] A legislator, having no particular interest in the legislation, whether treaty or domestic statute, might not speak with a committee member, attentively listen to debate, read the committee report, and heaven forbid, might not even read the bill or treaty before casting her vote.[64]

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[58] *Cf.* Glennon, *Interpreting "Interpretation": The President, the Senate, and When Treaty Interpretation Becomes Treaty Making*, 20 U.C. DAVIS L. REV. 913 (1987) (Senate advice function continues as long as treaty remains in force).

[59] Sometimes, the Senate Committee on Interior and Insular Affairs has jurisdiction over "treaties." *See, e.g.*, SENATE. COMM. ON INTERIOR AND INSULAR AFF., THE COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, S. DOC. NO. 433, 94th Cong., 1st Sess. (1975).

[60] *See* SEC v. Robert Collier & Co., Inc., 76 F.2d 939, 941 (2d Cir. 1935) (Learned Hand, J.): "[Courts] recognize that while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way." *Id.*

[61] U.S. CONST. art. II, § 2, cl. 2.

[62] SENATE COMM. ON RULES AND ADMIN., STANDING RULES OF THE UNITED STATES SENATE AND PROVISIONS OF THE LEGISLATIVE REORGANIZATION ACTS OF 1946 AND 1970 RELATING TO OPERATION OF THE SENATE 55 (1971). When the Senate forms itself into the Committee of the Whole, any member of the Senate may offer amendments to the legislation under consideration. Glennon, *Treaty Process Reform: Saving Constitutionalism Without Destroying Diplomacy*, 52 U. CIN. L. REV. 84, 106 (1983). Amendments sometimes threaten the entire treaty. Freshman Senators Zorinsky and DeConcini received tremendous national media — and presidential — attention for their opposition to the Panama Canal Treaty. *See* Ornstein, *The Constitution and Sharing of Foreign Policy Responsibility*, THE PRESIDENT, THE CONGRESS AND FOREIGN POLICY 58 (E. Muskie, K. Rush & K. Thompson ed. 1986)

[63] *See* Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1, 13-17 (1965).

[64] *See* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 997 (1982) (White, J., dissenting): "[t]he Constitution does not and cannot guarantee that legislators will carefully scrutinize legislation and deliberate before acting. In a democracy it is the electorate that holds the legislators accountable for the wisdom of their choices [not the judiciary]." *Id.*

Even if identifiable, in most cases, legislative purpose is not nearly as probative of meaning as the negotiators' purpose. Except for amendments the Senate may attach,[65] a treaty is entirely the product of the negotiators. Negotiators' purpose reflects the give-and-take associated with negotiation with the treaty party. Legislative purpose reflects only the treaty's meaning which the negotiators convey to the legislature; it is essentially second-hand purpose. Furthermore, evidence of American negotiators' purpose is not unreasonably difficult to produce. Thus, even if legislative intent were unknowable, treaty interpretation should give effect to the negotiators' purpose.

However, if a conflict exists between legislative purpose derived from executive communication to the Senate before ratification, and the negotiators' purpose derived from a secret negotiating record, a court should opt for an interpretation based on the legislative purpose. This conflict lies at the heart of the current controversy over the "reinterpretation" of the Anti-Ballistic Missile Treaty (ABM Treaty).[66] Under international law, the combination of a secret negotiating record and subsequent Soviet conduct under the ABM Treaty may very well enti-

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[65] Senate treaty amendments take the form of "understandings," "reservations," or "declarations." A "reservation" often is a statement that the United States does not adhere to a particular part of the treaty. The effect is to remove the obligation of the offending provision from the treaty. *See* Letter of Deputy Assistant Secretary of State for Congressional Relations Robert Beckel to Mary Jane Checchi, Staff Attorney, Senate Judiciary Committee (Oct. 27, 1977), *reprinted in* 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 375 [hereafter 1977 DIGEST]; Vienna Convention, *supra* note 26, at art. 2(1)(d).

An "understanding" is an interpretation of a treaty provision. The understanding may clarify ambiguous language or incorporate a statement of policy or procedure. *See* 1977 DIGEST, *supra*, at 376. Typically, the Senate makes reservations and understandings as conditions to its consent to ratification. *See* Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257, 258 (1983) [hereafter Glennon, *Senate Role*]. To have legal effect on the other treaty party, the amending party must physically attach the reservations and understandings to the instruments of ratification exchanged by the treaty parties. *See* Memorandum of Senate Foreign Relations Committee Legal Counsel Michael Glennon (Jan. 12, 1978), *reprinted in* 1978 DIGEST, *supra* note 20, at 694. This way, mutual consent is assured. *See* RESTATEMENT (REVISED), *supra* note 9, § 314. In its resolution consenting to ratification of the Panama Canal Treaty, the Senate gave its advice and consent subject to six reservations and six understandings. Panama Canal Treaty, Sept. 7, 1977, United States-Panama, 33 U.S.T. ___, T.I.A.S. No. 10,030, at 3-7.

Senate "declarations" bind the executive branch only, not other treaty parties. Consequently, such declarations typically are not included in the text of the instruments of ratification. *See* Glennon, *Senate Role*, *supra*.

[66] *See supra* note 4.

tle the United States to field test the components of the Strategic Defense Initiative.[67] However, this cannot mean that the President alone can authorize such testing. For the ABM Treaty is not only an agreement between the United States and the Soviet Union, but is also a piece of legislation enacted pursuant to the Constitution. In international law the President's interpretation of a treaty may be authoritative.[68] However, in the domestic context, constitutional mandates supersede international law.[69] Properly conceived, then, the ABM Treaty controversy is essentially a domestic Senate-President dispute over the legality of proposed executive action in the face of a prior conflicting law. As such, the proposed action should not be tested by international law principles but by the established principles of constitutional law.[70]

Assuming no conflict with legislative purpose, negotiators' purpose may still suffer from the defect of national bias. Litigants may find it much easier to produce extrinsic evidence from the government of the forum jurisdiction than similar evidence from other treaty signatories. Treaty interpretation that places greater probative weight on the parties' purpose than on the plain meaning of the text may make production of such evidence practically dispositive. This requires thorough research of the negotiating history and subsequent practice of all treaty parties.[71] With linguistic, geographic,[72] and even legal barriers,[73] this

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[67] ABM REPORT, *supra* note 4, at 84-87. The Administration proposes to field test and deploy a space-based antiballistic missile system. *Id.* at 2. While laboratory- and space-based research has proceeded with congressional consent, those holding the narrow interpretation of the ABM Treaty believe the United States would cross the threshold of treaty violation if it were to test the system by targeting and destroying reentry vehicles. *See generally id.*; *see infra* note 227.

[68] L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 167 (1972).

[69] *See* Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 869-70 (1987).

[70] For a discussion of these principles applied to treaties, see *infra* notes 92-148 and accompanying text.

[71] RESTATEMENT (REVISED), *supra* note 9, § 325 reporters' note 4.

[72] Dozens of nations negotiated and signed the United Nations Charter in 1945. *The United Nations Conference on International Organization*, 1946-47 U.N.Y.B. 12, 33-34, U.N. Sales No. 1947.I.18. These nations are scattered on five continents and speak scores of national languages. *Id.* However, most multilateral treaties to which the United States is party deal with international organizations or military matters. *See, e.g.*, Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161; Constitution of the World Health Organization, *opened for signature* July 22, 1946, 62 Stat. 2679, T.I.A.S. No. 1808, 14 U.N.T.S. 185. The subject matter of these treaties generally affects only states, thus an individual may have no special rights under them. *But see* Agreement on International Classification of Trademarked Goods and Services, *opened*

task could be nearly impossible to accomplish. Extrinsic evidence actually produced in American courts will more likely come from records of the United States State Department than from other foreign ministries. As a result, courts may interpret treaties in a decidedly pro-American way.

However, national bias is not inconsistent with the treaty interpretation role of domestic courts. American courts interpret treaties only to enforce domestic obligations.[74] A treaty's international aspects only involve the duties and rights of one state vis-à-vis other states. The Supreme Court has stated that the President is the United States' "sole organ" in international affairs.[75] Thus, the scope of the Court's treaty

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for signature June 15, 1957, 23 U.S.T. 1336, T.I.A.S. No. 7418, 550 U.N.T.S. 45 (allowing protection of trademarks held by individuals).

[73] Signatories may have classified much relevant material. The United States does not publish diplomatic materials until 15 years have passed. *See* RESTATEMENT (1962 Draft), *supra* note 20, § 154 reporters' note 3. Also, individual Americans should not probe too deeply into the foreign affairs of another country lest they violate 18 U.S.C. § 953 (1982) (prohibiting American citizen correspondence with foreign government made with intent to influence that government in relation to any dispute with the United States).

[74] *Edye v. Robertson*, 112 U.S. 580, 598-99 (1884). In contrast, some national constitutions require domestic courts to place international law above domestic law. L. OPPENHEIM, 1 INTERNATIONAL LAW 44 (H. Lauterpacht 8th ed. 1955). This divergence reflects the two basic views of the relationship between the international and domestic legal systems. Monists view the systems as one, with either domestic or international law superior over the other. *Id.* at 38-39. Dualists see the systems as fundamentally separate and each supreme within its own sphere. Domestic laws prevail over international in domestic courts, and international law prevails over domestic in international tribunals. *Id.* at 37. The details of the role of international law in United States courts remains controversial. *See, e.g., Agora: May the President Violate Customary International Law?* 80 AM. J. INT'L L. 913 (1986). However, consistent Supreme Court construction of the Supremacy Clause seems to place the United States in the dualist camp. Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 931-32 (1986). Consequently, the restricted role of American courts in treaty interpretation conforms with longstanding views of the place of international law in United States courts. *See* G. VON GLAHN, LAW AMONG NATIONS 25 (4th ed. 1981).

[75] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). Commentators have sharply criticized the *Curtiss-Wright* conclusion that international law vests the President with extra-constitutional foreign affairs powers. *See, e.g.*, Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946). As a practical matter, the Executive is the most appropriate branch to conduct diplomacy. *See infra* notes 133-36 and accompanying text. However, as a logical and constitutional matter, Congress — alone or in conjunction with the Executive — is the appropriate branch to set the policies diplomacy seeks to effect. *See infra* notes 139-41 and accompanying text. Unfortunately, the *Curtiss-Wright* court failed to distinguish these two sides of the diplomatic coin.

powers and duties does not extend beyond the nation's borders.[76] Moreover, to protect their sovereignty, states rarely submit to another's jurisdiction.[77] However, courts may exercise jurisdiction over citizens of treaty parties if American law does not specifically exempt them from jurisdiction and they fall within the scope of other requirements of United States law.[78] Treaties are usually silent about the method of individuals' dispute resolution methods.[79] Consequently, domestic fo-

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[76] The only foreign affairs powers the Constitution confers on the Supreme Court are original jurisdiction over cases affecting ambassadors, other public ministers, and consuls and appellate jurisdiction over cases arising under treaties. U.S. CONST. art. III, § 2.

Principles of customary international law support the proposition that good faith treaty interpretation cannot breach international obligations, even if the interpretation flows from use of domestic interpretive norms. Such principles impose a duty on states to accord foreigners certain minimum legal rights, including the right to access to an independent judiciary. G. SWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 105 (1967). Under these circumstances, it is unreasonable to hold a state responsible in international law for judicial acts taken within the legitimate scope of judicial authority, such as good faith treaty interpetation. *Id.* at 178. For discussion of the norm that treaties should be interpreted liberally and in good faith, see *infra* notes 282-96 and accompanying text.

[77] The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.); *cf.* French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427 (1903) (national government asserting proprietary interests); 28 U.S.C. § 1602 (1987) ("states are not immune from jurisdiction of foreign courts insofar as their commercial activities are concerned"). International arbitration or adjudication of international disputes is sometimes designated in a treaty. Some treaties invest a pre-existing forum with exclusive jurisdiction over disputes arising under the treaty. *See, e.g.*, U.N. CHARTER art. 36. Other treaties create new forums for dispute resolution. *See, e.g.*, Treaty Establishing International Arbitral Tribunal to Dispose of Claims Relating to the Gut Dam, March 25, 1965, United States-Canada, 17 U.S.T. 1566, T.I.A.S. No. 6114.

[78] RESTATEMENT (SECOND), *supra* note 12, §§ 73-82. The *Restatement (Second)* locates four possible bases of jurisdiction: territory, nationality, protection of certain state interests, and protection of certain universal interests. *Id.* § 10. Once a court determines that it may exercise jurisdiction, it should still consider whether jurisdiction is properly exercised. Aerospatiale Case, 107 S. Ct. 2542, 2561-62 (1987) (Blackmun, J. concurring in part and dissenting in part); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976). *See infra* note 283. *But cf.* Westinghouse Elec. Co. v. Rio Algom Ltd., 617 F.2d 1248 (7th Cir. 1980) (imposing treble damages through default judgment on foreign corporations for activities carried on outside the United States). For one foreign reaction to the *Rio Algom* decision, see Protection of Trading Interests Act, 1980, ch. 11 (barring enforcement of foreign judgments against British persons for multiple damages).

[79] *See, e.g.*, Agreement on Reciprocal Fishing Privileges, April 24, 1970, United States-Canada, 21 U.S.T. 1283, T.I.A.S. No. 6879.

rums resolve most treaty controversies, and the litigation parties typically are persons, not states.

The foregoing does not mean that a court may sua sponte disregard international law. Indeed, courts correctly and consistently give international law a special place in hierarchy of laws.[80] Courts recognize that if a nation violates international law, its infraction becomes subject to international resolution through various methods from negotiation to outright war.[81] Obviously, American courts are institutionally incapable of resolving international conflict through these methods. However, courts are uniquely qualified to resolve domestic legal disputes. National bias in the domestic legal system has no relevant meaning: generally speaking, all acts of the domestic legislature reflect a national bias. It is entirely appropriate — and the polity so expects — that domestic law reflect the interests of the domestic constituency.[82] Further, to allow international expectations to be met, the Supreme Court has relied on evidence from other treaty parties. This evidence includes the negotiating records[83] and practical construction[84] of the other treaty party. The Court even relied on foreign cases interpreting the disputed treaty.[85] Finally, the Court has firmly established that treaties should be interpreted liberally and in good faith.[86]

Through court reliance on extrinsic evidence, interested parties might

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[80] *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 270 (1796) ("The peace of mankind the honor of the human race, the welfare, perhaps the being of future generations, must in no inconsiderable degree depend on the sacred observance of national conventions.").

[81] Edye v. Robertson, 112 U.S. 580, 598 (1884).

[82] *See* Merrills, *Two Approaches to Treaty Interpretation*, 1968-69 AUSTL. Y.B. INT'L L. 55, 74-75, 78.

[83] *See, e.g.*, Aerospatiale Case, 107 S. Ct. 2542, 2550 (1987); Warren v. United States, 340 U.S. 523, 527 n.4 (1951); Cook v. United States, 288 U.S. 102, 116-18 (1933); Nielsen v. Johnson, 279 U.S. 47, 52-54 (1929); Doe v. Braden, 57 U.S. (16 How.) 635, 654-55 (1853).

[84] *See, e.g.*, *Aerospatiale Case*, 107 S. Ct. at 2550; Air France v. Saks, 470 U.S. 392, 396 (1985); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 183 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Factor v. Laubenheimer, 290 U.S. 276, 294-95 (1933); Todok v. Union State Bank, 281 U.S. 449, 454 (1930); *Nielsen*, 279 U.S. at 54; Sullivan v. Kidd, 254 U.S. 433, 443 (1921); Charlton v. Kelly, 229 U.S. 447, 465 (1913); United States v. American Sugar Ref. Co., 202 U.S. 563, 579 (1906); Terlinden v. Ames, 184 U.S. 270, 282-86 (1902); United States v. Texas, 162 U.S. 1, 41 (1896); Kinkead v. United States, 150 U.S. 483, 491-92 (1893); *In re* Ross, 140 U.S. 453, 467-70 (1891); *Braden*, 57 U.S. (16 How.) at 655-56.

[85] *See Air France*, 470 U.S. at 400; The Pizarro, 15 U.S. (2 Wheat) 227, 242 n.1 (1817).

[86] *See infra* notes 282-96 and accompanying text.

not receive notice of interpretations affecting their treaty rights and duties. Ideally, though, knowledge of legal rules is essential to the functioning of any legal system.[87] Moral and legal blame should attach only to those who (1) know the rules, (2) can choose to comply with the rules, and (3) act intentionally to violate the rules.[88] A legal system that places nearly dispositive weight on rules not generally known loses much of its ethical validity.[89] Treaty interpretation that gives such weight to largely inaccessible evidence falls into the same category.

In most circumstances, one can assume that people form sufficient choice and intent to be bound by a rule.[90] The difficult question in some treaty interpretation cases is whether the parties had knowledge of the law. In these cases, parties might not have access to extrinsic evidence that the court may find dispositive. However, those claiming rights under treaties *do* have notice of American agency and legislative interpretations. The missing interpretations are those of the other treaty parties. But even these interpretations can be wrought from data on practical construction by the other treaty party.[91] Thus, upon close examination of the proper role of the judiciary in treaty interpretation cases and the varied forms of textual and extrinsic evidence, one must conclude that a court may properly give effect to treaty negotiators' purpose as indicated from textual and extrinsic evidence. To fully reflect the current law of treaty interpretation, the *Restatement (Revised)* should include this norm in section 325.

b. Courts Should Interpret Treaties Consistently with the Constitution.

No court or commentator seriously questions the proposition that treaty interpretation should be consistent with the Constitution.[92] The

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[87] *See* L. FULLER, THE MORALITY OF LAW 39, 55-65 (1964).

[88] T. MORAWETZ, THE PHILOSOPHY OF LAW 178 (1980).

[89] *See* L. FULLER, *supra* note 87, at 55-65.

[90] Some argue that we can never really know the intentions of others, that intention is too interior a psychological state on which to rest societal blame. This argument reveals the confusion about the meaning of intention. Properly understood, intent is not private but the observable, conscious pursuit of results through action, without coercion or constraint. T. MORAWETZ, *supra* note 88, at 201. Determinists argue that people really do not exercise free choice but act according to the necessities of their history and personality. *Id.* The determinist's theory fails, however, because the "rule" formed by these necessities may be so general that it is uninformative or so detailed that it merely restates the relevant facts. *Id.* at 185-87.

[91] *See infra* notes 189-209 and accompanying text.

[92] *See* L. HENKIN, *supra* note 68, at 139.

Constitution is the preeminent law of the land. As the United States' "rule of recognition,"[93] the Constitution determines the validity of all laws enacted pursuant to it, including treaties. A court may find federal action, including treaties, unconstitutional for any of three reasons: (1) infringement of a person's fundamental rights,[94] (2) interference with state sovereignty,[95] or (3) violation of the principle of limited[96] and separated[97] powers. The Supreme Court has stated that when improper

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[93] *See supra* notes 30-33 and accompanying text.

[94] *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (prior restraints of expression bear heavy presumption against constitutional validity).

[95] *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled*, Garcia v. San Antonio Metro. Transit Auth., 464 U.S. 528, *reh'g denied*, 471 U.S. 1049 (1985).

[96] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."); *see also* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 260 (1796) (judiciary powerless to declare treaty breach without prior action of Congress).

An issue the courts apparently have not addressed concerns whether a treaty may be made not subject to future termination or amendment. Such treaties exist. *See, e.g.*, Treaty of Friendship and Territorial Sovereignty, United States-Tuvalu, February 7, 1979, T.I.A.S. No. 10,776, art. V(b) ("Article I of this Treaty shall not be subject to . . . termination."); Treaty of Friendship and Territorial Sovereignty, United States-Kiribati, September 20, 1979, T.I.A.S. No. 10,777 art. 7(b) ("Article 1 of this Treaty shall not be subject to termination."). In the first article of each treaty, the United States recognized the other parties' claims to formerly disputed islands.

Such clauses are plainly unconstitutional. These clauses effectively disable the federal government from legislating on the subject matter. If valid, the clauses tacitly amend the Constitution. For without the treaties, the federal goverment's powers over the subject matter would not otherwise be so limited. U.S. CONST. art IV, § 3, cl. 2 provides:

> The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The Supreme Court has long held that when a treaty conflicts with a later statute, the statute prevails, regardless of the expectations of the treaty signatories. The Court once wrote:

> If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control.

Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889). Although these treaties were submitted to the Senate for consent to ratification and encountered some opposition, the instant issue was not considered. *See generally* S. EXEC. REP. NO. 5, 98th Cong., 1st Sess. (1983).

[97] *See, e.g.*, Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983)

subjects of treaty negotiation may exist[98] and has overturned certain treaty terms it has found to violate the Bill of Rights.[99]

The Court gives federalism considerations little weight in treaty interpretation. States rights have had no legal recognition in foreign affairs since the end of the Articles of Confederation.[100] This norm exists in other countries as well.[101] Treaties[102] as well as executive agreements[103] override inconsistent state law, including state constitutions.[104]

i. Separation of Powers Framework

The Court applies a more complex analysis when litigants challenge treaties on separation of powers grounds. In *Missouri v. Holland*[105] Justice Holmes distinguished treaties "made under the authority of the United States" from acts of Congress "made in pursuance of the Constitution."[106] That decision upheld a Senate-approved treaty which regulated transactions considered beyond the power of Congress.[107] The opinion is consistent with a framework announced in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[108] later

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(legislative veto violates separation of powers principle).

[98] *See* Hauenstein v. Lynham, 100 U.S. 483, 490 (1879). The Court declined to describe the forbidden subjects. Presumably, they include illegal or unconstitutional acts.

[99] *See* Reid v. Covert, 354 U.S. 1 (1957) (finding invalid treaty terms barring trial-by-jury of American citizen dependents of American military personnel). *Cf.* Boos v. Barry, 56 U.S.L.W. 4254 (Mar. 22, 1988) (treaty requiring prevention of diplomatic insult does not justify ban on antigovernment protests in embassy vicinity). However, a treaty might limit constitutional rights under certain unusual circumstances. *See Reid*, 354 U.S. at 65-78 (Harlan, J., concurring) (finding continued validity of *In re* Ross, 140 U.S. 453 (1891) in which the Court let stand treaty terms requiring overseas trial-by-consul (implicitly barring trial-by-jury) of United States citizen civilians found in "uncivilized" countries).

[100] *See Ware*, 3 U.S. (3 Dall.) at 236-37.

[101] *See* Schreuer, *The Interpretation of Treaties by Domestic Courts*, 45 BRIT. Y.B. INT'L L. 255, 266 (1971).

[102] Kolovrat v. Oregon, 366 U.S. 187, 190 (1961); The Passenger Cases, 48 U.S. (7 How.) 283, 412-13 (1849) (Wayne, J. concurring); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236-37 (1796).

[103] United States v. Belmont, 301 U.S. 324, 331-32 (1937).

[104] *Ware*, 3 U.S. (3 Dall.) at 236-37.

[105] 252 U.S. 416 (1920).

[106] *Id.* at 433.

[107] The treaty set the hunting season for birds migrating between the United States and Canada. *Id.* at 431.

[108] 343 U.S. 579, 637-38 (1952).

adopted by the full court in *Dames & Moore v. Regan*.[109] Simply stated, the framework measures the constitutional validity of executive action according to the posture of Congress.

That posture follows a "spectrum running from explicit congressional authorization to explicit congressional prohibition."[110] When Presidents act pursuant to express or implied congressional authorization, their authority is at its apex. Courts will give such action wide latitude.[111] When Presidents act in the absence of either a congressional grant or denial of authority, they can only rely on their own independent powers which may exist concurrently with congressional powers. In this "zone of twilight,"[112] the test of validity likely depends on "the imperatives of events and contemporary imponderables rather than on abstract theories of law."[113] Finally, when Presidents act in opposition to the expressed or implied will of Congress, they can rely only upon their plenary constitutional powers minus any constitutional powers of Congress. Courts closely scrutinize such action, for it is validated only by forever disabling Congress.[114]

ii. Congressional Authorization

Senate-consented treaties and congressionally authorized executive agreements fall into Justice Jackson's first category: executive action

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[109] 453 U.S. 654, 668-69 (1981).

[110] *Id.* at 669.

[111] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, (1952) (Jackson, J., concurring). Justice Jackson wrote:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

Id. at 635-37 (footnotes omitted).

[112] *Id.* at 637.

[113] *Id.* Justice Jackson wrote: "[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Id.*

[114] *Id.* at 637-38; *see also* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (holding illegal United States Navy action pursuant to neither congressional authorization nor plenary presidential power).

explicitly authorized by Congress. Such a treaty or executive agreement "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation . . . ."[115] This latitude ends, however, when the treaty trammels fundamental personal rights.[116]

iii. Congressional Opposition

An international agreement made in opposition to congressional will is likely invalid. In this case, the Court requires the executive's power with regard to the treaty's subject matter to exceed that of Congress. Consequently, the international agreement must be made pursuant to a plenary presidential power. As a constitutional matter, the President's plenary powers in foreign affairs are strikingly few compared to those of the Congress.[117] The Supreme Court seems to have recognized a plenary presidential power to make agreements regarding diplomatic recognition[118] and possibly, treaty termination.[119] One commentator also

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[115] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

[116] Reid v. Covert, 354 U.S. 1 (1957).

[117] The Constitution lists only three presidential powers that directly implicate foreign relations: (1) "The executive Power shall be vested in a President of the United States of America," U.S. CONST. art. II, § 1, cl. 1; (2) "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ," *id.* at art. II, § 2, cl. 1; (3) "[H]e shall receive Ambassadors and other public Ministers . . . ," *id.* at art. II, § 3, cl. 1.

In stark contrast, the Constitution enumerates eighteen congressional powers that directly implicate foreign relations: (1) lay duties on imports, *id.* at art. I, § 8, cl. 1; (2) sell bonds, *id.* at art. I, § 8, cl. 2; (3) regulate foreign commerce, *id.* at art. I, § 8, cl. 3; (4) set naturalization law, *id.* at art. I, § 8, cl. 4; (5) set monetary policy, *id.* at art. I, § 8, cl. 5; (6) set the rate of foreign exchange, *id.* at art. I, § 8, cl. 5; (7) establish postal communication, *id.* at art. I, § 8, cl. 7; (8) define international law, *id.* at art. I, § 8, cl. 10; (9) declare war and laws of war, *id.* at art. I, § 8, cl. 11; (10) support armies, *id.* at art. I, § 8, cl. 12; (11) support a navy, *id.* at art. I, § 8, cl. 13; (12) define military and naval laws and regulations, *id.* at art. I, § 8, cl. 14; (13) call forth state militias, *id.* at art. I, § 8, cl. 15; (14) make all laws necessary and proper for carrying into execution all powers vested in federal government by the Constitution, *id.* at art. I, § 8, cl. 18; (15) suspend writ of habeas corpus in case of invasion, *id.* at art. I, § 9, cl. 2; (16) validate grant of foreign title to an officer of the United States, *id.* at art. I, § 9, cl. 8; (17) validate state-imposed import duties, *id.* at art. I, § 10, cl. 2; and (18) validate state compacts and state warmaking, *id.* at art. I, § 10, cl. 3.

Two foreign relations powers are explicitly shared: "[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; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls . . . ." *Id.* at art. II, § 2, cl. 2.

[118] *See* United States v. Belmont, 301 U.S. 324, 330-31 (1937). Because no congres-

suggests a plenary presidential power to conclude wartime agreements regarding commitments and armistices.[120] Presumably, then, an executive agreement made in the face of congressional opposition and made pursuant to a power not listed in Article II is invalid.

The Appropriations Clause[121] assures that conceding a plenary executive agreement power need not lead to despotism. Even though Presidents may unilaterally bind the United States through executive agreement, they must still rely on Congress to pass implementing legislation; the power of the purse remains supreme in the Congress. For example, Secretary of State Henry Kissinger committed the United States to "assure" the peace between Israel and Egypt through executive agreement.[122] If diplomatic negotiation, as a function of diplomatic recognition, is a plenary presidential power,[123] Secretary Kissinger's agreement did not require Senate consent to ratification or full congressional authorization. Nonetheless, Secretary Kissinger realized that only an appropriation of Congress could fund the agreement's obligations.[124]

iv. Congressional Silence

An international agreement made without explicit congressional consent and without explicit congressional disapproval falls into what Jus-

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sional intent existed in this case, it may be arguably classified as a concurrent power case. *See infra* notes 125-48 and accompanying text. However, the *Belmont* court stated "[i]n respect of what was done here, the Executive had authority to speak as the sole organ of [the] government." *Belmont*, 301 U.S. at 330.

[119] The Court has refused to require Senate consent to presidential treaty termination. *See* Goldwater v. Carter, 444 U.S. 996 (1979) (individual Senator's claim against President's treaty termination nonjusticiable without action of Senate as a whole). Also, Immigration and Nationalization Serv. v. Chadha, 462 U.S. 919 (1983) may bar legislative veto of proposed treaty termination. *See* T. FRANCK & M. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 330 (1987). *But cf.* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 260 (1796) (power to declare treaty breach committed to Congress).

[120] L. HENKIN, *supra* note 68, at 177 (such agreements considered an exercise of the Commander-in-Chief power).

[121] U.S. CONST. art. I, § 9, cl. 7 requires: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."

[122] *See* Agreement on Assurances, Consultations, and United States Policy on Middle East Peace, Feb. 27, 1976, United States-Israel, 32 U.S.T. 2151, T.I.A.S. No. 9828.

[123] *See supra* note 118 and accompanying text.

[124] Thus, the agreement reads: "The United States Government will make every effort to be fully responsive, within the limits of its resources and congressional authorization and appropriation, on an on-going and long-term basis to Israel's military equipment and other defense requirements, to its energy requirements and to its economic needs." Agreement on Assurances, Consultations, and United States Policy on Middle East Peace, *supra* note 122.

tice Jackson called a "zone of twilight" in which the validity of the agreement depends not on strict notions of separation of powers but largely on the "contemporary imponderables" of practical politics.[125] Upon analysis it seems that if an executive agreement poses a special threat of abuse or requires national consensus and deliberation for lasting national benefit, a court should find the agreement invalid if promulgated in the face of congressional silence. All other agreements are presumptively valid.[126]

The Framers did not establish the Constitution as a precise delineation of all interbranch powers, rather they intended that function follow form.[127] The Constitution created three separate specialized institutions which hold some enumerated powers exclusively,[128] but share other overlapping powers.[129] The Framers largely left open for interbranch negotiations the precise terms of these overlapping powers.[130] In approving the Constitution, the states ratified an "invitation to struggle."[131] Apparently, no litigant has successfully challenged an executive agreement on the grounds of lack of congressional consent, but a court would likely test the agreement by applying a functional analysis of the competence of the competing branches. Such an analysis follows.[132]

Commentators have identified several attributes supporting presidential authority to conclude certain types of international agreements in the face of congressional silence: unity and dispatch,[133] leadership,[134] energy,[135] and command of a professional bureaucracy.[136] However, presi-

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[125] *See supra* note 113 and accompanying text.

[126] Of course, these agreements still must pass constitutional muster. *See supra* notes 94-97 and accompanying text.

[127] Chief Justice Marshall wrote: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

[128] Tulis, *The Two Constitutional Presidencies*, in THE PRESIDENCY AND THE POLITICAL SYSTEM 68 (M. Nelson ed. 1984); *see supra* note 117.

[129] Ornstein, *supra* note 62, at 35.

[130] Tulis, *supra* note 128, at 68.

[131] *See generally* C. CRABB, JR. & P. HOLT, AN INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY (2d ed. 1984).

[132] For a more comprehensive exposition of this analysis, see M. Glennon, Towards Constitutional Diplomacy, ch. 3 (Aug. 29, 1987) (unpublished manuscript on file with author).

[133] *Id.*

[134] *See* L. BERMAN, THE NEW AMERICAN PRESIDENCY 10-11 (1987).

[135] *See* Tulis, *supra* note 128, at 69.

[136] Nelson & Tillman, *The Presidency, the Bureaucracy and Foreign Policy: Les-*

dential demagoguery[137] and a tendency to discount the bureaucracy's expert advice[138] argue against validating presidential authority to conclude executive agreements in the face of congressional silence.

Congress' unique capacity to build national consensus,[139] to deliberate,[140] and thereby check the other branches' power,[141] argue in favor of its participation in approving international agreements besides treaties. However, Congress' lack of unity[142] and its concomitant reactiveness[143] inhibit such participation.

Some international agreements, for example, those dealing with international trade, affect the entire nation. Consequently, they require national consensus and should receive explicit congressional consent.[144] Certain agreements indicate a disregard for bureaucratic expertise and expose the country to national security risks, such as President Reagan's agreement to supply weapons to Iran.[145] It is unlikely that this agreement would have survived sustained deliberation or garnered national consensus.[146]

Other international agreements, such as those promising disaster relief, do not require national consensus, but speedy commitment.[147] Still

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sons from Cambodia, in THE PRESIDENCY AND THE POLITICAL SYSTEM, *supra* note 128, at 496.

[137] *See* Tulis, *supra* note 128, at 61, 79.

[138] *See* Newsom, *The Executive Branch in Foreign Policy*, in THE PRESIDENT, THE CONGRESS AND FOREIGN POLICY, *supra* note 62, at 109. According to President Kennedy, blame for the Bay of Pigs failure lay with the Joint Chiefs of Staff and the Central Intelligence Agency for poor execution — not with himself for having chosen poor policy options. T. PATERSON, J. CLIFFORD & K. HAGEN, AMERICAN FOREIGN POLICY: A HISTORY 541 (1977).

[139] *See* A. MAASS, CONGRESS AND THE COMMON GOOD 11 (1983).

[140] *See* Hammond, *Congress in Foreign Policy*, in THE PRESIDENT, THE CONGRESS AND FOREIGN POLICY, *supra* note 62, at 84.

[141] Although Congress may impeach and convict executive and judicial branch members, U.S. CONST. art. I, § 3, cl. 6, Congress' power to appropriate, *id.* at art. I, § 9, cl. 7, and to change the jurisdiction of the federal judiciary, *id.* at art. III, § 2, are more common checks on the other branches' power.

[142] At least 25 committees from both houses of Congress deal with foreign relations. *See* Hammond, *supra* note 140, at 77.

[143] *See* J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 306 (1981).

[144] *See, e.g.*, 19 U.S.C. § 2503(b) (1988) (authorizing President to accept for the United States certain types of international trade agreements).

[145] *See* NAT'L J., Aug. 8, 1987, at 2015.

[146] *See id.*

[147] *See, e.g.*, Agreement on Privileges and Immunities of Disaster Assistance Personnel, United States-Nicaragua, Dec. 17, 18, 1979, 32 U.S.T. 514, T.I.A.S. No. 9720 (entering into force upon signature).

other agreements detail technical matters, such as development assistance.[148] These agreements would gain little from national debate or deliberation, thus should not require explicit congressional consent.

This section described a framework for determining the constitutionality of treaties when challenged on the basis of an abridgement of fundamental rights, federalism, or separation of powers. The norm that a court should interpret treaties consistently with the Constitution is a short hand notation of this framework. To fully reflect the current law of treaty interpretation, the ***Restatement (Revised)*** should include this norm in section 325.

c. Courts Should Give Agency Interpretation Great Weight

The Supreme Court has given great weight to rational, consistent, long-standing, and publicized treaty interpretations made by the agency charged with its negotiation and/or implementation.[149] This practice is almost identical to that developed in statutory interpretation.[150] Courts have established several qualifying criteria for assigning probative weight to agency interpretations of statutes. The key criteria include: (1) how soon the agency made the interpretation after the statute's enactment, (2) whether the public knew of the interpretation, (3) whether Congress re-enacted the statute with knowledge of the agency's interpretation, (4) whether clear congressional purpose contradicts the agency's interpretation, and (5) whether the agency has interpreted the statute consistently.[151] Courts may overturn an agency's statutory interpretation only if it is "plainly erroneous or inconsistent with the regulation,"[152] or if the courts do not need the agency's special expertise for interpretation.[153] However, courts have stated that an agency's interpre-

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[148] *See, e.g.*, Agreement on Joint Committee for Economic Relations, United States-Morocco, Sept. 25, 1980, 32 U.S.T. 2677, T.I.A.S. No. 9870 (entering into force upon signature); 19 U.S.C. § 2503(b) (1988) (authorizing President to accept for the United States certain types of international trade agreements).

[149] *See* O'Connor v. United States, 107 S. Ct. 347, 351 (1986); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961). Apparently the Court also gives foreign agency interpretations great weight. *Sumitomo*, 457 U.S. at 184 n.10.

[150] J. SUTHERLAND, *supra* note 46, § 49.01.

[151] *Id.* §§ 49.04-49.05.

[152] McCall Coal Co., v. United States, 374 F.2d 689, 691 (4th Cir. 1967).

[153] *See* Transbrasil S.A. Linhas Aereas v. Department of Transp., 791 F.2d 202 (D.C. Cir. 1986) (when statute's language and history indicate clear congressional intent, court need not reach issue of extent of deference to accord agency's interpretation); Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 403 N.E.2d 159, 426 N.Y.S.2d

tation is just one of many factors a court weighs in construing a statute.[154] Courts seem to observe these criteria loosely in treaty interpretation cases.[155] An agency's interpretation may actually dispose of treaty ambiguities.[156] Apparently, the Supreme Court has not interpreted a treaty contrary to an agency's consistent interpretation.[157] This norm may exist in other countries as well.[158]

Courts may defer to agency interpretations for several reasons. First, legislative purpose focuses only on the meaning the negotiators sought to convey to the legislature. However, contemporaneous interpretation of statutes by implementing agencies suggests what meaning the drafters *actually* conveyed.[159] Second, a lack of deference toward agency interpretations may undermine domestic and foreign diplomatic reliance. As these rules become unreliable, domestic and international confidence in the underlying legitimacy of American law will erode.[160]

Third, the Judiciary is simply incapable of replacing the special, intimate knowledge of the treaty that those charged with its negotiation possess.[161] The Judiciary's sole means of fact finding is litigants' discovery and United States law may prohibit litigants from soliciting diplomatic information from foreign governments, and even the United

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454 (1980) (when question is one of pure statutory reading and analysis dependent only on accurate apprehension of legislative intent, agency's interpretive regulations accorded much less weight).

[154] *See* Zuber v. Allen, 396 U.S. 168, 192 (1969) (agency's interpretation is "only one input in the interpretational equation").

[155] *See, e.g.*, Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982). In this case, the litigants disputed the actual intent of the treaty parties, the United States and Japan. The trial court admitted into evidence two contradictory letters, both written after ratification by different State Department legal advisors not present at the negotiations. The court of appeals chose one as correct. The Supreme Court found that "neither of these letters is indicative of the state of mind of the Treaty negotiators; they are merely evidence of the later interpretation of the State Department as the agency charged with interpreting and enforcing the Treaty." *Id.* at 184 n.10. Despite the inconsistent agency interpretations, the Supreme Court decided the case consistently with one of the State Department's letters.

[156] *See* cases cited *supra* note 149.

[157] Apparently the Supreme Court has rejected an agency's treaty interpretation as inconsistent with the agency's prior interpretations in only three cases. *See* Clark v. Allen, 331 U.S. 503 (1947); Perkins v. Elg, 307 U.S. 325, 329 (1939); De Lima v. Bidwell, 182 U.S. 1 (1901). The Court may also reject agency interpretations on the grounds of unconstitutionality. *See supra* notes 92-148 and accompanying text.

[158] *See* Schreurer, *supra* note 101, at 261-65.

[159] J. SUTHERLAND, *supra* note 46, § 49.01.

[160] *See* L. FULLER, *supra* note 87, at 38-41.

[161] L. HENKIN, *supra* note 68, at 167.

States government.[162] Thus, the Judiciary may be disabled relative to the Executive.

Finally, courts may defer to agency interpretations out of recognition of international law's evolutionary nature. The international legal system is evolving from a mostly primitive system to a mostly modern one.[163] Practice and treaties continually reshape customary norms. Indeed, one commentator maintains that the United States should allow the President to break customary international law in order to make it.[164] This phenomena may partially explain Supreme Court deference to executive interpretations.[165] The Court is loathe to require the Executive to take action under a treaty that may have international repercussions.[166] Consequently, the Court is content to defer to agency interpretations in foreign relations cases in general and treaty interpretation cases in particular.

Courts rely much more heavily on agency interpretations when construing treaties than when construing statutes.[167] This reliance seems undue. Judges have reserved treaty interpretation to themselves as a question of law.[168] The great deference given to agency interpretation amounts to a delegation of the vitally important judicial function of interpretation. Further, this delegation may be essentially standardless. The State Department's interpretation of a treaty may vary significantly over time.[169] In *statutory* interpretation the Supreme Court has lessened the probative weight of agency interpretation when the interpretation was not contemporaneous with the passage of the statute.[170]

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[162] *See supra* note 73 and accompanying text. For a compelling example of the obstacles litigants can face in discovering United States government diplomatic information, see Coplin v. United States, 6 Ct. Cl. 115, *rev'd*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd sub nom.* O'Connor v. United States, 107 S. Ct. 347 (1986).

[163] Hoebel, *Primitive Law and Modern*, 5 TRANS. N.Y. ACAD. SCI. 30, 41 (1942).

[164] Charney, *The Power of the Executive Branch of the United States Government to Violate International Law*, 80 AM. J. INT'L L. 913 (1986). *But see* Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923 (1986).

[165] *See* T. FRANCK & M. GLENNON, *supra* note 119, at 96.

[166] *See, e.g.*, Charlton v. Kelley, 229 U.S. 447 (1913) (although evidence indicated Italy had breached treaty, Court enforced its terms as applied to United States citizen because State Department had not formally declared Italy to be in breach).

[167] *See supra* notes 155-58 and accompanying text.

[168] *See* Sullivan v. Kidd, 254 U.S. 433, 442 (1921); Jones v. Meehan, 175 U.S. 1, 32 (1899).

[169] *See supra* notes 4, 66-70, and *infra* note 227 and accompanying text.

[170] To receive great probative weight, the agency must make its interpretation at the time of enactment or soon after. J. SUTHERLAND, *supra* note 46, § 49.08; *see* Breman v. Kroger Co., 513 F.2d 961 (7th Cir. 1975) (administrative interpretation coming 29 months after enactment not entitled to special weight as a contemporaneous

In *treaty* interpretation the Supreme Court has not evaluated the time frame of State Department interpretations but instead has granted all such interpretations great weight.[171] This deference may induce treaty claimants to solicit State Department endorsement of their interpretation before entering litigation. Conceivably, uncontested allegations of such endorsement could become grounds for granting a motion for summary judgment.[172]

This section described and analyzed the basis of the norm that courts should give great weight to agency interpretations of treaties. To fully reflect the current state of the law, the *Restatement (Revised)* should include this norm in section 325. Historically, however, courts have relied too heavily on agency interpretations.[173] A better norm would encourage courts to give appropriate weight to these interpretations. The standard for determining the appropriate weight should include the criteria applied in statutory interpretation.[174] The *Restatement (Revised)* should recommend this norm in its comments following section 325.

B. Treaties as Contracts

1. Notion

Contracts are legally enforceable agreements between parties regarding their rights and duties towards each other and towards third parties.[175] To qualify for judicial enforcement, a contract must possess certain formal and substantive elements.[176] Courts require these elements to prevent, among other things, fraud,[177] extreme unfairness due to unequal bargaining power,[178] and the enforcement of agreements the parties did not intend to enforce.[179]

Appropriately, the Supreme Court has classified treaties as contracts

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construction).

[171] *See* cases cited *supra* note 149.

[172] Under a judicial regime which gives dispositive weight to agency interpretations, State Department endorsement of a party's interpretation could establish that no genuine issue of material fact exists. If so, the court should grant the moving party judgment as a matter of law. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); C. WRIGHT, FEDERAL COURTS 663-68 (4th ed. 1983).

[173] *See supra* notes 155-58 and accompanying text.

[174] *See supra* notes 151-54 and accompanying text.

[175] *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 1-1 (1987).

[176] *See id.* § 1-11.

[177] *Id.* § 19-1.

[178] *Id.* § 9-3.

[179] *Id.* § 4-1.

among nations.[180] Since treaties are agreements between nation-states[181] these agreements confer rights and impose duties on the nation-state parties and their citizens. Treaties may even confer rights on third party nation-states and their citizens.[182] Treaties must conform to formal procedural requirements of the Constitution.[183] They must be written,[184] and their terms must be set out in sufficient clarity to indicate mutual intent to be bound.[185]

An essential presumption of international law is that all nation-states possess equal sovereignty. Sovereignty may be conceived as the capacity to represent a nation in international law.[186] Thus nation-states are by definition capable of undertaking obligations and accepting rights regarding other nation-states. Courts require consideration in contracts to prevent, among other things, extreme unfairness due to a party's incapacity. Unlike contracts, treaties may be valid without consideration.[187] This springs directly from the assumption of sovereignty: it is inconceivable that an agreement among equals include unfair terms.[188]

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[180] *See, e.g.*, Aerospatiale Case, 107 S. Ct. 2542, 2550 (1987); O'Connor v. United States, 107 S. Ct. 347, 351 (1986); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931); Sullivan v. Kidd, 254 U.S. 433, 439 (1921); Rainey v. United States, 232 U.S. 310, 316 (1914); United States v. American Sugar Ref. Co., 202 U.S. 563, 577 (1906); Geofroy v. Riggs, 133 U.S. 258, 271 (1890); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson, 112 U.S. 580, 598 (1884); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

[181] Since individuals are not recognized in international law, they may not be true parties to treaties. *See* Mosler, *Subjects of International Law*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 442 (1984); Partsch, *Individuals in International Law*, in 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 316 (1984).

[182] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 619-22 (3d ed. 1979). Treaties may not take away rights of third parties. *See* The Amistad, 40 U.S. (15 Pet.) 518, 596 (1841).

[183] *See supra* notes 36-39 and accompanying text; *see also* T. FRANCK & M. GLENNON, *supra* note 119, at 227-36.

[184] *See, e.g.*, The Case Act, 1 U.S.C. § 112(b) (1985): "The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), other than a treaty, to which the United States is a party . . . ." *Id.*

[185] For Senate reaction to striking ambiguities in four "secret" agreements between the United States and Israel, see Senate Foreign Relations Committee Memorandum of Law on Choice of Instruments for Sinai Accords, *reprinted in* T. FRANCK & M. GLENNON, *supra* note 119, at 406-12.

[186] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316-18 (1936).

[187] *See, e.g.*, Charlton v. Kelly, 229 U.S. 447, 476 (1913) (treaty obligations need not be reciprocal); *see infra* notes 238-42 and accompanying text.

[188] *Cf.* Statement of Mr. Raul Prebisch, Secretary General of the United Nations Conference on Trade and Development, in J. BARTON & B. FISHER, INTERNATIONAL

2. Interpretive Norm

a. Courts Should Give Substantial Weight to the Parties' Practical Construction of the Treaty.

In construing contracts, courts often give substantial probative weight to evidence of notorious, subsequent, and consistent practice of the contract parties.[189] Courts find such "practical construction" of agreements solid evidence of mutually held intentions regarding the rights conferred and duties the contract imposes.[190] This heavy weighting of practical construction conforms with the Uniform Commercial Code,[191] the *Restatement of Contracts*,[192] and the United Nations Convention on Contracts for the International Sale of Goods.[193]

Courts interpreting treaties also place substantial reliance on evidence of notorious, subsequent, and consistent practice of treaty parties.[194] Under accepted principles of international law, a state may not

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TRADE AND INVESTMENT 503 (1986) (to establish a "New International Economic Order," developed nations are duty-bound to aid economies of developing countries).

[189] *See* authorities cited in J. CALAMARI & J. PERILLO, *supra* note 175, at 179 n.90.

[190] *Id.*

[191] U.C.C. § 2-208(1) (1986) requires:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

Id.

[192] "If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation." RESTATEMENT OF CONTRACTS § 235(e) (1932).

[193] In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

United Nations Convention on Contracts for the International Sale of Goods, art. 8(3), *opened for signature* Apr. 11, 1980, U.N. Doc. A/CONF.97/18, *reprinted in* 52 Fed. Reg. 6264-80 (1987). This convention entered into force in the United States on Jan. 1, 1988. *Id.* at 6262.

[194] Courts call this phenomena either "practical construction" or "subsequent conduct." *See, e.g.*, Aerospatiale Case, 107 S. Ct. 2542, 2550 (1987); Air France v. Saks, 470 U.S. 392, 396 (1985); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 255-60 (1983); Kolovrat v. Oregon, 366 U.S. 187, 196 (1961); Factor v. Laubenheimer, 290 U.S. 276, 294-95 (1933); Todok v. Union State Bank, 281 U.S. 449, 454 (1930); Nielsen v. Johnson, 279 U.S. 47, 52 (1929); Sullivan v. Kidd, 254

unilaterally expand or abuse its rights under a treaty without the consent of other treaty signatories.[195] This consent may be actual or constructive.[196] Constructive consent under principles of international law may include a party's lack of objection to another party's practice upon notice.[197]

There is an important difference between agency interpretations and the parties' notorious, subsequent, and consistent practice. Agency interpretations reflect only the purposes of one treaty party, while the parties' subsequent practice indicates mutually held purposes.[198] Thus, interpretation consistent with this norm avoids the problem of national bias.[199]

Judicial deference to signatory practical construction may flow from recognition of the primitive aspects of international law. The informal nature of dispute resolution reveals international law's primitive aspects.[200] The International Court of Justice and its predecessor have conclusively resolved relatively few significant international disputes.[201] Diplomacy is more common. In a sense, all treaty negotiation is a form of dispute resolution: remedial[202] or prospective.[203] In order to give the political branches the widest possible discretion in resolving interna-

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U.S. 433, 443 (1921); Charlton v. Kelly, 229 U.S. 447, 465 (1913); United States v. American Sugar Ref. Co., 202 U.S. 563, 579 (1906); Terlinden v. Ames, 184 U.S. 270, 283-88 (1902); United States v. Texas, 162 U.S. 1, 23 (1896); Kinkead v. United States, 150 U.S. 483, 486 (1893); *In re* Ross, 140 U.S. 453, 466-67 (1891).

[195] H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 286-306 (1966). This follows from the international law concept of *pacta sunt servanda*. This concept requires: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, *supra* note 26, at art. 26. The idea is incorporated into the interpretive norm that treaties should be interpreted liberally and in good faith. *See infra* notes 282-96 and accompanying text.

[196] *See* Greig, *The Interpretation of Treaties and Article V.2 of the Nuclear Non-Proliferation Treaty*, 6 AUSTL. Y.B. INT'L L. 76, 94 (1974-75).

[197] *See id.*

[198] Those familiar with Zen may appreciate the following analogy: agency interpretation is the sound of one hand clapping; the parties' subsequent practice is the sound of both hands clapping.

[199] *See supra* notes 71-86 and accompanying text.

[200] *Cf.* M. GLUCKMAN, THE IDEAS OF BAROTSE JURISPRUDENCE 1-7 (1965).

[201] *See* 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 727 (L. Gross ed. 1976).

[202] *See, e.g.*, Treaty on Prisoner Transfer, June 7, 1979, United States-Turkey, 32 U.S.T. 3187, T.I.A.S. No. 9892.

[203] *See, e.g.*, Agreement on Contingency Plans for Spills of Oil and Other Noxious Substances, June 19, 1974, United States-Canada, 25 U.S.T. 1280, T.I.A.S. No. 7861.

tional disputes, the Supreme Court defers to the President and Congress during wartime, even in the most compelling cases.[204]

Certain problems arise when courts give substantial weight to the parties' practical construction of a treaty. Practical construction likely indicates the meaning the signatories attached to the treaty. However, more interests may be at stake than those of the signatories. A treaty may create certain third party rights.[205] Third party states and persons may rely on the promise of enforcement of these rights. Since these parties do not have co-equal status as actual signatories, they may be unable to fully protect their interests.[206] Treaty signatories may be able to cut off third party rights through subsequent practice.[207] Under a regime that gives substantial weight to subsequent practice of signatories, a court may fail to protect these rights.

However, this seems unlikely since third party rights can only arise if the parties explicitly so intend.[208] If this norm is correctly applied, only evidence of notorious, subsequent, and consistent practice can prove intent. The specific nature of this conduct virtually precludes a simultaneous finding of an intent to benefit a third party and that third party's unavoidable detrimental reliance.[209]

This section set forth and analyzed the basis of the norm that courts should give substantial weight to the parties' practical construction of a treaty. Proper application of this norm brightly illuminates mutually held purposes while avoiding interference with legitimate third party interests. To fully reflect the current law of treaty interpretation, the *Restatement (Revised)* should maintain this norm in section 325.

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[204] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (approving wartime government practice of imposing imprisonment solely on account of membership in racial group).

[205] 1 L. OPPENHEIM, *supra* note 74, at 925-28.

[206] *See id.* at 927.

[207] *See* Coplin v. United States, 6 Ct. Cl. 115, *rev'd*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd sub nom.* O'Connor v. United States, 107 S. Ct. 347 (1986) (United States practice consented to by Panama under Panama Canal agreement negated tax-free status of Panama Canal Commission employees thought created by plain meaning of agreement).

[208] J. CALAMARI & J. PERILLO, *supra* note 175, § 17-2.

[209] A court may hold that, treaty language notwithstanding, the parties never intended to confer third party rights. For want of intent, no such rights arose; consequently, subsequent practice destroyed no such rights. *See* cases cited *supra* note 207.

C. Treaties as Sui Generis

1. Notion

The underlying rationale for classifying treaties as sui generis is the idea that treaties are unlike legislation and contracts. *Restatement (Revised)* section 325 implicitly supports this position by promoting the norms associated with it.

a. Treaties Are Unlike Legislation.

Theoretically, only secondary rules created pursuant to the community's rule of recognition are valid.[210] To acquire validity in the United States, legislation must follow specific constitutional procedures.[211] These procedures require that Congress create legislation either directly or through a delegation to another branch of the government.[212] Executive agreements entered into pursuant to congressional delegations meet these constitutional requirements.[213] However, certain executive agreements stand without congressional authorization, but exist pursuant to plenary or concurrent executive power.[214] These executive agreements qualify as legislation. They are sovereign-created rules of law regulating the relations between persons and between persons and the state.

Through practical construction, parties may amend treaties much more easily than a legislature can amend laws.[215] The Senate normally does not actually negotiate or write the treaties to which it gives consent.[216] The Senate's understanding of a treaty is derived largely from testimony given before the Senate Foreign Relations Committee.[217] Typically, executive branch and academic witnesses give the testi-

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[210] *See supra* notes 30-32 and accompanying text.

[211] *See* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983) (the "finely wrought and exhaustively considered procedure" for making law may not be circumvented).

[212] *See supra* notes 36-37, 39 and accompanying text.

[213] *Id.*

[214] State Dep't Airgram to all Diplomatic Posts Concerning Criteria for Deciding What Constitutes an International Agreement (Mar. 9, 1976), *reprinted in* 1 M. GLENNON & T. FRANCK, UNITED STATES FOREIGN RELATIONS LAW 14, 17 (1980). *See supra* notes 117-48 and accompanying text.

[215] *See supra* notes 194-204 and accompanying text.

[216] The last major Senate involvement in actual negotiation led to the signing of the United Nations Charter in 1945. *See* 14 M. WHITEMAN, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 53-55 (1970); *see also* L. HENKIN, *supra* note 68, at 131.

[217] *See* S. Res. 167. § 2(2)(B)-(D), 100th Cong., 1st Sess. (1987), *reprinted in* ABM REPORT, *supra* note 4, at 117.

mony.[218] Rarely, if ever, does the Senate hear the views of foreign treaty parties.[219] Thus, Senators rely heavily on executive interpretations when deciding whether to vote for consent to ratification.[220] Senate reliance notwithstanding, President Reagan has changed past Administrations' consistent interpretation of a valid treaty.[221] Although it is vested with the power,[222] Congress has done little unilaterally to enforce prior treaty interpretations.[223] Treaties result from diplomatic negotiation, an activity in which Congress simply cannot effectively participate.[224] Thus, Congress cannot reimpose the old executive interpretation through unilateral renegotiation.

Moreover, Congress' power to impose its interpretation on the President through legislation may be limited.[225] Congressional interpretation through law-making may affect the rights and duties of other treaty signatories. However, basic principles of international law bar states from unilaterally expanding their rights under treaties without the consent of other signatories.[226] Indeed, it could be that other signatories

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[218] *See, e.g.*, ABM REPORT, *supra* note 4, at 36-37.

[219] Foreign governments may encourage Senate consent to treaties between the United States and third countries. *See, e.g.*, S. EXEC. REP. NO. 5, 98th Cong., 1st Sess. (1983) (New Zealand urging Senate consent to treaties between United States and Tuvalu, and United States and Kiribati).

[220] *See id.* at 39-40.

[221] *See supra* note 4.

[222] The Supreme Court has long held that Congress may effectively amend a treaty through passage of inconsistent legislation. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson, 112 U.S. 580, 599 (1884). However, courts normally avoid construing treaties in a way that conflicts with subsequent Congressional acts. *See, e.g.*, Cook v. United States, 288 U.S. 102, 120 (1933). Nonetheless, it follows that if Congress has the power to amend a treaty through legislation, surely it has the lesser power to interpret a treaty through legislation.

[223] In 1978, the Senate considered whether, in effect, to amend its rules so as to make a point of order lie against any bill which would appropriate money to support an executive agreement which, in the Senate's opinion, should have been submitted as an Article II treaty. This Treaty Powers Resolution, S. 3076, 95th Cong., 2d Sess. § 502 (1978), never passed the Senate. If it had, it might have presented serious constitutional problems. It presumes, contrary to the Supreme Court's reading of the Constitution, *see* United States v. Belmont, 301 U.S. 324, 330-31 (1937), that the President has no plenary or concurrent executive agreement power. *See supra* notes 117-48 and accompanying text.

[224] *See supra* notes 142-43, 216 and accompanying text.

[225] L. HENKIN, *supra* note 68, at 136.

[226] *See* Greig, *supra* note 196, at 94.

may not dispute the American Executive's reinterpretation of a treaty.[227]

Ideally, the nature of the parties and interests affected by rules should influence the choice of interpretive norms a court applies to those rules. This follows from the fundamental ethical notion that normative homogeneity defines the bounds of a society.[228] Domestic legislation operates within only one society, the society of the country that enacted the legislation. The subject matter of domestic primary rules has two dimensions. Primary rules regulate (1) the relations between persons, and (2) the relations between the sovereign and the people. Thus, with domestic legislation, affected parties and interests are fairly homogeneous.

Treaties operate within the international plane, in which nation-states are the only components of society, as well as within the domestic legal systems of each signatory country. Parties and interests affected by treaties encompass a wider spectrum with less homogeneity of pertinent attitudes than those affected by domestic legislation.[229] The subject matter of treaties has five dimensions. Treaties may regulate (1) the relations between persons within a single signatory jurisdiction, (2) the relations between a single signatory state and its people, (3) the relations between signatory states, and (4) the relations between one signatory state and the persons of all other signatory states, (5) the relations between persons of one signatory jurisdiction and persons of all other signatory jurisdictions. Also, a wider assortment of tribunals and authorities interpret treaties, each having different doctrinal traditions and procedural methods and not being subject to the uniformity producing influences that operate in a unitary judicial system.[230]

b. Treaties Are Unlike Contracts.

For any contract to be legally enforceable at common law, a court must conclude that a meeting of the minds of the offeree and offeror

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[227] Senate opponents of President Reagan's Strategic Defense Initiative maintain that development and testing of the system violates the ABM Treaty. *See supra* note 4. However, in the joint statement of the United States and the Soviet Union concluding the recent Washington summit, the parties agreed:

> [to] work out an agreement that would commit the sides to observe the ABM treaty, as signed in 1972, while conducting their research and development and testing as required, which are permitted by the ABM treaty, and not to withdraw from the ABM treaty for a specified period of time.

TIME, Dec. 21, 1987, at 21.

[228] P. DEVLIN, THE ENFORCEMENT OF MORALS 11-12 (1959).

[229] J. SUTHERLAND, *supra* note 46, § 32.09.

[230] *Id.*

occurred.[231] However, treaties may well be valid, and even useful, without a meeting of the minds. Vague wording in treaties dealing with a highly emotional or politicized subject matters may actually have been intended to conceal areas of disagreement rather than reveal areas of agreement.[232]

For a contractual promise to be enforceable at common law, the promise must be supported by consideration.[233] The presence of consideration assures the court that the parties possessed equal competence to enter the transaction and defend their interests.[234] This notion of equality conforms with utilitarian ideals.[235] Under a utilitarian regime, the interest of the community is the sum of the interests of the members who compose it.[236] Utilitarianism thus presumes a homogeneous society in which all members of the community recognize each other as equal.[237] If this were not true, the interest of the community would be a weighted sum of individual interests, recognizing that the some members' interests are more important than others'.

The international law of treaties recognizes no principle of contractual consideration.[238] Indeed, many treaty terms reveal tremendously unequal rights and duties.[239] Treaty inequality reflects the fundamental inequality of nations. The international community is the very epitome of a heterogeneous society. Members possess radically different inter-

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[231] *See* J. CALAMARI & J. PERILLO, *supra* note 175, § 1-1.

[232] *See* Greig, *supra* note 196, at 82, 84 n.15 (citing the Nuclear Non-Proliferation Treaty and Article 79 of the United Nations Charter as documents intended to give illusion, not reality, of agreement).

[233] *See* J. CALAMARI & J. PERILLO, *supra* note 175, § 4-1.

[234] *See id.* § 9-3.

[235] J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. iv, §§ 2-4 (1789). Utilitarianism is a:

> principle which approves or disapproves of every action whatsoever, according to the tendency to which it appears to have to augment or diminish the happiness of the party whose interest is in question . . . . The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members.

Id.

[236] *Id.*

[237] *See* H. MAINE, EARLY HISTORY OF INSTITUTIONS 398-400 (1888).

[238] *Id.* I. BROWNLIE, *supra* note 182, at 612-13. Communist and newly independent states disagree with Western jurists on this point.

[239] For example, the United Nations Charter established a two-tiered society composed of the five great powers after World War II (that possess Security Council vetoes) on the one hand, and all the rest of the world on the other. T. PATERSON, J CLIFFORD, & K. HAGEN, *supra* note 138, at 406.

ests, powers, and privileges.[240] In domestic contract law, evidence of unequal bargaining position could persuade a judge to allow the weaker party to void the contract.[241] In international law, no state owes a fiduciary obligation towards another, unless the stronger party freely undertakes the obligation.[242]

2. Interpretive Norms

a. Courts Should Interpret Treaties According to the Plain Meaning of Their Terms.

The Supreme Court properly assumes that treaty drafters possess a great degree of professionalism.[243] Courts presume drafters exercise great care in formulating ideas into treaty words.[244] Consequently, the treaty text alone may be the best evidence of the actual purposes of the treaty parties. Accordingly, proponents of this norm argue that courts should interpret treaties according to the plain, ordinary, or literal meaning of their words, without resort to extrinsic evidence of purpose.[245] In many cases the Supreme Court recited this norm, but in practice the Court never rejected inconsistent, legitimate extrinsic evidence.[246] *Restatement (Revised)* section 325 promotes this norm.[247]

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[240] This fundamental inequality of community members exists in domestic systems. One jurisprude reports: "I have myself heard an Indian Brahmin dispute it [the presumption of equality] on the ground that, according to the clear teaching of his religion, a Brahmin was entitled to twenty times as much happiness as anybody else." H. MAINE, *supra* note 237, at 399.

[241] J. CALAMARI & J. PERILLO, *supra* note 175, § 8-1.

[242] The Supreme Court construes ambiguities in Indian treaties in favor of Native Americans. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 512, 582 (1832).

[243] *See* Rocca v. Thompson, 223 U.S. 317, 332 (1912).

[244] *Id.*

[245] This norm is also called "the plain meaning rule." T. YU, THE INTERPRETATION OF TREATIES 144 n.1 (1927). At one time the plain meaning rule was widely applied in statutory interpretation. However, the doctrine's weaknesses, many of which are noted in this section, became increasingly apparent in American jurisprudence by the 1940s. O. HETZEL, LEGISLATIVE LAW AND PROCESS 163 (1980). Courts now interpret statutes typically through resort to legislative histories. *Id.* It is interesting that the *Restatement (Revised)* would reverse this trend as applied to treaties.

[246] *See, e.g.*, Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 180 (1982); Maximov v. United States, 373 U.S. 49, 54 (1963); Warren v. United States, 340 U.S. 523, 526 (1951); Clark v. Allen, 331 U.S. 503, 508, 513 (1947); Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 163-64 (1940); Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 10-11 (1936); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931); *Rocca*, 223 U.S. at 330-32; Vilas v. City of Manila, 220 U.S. 345, 359-60 (1911); French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427, 439 (1903); Geofroy v. Riggs, 133 U.S. 258, 271 (1890); The Pizarro, 15 U.S. (2 Wheat.) 227, 245-46 (1817).

[247] *See supra* note 9.

Application of this norm effectively excludes possibly contradictory evidence upon a relatively easy showing of lack of ambiguity.[248] This eases the task of litigants in producing evidence and the task of judges in evaluating evidence.[249] If rigidly applied, the norm does not require litigants to thoroughly research the negotiating history and subsequent practice of all treaty parties.[250] Such research could pose a nearly impossible task with linguistic, geographic, and even legal barriers.[251]

This norm reinforces the idea that judges should interpret the law, not invent it. The plain meaning rule restricts the judge's discretion in admitting interpretive evidence. Consequently, it limits judicial opportunity for inventiveness when courts apply that evidence to the treaty during interpretation. Some maintain that judges have no power to enlarge or improve the law.[252] Judicial legislation was once called a jurist's cardinal sin[253] and this debate continues to the present.[254] In construing statutes, judges often view themselves as interpreters, not lawgivers.[255]

But by limiting judicial discretion, this norm creates more problems than it solves. The *Restatement (Revised)* focuses its inquiry on the ordinary or plain meaning of the treaty terms, as deduced from the treaty itself.[256] It thus purports to present an exhaustive list of interpretive criteria.[257] If an exhaustive list of interpretive criteria is formalized, a danger exists that the list will not be inclusive enough.

For example, a litigant might gain advantage by maintaining that article 31 of the Vienna Convention,[258] upon which *Restatement (Revised)* section 325 is based, also contains an exhaustive list. How can one know whether article 31 is exhaustive or not? One must use the

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[248] *See supra* note 29 and accompanying text.

[249] *See* Merrills, *supra* note 82, at 76-78.

[250] RESTATEMENT (REVISED), *supra* note 9, § 325 reporters' note 5.

[251] *See supra* notes 72-73 and accompanying text.

[252] Root, *The Importance of an Independent Judiciary*, 72 INDEPENDENT 704 (1912), *cited in* M. COHEN, LAW AND THE SOCIAL ORDER 112 (1967).

[253] Sharswood, *Essay on Professional Ethics*, 3 REP. A.B.A. 45 (1907), *cited in* M. COHEN, *supra* note 252, at 112.

[254] *See* Bishin, *supra* note 63, at 1-3.

[255] *See, e.g.*, Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 214-15 (1962).

[256] *See supra* notes 9 & 29 and accompanying text.

[257] For example, under a norm that requires interpretation according to the treaty's plain meaning, evidence of practical construction, no matter how probative, is inadmissible.

[258] *See supra* note 26.

interpretation strategy article 31 outlines.[259] Because the plain words of the article are silent on the question of exhaustiveness, one is tempted to resort to other evidence of the parties' purposes. In fact, the preparatory works of the International Law Commission indicate that article 31 was not intended to be exhaustive.[260] However, the ordinary meaning of the text would not bring about an ambiguous, obscure, unreasonable, or absurd result. Thus, under the terms of the Vienna Convention, and by implication the *Restatement (Revised)*,[261] this evidence must be ignored.[262] If a treaty is simply silent, article 31 and the *Restatement (Revised)* resolve nothing. Borrowing the common-law rule of construction that legislative omissions are purposeful,[263] one still cannot say what was omitted: the statement "This list is exhaustive" or the opposite statement, "This list is *not* exhaustive."

Excessive reliance on the grail of plain meaning is especially problematic when one realizes that "plain meaning" is indeterminate without extrinsic information. In any communication, "plain" words are susceptible of many possible meanings.[264] Perhaps no such thing as "plain meaning" exists and instead, ambiguity infects all communication.[265] The only relevant meaning is that which the treaty signatories attached to a given term. After all, the treaty is their agreement; they should be able to fix any meaning they desire to treaty terms regulating their relationship. Under the *Restatement (Revised)* rule, unless the evidence on an "unplain" meaning is derived from subsequent practice or a subsequent agreement, the evidence should be excluded.[266]

The arbitrary distinction between plain and "unplain" meaning increases confusion in judicial decision making. Treaty litigants may scramble the evidentiary bases of their claims in their pleadings.[267] For example, at the pleading stage, a party may base a claim on highly probative but extrinsic evidence. This information imprints on the

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[259] This ontological anomaly arises because article 31 itself is part of a treaty under the jurisdiction of the Vienna Convention.

[260] Merrills, *supra* note 82, at 57 n.10. The International Law Commission was responsible for drafting the Vienna Convention. S. ROSENNE, *supra* note 29, at 29.

[261] *See supra* note 29 and accompanying text.

[262] *See supra* note 29 (text of Vienna Convention art. 32).

[263] *See supra* note 56 and accompanying text.

[264] *See* Merrills, *supra* note 82, at 58-59.

[265] M. MCDOUGAL, H LASSWELL, & J. MILLER, *supra* note 13, at xvii. *See also* Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.). "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Id.*

[266] RESTATEMENT (REVISED), *supra* note 9, § 325(2).

[267] *See* Greig, *supra* note 196, at 87; Merrills, *supra* note 82, at 61-64.

judge's mind. The plain meaning norm implicitly requires the judge, at a later stage in the proceedings, to rule whether the treaty text presents ambiguity sufficient to permit the introduction of extrinsic evidence. At that point, the prior imprint of the highly probative extrinsic evidence may very well subconsciously influence the judge in her decision making.[268] This influence is improper under the narrow *Restatement (Revised)* system which sharply limits the admission of extrinsic evidence. Those reading the decision will not know if the judgment resulted from the formal two tiered process, or from an improper weighting of extrinsic evidence derived from the pleadings.

The norm that courts should interpret treaties according to the plain meaning of their terms presumes that the treaty drafters intended the treaty receive specific interpretation. This presumption is unfounded. For several reasons, generalities may more often compose treaties than specifics. An interpretive strategy that lets the signatories' purposes control the meaning of a treaty deals more effectively with this type of document than a strategy that looks only to the final written words.

That some treaties are more normative than proscriptive is readily verifiable.[269] Signatories may intend that obedience to treaty terms be discretionary. Through subsequent practice, parties may easily amend treaties.[270] Parties to treaties dealing with highly emotional or politicized subjects may actually have intended to use vague wording to conceal areas of disagreement rather than reveal areas of agreement.[271] That a treaty's purpose may have been to create the illusion, not reality of a meeting of the minds, does mean the treaty is a nullity.

The negotiators may envision a vague treaty as the first step in a process that will lead to a more workable future document.[272] Signato-

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[268] *See* Greig, *supra* note 196, at 87.

[269] *Compare* U.N. CHARTER art. 2, para. 4 (banning offensive use of force among Charter signatories) *with* Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 AM. J. INT'L L. 109, 116 (1983) (describing how Charter signatory Argentina violated article 2(4) of the Charter without serious sanction).

[270] *See supra* notes 194-209 and accompanying text.

[271] Greig, *supra* note 196, at 116.

[272] Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (GATT) regulate the granting of subsidies and the imposing of countervailing duties in outline form. In 1979, certain GATT members concluded the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, commonly known as the "Subsidies Code." The Subsidies Code gave detail to the outline of the original GATT. *See* STAFFS OF THE HOUSE COMM. ON WAYS AND MEANS AND THE SENATE COMM. ON FINANCE, H.R. DOC. NO. 18, 96th. Cong., 1st Sess., MULTILATERAL TRADE NEGOTIATIONS: INTERNATIONAL CODES AGREED TO IN GENEVA, SWITZERLAND (Comm. Print 1979).

ries may feel that a vague treaty is better than no treaty.[273] Also, the parties may hope that subsequent practice under a vague treaty will expand its scope or enhance the authority of the organization created under the agreement.[274] Finally, the parties may expect that a future treaty will fix the problems acknowledged in the present treaty.[275]

The plain meaning norm isolates treaty interpretation from its necessarily political environment. Treaties are essentially records of political compromise between nation-states; their creation and continued vitality depend upon the consent of all parties. A treaty's preparatory works often explicitly reflect the political compromises implicitly indicated in the treaty's text.[276] The plain meaning norm inhibits the inevitable and essential influence of public policy, what Oliver Wendell Holmes called "the secret root from which the law draws all the juices of life."[277] When rigidly applied, it amounts to legal pedantry,[278] a type of sterile intellectualism that may lead a judge to smugly say, "This is not a court of justice; this is a court of law."[279]

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[273] *See* Greig, *supra* note 196, at 116.

[274] Signatories originally envisioned GATT as a provisional structure. An International Trade Organization (ITO) was to institutionalize this structure. However, the ITO never won congressional approval, and, after 40 years, GATT is still "provisional." *See* R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 53-55 (1975).

[275] *See* J. BARTON & B. FISHER, *supra* note 188, at 151 "One of the most important values of the GATT is as a framework for negotiating trade agreements." *Id.*

[276] *See* Greig, *supra* note 196, at 116.

[277] O. HOLMES, THE COMMON LAW (1881). Holmes wrote:

> The very considerations which judges most rarely mention and always with an apology are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient to the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.

Id. at 35. *See also* Vegelahn v. Guntner, 167 Mass. 92, 105-06, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting). Holmes noted "[t]he true grounds of decisions are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes." *Id.*

[278] *See* Greig, *supra* note 196, at 118.

[279] Cravens, *Paean to Pragmatism*, 50 N.C.L. REV. 977 (1972). Judge Cravens characterized such a jurist as one who "fervently believes that it is far, far better that a rule be certain and unjust than to tinker with it. It is a delight to him to construct

This section described and analyzed the basis of the norm that courts should interpret treaties according to the plain meaning of their terms. At first impression, the norm seems to ease judicial decision making. However, the norm presumes a limited view of the proper role of the judiciary, a simplistic treatment of the meaning of plain meaning, and a narrow conception of the treaty making project. Further, apparently the Supreme Court has not decided a case through exclusive application of this norm.[280]

Essentially, this norm directs the court to textual evidence. Therefore, whatever merit this norm holds is subsumed under the previously discussed norm that courts should give effect to drafters' purpose as derived from textual and extrinsic evidence.[281] To fully reflect the current law of treaty interpretation in the United States, the *Restatement (Revised)* should not include this norm in section 325.

b. Courts Should Interpret Treaties Liberally and in Good Faith.

Domestic court decisions do not necessarily affect the international law which international courts apply.[282] However, in resolving treaty controversies, courts sense the possible diplomatic repercussions of their decisions. Consequently, American courts have developed a host of jurisdictional,[283] procedural,[284] and interpretive techniques to avoid giving

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painstakingly, with adequate display of erudition, an edifice of logic and precedent upon which justice may be sacrificed." *Id.*

[280] *See supra* note 246 and accompanying text.

[281] *See supra* notes 40-91 and accompanying text.

[282] The Statute of the International Court of Justice allows resort to "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." Statute of the International Court of Justice, art. 38.1(d). However, in most cases, domestic court decisions probably hold the least probative weight in determining a rule of international law. This source of law is the last enumerated in article 38.1 and the only one denominated a "subsidiary means." This may infer the other sources are more weighty. *See* I. BROWNLIE, *supra* note 182, at 4.

[283] American courts have developed a framework for determining and exercising jurisdiction in international antitrust cases. First described in Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976), and refined in Mannington Mills v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979), courts using this framework balance the following factors:

> 1. Degree of conflict with foreign law or policy;
> 2. Nationality of the parties;
> 3. Relative importance of the alleged violation of conduct . . . [in the United States] compared to that abroad;
> 4. Availability of a remedy abroad and the pendency of litigation there;
> 5. Existence of intent to harm or affect American commerce and its

diplomatic offense. The major interpretive device is the norm that a court should interpret treaties liberally and in good faith so as to preserve amity among nations.[285]

This "liberal interpretation" includes a set of rebuttable presumptions. First, a court will presume that the treaty parties used treaty terms as defined in international law.[286] Second, a court will presume that the parties did not intend to encroach upon rights allowed under general principles of international law.[287] Third, the parties intended the treaty to secure equality and reciprocity among them.[288]

This norm conforms with the *Restatement (Revised)* and the Vienna Convention.[289] It is consistent with the devices American courts have

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foreseeability;

6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or under conflicting requirements by both countries;

8. Whether the court can make its order effective;

9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

10. Whether a treaty with the affected nations has addressed the issue.

Id. at 1297-98.

[284] In cases implicating foreign policy, courts often solicit State Department views. *See, e.g.*, Coplin v. United States, 6 Cl. Ct. 115, *rev'd*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd sub nom.* O'Connor v. United States, 107 S. Ct. 347 (1986).

[285] *See, e.g.*, Air France v. Saks, 470 U.S. 392, 396 (1985); Kolovrat v. Oregon, 366 U.S. 187, 193 (1961); United States v. Pink, 315 U.S. 203, 224-25 (1942); Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 163 (1940); Factor v. Laubenheimer, 290 U.S. 276, 293 (1933); Todok v. Union State Bank, 281 U.S. 449, 454 (1930); Nielsen v. Johnson, 279 U.S. 47, 51-52 (1929); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Ford v. United States, 273 U.S. 593, 618 (1927); Asakura v. City of Seattle, 265 U.S. 332, 342 (1924); Sullivan v. Kidd, 254 U.S. 433, 439 (1921); Rainey v. United States, 232 U.S. 310, 316 (1914); Geofroy v. Riggs, 133 U.S. 258, 271 (1890); Hauenstein v. Lynham, 100 U.S. 483, 487 (1879); The Pizarro, 15 U.S. (2 Wheat.) 227, 245-46 (1817).

[286] *See, e.g., Geofroy*, 133 U.S. at 271; *The Pizarro*, 15 U.S. (2 Wheat.) at 246.

[287] *See, e.g., Nielsen*, 279 U.S. at 54-57; *Geofroy*, 133 U.S. at 268; Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889); Wildenhus's Case, 120 U.S. 1, 14-16 (1886); The Amistad, 40 U.S. (15 Pet), 518, 594-95 (1841); United States v. Percheman, 32 U.S. (7 Pet.) 51, 86-87 (1833); *The Pizarro*, 15 U.S. (2 Wheat.) at 245.

[288] *Geofroy*, 133 U.S. at 271. The Court found that "[i]t is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them." *Id.*

[289] *See supra* notes 9 (text of Restatement § 325) and 26 (text of Vienna Convention art. 31) and accompanying text.

developed to avoid giving diplomatic offense.[290] This reticence is justified by the judiciary's constitutional and functional incapacity to conduct diplomatic investigation and dispute resolution.[291]

Treaty interpretation that seeks to secure equality and reciprocity among treaty beneficiaries[292] is consistent with modern American theories of justice.[293] Such interpretation limits the benefits under a treaty to those that any treaty party may receive. Through this cooperation, a form of international social synergy develops in which all are better off incrementally than if a court were to distribute the benefits unequally to satisfy national self-interest.[294]

The norm that courts should interpret treaties liberally and in good faith has appeared as dicta in a number of cases and may never have been the actual basis of a Supreme Court holding.[295] However, the positive difference in value between dicta and holding is unclear. This is especially true since courts have consistently recited this dicta since 1817.[296] It is inconceivable that the Supreme Court would continue to apply an interpretive norm for over 170 years in such a variety of cases if it had no objective value. Because the use of the norm fits neatly into neither the box called "holding" nor the box called "dicta" does not mean we should reject or ignore it altogether.

This section described and analyzed the basis of the norm that courts should interpret treaties liberally and in good faith. Case law and juris-

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[290] *See supra* notes 283-84 and accompanying text.

[291] *See* L. HENKIN, *supra* note 68, at 208-16.

[292] *See supra* note 288 and accompanying text.

[293] John Rawls developed a theory of justice that complements this norm. J. RAWLS, A THEORY OF JUSTICE (1971). Rawls' theory finds justice residing in principles of distribution. The first principle requires equality in the assignment of basic rights and duties. The second principle requires that socioeconomic inequalities be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all. Thus, while the distribution of wealth and income need not be equal, it must nevertheless be to everyone's advantage. *Id.* Rawls' theory continues to generate concerted jurisprudential comment. *See, e.g.*, Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. REV. 613 (1986). Consequently, his theory remains more normative than positive, both in the American and international legal systems. This should not bar the use of Rawls' theory to complement the interpretive norm under discussion. The norm finds ample independent support in the Vienna Convention and over 150 years of Supreme Court case law. As such, analysis of the relationship between the norm and the theory most likely finds the norm supporting the theory, not the converse.

[294] *Cf.* J. RAWLS, *supra* note 293, at 4-5.

[295] Y. CHANG, *supra* note 16, at 179-81.

[296] *See* cases cited *supra* note 285.

prudential positions solidly support this norm. Therefore, to fully reflect the current law of treaty interpretation, the *Restatement (Revised)* should include this norm in section 325.

III. PROPOSALS FOR THE *Restatement (Revised)*

This part of the Comment proposes changes in the *Restatement (Revised)* to reflect current American practice in treaty interpretation. First, it describes the *Restatement*'s normative purposes and its accomplishment of those purposes. Second, it describes a method by which the American Law Institute could reformulate the *Restatement (Revised)* to better reflect its purposes in the area of treaty interpretation.

A *Restatement* should primarily restate the law.[297] Of secondary importance, a *Restatement* should describe how the law is changing and suggest the direction the change should take.[298] At present, there are two main sources of treaty interpretation norms: Supreme Court opinions and section 325 of the *Restatement (Revised)*. The Supreme Court has never given an exhaustive list of the relevant factors in treaty interpretation. It has expressed no preference for one form of evidence over another.[299] Because treaty interpretation often turns on the very specific facts of a case, this "no preference" course seems prudent, both for the Court and the *Restatement (Revised)*.

Unfortunately, the *Restatement (Revised)* does not accurately describe the current American law or international law of treaty interpretation. Further, section 325 promotes an unnecessarily vague methodology derived from a treaty the Senate has refused to ratify. In light of both the Supreme Court's strong position on the essentials of interpreting international agreements, and the jurisprudential defects in the *Restatement*'s current position, the American Law Institute should reformulate *Restatement (Revised)* section 325.

A useful summary of interpretive norms should begin by observing that all such norms are merely rebuttable presumptions; that evidence of contrary purposes rebuts these presumptions. Next, the summary should state that the parties may introduce any form of otherwise admissible evidence to shed light on the treaty's meaning. Finally, the *Restatement (Revised)* should list the norms the Supreme Court has applied over the years in treaty interpretation cases. Such a list should include:

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[297] *See supra* note 21.

[298] *See supra* note 22.

[299] *See supra* note 16 and accompanying text.

A court should:

a. give effect to the drafters' purpose as indicated by textual and extrinsic evidence;

b. interpret treaties consistently with the Constitution;

c. give agency interpretations great weight;

d. give substantial weight to the parties' practical construction of the treaty;

e. interpret treaties liberally and in good faith.

Typically *Restatement* sections are followed by clarifying comments and reporters' notes. The legal status of these two types of addenda is unclear. Nonetheless, both are considered persuasive authority. A *Restatement* using the above reformulation could conclude with the following comments or reporters' notes:

a. The guiding principle of treaty interpretation is to give effect to the purposes of the treaty signatories. The Supreme Court has never interpreted a treaty solely according to the purpose determined from the plain meaning of the treaty's terms. Typically, the Court will consider a wide variety of extrinsic evidence of purposes which may cause the Court to ignore or accept the plain meaning of the text, or insert omitted text.

b. In construing treaties, the Supreme Court has borrowed interpretive norms from the domestic law of legislation, contracts, and real property. It has also applied international standards of treaty interpretation. It may apply several norms simultaneously. It has revised some norms in their application to treaties, while interpretive norms from other areas of the law have not been applied at all.

c. The Supreme Court has never interpreted a treaty contrary to the longstanding and consistent interpretation of the agency charged with the treaty's negotiation and implementation. However, the weight courts accord agency interpretations of treaties should vary with factors similar to those courts apply to determine the probative weight of agency interpretations of statutes. These factors include: (1) how soon the agency made the interpretation after the treaty's ratification, (2) whether the public knew of the interpretation, (3) whether Congress enacted implementing legislation with knowledge of the agency's interpretation, (4) whether clear

congressional purpose contradicts the agency's interpretation, and (5) whether the agency has interpreted the treaty consistently.

CONCLUSION

In deciding hard cases, judges first determine abstract justice, then examine the "law" on which to base the written opinion.[300] That determination results from the effect of innumerable evidentiary stimuli on the personality of the judge. The wider the variety of stimuli, the better the decision. Presently, the *Restatement (Revised)* unduly restricts the evidentiary stimuli available to a judge required to interpret a treaty.

This Comment proposes a framework for analyzing treaty interpretation cases and uses that framework to develop a coherent set of interpretive norms. These norms are then organized and briefly noted in a proposed reformulated *Restatement (Revised)* section 325. The result of this reformulation should be more effective litigation strategy and more easily reconcilable case law. Oliver Wendell Holmes castigated the view of judge-made law as some "brooding omnipresence in the sky."[301] A *Restatement* that proposes a workable theory of judicial decision making in treaty interpretation cases should help replace this view with one in which decisions are based on reasonable and identifiable standards.

James C. Wolf

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[300] John Marshall reportedly declared: "Judgment for the plaintiff; Mr. Justice Story will furnish the authorities." Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 654 (1932). *See generally*, Cravens, *supra* note 279; Hutcheson, *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929).

[301] Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).