

The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection

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INTRODUCTION

“Treaties of every kind . . . are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith” [T]he court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by [treaty] stipulations shall be recognized and protected.¹

This passage from the 1884 case of *Chew Heong v. United States* captures one of the most venerable principles of Supreme Court treaty jurisprudence.² State interference with treaties under the Articles of Confederation made the subject a sensitive one from the earliest stages of our nation’s history.³ To address the problem, the Framers of the new Constitution empowered the federal courts to give effect to treaty obligations as a matter of supreme federal law.⁴ At its core, the requirement of fidelity to “the most scrupulous good

1. *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) (citation omitted).

2. The Supreme Court emphasized the importance of judicial adherence to good faith in the interpretation of treaties as early as the 1821 case of *The Amiable Isabella*. See 19 U.S. (6 Wheat.) 1, 68 (1821) (observing that it is “bound to observe” treaties “with the most scrupulous good faith”); see also *infra* notes 165–184 and accompanying text (examining *The Amiable Isabella* and the emergence of the judicial doctrine of good faith in greater detail).

3. See Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. ‘States’ Rights’ in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1312–14 (1999) (canvassing the problems caused by state interference with foreign relations under the Articles of Confederation and noting that “the Founding concern with treaty violations . . . dated back to the nation’s ‘first’ international compact, the 1783 Treaty of Paris, which ended the Revolutionary War and secured recognition of American independence by Great Britain”); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1198–1200 (2000) (observing that the refusal of states to adhere to the terms of the 1783 Treaty of Paris had risked “material consequences” for the nation as a whole and that this experience led to provisions for ensuring compliance with treaties in Articles III and VI).

4. See U.S. CONST. art. III, § 2, cl. 1 (providing that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made” under the authority of the

faith”⁵ in treaty interpretation reflects a recognition of the immensity of this responsibility. It mandates federal court—and for that matter state court⁶—sensitivity to the international implications of treaty interpretation and, in so doing, serves to protect against an inadvertent breach of the nation’s treaty obligations through judicial action.

Unfortunately, good faith has died. With no ceremony and outside the scrutiny of scholars, it was silently interred by the Supreme Court early in the last century. Modern scholarly accounts suggest that the spirit is still alive,⁷ but no Court treaty opinion has mentioned good faith since 1933.⁸ Its companion, the “liberal interpretation” canon, has suffered a similar, if less stark, fate.⁹ In the end, lacking any attention from the Supreme Court, the powerful admonition that the “honor of the government and people of the United States is involved”¹⁰ in treaty interpretation has simply passed away.

The disappearance of good faith from Supreme Court treaty doctrine does not appear to be by design. The Court nowhere announced a change in direction. Indeed, there is little to suggest that it is even aware that modern treaty jurisprudence has departed significantly from its original course. It would seem, rather, that the decades-long absence of good faith merely reflects a rudderless drift in treaty interpretation. Even an unintended drift, however, can have serious negative consequences.

With respect to treaty interpretation, the consequence has been confusion in the lower courts. Through a combination of inattention and Supreme Court rhetorical ambiguity, district and appellate courts alike have increasingly disregarded the core principles of good faith treaty interpretation and, in many cases, have rejected them outright. In contrast to the unique international law origins of treaties, for example, some federal courts have recently declared that “[c]ourts construe treaties just as they do statutes.”¹¹ Moreover, notwithstanding the inherent needs of international uniformity, most treaty cases in the lower courts

United States). This judicial power is vested in the Supreme Court of the United States “and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

5. *Chew Heong*, 112 U.S. at 540 (citation omitted); see also *The Amiable Isabella*, 19 U.S. (6 Wheat.) at 68 (declaring that courts are bound to observe treaties “with the most scrupulous good faith”).

6. As explained in greater detail below (see *infra* notes 57–67 and accompanying text), Article VI of the Constitution elevates treaties made under the authority of the United States to “the supreme Law of the Land” and expressly prescribes that the “Judges in every State” are bound by such law “any Thing in the Constitution or Laws of any State to the contrary notwithstanding.” U.S. CONST. art VI, cl. 2.

7. See also *infra* notes 213–214 and accompanying text (analyzing modern scholarly accounts of treaty interpretation in greater detail).

8. See *Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933); see also *infra* notes 216–218 and accompanying text (examining the absence of good faith from modern Supreme Court treaty cases).

9. The Supreme Court has mentioned the notion of a liberal construction of treaty rights only once in the last forty years. See *infra* notes 220–224 and accompanying text (analyzing the disappearance of the substantive liberal interpretation canon from modern Supreme Court treaty case law).

10. *Chew Heong*, 112 U.S. at 540.

11. See *Cannon v. United States Dep’t of Justice*, 973 F.2d 1190, 1192 (5th Cir. 1992); see also *infra* notes 265–271 and accompanying text (examining this development in greater detail).

fail to consider—or even mention the existence of—prior interpretive decisions by the courts of our nation's treaty partners.¹²

At the foundation of these and similar examples lies a failure of domestic courts to appreciate the seriousness of their task in the interpretation of the nation's treaty obligations. Such an appreciation was the function of the overarching doctrine of good faith. It served to remind courts of the special international law origins of treaties, of their fundamental difference with purely domestic legal norms, and of the need to show sensitivity for the views of our nation's treaty partners. Judicial adherence to good faith, in short, was the interpretive glue that bound together the complexities of treaty interpretation into a coherent whole.

The derivative "liberal interpretation" canon also functioned as an admonition that substantially more is at stake with treaty interpretation than with other forms of domestic law.¹³ This concrete manifestation of good faith interpretation counseled courts to prefer interpretations that favor, rather than restrict, the rights a treaty was designed to protect.¹⁴ In this way, the liberal interpretation canon served as a safeguard against inadvertent breaches of our nation's treaty obligations through judicial action.

Treaties possess a unique dual nature in our domestic constitutional system. Pursuant to the Supremacy Clause, treaties enjoy federal law dignity equal to Article I legislation.¹⁵ But in contrast with that more prosaic form of federal law, treaties also carry legal force in an external dimension. That is, by their very definition, they represent international legal obligations the United States owes to its treaty partners.¹⁶ When domestic courts interpret a treaty, therefore, they are simultaneously applying domestic federal law and giving content to the nation's international obligations.

For most of our legal history, treaties designed to function as directly applicable federal law (so-called "self-executing" treaties¹⁷) were comparatively few in number and limited in scope. The last half-century, however, has

12. See *infra* notes 328–33 and accompanying text (detailing examples of this common failure in federal court interpretations of one private-law treaty, the United Nations Convention on Contracts for the International Sale of Goods).

13. See *infra* Part II.A.2. (analyzing the liberal interpretation canon in greater detail).

14. See *infra* notes 201–12 and accompanying text (examining Supreme Court jurisprudence discussing the need for a liberal interpretation of treaties).

15. U.S. CONST. art. VI, cl. 2 (providing that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land").

16. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 339 (stating that agreements under international law are binding obligations of the treaty partners); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 (1987) (same); *id.* § 301 (defining an international agreement as "an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law") [hereinafter RESTATEMENT OF FOREIGN RELATIONS].

17. See *infra* notes 68–70, 106–18 and accompanying text (examining the self-execution doctrine for treaties).

witnessed a marked change. The roll of self-executing treaties accepted by the United States now numbers in the many hundreds.¹⁸ As a result, it is now a common occurrence that domestic courts are called upon to interpret and apply directly applicable treaties as one aspect of the “the supreme Law of the Land.”¹⁹

The consequence in recent years is that the proper scope and function of treaties in our constitutional design has moved squarely to the center of scholarly controversy: Nearly every aspect of treaty law—including the very constitutionality of self-execution²⁰—is now the subject of heated debates.²¹ And as the substantive and political influence of treaties has grown, so too has the significance of treaty interpretation. Echoing earlier controversies concerning federal statutory law,²² the powers of federal courts in relation to treaties is rapidly becoming a primary focus of both scholarly²³ and political²⁴ dispute. It is

18. Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 921–23 (2004) (summarizing the results of a comprehensive review of directly applicable treaties in the United States).

19. U.S. CONST. art. VI, § 1, cl. 2.

20. See, e.g., Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

21. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003).

22. For an introduction to these contentious debates, see William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

23. See Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998) [hereinafter Van Alstine, *Dynamic Interpretation*]; Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1275–80 (2002) [hereinafter Van Alstine, *Treaty Delegation*]; John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001) [hereinafter Yoo, *Treaty Interpretation*]; John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305 (2002) [hereinafter Yoo, *False Sirens*].

24. A prominent example is the political controversy over an attempt by executive branch lawyers to interpret the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 20 U.S.T. 3316, 75 U.N.T.S. 135, to exempt the President. See Editorial, *Closer to the Truth*, WASH. POST, Aug. 26, 2004, at A22 (opining that the “crimes at Abu Ghraib” prison in Iraq “were, in part, the result of the 2002 decision by the president and his top aides to set aside the Geneva Conventions”); Opinion, *Reforming Guantanamo*, INT’L HERALD TRIB., July 5, 2004, at 8 (criticizing President Bush for “declar[ing] himself free, at times of his choosing, from the Geneva [C]onventions following advice from Attorney General John Ashcroft, whose staff produced the infamous memo on how to get around laws against torture”); see also *infra* note 40 (noting the controversy among the federal courts over the domestic force of this POW Convention).

against this backdrop that the modern dismissal of good faith interpretation rises to prominence.

This Article intends to refocus judicial and scholarly attention on the critical role of good faith in domestic treaty interpretation. Part I begins with an examination of the special constitutional status of treaties. Although they enjoy the same federal law foundation as an Article I law, this first Part explains that treaties may accomplish a legal act that a statute, by its nature, may not: The creation of reciprocal obligations between the United States and a foreign sovereign under international law.²⁵ This international dimension produces a significantly different context, even as a matter of domestic law, for judicial interpretation and application of self-executing treaties. Part I then concludes with an overview of the Supreme Court's modern approach to treaty interpretation.²⁶

With this foundation, Part II turns to the rise and fall of the judicial doctrine of good faith treaty interpretation. This Part will first trace the historical rise of the doctrine of good faith.²⁷ We will see that, together with its companion liberal interpretation canon,²⁸ the doctrine of good faith treaty interpretation arose and continued to flourish for nearly the first century-and-a-half of the nation's existence.²⁹

Part II next charts the unfortunate demise of good faith.³⁰ Although some scattered strands of modern practice bear a faint resemblance to their ancestors,³¹ this resemblance, as the final section of Part II explains, is deceptive.³² The coherent theme that the doctrine of good faith provided to guide the special judicial responsibilities in treaty interpretation is missing in the fragmented modern approach.

The significance of this coherent theme for modern treaty interpretation is the subject of the final analysis in Part III. The examination first focuses on the broad structural benefits of an express resurrection of good faith. These include: a restoration of clarity to the nature of treaties;³³ a revival of the fundamental

25. Through so-called "congressional-executive agreements" the President and Congress have agreed on the approval of the World Trade Agreements, the North American Free Trade Agreement, and other international trade pacts through standard Article I legislation. The constitutionality of this practice is the subject of heated scholarly debate. Compare Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 909-14 (1995) (arguing that such congressional-executive agreements are constitutional), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1228-35 (1995) (questioning the constitutionality of this alternative means of consent to treaties).

26. See *infra* Part I.D.; Part II.B. also examines the confusion in the lower federal courts resulting from the rhetorical ambiguities in modern Supreme Court treaty case law.

27. See *infra* Part II.A.1.

28. See *infra* Part II.A.2.

29. See *infra* notes 165-181 and accompanying text.

30. See *infra* Part II.B.

31. This resemblance is most noticeable in certain contemporary references to liberal interpretation of treaties. See *infra* Part II.C.

32. See *infra* notes 228-237 and accompanying text.

33. See *infra* Part III.A.1.

distinction with purely domestic statutes;³⁴ and a return of the powerful admonishment to the courts of the significance of their task in treaty interpretation.³⁵ Part III then examines the role of good faith in practical application. We will see there that a vigorous return of good faith will serve to remind courts of the need for an “autonomous” interpretation of treaties,³⁶ for expansive interpretations to avoid judicial treaty breach,³⁷ and for respect for foreign interpretations of treaties in the interests of international uniformity.³⁸ Finally, Part III concludes with a review of the role of the executive branch in the judicial interpretation of treaties.³⁹

The present international tensions amply demonstrate the need for a revival of good faith in treaty interpretation. To illustrate this point one need look no further than the intense controversies over the domestic force of the Geneva Prisoners of War Convention,⁴⁰ the implications of the Vienna Convention on Consular Relations⁴¹ for hundreds of foreign citizens in state prisons,⁴² and the

34. See *infra* Part III.A.2.

35. See *infra* Part III.A.3.

36. See *infra* Part III.B.1.

37. See *infra* Part III.B.2.

38. See *infra* Part III.B.3.

39. See *infra* Part III.C.

40. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 20 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention on Prisoners of War]. The Supreme Court recently sidestepped the issue of whether this Geneva Convention is self-executing and thus binding on the President. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 514–15 (2004) (noting that the Fourth Circuit had concluded that the Geneva Convention was not self-executing, but then failing to address the issue itself). Some courts have held, however, that this Geneva Convention is self-executing. See, e.g., *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 164–65 (D.D.C. 2004) (concluding that this Geneva Convention is self-executing “[b]ecause the Geneva Conventions were written to protect individuals, . . . because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the . . . Geneva Convention [on Prisoners of War] itself manifests the contracting parties’ intention that it not become effective as domestic law without the enactment of implementing legislation”); *United States v. Lindh*, 212 F. Supp. 2d 541, 553–54 (E.D. Va. 2002) (holding that certain provisions of the Geneva Convention on Prisoners of War are self-executing and thus “are a part of American law and . . . binding in federal courts under the Supremacy Clause,” and noting that this point was “essentially conceded by the government”); *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) (“[I]t is inconsistent with both the language and spirit of the [Geneva Convention on Prisoners of War] and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law.”).

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

42. The International Court of Justice and the United States Supreme Court have taken nearly opposite positions on the interpretation and force of the Vienna Convention on Consular Relations. Compare *Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar. 31) (holding that the United States breached its obligation to fifty Mexican nationals regarding the notification obligations under the Vienna Convention, and ordering a review and reconsideration of the convictions by U.S. courts), with *Federal Republic of Germany v. United States*, 526 U.S. 111, 112–13 (1999) (*per curiam*) (denying, without mention of the doctrine of good faith, Germany’s motion for leave to file an original complaint with the Supreme Court for a stay of execution of a German national by the State of Arizona, notwithstanding an earlier order from the I.C.J. explicitly directing the United States to prevent the execution), and *Breard v. Greene*, 523 U.S. 371, 375–77 (1998) (refusing to follow an I.C.J. preliminary order insisting on a stay of execution pending full I.C.J. review of a Vienna

rapid expansion of private-law treaties designed to secure international legal uniformity.⁴³ For these and myriad similar issues, the doctrine of good faith reminds courts of the immense “responsibilities of [their] stations”⁴⁴ in the domestic application of the nation’s international treaty commitments.

I. A REVIEW OF THE CONSTITUTIONAL STATUS OF TREATIES

For most of our nation’s legal history, treaty law was confined to a relatively narrow enclave of issues surrounding peace, national defense, and reciprocal rights to commerce and navigation.⁴⁵ Recent decades have witnessed a substantial change. With the rapid rise of international cooperation on shared global concerns has come an equally rapid expansion of treaty law.⁴⁶ The result—even if one leaves aside the hundreds of treaties with Native American tribes⁴⁷—is that the number of directly enforceable treaties already accepted by the United States alone now exceeds 400.⁴⁸ Many of these are multilateral and thus may also govern our country’s relations with numerous countries.⁴⁹ Moreover, in contrast to their modest beginnings, treaties now regulate nearly the full substan-

Convention claim, reasoning—again without mentioning the doctrine of good faith—that the matter at issue was subject to domestic procedural law in any event).

43. For example, the Senate recently gave its advice and consent to a private-law treaty that displaces contrary state law, in this case Article 9 of the Uniform Commercial Code, for certain international security interests. *See* Convention on International Interests in Mobile Equipment, Nov. 16, 2001, S. TREATY DOC. 108-10 (2003), available at <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf> (last visited Mar. 31, 2005). For a review of the numerous other private-law treaties accepted by the United States, see Van Alstine, *supra* note 18, at 921–24.

44. *See* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 68 (1821) (noting “the responsibility of our stations” on the Supreme Court, because the matters at issue “embrace the interpretation of a treaty which we are bound to observe with the most scrupulous good faith”).

45. The most common early treaties concluded by the United States addressed the subjects of peace (including, of course, the 1783 Treaty of Peace with Great Britain); consular relations, *see, e.g.*, Convention Between His Most Christian Majesty and the United States of America, for the Purpose of Defining and Establishing the Functions and Privileges of Their Respective Consuls and Vice-Consuls, Nov. 14, 1788, Fr.-U.S., 8 Stat. 106; and “Friendship, Commerce, and Navigation”, *see, e.g.*, Treaty of Friendship, Limits and Navigation, Between the United States of America, and the King of Spain, Oct. 27, 1795, U.S.-Spain, 8 Stat. 138, and Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, by their President, with the Advice and Consent of their Senate, Nov. 19, 1794, Gr. Brit.-U.S., 8 Stat. 116.

46. *See* Van Alstine, *supra* note 18, at 922–23.

47. Before it ceased the practice in the late 1800s, the United States concluded nearly 400 treaties with Native American tribes. *See* 2 INDIAN AFFAIRS: LAWS AND TREATIES (Charles J. Kappler ed., 1904) (listing 389 such treaties concluded prior to 1883).

48. *See* Van Alstine, *supra* note 18, at 921–22 (summarizing a comprehensive review of self-executing treaties already accepted by the United States).

49. For example, in addition to the United States, the United Nations Convention on Contracts for the International Sale of Goods (CISG) has over sixty member states. *See* CISG, Apr. 11, 1980, 1489 U.N.T.S. 3; United Nations Commission on International Trade Law (UNCITRAL), available at <http://www.uncitral.org/english/status/status-e.htm> (last visited Apr. 12, 2005) (setting forth the list of member states). The Montreal Protocol to the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45, also has over fifty member states. *See* <http://www.icao.int/icao/en/leb/mtl99.htm> (last visited Apr. 12, 2005) (listing the member states to the Montreal Protocol).

tive breadth of domestic law, from commercial to criminal law, family to tax law, and even administrative law and civil procedure.⁵⁰

One prominent consequence of this expansion is that the once-dormant field of treaty law has moved to the center of scholarly attention. Of particular interest has been the special constitutional status of treaties, a subject scholars in recent years have examined in some detail.⁵¹ A brief review will thus suffice to set the background for the critical analysis of modern treaty jurisprudence to follow.

A. TREATIES IN THE CONSTITUTIONAL DESIGN

Treaties concluded under the authority of the United States enjoy a distinctive status under the Constitution. Article II, Section 2 grants to the President, “by and with the Advice and Consent” of a supermajority of the Senate,⁵² the power to make treaties on behalf of the United States.⁵³ In marked contrast with the standard model of concurrent lawmaking powers, the Constitution makes clear that this power is *exclusive* to the federal government. Article I, Section 10 expressly prohibits the states from entering into “any Treaty, Alliance, or Confederation,”⁵⁴ as well as from concluding “any Agreement or Compact” with a foreign power.⁵⁵

The Constitution’s description of the legal force of treaties is equally expansive. Although sometimes famously overlooked,⁵⁶ the familiar Supremacy Clause in Article VI includes treaties made by the United States within the “supreme Law of the Land.”⁵⁷ Like the Constitution and other forms of federal law, therefore, a treaty—when its substance so directs⁵⁸—will broadly preempt

50. See Van Alstine, *supra* note 18, at 922–27.

51. See, e.g., Bradley, *supra* note 21, at 451–58 (arguing that the federalism and separation of powers doctrines constrain the treaty power); Curtis A. Bradley, *The Treaty Power and American Federalism*, Part II, 99 MICH. L. REV. 98 (2000) [hereinafter *Treaty Power II*] (responding to critics of his view on the limited scope of the treaty power); Golove, *supra* note 21, at 1081–1100, 1278–1313 (comprehensively reviewing the constitutional foundation of treaties); Swaine, *supra* note 21, at 413–49 (canvassing the competing views on the proper scope of federalism and the treaty power).

52. U.S. CONST. art. II, § 2 (providing that the President “shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

53. *Id.*

54. *Id.* art. I, § 10, cl. 1.

55. *Id.* art. I, § 10, cl. 3. Congress may, however, consent to such an agreement or compact by a state with a foreign power. See *id.*

56. Consider, for example, the famous case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Although the case represented a fundamental shift in constitutional doctrine on the powers of the federal government (especially of the federal courts), the Supreme Court never mentions treaties as a valid source of federal law. See Van Alstine, *supra* note 18, at 893–94 (describing this flaw in *Erie*).

57. See U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”).

58. As explained immediately below, not all treaties will take immediate effect as preemptive federal law. See *infra* notes 106–107 and 117–118 and accompanying text (describing the doctrine of “self-executing” treaties).

inconsistent state law⁵⁹ (and even prior federal law⁶⁰). To drive home the point, Article VI includes an express provision declaring the obligation of “the Judges in every State” to give effect to treaties notwithstanding “any Thing in the Constitution or Laws of any State to the Contrary.”⁶¹

This separate grant of an authority to conclude treaties, when combined with the description of treaties as the supreme law of the land in Article VI, makes clear that Article II, Section 2 also represents an independent delegated power to create federal law.⁶² To be sure, as the Supreme Court observed this past term, “[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, ‘to make Treaties.’”⁶³ But when a treaty receives the supermajority consent of one legislative body (the Senate), it may take direct effect as federal law even without Article I implementing legislation,⁶⁴ and notwithstanding the declaration in Article I that “all legislative powers herein granted” are vested in Congress as a whole.⁶⁵ Moreover, because the treaty power represents a sepa-

59. See *DeCanas v. Bica*, 424 U.S. 351, 357 n.5 (1976) (concluding that “even absent . . . a manifestation of congressional intent to ‘occupy the field,’ the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any . . . treaties”); *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941) (“When the national government by treaty . . . has established rules and regulations . . . the treaty . . . is the supreme law of the land. No state can add to or take from the force and effect of such treaty. . .”).

60. Pursuant to the “last-in-time rule,” whenever a treaty and a statute conflict, the later adopted of the two will prevail. See *Breard v. Greene*, 523 U.S. 371, 376 (1998) (observing that “when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null”) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that when an act of legislation conflicts with the self-executing provisions of a treaty, “the one last in date will control the other”).

61. U.S. CONST. art. VI, cl. 2 (providing with regard to the Constitution, laws, and treaties of the United States that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).

62. See Golove, *supra* note 21, at 1284 (convincingly explaining the nature of the treaty power as a separate and independent lawmaking power delegated to the federal government, and not merely “a secondary mode for exercising the legislative powers delegated to Congress”); see also *id.* at 1286 n.717 (stating that legislation and treaties “are alternative modes of promulgating laws”); Van Alstine, *supra* note 18, at 948–51 (“Statutes and treaties may find the same constitutional source for their status as federal law, but the power to promulgate Article I laws and the power to make treaties proceed from different constitutional sources of authority.”).

63. *United States v. Lara*, 541 U.S. 193, 201 (2004) (quoting U.S. CONST. art. II, § 2, cl. 2).

64. See *Dianese v. Hale*, 91 U.S. 13, 18–19 (1875) (“For as treaties made under the authority of the United States are, by the Constitution, declared to be part of the supreme law of the land, when they are complete in themselves, and need no supplemental legislation to carry them into effect, such legislation is not necessary for the purpose of giving them force and validity.”); see also *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (observing that a treaty may have direct effect as federal law when “no domestic legislation is required to give [it] the force of law in the United States”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that treaty provisions are directly enforceable when they “require no legislation to make them operative”).

65. See U.S. CONST. art. I, § 1; see also Golove, *supra* note 21, at 1286 (properly observing that “whenever a treaty makes stipulations on subjects falling within the scope of Congress’s legislative authorities, the treaty overrides the general separation of powers principle that legislative authority is vested in Congress”).

rate and independent delegation of lawmaking authority, treaties are not limited by the traditional subject-matter checks on federal legislative power.⁶⁶

The express inclusion of treaties within Article III represents a final, essential element in the constitutional plan.⁶⁷ By declaring that the “judicial Power” of federal courts extends to cases “arising under . . . treaties,” Article III, Section 2 ensures final federal control over the application of treaties. When they are designed to take direct effect of their own force,⁶⁸ therefore, nearly 200 years of consistent Supreme Court precedent⁶⁹ makes clear that federal courts have the authority to apply such “self-executing” treaties with the full force of preemptive federal law.⁷⁰

B. THE OBLIGATION OF FEDERAL COURTS TO INTERPRET AND APPLY TREATIES AS SUPREME FEDERAL LAW

The treaty elements of Articles III and VI also have important implications for the internal allocation of authority within the federal government. By virtue of the Supremacy Clause,⁷¹ treaties proceed from essentially the same federal law foundation as Article I legislation. In recognition of this, the Supreme Court has long affirmed that, in disputes raised before domestic courts, a self-

66. See *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (declaring that, “because by Article II, Section 2, the power to make treaties is delegated expressly,” the substantive federalism limits of federal lawmaking under Article I do not apply and observing specifically in this regard that “it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States”); cf. *United States v. Lara*, 541 U.S. at 201 (“[A]s Justice Holmes pointed out, treaties made pursuant to th[e] treaty] power can authorize Congress to deal with ‘matters’ with which otherwise ‘Congress could not deal.’”) (quoting *Missouri v. Holland*, 252 U.S. at 433)). For a criticism of this well-accepted constitutional proposition, see Bradley, *Treaty Power*, *supra* note 21, at 451–58 (arguing that the scope of the treaty power is limited by the doctrines of federalism and enumerated federal power); Bradley, *Treaty Power II*, *supra* note 51 (responding to criticisms of his view on the substantive limits of the treaty power).

67. U.S. CONST. art. III, § 2, cl. 1. (providing that “the judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made” under the authority of the United States).

68. The substance or express terms of a particular treaty may require congressional implementation before it may take effect as domestic law. For more on this point, see *infra* notes 117–118 and accompanying text.

69. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that where treaty provisions “are self-executing, that is, require no legislation to make them operative . . . they have the force and effect of a legislative enactment”); *Strother v. Lucas*, 37 U.S. 410, 439 (1838) (“Treaties are the law of the land and a rule of decision in all courts.”); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (“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.”). Indeed, the Court recognized the direct effect of treaties as federal law as early as 1794, when it declared that a particular state law would be invalid to the extent that it was “in direct opposition” to rights protected by the 1783 Treaty of Peace with Great Britain. See *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 5 (1794).

70. See *Van Alstine*, *supra* note 18, at 913–17 (canvassing the history of Supreme Court precedent on the self-execution doctrine).

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

executing treaty⁷² is “equivalent to an act of the legislature.”⁷³ When a treaty provides the rule of decision for a given case, therefore, domestic courts have not only the right, but the “obligation” to give effect to the treaty just as they would a statute or other form of federal law.⁷⁴

Moreover, the express inclusion of treaties within the judicial power of Article III means that final authority over their interpretation also falls within the formal province of the federal courts.⁷⁵ Similar to the parallel institution of Article I legislation,⁷⁶ therefore, the views of the political branches⁷⁷ will not control the interpretation of treaties.⁷⁸ While the foreign affairs context of treaties makes it appropriate to afford calibrated respect to the reasonable interpretive opinions of the executive branch,⁷⁹ once a treaty takes direct effect

72. See *supra* notes 67–70 and accompanying text.

73. *Foster v. Neilson*, 27 U.S. at 314; see also *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889) (“If [a] 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”); *Whitney v. Robertson*, 124 U.S. at 194 (concluding that a self-executing treaty has the “force and effect of . . . a legislative enactment”); *Edye v. Robertson*, 112 U.S. 580, 598 (1884) (describing self-executing treaties as legal norms which are in the “same category as other laws of Congress”); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (observing that when a treaty creates individual rights it “as much binds those rights and is as much to be regarded by the court as an act of congress”).

74. *Schooner Peggy*, 5 U.S. (1 Cranch) at 109–10 (holding that because a treaty is the supreme law of the land “its obligation on the courts of the United States must be admitted. . . . [W]here a treaty is the law of the land, and as such affects the rights of the parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress”); see also *Maiorano v. Balt. & Ohio R.R.*, 213 U.S. 268, 272–73 (1909) (“A treaty . . . by the express words of the Constitution, is the supreme law of the land, binding alike national and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights.”).

75. See, e.g., *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (holding that “the courts have the authority to construe treaties”) (citing *Baker v. Carr*, 369 U.S. 186 (1969)); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (declaring that “courts interpret treaties for themselves”); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 239 (1796) (holding in regard to the interpretation of a particular treaty that “the Courts, in which the cases arose, were the only proper authority to decide, whether the case was within the article of the treaty, and the operation and effect of it”).

76. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (declaring that the views of a later Congress about the interpretation of a statute are of “very little, if any, significance”) (quoting *Rainwater v. United States*, 356 U.S. 590, 593 (1958)); see also *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (“We have often observed . . . that ‘the views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one.’”) (quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 348–49 (1963)); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994) (“[W]e have observed on more than one occasion that the interpretation given by one Congress . . . to an earlier statute is of little assistance in discerning the meaning of that statute.”) (quoting *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 168 (1989)); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (same); *United States v. Price*, 361 U.S. 304, 313 (1960) (same).

77. For an analysis of the proper role of the executive branch in treaty interpretation, see *infra* Part III.C below.

78. The Supreme Court has made clear that the subsequent views of the Senate likewise will not control the interpretation of a treaty. See *Fourteen Diamond Rings*, 183 U.S. 176, 180 (1901) (“The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it.”).

79. See *El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) (observing that respect is ordinarily due to the “reasonable views” of the executive branch concerning treaty interpretations);

as federal law, it falls within the responsibility of the federal courts, in the famous words of *Marbury v. Madison*, “to say what the law is.”⁸⁰

There are sound reasons for these special constitutional arrangements for treaties. First, the delegation of exclusive control over treaty-making to the federal government ensures that the parochial concerns of the numerous and disparate state polities cannot frustrate the interests of the nation as a whole in matters of international diplomacy, trade, and commerce.⁸¹ Second, and of equal importance, the inclusion of treaties within the federal judicial power guarantees a final and authoritative federal voice in their domestic interpretation and application. Indeed, this was the core holding in one of the Supreme Court’s most famous early decisions, *Martin v. Hunter’s Lessee*,⁸² which made clear the Court’s ultimate role in ensuring uniformity in the interpretation of the nation’s treaty obligations.⁸³

Finally, and perhaps most importantly, the designation of treaties as “the supreme Law of the Land” serves to protect against the international embarrassment and friction that would flow from subsequent interference by the legislatures or courts of the individual states. There will be more to say about this below;⁸⁴ it will suffice at this point to observe that the risk of international discord was a real and immediate concern during the Framing Period—and one (although in a different aspect) that remains today.⁸⁵

C. UNDERSTANDING THE SPECIAL BIFACETED NATURE OF TREATIES

The apparent constitutional equation of treaties and other forms of federal law carries a risk of deception. There is little in the text of Articles III and VI to suggest that treaties made by the United States are entitled to any special treatment by the domestic courts. In both, treaties are simply listed parallel to other, more prosaic categories of federal law.⁸⁶

Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982) (stating that courts should accord “great weight” to the interpretive views of executive agencies charged with the enforcement of a treaty). For more on this point, see *infra* notes 399–412 and accompanying text.

80. 5 U.S. (1 Cranch) 137, 177 (1803).

81. See *supra* notes 52–55 and accompanying text.

82. 14 U.S. 304, 347–60 (1816).

83. Although easily overlooked, *Martin v. Hunter’s Lessee* involved the application of individual rights created by a treaty. The case arose after the Supreme Court of Virginia refused to follow the federal Supreme Court’s enforcement of treaty rights in an earlier case. See *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. 603, 627 (1812) (holding in a land dispute that a treaty “being the supreme law of the land, confirmed the title to [Fairfax], his heirs and assigns, and protected [Fairfax] from any forfeiture by reason of alienage” under state law); see also *infra* note 414 (setting forth the complete quotation from *Martin v. Hunter’s Lessee*).

84. See *infra* notes 101–103 and accompanying text.

85. See *infra* notes 301–302 and accompanying text.

86. U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”); U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”).

An equivalent federal law foundation does not, however, mean an equivalent legal nature. To the contrary, the doctrine of good faith interpretation, as Part II will explain, arose precisely to ensure judicial sensitivity to the fundamental differences between treaties and legal norms of purely domestic-law origin.⁸⁷ But we will also see that good faith silently departed from Supreme Court treaty jurisprudence long ago, leaving lower court confusion in its wake.⁸⁸ To appreciate fully the implications of these developments requires a return to the source, and thus a careful reexamination of the special dual functions of treaties under domestic and international law.

1. Treaties as International Legal Obligation

The special constitutional arrangement for the making and confirmation of treaties flows from an important insight about their legal nature in general. Treaties accomplish a legal act that an Article I statute by its nature can not: They create an external sovereign commitment of the United States owed to a foreign state, and as is now increasingly the case to individuals as well,⁸⁹ under international law. This commitment, importantly, is also quite apart from whatever force a treaty may have as a matter of directly enforceable domestic law.

At the core of the Article II treaty power is also a recognition that the essence of a treaty is found in its international dimension. Each of the essential stages in the life of a treaty is defined by the specific consequences that attach under international law. Whether bilateral or multilateral, a treaty begins its life with negotiations between sovereign states—which for the United States are conducted, by constitutional tradition, solely by the executive branch⁹⁰—and their agreement on its substantive terms.⁹¹ The end of this process—the authentication of a final text—is marked by the formal international law act of a signature

87. See *infra* Part II.B.

88. See *infra* Part II.C.

89. Only sovereign states are thought to possess rights and duties in the classic model of international law. As Carlos Vazquez has convincingly demonstrated, however, when properly understood, this narrow sense of “rights” means only the power to invoke the structures of international law to sanction violations, and thus does not preclude individuals from being the beneficiaries of primary rights under international law. See Carlos Manuel Vazquez, *Treaty-based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1087–94 (1992) (explaining the distinction between the “secondary rights” to “set in motion the machinery of international law for sanctioning violations,” which are held exclusively by states, and the “primary rights” that international law protects in the first place, which also may be held by individuals). To the contrary—as the great number and variety of private rights treaties in the fields of commercial law, taxation, human rights and others attest (see *supra* notes 45–50 and accompanying text)—it is now increasingly common for individuals to be “the direct and intended beneficiaries of obligations imposed on states by international law.” *Id.* at 1087.

90. Although the “advice” element of Senate involvement in the treaty power under Article II, section 2, may suggest otherwise, within a few years of the ratification of the Constitution, actual practice by the executive branch quickly excluded formal Senate involvement in the negotiation of treaties. See Yoo, *Treaty Interpretation*, *supra* note 23, at 895–901 (canvassing the historical foundations of this constitutional tradition).

91. Generally, this substantive agreement occurs when all states involved in a treaty’s drafting consent to the adoption of its text. See Vienna Convention on the Law of Treaties, *supra* note 16, art.

by representatives of the approving states.⁹²

Here it would seem that domestic law intervenes, for the Constitution imposes the condition of “advice and consent” by a local legislative institution: the Senate.⁹³ But even where domestic law requires this act, international law prescribes whether and when a treaty takes formal legal effect, most commonly when the parties present formal instruments of ratification.⁹⁴ Indeed, the Supreme Court made clear long ago that even the domestic-law incidents of a treaty (about which more immediately below⁹⁵) depend on this formal international law act.⁹⁶

A treaty thus begins its life and rises to maturity as a creature of international law. The same is true for its ultimate point of legal effectiveness. International law prescribes when a treaty enters into force,⁹⁷ as well as the legal conclusion that a treaty represents a formal obligation of the treaty partners. This obligation, importantly, derives not from domestic-law sources, but rather from the requirement under international law that sovereign states faithfully adhere to their commitments.⁹⁸ From its very birth in international law, therefore, a treaty carries an obligation that the partner states perform their undertakings in “good faith.”⁹⁹ Louis Henkin has accurately described this rule of *pacta sunt servanda* as “the most important principle of international law.”¹⁰⁰

This international law foundation was well known to the Framers of the Constitution, as was the fact that a failure to fulfill treaty commitments can

9(1). For those treaties approved at an international conference, adoption of a treaty’s text requires “the vote of two-thirds of the States present and voting.” *Id.* art. 9(2).

92. *See id.* art. 10 (providing that, unless the treaty parties expressly agree otherwise, “[t]he text of a treaty is established as authentic and definitive . . . by the signature, signature *ad referendum* or initialing by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text”).

93. *See supra* note 52 and accompanying text (citing U.S. CONST. art. II, § 2).

94. *See* Vienna Convention on the Law of Treaties, *supra* note 16, art. 16 (providing that where the final consent of a state is conditioned on a subsequent ratification or similar act, the consent is established by a formal instrument of ratification either exchanged between treaty partners or deposited with a designated depositary).

95. *See infra* Part I.C.2.

96. *See* *Haver v. Yaker*, 76 U.S. 32, 34 (1869) (holding that to the extent a treaty affects private rights as a matter of domestic law it “is not considered as concluded until there is an exchange of ratifications”) (citing *United States v. Arredondo*, 31 U.S. (6 Peters.) 691 (1832)).

97. The formal entry into force of a treaty may occur after a state has expressed its consent, such as when a designated threshold of ratifying or acceding states is met. *See* Vienna Convention on the Law of Treaties, *supra* note 16, art. 24 (providing that a treaty enters into force as provided therein or as otherwise agreed by the negotiating states, and failing such an agreement when all negotiating states have expressed their consent to be bound).

98. *See id.* art. 26 (declaring that treaties in force are binding on the parties under international law); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 16, § 321 (same).

99. *See* Vienna Convention on the Law of Treaties, *supra* note 16, art. 26 (providing that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 16, § 321 (same).

100. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 62 (1990); *see also* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 16, § 321 & cmt. a (1987) (referring to the binding force of international law agreements in light of the doctrine of *pacta sunt servanda*).

occasion significant discord. Indeed, it was the practical experience with international friction over the nation's good faith performance of treaties under the Articles of Confederation that drove the distinctive constitutional arrangements for treaties.¹⁰¹ In the charged environment after the War of Independence, many state legislatures and courts refused to give effect to protections afforded British creditors under the 1783 Treaty of Peace.¹⁰²

The first step the Framers took to protect against the risk of renewed international conflict from these state actions was to designate treaties as the "supreme Law of the Land."¹⁰³ But more important for present purposes was the new institutional mechanism the Framers created for the local enforcement of treaties. Through the express inclusion of treaties within Article III, the Framers determined to confer on the federal courts the responsibility to ensure fidelity to the domestic-law incidents of the nation's international treaty obligations. It is this responsibility, ultimately, that forms the distinctive interpretive context for the judicial application of treaties, even as a matter of domestic law.¹⁰⁴

2. The Domestic-Law Incidents of Treaties

Not all treaties are directly enforceable in federal and state courts as a matter of domestic law. Some exclusively involve undertakings between the United States and a foreign sovereign in their relations *inter se*. Pure treaties of peace, diplomacy, or arms control often provide a good example.¹⁰⁵ When a treaty of

101. See Flaherty, *supra* note 3, at 1312–14 (1999) (examining the international friction that arose from state interference with treaty obligations under the Articles of Confederation and noting that this problem was a principal reason for the special constitutional protections for treaties); Swaine, *supra* note 3, at 1199–1200 (observing that the refusal of states to adhere to the terms of the 1783 Treaty of Paris led to the special arrangements for treaties in Articles III and VI); Golove, *supra* note 21, at 1102–49 (comprehensively examining the problems that arose from state interference with treaties under the Articles of Confederation and the resultant decisions to enhance the treaty-making powers of the national government under the new Constitution).

102. Flaherty, *supra* note 3, at 1312–13 (canvassing the problems caused by state interference with foreign relations under the Articles of Confederation and noting that "the Founding concern with treaty violations . . . dated back to the nation's 'first' international compact, the 1783 Treaty of Paris, which ended the Revolutionary War and secured recognition of American independence by Great Britain").

103. Swaine, *supra* note 3, at 1199–1200 (stating that "[t]he Supremacy Clause, together with the Necessary and Proper Clause, was intended to allow the federal government to ensure U.S. compliance with its international obligations"); Flaherty, *supra* note 20, at 2118–19 (observing that the international friction caused by the refusal of states to give domestic effect to treaty obligations under the Articles of Confederation was a principal reason for the Framers' decision to include treaties within the Supremacy Clause); Flaherty, *supra* note 3, at 1314 (declaring that one way the Framers addressed the problem of state refusal to enforce treaty obligations "was to make treaties—including treaties that predated the new Constitution—the supreme law of the land over state law and make them judicially enforceable").

104. See *infra* notes 166–180 and accompanying text.

105. There is nothing to prevent even a treaty of peace from including self-executing provisions. Perhaps the most prominent example of this is the 1783 Treaty of Peace with Great Britain, which included controversial protections for private British creditors, and which was the subject of some of the most important early Supreme Court cases. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237

this nature solely “import[s] a contract”¹⁰⁶ between sovereigns, therefore, it “addresses itself to the political, not the judicial department.”¹⁰⁷

Many modern treaties, however, also involve the rights of private individuals or otherwise are directed toward the internal, domestic law of the treaty partners.¹⁰⁸ The numerous self-executing treaties in the traditional domestic-law fields of taxation,¹⁰⁹ commercial law,¹¹⁰ civil rights,¹¹¹ and family law¹¹² amply illustrate this phenomenon. In such a case, interestingly, the international obligation is that the parties must give effect to a treaty as a matter of domestic law. In many nations, this may be accomplished only through a formal act of legislation by domestic-lawmaking institutions.¹¹³

In this country, however, the special constitutional status of treaties permits the United States to short-circuit the process; for under the self-execution doctrine, a treaty may take direct effect as preemptive federal law of its own force.¹¹⁴ As the Supreme Court explained in *Haver v. Yaker*¹¹⁵ nearly a century-and-a-half ago, “[i]n this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land.”¹¹⁶

This does not mean that the enforcement of all private-right treaties immediately falls to the federal courts.¹¹⁷ Such treaties may nonetheless condition their

(1795) (enforcing the creditor protection provisions of the 1783 Treaty of Peace and holding that such provisions directly “nullified” contrary state laws).

106. *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

107. *Id.*; see also *Cherokee Nation v. Georgia*, 30 U.S. 1, 30 (1831) (“[T]here is . . . a great deal of sense in the [traditional] rule . . . that as between sovereigns, breaches of treaty were not breaches of contract cognizable in a court of justice . . .”).

108. For a comprehensive review of the existing treaties that are directly enforceable as domestic law in the United States, see Van Alstine, *supra* note 18, at 917–27.

109. See *id.* at 923–24 (describing taxation treaties).

110. See *id.* at 922–23 (describing the extant self-executing commercial law treaties).

111. See *id.* at 924 (describing treaties designed to protect the civil rights of foreign citizens in the United States).

112. See *id.* at 924–25 (describing treaties in the fields of civil procedure and family law).

113. See Van Alstine, *Treaty Delegation*, *supra* note 23, at 1265; Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 575 (1991) (observing that in some countries “treaties . . . require parliamentary action before the courts will recognize individual rights”).

114. See *supra* notes 56–70 and accompanying text.

115. 76 U.S. (9 Wall.) 32 (1869).

116. *Id.* at 35.

117. The fundamental declaration of the Supreme Court on the distinction between those treaties that take direct effect of their own force and those that require legislative implementation is found in the 1829 case of *Foster v. Neilson*:

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. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

27 U.S. (2 Pet.) 253, 314 (1829).

effect—whether explicitly or implicitly—on further congressional action.¹¹⁸ When a treaty is self-executing, however, the combined effect of the treaty provisions of Articles II, III, and VI is that the treaty simultaneously fulfills the dual functions of international legal obligation and judicially enforceable domestic rule of law.

The special bifaceted legal force of self-executing treaties should not, however, mislead about their essential nature. For purposes of international law, any limitations of a local origin must recede to the background.¹¹⁹ But even under our domestic Constitution, the power of treaty-lawmakers to create federal law through the vehicle of a treaty is only incident to the power to create international law obligations in the first place. To be sure, the treaty power is independent of the legislative power of Congress in Article I.¹²⁰ The domestic-law incidents of a self-executing treaty do not exist on their own, however. From the very nature of a treaty, those empowered to create federal law under Article II (the President with the consent of a super-majority of the Senate) may only do so on the foundation of an extant treaty obligation under international law.¹²¹

Even when a particular treaty simultaneously fulfills the dual functions of international law obligation and domestic rule of law, the second function necessarily derives from the first. As analysis below will demonstrate,¹²² this international law obligation creates a fundamentally different context for the judicial interpretation of treaties as a unique element of the “supreme Law of the Land.”¹²³

118. For a variety of reasons found either in its substance or in express reservations, a treaty may not function on its own as judicially enforceable federal law. See Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) (examining in detail the circumstances under which treaties do not take direct effect as preemptive federal law); Carlos Manuel Vazquez, *Treaty-based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992) (same).

119. See Vienna Convention on the Law of Treaties, *supra* note 16, art. 27 (“A party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.”); see also RESTATEMENT OF FOREIGN RELATIONS, *supra* note 16, § 311(3) (“A state may not invoke a violation of its internal law to vitiate its consent to be bound unless the violation was manifest and concerned a rule of fundamental importance.”); *id.* § 321 cmt. a (stating that the basic obligation of *pacta sunt servanda* “includes the implication that international obligations survive restrictions imposed by domestic law”).

120. See *supra* notes 62–66 and accompanying text.

121. The Constitution expressly ties the federal law status of treaties to the existence of the international treaty. See U.S. CONST. art. II, § 2 (granting to the President the power to “make treaties” with the consent of the Senate); *id.* art. VI, § 2 (conferring “supreme Law of the Land” status to treaties “made, or which shall be made, under the Authority of the United States”); *id.* art. III, § 2 (providing that the judicial power extends to treaties “made, or which shall be made,” under the authority of the United States).

122. See *infra* Part III.

123. See U.S. CONST. art. VI, cl. 2.

D. THE MODERN JURISPRUDENCE OF TREATY INTERPRETATION

Although—as the Supremacy Clause itself recognizes¹²⁴—legally binding treaties of the United States predate even the Constitution,¹²⁵ surprisingly little is known about the modern nature and effect of treaty law. At least 400 are in force,¹²⁶ yet there is no comprehensive compilation of self-executing treaties in the United States. A list of the “treaties in force” for the United States is maintained by the State Department, but it provides no distinction on their domestic-law effect.¹²⁷ On the other hand, treaties with a clear self-executing effect are sometimes listed as statutory notes in the United States Code.¹²⁸ Given this simple difficulty of identification, it is perhaps understandable that modern judicial confrontations with treaties reflect at best a deep ambivalence—at worst a deep confusion—over their precise legal nature.

Nonetheless, modern Supreme Court case law on the interpretation of treaties is marked by a fair degree of consistency (at least in its rhetoric). The standard formulation begins with a recognition that a treaty by its nature is “an agreement among sovereign powers.”¹²⁹ From this, the Court has properly reasoned that its core responsibility in matters of interpretation is “to read the treaty in a manner ‘consistent with the shared expectations of the [treaty] parties.’”¹³⁰ Indeed, a declaration of fidelity to shared expectations has become near boilerplate in modern Supreme Court treaty opinions.¹³¹

The mechanics of Supreme Court treaty interpretation are also unsurprising.

124. The Supremacy Clause expressly provides that treaties concluded before ratification of the Constitution also have the force of “supreme Law of the Land.” See U.S. CONST. art. VI, cl. 2 (employing the past tense in providing that “all treaties made . . . under the authority of the United States” shall be the “supreme Law of the Land”); see also *Chirac v. Chirac’s Lessee*, 15 U.S. (2 Wheat.) 259 (1817) (holding with regard to a 1778 treaty with France that “[i]t is unnecessary to inquire into the effect of this treaty under the confederation, because . . . the confederation had yielded to our present constitution, and this treaty had become the supreme law of the land”).

125. Prominent examples include, of course, the 1783 Treaty of Peace with Great Britain, and a 1788 counselor treaty with France, to which the Senate gave its advice and consent after the ratification of the Constitution. See *Convention Defining and Establishing the Functions and Privileges of Counsels and Vice Counsels*, Nov. 14, 1788, U.S.-Fr., 8 Stat. 106.

126. For an overview of existing self-executing treaties, see Van Alstine, *supra* note 18, at 917–27.

127. The list of treaties in force is available at the website of the United States Department of State at <http://www.state.gov/s/l/c8455.htm> (last visited Apr. 2, 2005).

128. See, e.g., 49 U.S.C. § 40105 note (2000) (reprinting the text of the Warsaw Convention on International Air Transportation).

129. See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996); see also *Société Nationale Industrielle Aérospatiale vs. United States Dist. Court*, 482 U.S. 522, 533 (1987) (“In interpreting an international treaty, we are mindful that it is ‘in the nature of a contract between nations . . .’”) (quoting *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984)).

130. *Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (quoting *Air Fr. v. Saks*, 470 U.S. 392, 399 (1985)).

131. This formulation traces its lineage to *Saks*, 470 U.S. at 399 (“It is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.”); see also *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999) (quoting *Saks* for the same proposition); *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 536 (1991) (same); *United States v. Stuart*, 489 U.S. 353, 365–66 (1989) (same); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (observing that in interpreting a treaty a court’s “role is limited to giving effect to the intent of

The process begins, we are told, "with the text of the treaty and the context in which the written words are used."¹³² For Justice Scalia and other adherents to "textualist" interpretation, this is also where the interpretive process generally should end. In sympathetic echo with the contentious debates over the force of text in statutory interpretation,¹³³ Justice Scalia has argued that the plain meaning of a treaty's text should also control.¹³⁴ The import here is that where the text is clear, an interpreter should not review the drafting history or other extrinsic evidence of the treaty partners' shared intent.¹³⁵

In its more recent case law, however, the Court has correctly rebuffed this attempt to extend textualist interpretive approaches to the treaty context. It is now accepted practice for the Court to look beyond the text to the drafting history of a treaty (the so-called *travaux préparatoires*). "Because a treaty ratified by the United States is not only the law of this land . . . but also an agreement among sovereign powers," the Court recently declared, "we have traditionally considered as aids to its interpretation the negotiating and drafting history"¹³⁶ In a similar vein, the Court has emphasized the importance of the subsequent, agreed-upon practice of the parties as evidence of a treaty's

the treaty parties"). References to the role of the "intent of the parties" in treaty interpretation appeared as early as 1795 in the case of *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1795).

132. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 534–35 (1991) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) (quoting *Société Nationale Industrielle Aérospatiale vs. United States Dist. Court*, 482 U.S. 522, 534 (1987) (quoting *Air Fr. v. Saks*, 470 U.S. 392, 397 (1985))); see also *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 65 (1993) ("Our interpretation must begin, as always, with the text of the Conventions."); *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty . . . we first look to its terms to determine its meaning.").

133. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 30–35 (1997) (criticizing the use of legislative history in statutory interpretation); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68–70 (1994) (same); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (examining the rise of textualist approaches to statutory interpretation).

134. See *United States v. Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (arguing that the interpretive process should end once the Court concludes that a treaty's text "resolves the issue presented"); see also David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 979 (1994) (arguing that in *Stuart* "Justice Scalia was intent on extending his jurisprudence of statutory construction to the treaty area"). For similar expressions of a textualist approach to treaty interpretation, see *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 194 (1993) (Blackmun, J., dissenting) ("[A] treaty's plain language must control absent 'extraordinarily strong contrary evidence.'") (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989) (Scalia, J.) ("We are to find out the intention of the parties . . . and having found that, our duty is to follow it as far as it goes, and to stop where it stops . . .") (quoting *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821)).

135. See *Stuart*, 489 U.S. at 371 (arguing with regard to a tax treaty that "[g]iven that the Treaty's language resolves the issue presented, there is no necessity of looking further to discover 'the intent of the Treaty parties'") (quoting the majority opinion, *id.* at 366). Justice Scalia has alternately suggested that even for ambiguous text "the most natural reading" should prevail unless there is a contrary "clear drafting history." See *Chan*, 490 U.S. at 134 n.5 (asserting with regard to the interpretation of a treaty that "[e]ven if the text were less clear, its most natural reading could properly be contradicted only by clear drafting history").

136. *El Al Isr. Airlines v. Tseng*, 525 U.S. 155, 167 (1999) (quoting *Zicherman v. Korean Airlines*, 516 U.S. 217, 226 (1996)); see also *E. Airlines*, 499 U.S. at 535 ("[W]e may look beyond the written

original meaning.¹³⁷

Finally, the Supreme Court has also considered the views of the executive branch on issues of treaty interpretation. Although not conclusive, the primary role of the executive as representative of the United States in matters of foreign affairs¹³⁸ makes it appropriate to afford calibrated respect to its interpretive opinions.¹³⁹ This is particularly true when the continuing administration of a treaty is expressly entrusted to a specific executive branch agency.¹⁴⁰

There is, in large measure, little to criticize in these general formulations. At a basic level, the now-common reference to the importance of “shared expectations” properly reflects a recognition of the distinctive nature of treaties. Interpretation based on text, context, and drafting history likewise should occasion little dispute.¹⁴¹ And although past practice seems to have bordered on unthinking

words to the history of the treaty [and] the negotiations.”) (quoting *Air Fr. v. Saks*, 470 U.S. 392, 396 (1985) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943))).

137. See, e.g., *El Al Isr. Airlines*, 525 U.S. at 167 (approving of a review of “the postratification understanding of the contracting parties” in treaty interpretation); *E. Airlines*, 499 U.S. at 535 (1991) (stating that a court, in addition to drafting history, may examine “the practical construction adopted by the parties.”) (quoting *Saks*, 470 U.S. at 396 (quoting *Choctaw Nation of Indians*, 318 U.S. at 431–32)); *O’Connor v. United States*, 479 U.S. 27, 33 (1986) (“The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning.”) (citing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259–60 (1984), and *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 158–61 (1934)); see also *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 16, § 325(2) (“Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken into account in its interpretation.”).

138. See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (“[T]he historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)); see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (observing that the President has “unique responsibility” regarding matters of “foreign and military affairs”); *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion) (stating that the President has “the lead role . . . in foreign policy”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (observing with regard to the conduct of foreign affairs that “[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation”).

139. See *El Al Isr. Airlines*, 525 U.S. at 168 (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

140. As the quotation in the preceding footnote makes clear, the treaty deference is due to the interpretive views of the government agencies “charged with their negotiation and enforcement.” See *El Al Isr. Airlines*, 525 U.S. at 168; *Avagliano*, 457 U.S. at 184–85; see also Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 701–07 (2000) (arguing in favor of application to treaties of the “*Chevron Doctrine*,” under which special deference is afforded the interpretive views of executive branch agencies charged with the administration of statutes); Van Alstine, *Treaty Delegation*, *supra* note 23, at 1298–1302 (arguing that one factor affecting the degree of respect courts should afford to executive branch interpretations of a treaty is whether its continuing enforcement is entrusted to a particular executive branch agency).

141. More recently, even Justice Scalia seems to have relented on the value of drafting history in the treaty context. See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (Scalia, J.)

judicial acquiescence to executive branch opinions,¹⁴² the Supreme Court now has reined in its excessive rhetoric. For example, in its most recent opinion on the subject, the Court stated merely that “respect” is “ordinarily” due, and only to the “reasonable” views of the executive branch.¹⁴³

The problem arises not in these narrow mechanics of interpretation, but rather in a broader failure to appreciate the full implications of the special bifaceted nature of treaties. To be sure, the Supreme Court has commonly made reference to a contractual model in treaty interpretation. Thus, for example, the Court observed in *Société Nationale Industrielle Aérospatiale vs. United States District Court*, “in interpreting an international treaty, we are mindful that it is ‘in the nature of a contract between nations.’”¹⁴⁴ Such at least is the rhetoric.

A recognition that the essence of a treaty flows from its nature as international obligation is indeed the proper launch point for interpretation. The barren contractual references aside, however, the Court has given little indication that treaties, when self-executing, are any different from federal statutes. As we have seen, the Court has seemingly resolved the perennial dispute over textualism in favor of the use of drafting history.¹⁴⁵ But beyond this, the Court has only offered the generic observation that the “general rules of construction apply”¹⁴⁶ to treaties as well. The result, as Part III will examine in greater detail, has been severe confusion in the lower courts over the nature of treaties and the role of federal judges in applying treaties as “the supreme Law of the Land.”¹⁴⁷

What is the cause of this ambiguous drift in modern treaty jurisprudence? It is, I maintain, the significant, though largely unnoticed, disappearance from Supreme Court case law of a once-venerable principle of adherence to “utmost good faith” in treaty interpretation.¹⁴⁸ As we shall see below, the rule of good faith interpretation inexplicably disappeared from Supreme Court jurisprudence

(acknowledging that “[b]ecause a treaty . . . is . . . also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties”).

142. One scholar concluded after a review of Supreme Court case law before the *El Al* opinion noted above (*supra* notes 139–140) that treaty interpretation was “bankrupt because of unbridled deference” to the views of the executive branch. See Bederman, *supra* note 134, at 954.

143. See *El Al Isr. Airlines*, 525 U.S. at 168 (1999) (observing that federal courts “ordinarily” should give “respect” to the “reasonable views” of the executive branch concerning the meaning of a treaty).

144. 482 U.S. 522, 533 (1987) (quoting *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984)); see also *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979) (“A treaty . . . is essentially a contract between two sovereign nations.”); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (stating that “treaties are contracts between independent nations”).

145. See *supra* notes 133–136 and accompanying text.

146. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699–700 (1988) (observing that in treaty interpretation “general rules of construction may be brought to bear on difficult or ambiguous passages”); see also *E. Airlines*, 499 U.S. at 535 (stating for treaty interpretation that the “[g]eneral rules of construction apply”); *Société Nationale*, 482 U.S. at 533–34 (same) (quoting *Trans World Airlines*, 466 U.S. at 262).

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

148. See *infra* Part II.C.

in the early part of the last century.¹⁴⁹ Its companion canon of liberal interpretation to avoid judicial treaty breach¹⁵⁰ has suffered a similar fate.¹⁵¹ And although the Court has paid lip service to the derivative principle of respect for the views of foreign treaty courts,¹⁵² the execution has been uneven,¹⁵³ and the lower courts have almost entirely disregarded it in any event.¹⁵⁴

II. THE RISE AND FALL OF GOOD FAITH IN TREATY JURISPRUDENCE

A. GOOD FAITH'S VENERABLE PAST

1. The Early Emergence of Treaty Good Faith

The notion of good faith fulfillment of treaty obligations has existed from the earliest formulations of international law. As early as the seventeenth century, the grandfather of international law, Hugo Grotius, emphasized the obligation of good faith even in war,¹⁵⁵ and indeed dedicated entire chapters to the importance of good faith “between enemies,”¹⁵⁶ “in ending war,”¹⁵⁷ and “during war.”¹⁵⁸ Expanding on these observations a century later, Emer de Vattel, the other principal architect of modern international law, opined that good faith was at the center of the international treaty system. “There would no longer be any security, no longer any commerce between mankind,” he asserted, “if they did not think themselves obliged to keep faith with each other, and to perform their promises.”¹⁵⁹

Good faith in this most basic sense is merely a reflection of the proposition that sovereign states must adhere to their international commitments.¹⁶⁰ It is nonetheless also a well-established principle of international law that the very interpretation of treaty obligations is subject to the premise of good faith.¹⁶¹ Stated generally, this interpretive norm mandates that sovereign actors construe

149. See *infra* Part II.B.

150. See *infra* Part II.A.2.

151. See *infra* notes 219–224 and accompanying text.

152. See *infra* note 358 and accompanying text.

153. See *infra* notes 354–357 and accompanying text.

154. See *infra* notes 369–377 and accompanying text.

155. See HUGO GROTIUS, *DE IURE BELLI AC PACIS LIBRI TRES* bk. III, ch. XXI, at 832–44 (Francis W. Kelsey trans., 1925) (5th ed. 1646) (comprehensively examining the role of “good faith” “during war”).

156. *Id.* at ch. XIX, 792–803.

157. *Id.* at ch. XX, 804–31.

158. *Id.* at ch. XXI, 832–44.

159. 2 VATTEL, *LE DROIT DE GENS*, ch. 12, para. 163 (Edward D. Ingraham, trans., AMS Press 1982) (1883); see also *Chew Heong v. United States*, 112 U.S. 536, 539 (1884) (citing this observation with approval).

160. See *supra* notes 99–100 and accompanying text. In his analysis of the treaty power under the new Constitution, Alexander Hamilton likewise recognized the obligation of good faith performance. See *THE FEDERALIST* No. 75 (Alexander Hamilton) (observing with regard to the treaty power that “[i]ts objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith”) (emphasis in original).

161. See Vienna Convention on the Law of Treaties, *supra* note 16, art. 31 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty

their treaty obligations on a premise of equality and a mutual intent of faithful performance.¹⁶² As Vattel explained well over two centuries ago, international law should prefer treaty interpretations that “make[] for the common benefit of the contracting parties and tend[] to put them on a footing of equality.”¹⁶³

As a principle of international law, the primary relevance of good faith is in regulating the sovereign international interaction of the treaty partners.¹⁶⁴ Article II of the Constitution accordingly confers the authority to “make Treaties” on the executive branch (with the consent of the Senate).¹⁶⁵ As we have seen,¹⁶⁶ however, the Constitution also extends the relevance of treaty law to the domestic judicial realm, for the combined effect of the Supremacy Clause and Article III, Section 2 means that the domestic enforcement of treaties falls within the judicial competence of the federal courts.¹⁶⁷ In other words, even though its origins are in international law, the domestic enforcement agency for a self-executing treaty is the federal courts in their role as the final arbiters of federal law.¹⁶⁸ The result of this insertion of domestic courts into treaty enforcement is that their interpretive decisions also carry the risk of compromising the good faith of the United States in its relations with foreign sovereigns.

The Supreme Court recognized the gravity of this responsibility from its first engagements with treaties under the new Constitution. A prominent early example is the 1821 case of *The Amiable Isabella*.¹⁶⁹ At issue there was the construction of certain protections for captured ships in a 1795 treaty between the United States and Spain.¹⁷⁰ Although the Court ultimately concluded that the treaty was not controlling, it did so only after a careful examination of the special international law implications of treaty interpretation as compared to the conventional judicial application of domestic law. The issues of the case, the Court declared,

in their context and in the light of its object and purpose.”); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 16, § 325(1) (same).

162. See *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (declaring that there is a “a general principle of construction with respect to treaties that they shall be liberally construed, so as to . . . secure equality and reciprocity between them”) (citing *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1880)).

163. See VATTEL, *supra* note 159, ch. 12, para. 163.

164. The doctrine of good faith does not sanction judicial creation of substantive treaty obligations. Rather, as Part III.A.3. explains below, the doctrine serves a broader function of impressing on courts the seriousness of their task and the importance of avoiding a breach of treaty obligations through judicial action.

165. See U.S. CONST. art. 2, § 2, cl. 2; see also *supra* notes 53–55 and accompanying text (analyzing this power of the President and a supermajority of the Senate).

166. See *supra* notes 56–70 and accompanying text.

167. See *supra* notes 67–70 and accompanying text.

168. See *supra* notes 72–80 and accompanying text (explaining that because of the inclusion of treaties within the “judicial Power” of Article III, federal courts have final interpretive authority for self-executing treaties).

169. *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1 (1821).

170. See Treaty of Friendship, Limits and Navigation, Oct. 27, 1795, U.S.-Spain, art. 17, 8 Stat. 138.

[E]mbrace the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our Government could not violate without disgrace, and which this Court could not disregard without betraying its duty. It need not be said, therefore, that we feel the responsibility of our stations on this occasion . . . ¹⁷¹

In the early life of the United States, the consequences of treaty violations were real and significant. Such concerns, as we have seen,¹⁷² even prompted essential elements in the design of the Constitution. In the early years, therefore, Supreme Court observance of an interpretive norm of good faith operated to protect the new and comparatively weak country from a risk of serious international discord.

The doctrine of good faith interpretation nonetheless continued to flower even as the nation's influence grew and the subject of treaties began to extend into commercial and economic realms. In numerous opinions throughout the latter half of the nineteenth century and into the twentieth, the Supreme Court repeatedly emphasized the need to observe treaty obligations "with entire good faith, and scrupulous care."¹⁷³ These reaffirmations of good faith embraced, importantly, the interpretation of treaties on trade and commerce,¹⁷⁴ extradition,¹⁷⁵ and the property rights of foreign nationals.¹⁷⁶

There is perhaps no better declaration of the expansion of good faith into matters beyond peace and diplomacy than in the 1902 Supreme Court opinion

171. See 19 U.S. at 68; see also *The Marianna Flora*, 24 U.S. 1, 49 (1826) (citing the principle of good faith treaty interpretation with regard to an early treaty with Spain).

172. See *supra* notes 101–103 and accompanying text.

173. See *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928) ("The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them."); *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921) ("While the question of the construction of treaties is judicial in its nature, . . . courts when called upon to act should be careful to see that international engagements are faithfully kept and observed . . ."); *Johnson v. Browne*, 205 U.S. 309, 321 (1907) (affirming with respect to an extradition treaty that "it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith"); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902) (declaring that a treaty "should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose"); *Grin v. Shine*, 187 U.S. 181, 184 (1902) (declaring with regard to certain extradition treaties that they "should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused"); *Geofroy v. Riggs*, 133 U.S. 258, 271–72 (1890) (declaring that there is a "a general principle of construction with respect to treaties that they shall be liberally construed, so as to . . . secure equality and reciprocity between them") (citing *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1880)); *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) (stating that treaties "are to be kept in most scrupulous good faith").

174. See, e.g., *Jordan*, 278 U.S. at 123 (reaffirming the good faith doctrine in interpreting a 1911 treaty on trade and commerce with Japan).

175. See, e.g., *Grin*, 187 U.S. at 184 (applying the good faith doctrine with regard to the interpretation of an extradition treaty with Russia).

176. See, e.g., *Chew Heong*, 112 U.S. at 540 (stating with regard to the rights of Chinese nationals under an 1880 treaty with China that treaties "are to be kept in most scrupulous good faith").

in *Tucker v. Alexandroff*.¹⁷⁷ That case involved a demand by the Russian consul in the United States to surrender a deserting sailor under an 1832 treaty.¹⁷⁸ The Supreme Court first broadly reaffirmed that a treaty “should be interpreted in a spirit of *uberrima fides* [good faith], and in a manner to carry out its manifest purpose.”¹⁷⁹ In a passage worthy of extended quotation here, it then wonderfully captured the reasons for fidelity to this “utmost good faith” in treaty interpretation even in matters beyond war and peace:

As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence.¹⁸⁰

In furtherance of these principles, the Court resolved certain ambiguities in the treaty with Russia in favor of the right of our treaty partner to demand surrender of the deserting sailor even though the ship at issue was still under construction in the United States.¹⁸¹

There will be more to say about this below;¹⁸² it will suffice at this point to observe that for the first century-and-a-half of the nation’s existence, the Supreme Court recognized an essential need for judicial adherence to good faith in treaty interpretation. The doctrine of self-execution conferred on the federal judiciary—and in some cases state courts by default, particularly in the nation’s early years¹⁸³—a responsibility to interpret our nation’s international treaty obligations.¹⁸⁴ As the Supreme Court perceived from its earliest cases,¹⁸⁵ the

177. 183 U.S. 424 (1902).

178. *See id.* at 427–29.

179. *Id.* at 437.

180. *Id.*

181. *See id.* at 437–40; *see also id.* at 446 (specifically concluding with regard to the unfinished status of the ship at issue that “[t]he treaty should be liberally interpreted in this particular to carry out the intent of the parties” to promote the arrest and surrender of deserters).

182. *See infra* Parts III.A.1, 3.

183. Because federal courts have jurisdiction for cases arising under treaties, *see* 28 U.S.C. § 1331 (2000), and defendants have a corresponding right of removal in any event, *see* 28 U.S.C. § 1441(b) (2000), the opportunities for state court interpretation of treaties should be comparatively rare. Nonetheless, there may indeed be prominent cases for such state court action, as the most recent controversy over the rights of foreign criminal defendants under the Vienna Convention on Consular Relations illustrates. *See supra* note 42 (describing this controversy); *see also, e.g.*, *New Jersey v. Homdziuk*, 848 A.2d 853, 859–60 (N.J. Super. Ct. App. Div. 2004) (interpreting the Convention as not requiring the exclusionary rule for violations of rights set forth therein); *Oregon v. Sanchez-Llamas*, 108 P.3d 573, 574–78 (Or. 2005) (interpreting that Convention as not creating individual rights).

184. *See supra* notes 67–70 and accompanying text.

185. *See supra* notes 169–171 and accompanying text.

background norm of good faith interpretation served to impress upon the domestic courts both the seriousness of this responsibility and that a treaty's international origins create a fundamentally different context for its interpretation as a matter of domestic law.

2. Good Faith and the Liberal Interpretation Canon

From its first appearance in treaty jurisprudence, the doctrine of good faith interpretation has typically traveled with a companion: the "liberal interpretation canon." The notion that treaties should be interpreted in a "liberal spirit"¹⁸⁶ first gained prominence in the early 1800s, as both federal and state courts confronted private rights protected in the nation's first treaties of "friendship, commerce and navigation."¹⁸⁷ Classic examples of the self-execution doctrine,¹⁸⁸ these so-called FCN treaties protect civil, property, and commercial rights of private citizens in the respective treaty countries.¹⁸⁹

The liberal interpretation canon emerged in the context of the unmistakable purpose of such treaties to secure reciprocal enforcement of private rights in the territory of the treaty partners. As Justice Johnson reasoned in *The Amiable Isabella*¹⁹⁰—a case previously encountered in the discussion of good faith above¹⁹¹—"the day may arrive when American commerce will have no cause to regret that our Courts have pursued liberal and enlarged views" in construing the rights of foreign nationals under FCN treaties.¹⁹²

With this foundation, by 1830 the Supreme Court had established a linguistic pattern for the interpretation of private treaty rights. Construing a 1794 FCN treaty with Great Britain, the Court in *Shanks v. Dupont*¹⁹³ posed the rhetorical question: "If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why

186. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603, 629 (1812) (Johnson, J., dissenting) (citing "the liberal spirit in which national contracts ought to be construed"); see also *Ware v. Hylton*, 3 U.S. 199, 256 (1796) (Paterson, J., concurring) (stating with regard to the rights of British creditors protected by the 1783 Treaty of Peace with Great Britain that "[t]he construction of a treaty made in favor of such creditors, and for the restoration and enforcement of pre-existing contracts, ought to be liberal and benign").

187. Early examples of such treaties include the 1794 Treaty of Amity, Commerce and Navigation, June 30, 1797, U.S.-Gr. Brit., 5th Cong., sess. I, ch. 6, 1 Stat. 523 and the Treaty of Friendship, Limits and Navigation, Oct. 27, 1795, U.S.-Spain, 8 Stat. 138.

188. Federal courts have often confirmed that FCN treaties are self-executing. See, e.g., *Spiess v. C. Itoh & Co. (Am.), Inc.*, 643 F.2d 353 (5th Cir. 1981) (holding that "FCN treaties . . . are self-executing treaties, that is, they are binding domestic law of their own accord, without the need for implementing legislation"); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1107-08 (D.C. Cir. 2001) (holding that the FCN treaty with Iran was self-executing).

189. The United States now has treaties of friendship, commerce, and navigation with sixty-three countries. For a listing of such treaties, see note following 8 C.F.R. § 236.1 (2003).

190. 19 U.S. (6 Wheat.) 1 (1821).

191. See *supra* notes 169-171 and accompanying text.

192. 19 U.S. at 89 (Johnson, J., dissenting).

193. 28 U.S. (3 Pet.) 242 (1830) (interpreting the 1794 Treaty of Amity, Commerce and Navigation with Great Britain).

should not the most liberal exposition be adopted?"¹⁹⁴ On the basis of this preference for liberal interpretation of treaty rights, the Court thus construed a provision protecting the property rights of "British subjects" to include a South Carolina woman who married a British officer.¹⁹⁵

By the late 1800s, this preference for a broad interpretation of private rights had coalesced into an established principle of treaty jurisprudence. Indeed, in 1879 the Supreme Court even described its earlier formulation in *Shanks*¹⁹⁶—now restated as an affirmative declaration—as "the settled rule in this court."¹⁹⁷ The Court thus affirmed in *Hauenstein v. Lynham* that "[w]here a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred."¹⁹⁸

At the foundation of this interpretive doctrine was once again a recognition of the international origins of treaty rights and obligations. Where treaties were designed to protect the rights of private citizens, liberality in the interpretation under our domestic law was seen as advancing the presumed object of treaties to secure reciprocal rights under international law.¹⁹⁹ It is not surprising then that declarations of the liberal construction canon also frequently appear as a

194. *Id.* at 249.

195. *See id.* at 249–50; *see also* *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 744 (1832) (interpreting a provision in a 1795 treaty between the United States and Spain in favor of certain land grantees because they were "evidently intended to be protected and secured in their rights by the stipulation of [the] treaty, which ought to be construed liberally by a tribunal authorized and required to decide on the validity of these grants").

196. *See also supra* notes 193–194 and accompanying text.

197. *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879).

198. *Id.*; *see also* *Geofroy v. Riggs*, 133 U.S. 258, 271–72 (1890) (citing *Hauenstein*, 100 U.S. at 487); *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) ("Treaties of every kind, . . . are to receive a fair and liberal interpretation, according to the intention of the contracting parties . . .").

199. *See* *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928) (asserting that treaty "obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them"); *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 581 (1908) (observing that "treaties should be liberally interpreted with a view to protecting the citizens of the respective countries in rights thereby secured"); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902) (declaring that treaties "should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity" between the treaty partners); *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) ("It 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."). The most complete statement of the connection between liberal interpretation and the nature of treaties as reciprocal obligations under international law is found in *Factor v. Laubenheimer*, 290 U.S. 276 (1933). There, the Supreme Court explained:

In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

290 U.S. at 293–94.

complement to the doctrine of good faith interpretation.²⁰⁰

The liberal interpretation canon continued to flourish in the initial decades of the 1900s.²⁰¹ Throughout that time, the Supreme Court continued to affirm the “fundamental principle that treaties should receive a liberal interpretation to give effect to their apparent purpose.”²⁰² This was not merely a more flexible response to the perennial debates over the evidence courts may appropriately consider in interpretive inquiries.²⁰³ Rather, in nearly a dozen opinions in the first half of the twentieth century, the Court repeatedly emphasized that the subject of the liberal interpretive canon was substantive rights secured by treaties.²⁰⁴ Indeed, the Court embraced the preference for an expansive interpretation of private rights with respect to treaties ranging from commercial and

200. See, e.g., *id.* at 293 (1933) (“Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.”); *Jordan v. K. Tashiro*, 278 U.S. 123 (1928) (same); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902) (“Treaties of every kind are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith.”); *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) (same); see also *The Amiable Isabella*, 19 U.S. 1, 84–85 (1821) (Johnson, J., dissenting) (citing “the obligation to execute [treaties] in a spirit, not only of good faith, but of liberality”).

201. Because of the particular historical background, the Supreme Court has applied a strong principle of liberal interpretation in treaties with Native American Tribes. See *Antoine v. Washington*, 420 U.S. 194, 199 (1975) (“The canon of construction applied over a century-and-a-half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice.”) (citing, *inter alia*, *Menominee Tribe v. United States*, 391 U.S. 404, 406 n.2 (1968); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Winans*, 198 U.S. 371, 380–81 (1905); *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886); *United States v. Kagama*, 118 U.S. 375 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)); see also *South Dakota v. Bourland*, 508 U.S. 679, 699–700 (1993) (citing the established principle that “treaties should be construed liberally in favor of the Indians”) (quoting *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n.17 (1978) (observing that in interpreting Native treaties “[d]oubtful expressions are to be resolved in favor” of the Native American Tribes) (quoting *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 174 (1973)).

202. *Todok v. Union State Bank of Harvard, Neb.*, 281 U.S. 449, 454 (1930); see also *infra* note 204 (citing additional authority for this proposition from the early 1900s).

203. See *supra* notes 133–136 and accompanying text (noting the controversies over textualist approaches to interpretation).

204. See *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940) (“Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred.”); *Factor v. Laubenheimer*, 290 U.S. 276, 293–94 (1933) (“Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) (same); *Jordan v. K. Tashiro*, 278 U.S. 123 (1928) (same); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924) (same); *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 581 (1908) (observing that “treaties should be liberally interpreted with a view to protecting the citizens of the respective countries in rights thereby secured”); see also *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (observing that the Court “has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect”); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (citing “the familiar rule with respect to the liberal construction of treaties”); *Todok*, 281 U.S. at 454 (affirming the “fundamental principle” that treaties should be liberally construed); *Oklahoma v. Texas*, 260 U.S. 606, 641 (1923) (Reynolds, J., dissenting) (citing the “general principle of construction” that treaties are to be construed liberally); *Tucker v. Alexandroff*,

property rights,²⁰⁵ to trademark protection,²⁰⁶ and even to taxation.²⁰⁷ Thus, for example, the Court liberally construed ambiguous treaties in this period to conclude that the term “goods and effects” embraced real property rights as well;²⁰⁸ that, notwithstanding the absence of an express prohibition, the initial refusal of a treaty partner to extradite precluded later conviction for the offense at issue;²⁰⁹ that a right to carry on “trade” included the business of pawnbroker;²¹⁰ that such a right also extended to the operation of a hospital;²¹¹ and that a prohibition on discriminatory taxation based on citizenship also extended to discrimination based on foreign residency.²¹²

B. THE SILENT DEATH OF GOOD FAITH

The received wisdom holds that adherence to good faith remains an essential element in the regime of treaty interpretation. Even in the work of careful treaty scholars, descriptions of modern Supreme Court doctrine prominently include citations to the principle of good faith interpretation.²¹³ Its companion canon of

183 U.S. 424, 437 (1902) (declaring that treaties “should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity” between the treaty partners).

205. See *Todok*, 281 U.S. at 454 (applying “the fundamental principle that treaties should receive a liberal interpretation to give effect to their apparent purpose” in upholding private inheritance rights under treaties with Norway and Sweden); *Jordan v. Tashiro*, 278 U.S. 123 (1928) (applying the liberal interpretation canon to a 1911 FCN treaty with Japan).

206. See *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940) (applying the liberal interpretation canon with respect to the 1929 General Inter-American Convention for Trade-Mark and Commercial Protection).

207. See *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) (liberally construing a 1929 treaty with Denmark with regard to discriminatory state taxes).

208. *Todok*, 281 U.S. at 454 (applying the liberal interpretation canon to hold that the term “goods and effects” in a 1783 treaty with Sweden extended to real property rights).

209. See *Johnson v. Browne*, 205 U.S. 309, 321 (1907) (applying the principle that an extradition treaty “between sovereignties should be construed in accordance with the highest good faith” to hold that, notwithstanding unclear language, an 1889 treaty with Great Britain precluded conviction for an offense for which a Canadian court had previously refused extradition); see also *Factor v. Laubenheimer*, 290 U.S. 276, 293–94 (1933) (applying the liberal interpretation canon to recognize the right of Great Britain to extradition of a British subject notwithstanding certain ambiguous language in the applicable extradition treaty).

210. See *Asakura v. City of Seattle*, 265 U.S. 332, 342–43 (1924) (applying the principle that treaties “are to be construed in a broad and liberal spirit” to conclude that the business of pawnbroker was a “trade” within the meaning of a 1911 treaty with Japan).

211. See *Jordan v. Tashiro*, 278 U.S. 123, 127–28 (1928) (observing that “the principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed” and thus broadly interpreting a right to carry on a “trade” and to lease land for “commercial purposes,” secured by a 1911 treaty with Japan, to encompass the construction and operation of a hospital).

212. See *Nielsen v. Johnson*, 279 U.S. 47, 51, 58 (1929) (holding that an ambiguous provision in a 1826 treaty with Denmark, when “interpreted with that liberality demanded for treaty provisions,” prohibited a discriminatory succession tax on alien decedents); see also *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879) (applying the liberal interpretation canon to hold that an ambiguous provision in an 1850 treaty with the Swiss Confederation permitted an inheritance claim).

213. See *Bederman*, *supra* note 134, at 966 (observing that “Canon Two” of treaty interpretation is that “[t]reaties should be construed liberally and in good faith,” although elsewhere strongly criticizing

liberal construction to avoid judicial treaty breaches likewise continues as a core component in contemporary reviews.²¹⁴

Unfortunately, examination with a more-focused lens reveals that good faith silently died long ago. The story of the abrupt change in judicial course, which began long before the modern Rehnquist court,²¹⁵ is a short one: With no ceremony, the doctrine of good faith interpretation was put to rest by the Supreme Court nearly three quarters of a century ago. Some commentators have observed the crumbling edifice of the internationalist approach in treaty interpretation.²¹⁶ What has gone unnoticed, however, is the disappearance of its foundation. The last recorded reference of any kind by the Court to the role of good faith in the judicial construction of international treaties²¹⁷ was in its 1933 opinion in *Factor v. Laubenheimer*.²¹⁸

The liberal construction canon has experienced a similar, though less stark, fate. Deceptive rhetorical similarities aside (about which more immediately below²¹⁹), the Supreme Court has cited the substantive doctrine only once in the last forty years.²²⁰ And even this rare citation, itself fifteen years ago in *United*

the Rehnquist court for its failure to adhere to these doctrines); see also James C. Wolf, Comment, *The Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023, 1040 (1988) (declaring that the Supreme Court “has firmly established that treaties should be interpreted liberally and in good faith”).

214. See John J. Barrett III, *The Doctrine of Specialty: A Traditional Approach to the Issue of Standing*, 29 CASE W. RES. J. INT’L L. 299, 317 (1997) (observing that “federal courts rely primarily upon three canons of treaty construction” one of which is “the view that treaties should be construed ‘liberally and in good faith’”) (quoting Bederman, *supra* note 134, at 966); Wolf, *supra* note 213, at 1040 (stating that the requirement of liberal interpretation is “firmly established”).

215. For a broad criticism of the pre-1994 practice of the Rehnquist Court, including its disregard of the good faith and liberal interpretation canons, see Bederman, *supra* note 134, at 1016–25.

216. See Bederman, *supra* note 134, at 972 (“There is greater conflict today than ever before between U.S. practice and more international approaches to treaty interpretation.”); Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U. J. INT’L L. & POL’Y 559, 561 (1996) (concluding that the Supreme Court has “consistently applied” a “restrictive method” for “the interpretation of international agreements for the past decade”); Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT’L L. 458, 460 (1998) (observing that a series of modern Supreme Court opinions interpreting treaties “have struck observers abroad and in the United States as extremely restrictive”).

217. As noted above, the doctrine of good faith has lived on in the interpretation of treaties with Native American Tribes due to the special legal and historical responsibilities of the United States. See *supra* note 201.

218. 290 U.S. 276, 293 (1933) (connecting the notion of good faith with the liberal interpretation canon in the observation that “[c]onsiderations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.”).

219. See *infra* Part II.C.

220. *United States v. Stuart*, 489 U.S. 353, 368 (1989) (citing the principle that “a treaty should generally be ‘construe[d] . . . liberally to give effect to the purpose which animates it’ and that ‘[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred’”) (quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940)).

States v. Stuart,²²¹ provoked a spirited objection by Justice Scalia based on a perceived excessive liberality in treaty interpretation.²²² The substantive liberal interpretation doctrine has not been mentioned since. Moreover, other than in *Stuart*, the Court²²³ has referred to a preference for an expansive interpretation of treaty-based rights in only one decision in the last sixty years.²²⁴

This fundamental shift in treaty interpretation has occurred without any explanation. Indeed, there is little indication that the Court has even noticed the absence of good faith and liberal interpretation from its treaty case law. Some scattered remnants of an internationalist perspective admittedly remain.²²⁵ And the Court on occasion has displayed some sensitivity to the distinctive legal nature of treaties.²²⁶ What is missing, however, is a common theme—a complete and coherent doctrine that is faithful to the international law origins of treaties and thus to their fundamental difference from statutory federal law.

As Part III will explain, this was the essential role played by the judicial doctrine of good faith interpretation. Its disappearance from Supreme Court jurisprudence lies at the root of much of the serious confusion in the lower courts over the application of treaties as a matter of domestic law. Before turning to that analysis, however, it is necessary to clear away some remaining underbrush of potential misunderstanding over the role of “liberal interpretation” in modern treaty law.

C. THE MISUSED RESIDUE OF LIBERAL CONSTRUCTION

Casual observers of modern treaty law will read the preceding section with a skeptical eye. References to “liberal interpretation,” they will correctly note, are not uncommon in Supreme Court treaty opinions.²²⁷ Closer examination reveals, however, that the similarity is rhetorical only, and that the modern citation to liberal interpretation has very little in common with its apparent antecedent.

It is true that the modern Supreme Court on occasion has made the following observation: “Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history

221. 489 U.S. 353 (1989).

222. *Id.* (Scalia, J., concurring) (objecting to a flexible approach to treaty interpretation and observing that “[g]iven that the Treaty’s language resolves the issue presented, there is no necessity of looking further to discover ‘the intent of the Treaty parties’”) (quoting the majority opinion, *id.* at 366).

223. However, two Justices also have referred to the doctrine in individual opinions not joined by a majority of the Court. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 263 (1984) (Stevens, J., dissenting) (citing the notion that where a treaty admits of liberal and restrictive constructions, the former is to be preferred); *Zschernig v. Miller*, 389 U.S. 429, 456–57 (1968) (Harlan, J., concurring) (same).

224. See *Kolovrat v. Oregon*, 366 U.S. 187, 193 (1961) (“This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect.”).

225. See *infra* notes 232–234, 358 and accompanying text.

226. See *infra* notes 232–234 and accompanying text.

227. See *infra* notes 228–234 and accompanying text.

of the treaty, the negotiations, and the practical construction adopted by the parties.”²²⁸ Notice, however, that there is a subtle but significant change in the meaning of “liberally” here. First, in contrast to the original internationalist premise, the comparison point is now domestic contract law. In this view, courts must merely show more flexibility in interpreting treaties than they would in applying the rules of contract law to simple agreements between private parties. For example, in *Eastern Airlines, Inc. v. Floyd*, the Court observed that treaties are merely more flexibly interpreted than “private agreements.”²²⁹ Even if unintended, the subtle, but significant, message to the courts is that the interpretive reference point for treaties is domestic, not international, law and that treaties are merely a particular variant of a private-law contract.

Moreover, the message of liberal interpretation no longer relates to the original focus on substantive treaty rights. Rather, the subject now is merely an evidentiary one. That is, the new formulation simply allows courts to look beyond text to other sources of evidence to resolve disputed issues of treaty interpretation.²³⁰ All that remains of liberal construction in this reformulation, in other words, is a more flexible approach to the otherwise controversial issue of the use of drafting history in the interpretation of domestic legal texts.²³¹

Standing alone, there is little amiss in such a flexible approach to interpretive evidence. To the contrary, consideration of drafting history and later agreed practice is faithful to the special international origins of treaties.²³² A comprehensive method for divining shared intent likewise properly acknowledges that the interpretation of international agreements should not be influenced by the restrictive idiosyncrasies of domestic contract law,²³³ most notably the infamous parol evidence and plain meaning rules.²³⁴

Nonetheless, it is important to recognize that these recent references to

228. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (quoting *Air Fr. v. Saks*, 470 U.S. 392, 396 (1985) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943))); see also *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 84 (1993) (Blackmun, J., dissenting) (quoting same); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988) (quoting same).

229. See, e.g., *E. Airlines*, 499 U.S. at 535 (quoting *Saks*, 470 U.S. at 396).

230. See *supra* notes 136–137 and accompanying text (discussing this accepted aspect of treaty interpretation in greater detail).

231. See *supra* notes 133–135 and accompanying text.

232. See Vienna Convention on the Law of Treaties, *supra* note 16, art. 31.

233. This new emphasis on a more liberal interpretation for treaties, as compared to private contracts, may merely be a response to an excessive reliance on contract methodology in some older Supreme Court cases. See, e.g., *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921) (stating that “[w]riters of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals”); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902) (suggesting that the meaning of treaties “is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts”) (quoting 1 JAMES KENT, COMMENTARIE ON AMERICAN LAW *174).

234. See RESTATEMENT (SECOND) OF CONTRACTS §§ 209–16 (1979) (describing the limitations on the use of parol evidence to establish agreements beyond the text of a writing); U.C.C. § 2-202 (2003) (describing same for sale of goods transactions).

liberality are of an essentially different nature from the original doctrine.²³⁵ The traditional liberal interpretation canon mandated an expansive interpretation of the *substantive* rights protected in international agreements. The Supreme Court's repeated focus in the nineteenth and early twentieth centuries on the "rights that may be claimed" under a treaty leaves little room for doubt on this score.²³⁶ The new formulation, in contrast, says nothing—at least expressly²³⁷—about the interpretation of substantive treaty rights.

Unfortunately, once again the Supreme Court has never explained the reason for (nor even indicated an awareness of) this significant change in the meaning of liberal construction.²³⁸ The result is a return to our common theme: confusion in the lower courts. Some courts have continued to cite the traditional premise of liberality for substantive treaty-based rights.²³⁹ But the reformulated focus merely on appropriate interpretive evidence has led others to conclude that the Supreme Court now rejects the traditional expansive approach to treaty construction. The Fifth Circuit's recent opinion in *Kreimerman v. Casa Veerkamp, S.A. de C.V.*²⁴⁰ could hardly be clearer in this regard:

235. See *supra* notes 186–198 and accompanying text.

236. See *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924) ("Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of *rights that may be claimed* under it and the other favorable to them, the latter is to be preferred.") (emphasis added); *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 581 (1908) (observing that "treaties should be liberally interpreted with a view to protecting the citizens of the respective countries in rights thereby secured"); *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 249 (1830) (indicating a preference for liberal interpretation of treaties with express reference to the "private rights" protected therein); see also *Factor v. Laubenheimer*, 290 U.S. 276, 293–94 (1933); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928).

237. See *infra* notes 347–348 and accompanying text (discussing the possibility that the Court intends to employ a more flexible substantive approach to treaty interpretation).

238. The new form of liberal interpretation with reference only to permissible interpretive evidence first appeared in *Air France v. Saks*, in which the Court adopted language from a 1943 opinion interpreting a treaty with a Native American tribe. 470 U.S. 392, 396 (1985) (quoting *Choctaw Nation*, 318 U.S. at 431–32 (1943)). In so doing, the *Saks* court made no mention of the traditional, substantive liberal interpretation canon, but also gave no indication of an intent to change treaty interpretation doctrine. Later courts have simply picked up the *Saks* language without suggesting any change of course. See *E. Airlines*, 499 U.S. at 535 (1991) (citing and quoting *Saks* and *Choctaw Nation*); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988) (same).

239. See *In re Extradition of Howard*, 996 F.2d 1320, 1330 (1st Cir. 1993) ("[I]f a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.") (quoting *Factor v. Laubenheimer*, 290 U.S. 276, 293–94 (1933)); *United States v. Lehder-Rivas*, 955 F.2d 1510, 1520 (11th Cir. 1992) (citing *Laubenheimer* for the same proposition); *Kear v. Hilton*, 699 F.2d 181, 184 n.6 (4th Cir. 1983) (same); *Koskotas v. Roche*, 740 F. Supp. 904, 909–10 (D. Mass. 1990) (applying the liberal construction canon to an extradition treaty to broaden the scope of extraditable offenses); *Westar Marine Serv. v. Heerema Marine Contractors, S.A.*, 621 F. Supp. 1135, 1139 (N.D. Cal. 1985) (favoring a "liberal application" of a treaty to extend its scope to certain other persons consistent with the purpose of the treaty); *McElvy v. Civiletti*, 523 F. Supp. 42, 47 (S.D. Fla. 1981) (applying the liberal construction canon with regard to a review of an order of extraditability under an extradition treaty).

240. 22 F.3d 634 (5th Cir. 1994).

Courts commonly declare that treaties are more “liberally construed” than contracts. This does not mean, however, that treaty provisions are construed broadly. Rather, this “liberal” approach to treaty interpretation merely reflects . . . the willingness of courts, when interpreting difficult or ambiguous treaty provisions, to “look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.”²⁴¹

Indeed, the *Kreimerman* court then declared that modern precedent actually requires a stance directly opposite from liberal interpretation. In its view, “existing precedents—though sparse—suggest that treaty provisions should be construed narrowly rather than broadly.”²⁴² The Fifth Circuit is not alone in this position.²⁴³ An equally confused line of authority has developed over the very issue of self-execution. Prodded by executive branch attempts to secure situation-specific political authority over treaty obligations, some recent federal courts have invoked—without citing supporting authority or the liberal interpretation canon—a presumption against the judicial enforcement of treaty rights.²⁴⁴ As with so much in the law of treaty interpretation, in short, doubt about the precise state of Supreme Court precedent over the liberal interpretation canon has left a considerable amount of disarray in the lower federal courts.

III. RESURRECTING GOOD FAITH IN TREATY INTERPRETATION

A. THE ROLE OF GOOD FAITH IN THE DOMESTIC ENFORCEMENT OF TREATIES

As noted in the Introduction and examined in Part II above, the departure of good faith from Supreme Court treaty case law likely was not by design. The Court nowhere announced—nor indeed even indicated an awareness of—a change in course.²⁴⁵ It would seem, rather, that the decades-long absence of the

241. *Id.* at 638–39 (quoting *E. Airlines*, 499 U.S. at 535 (citations omitted)).

242. *Id.* at 639; *see also id.* (“As treaties establish restrictions or limitations on the exercise of sovereign rights by signatory States, courts should interpret treaty provisions narrowly—for fear of waiving sovereign rights that the government or people of the State never intended to cede.”). Ironically, the *Kreimerman* court also quoted the text of the Vienna Convention on the Law of Treaties requiring good faith interpretation. *Id.* at 638 n.9 (“The text of a treaty must 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 light of its object and purpose.’”) (quoting Vienna Convention on the Law of Treaties, *supra* note 16, art. 31(1)).

243. *United States v. Duarte-Acero*, 208 F.3d 1282, 1285 (11th Cir. 2000) (accepting the view that the principle of liberal construction of treaties “‘does not mean . . . that treaty provisions are construed broadly’”) (quoting *Kreimerman*, 22 F.3d at 638–39).

244. *See, e.g., United States v. Emuegbunam*, 268 F.3d 377, 389–90 (6th Cir. 2001) (stating, without citation of supporting authority, that “[a]s a general rule . . . international treaties do not create rights that are privately enforceable in the federal courts”); *United States v. Jimenez-Nava*, 243 F.3d 192, 195–96 (5th Cir. 2001) (same); *United States v. De la Pava*, 268 F.3d 157, 164 (2d Cir. 2001) (same). For a persuasive, critical examination of recent developments on the issue of self-execution see generally Sloss, *supra* note 20.

245. *See supra* note 238.

principle of good faith interpretation is merely the result of a rudderless drift in treaty jurisprudence.

The prolonged silence nonetheless carries important, negative consequences. As this Subpart A will first explain, an express revival of the doctrine of good faith interpretation would bring a variety of broad structural benefits to the judicial application of treaties as a matter of domestic law. Included among these are a return of clarity to the nature of treaties,²⁴⁶ a reestablishment of the significant distinction between treaties and purely domestic legal norms,²⁴⁷ and a reminder to the courts of the significance of their task in treaty interpretation.²⁴⁸

Subpart B will then examine the practical consequences of a reinvigoration of good faith for treaty interpretation. We will see that reviving an internationalist perspective will serve to avoid infecting treaty interpretation with purely domestic-law doctrines,²⁴⁹ return judicial modesty to treaty interpretation to protect against inadvertent treaty breaches,²⁵⁰ and remind courts of the need for respectful consideration of foreign court precedents in the interests of uniformity.²⁵¹

1. The Role of Good Faith in Underscoring the International Origins of Treaties

The principal benefit of a reinvigorated doctrine of good faith is to restore certainty among domestic courts on the precise legal nature of treaties. At its most elemental, the function of good faith is to anchor the interpretation of treaties to their international origins. Treaties, as we have seen,²⁵² are conceived, negotiated, and brought into being as creatures of international law. With this background, acknowledgement that the good faith of the United States is at stake in treaty interpretation reminds courts of the essential nature of treaties as solemn legal obligations on the international plane.

This is all the more important given the special constitutional system for treaties in this country. Recall that, through the combination of the treaty power²⁵³ and the Supremacy Clause,²⁵⁴ treaties may operate of their own force as directly applicable federal law.²⁵⁵ Nonetheless, even when a particular treaty fulfills the dual functions of international law and domestic legal norm, the second function follows from the first.²⁵⁶ In other words, even for self-executing treaties, the international law obligations both create the foundation and set the interpretive context for their status as domestic law. For this reason,

246. See *infra* Part III.A.1.

247. See *infra* Part III.A.2.

248. See *infra* Part III.A.3.

249. See *infra* Part III.B.1.

250. See *infra* Part III.B.2.

251. See *infra* Part III.B.3.

252. See *supra* notes 90–96 and accompanying text.

253. See U.S. CONST. art. II, § 2.

254. See *id.* art. VI, cl. 2.

255. See *supra* notes 68–70 and accompanying text.

256. See *supra* Part I.C.2. (examining this point in greater detail).

the content of the federal law incidents of treaties derives from and is thus directly tied to the contours of the original “contractual” obligations assumed under international law.

To be sure, it is not uncommon for the Supreme Court to make reference to a contractual model in describing the legal nature of treaties.²⁵⁷ Unfortunately, these bare contractual references aside, the Court generally has failed to emphasize that the unique international law origins and nature of treaties create a fundamentally different context for their interpretation. The Court’s opinion in *Chan v. Korean Air Lines, Ltd.*²⁵⁸ provides a good illustration. At issue in *Chan* was the interpretation of certain carrier liability provisions in the Warsaw Convention on International Air Transportation.²⁵⁹ Although the interpretation of a treaty was at issue, *Chan*’s analysis, in structure and idiom, is virtually indistinguishable from the interpretation of a purely domestic-law statute. The Court made no mention of the international law origin or foundation of treaties, or indeed of the nature of treaties as sovereign obligations of the United States.²⁶⁰ It also failed to consider the prior views of the courts of our treaty partners.²⁶¹ Finally, it even dispensed with the instruction that the object of treaty interpretation is to give effect to the shared expectations of the treaty parties.²⁶² Instead, the Court turned immediately to the text of the treaty²⁶³ and, finding no apparent ambiguity, ended its analysis.²⁶⁴

Chan is not merely an isolated misstep. Even when it has cited the contract metaphor, the modern Court has often given little indication in its treaty opinions that the interpretive enterprise is at all different from that for statutes. As David Bederman concluded after an extensive review of the early Rehnquist Court, many treaty cases “have been litigated and decided as if they presented merely a slight variant on the problem of statutory construction.”²⁶⁵ Some cases, to be sure, have been better than others.²⁶⁶ But without careful attention

257. See *supra* notes 143–144 and accompanying text.

258. 490 U.S. 122 (1989).

259. *Id.* at 125–26.

260. See *supra* notes 90–96 and accompanying text (examining the international origins of treaties in greater detail).

261. For more on this issue, see *infra* Part III.B.3.

262. See *supra* notes 130–131 and accompanying text.

263. Indeed, the first sentence of the Court’s opinion after the statement of facts began “Article 3 of the Warsaw Convention provides.” *Chan*, 490 U.S. at 126. Of course, similar to other legal texts, the express provisions of a treaty are the prime source for interpretive evidence. The point here is that the special background and legal nature of treaties creates a significantly different context for understanding the precise meaning of treaty texts.

264. See *id.* at 134 (acknowledging that drafting history may be consulted in treaty interpretation “to elucidate a text that is ambiguous,” but ultimately holding that “where the text is clear, as it is here, we have no power to insert an amendment”).

265. Bederman, *supra* note 134, at 1022.

266. One particularly prominent example is *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), in which the Court actively considered the views of courts of our treaty partners. *Id.* at 175–76. For a more detailed analysis of this positive aspect of *El Al Israel Airlines*, see *infra* notes 388–390 and accompanying text.

to the special nature of treaties, all that typically remains has been to apply the standard approaches of statutory interpretation to treaties as well.

The consequences of this “extraordinarily mischievous development”²⁶⁷ for the practice of the lower courts were perhaps predictable. Lacking more complete guidance from the Supreme Court, federal courts have begun to state expressly what the Court has often allowed by default. The Fifth Circuit, for example, has declared that “[c]ourts construe treaties just as they do statutes.”²⁶⁸ And in the view of the Second Circuit, “[t]reaties are construed in much the same manner as statutes.”²⁶⁹ As a reflection of the reigning muddle over the nature of treaties, both courts ironically cited Supreme Court treaty opinions for this basic proposition,²⁷⁰ and the latter court even cited statutory interpretation opinions as precedent for treaty issues.²⁷¹

The central function of the doctrine of good faith interpretation in the first century-and-a-half of the nation’s existence was to protect against such parochial interpretive approaches by admonishing courts that treaties fundamentally are creatures of international, not domestic, law.²⁷² As recent federal court opinions illustrate, this core insight is at risk in the continued absence of the doctrine from Supreme Court treaty jurisprudence. Even if self-executing, a treaty has a single content; although it may have a dual status under international and national law, it does not have a dual meaning.²⁷³ By reminding courts of the determinative international origins of treaties, the good faith doctrine protects against parochial interpretive approaches and substantive norms derived from the idiosyncrasies of domestic law—or, in other words, from the precise substantive errors of treaty interpretation examined in more detail below.²⁷⁴ As it did in its venerable past, therefore, an explicit return of the doctrine of good faith interpretation will work to avoid uninformed divergence between the domestic and international law force of treaties and thus prevent

267. Bederman, *supra* note 134, at 1022.

268. *Cannon v. United States Dep’t of Justice*, 973 F.2d 1190, 1192 (5th Cir. 1992).

269. *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 215 (2d Cir. 1999); *see also* *Collins v. Nat’l Transp. Safety Bd.*, 351 F.3d 1246, 1251 (D.C. Cir. 2003) (“[T]reaty interpretation should be ‘guided by principles similar to those governing statutory interpretation.’”) (quoting *Ice. S.S. Co., Ltd. v. Dep’t of Army*, 201 F.3d 451, 458 (D.C. Cir. 2000)); *Croll v. Croll*, 229 F.3d 133, 136 (2d Cir. 2000) (citing this observation of *Kahn Lucas Lancaster* with approval).

270. *See Cannon*, 973 F.2d at 1192 (citing *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)); *Kahn Lucas Lancaster*, 186 F.3d at 215 (citing *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992), *and Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177–83 (1993)).

271. *Kahn Lucas Lancaster*, 186 F.3d at 215 (citing *United States Nat’l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993), for the proposition that “[s]tatutory construction is a ‘holistic endeavor’”).

272. *See supra* notes 165–180 and accompanying text.

273. *See* Bederman, *supra* note 134, at 1011 (criticizing the so-called “dual treaty approach” under which a treaty may have different meanings under international and domestic law and arguing that “[t]he essence of the canon of good faith and liberal interpretation is precisely to avoid this problem”).

274. *See infra* Part III.B.1.–3.

uninformed breaches of the nation's international obligations.²⁷⁵

2. Reviving the Fundamental Distinction between Treaties and Statutes

A second overarching benefit—related to the first—from a return of a robust notion of good faith in treaty interpretation is to reestablish the fundamental contrast between treaties and statutes. To be sure, in their domestic-law incidents treaties enjoy the same federal law foundation as Article I legislation.²⁷⁶ But stated in isolation, this simple observation plants the seeds of potential misunderstanding. The primary function of treaties is to create reciprocal international legal obligations of the United States and a foreign sovereign.²⁷⁷ In sharp contrast to statutes, therefore, the application of treaties involves interpreting the obligations owed to a sovereign entity that is external to our national polity.

Moreover, the very process for the creation of treaties is markedly different from standard legislation. Contrary to the majoritarian premise of statutory adoption, there is no means of imposing treaty obligations on a dissenting minority. If the product of negotiations is not satisfactory, a disaffected nation may simply not ratify the treaty. The littered landscape of failed treaties provides ample evidence of this.²⁷⁸

The consequence of this fact is that treaties are necessarily the product of consensus. This is fundamentally unlike the shifting coalitions and, most important, the ultimate power of majority voting that characterize the approval of domestic legislation. For bilateral treaties, the need for consensus at the drafting stage is obvious.²⁷⁹ But even for complex multilateral projects where the pull of

275. See, e.g., *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921) (“While the question of the construction of treaties is judicial in its nature, . . . courts when called upon to act should be careful to see that international engagements are faithfully kept and observed . . .”); *Grin v. Shine*, 187 U.S. 181, 184 (1902) (declaring that treaties “should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers”); *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 68 (1821) (observing a principle of good faith related to the interpretation of treaties “which our Government could not violate without disgrace, and which [the Supreme] Court could not disregard without betraying its duty”).

276. See U.S. CONST. art. VI, cl. 2; see also *supra* notes 72–74 and accompanying text (examining this point in greater detail).

277. As noted earlier, the precise substantive requirements for the conclusion of a constitutionally valid treaty are subject to a substantial scholarly debate. See *supra* note 118 and accompanying text.

278. One prominent example is the failed negotiations on a proposed comprehensive investment treaty, the so-called Multilateral Agreement on Investment. See U.N. CONFERENCE ON TRADE & DEVELOPMENT, LESSONS FROM THE MAI, U.N. Doc. No. UNCTAD/ITE/IIT/Misc.22, U.N. Sales No. E.99.II.D.26 (1999) (examining the decision of Organization for Economic Cooperation and Development to terminate negotiations on the proposed MAI convention), available at <http://www.unctad.org/en/docs/psiteitmt22.en.pdf> (last visited May 29, 2005).

279. See Vienna Convention on the Law of Treaties, *supra* note 16, art. 9(1) (providing that agreement on a treaty's text requires the consent of all states involved in the negotiations); see also Bederman, *supra* note 134, at 1032 (noting that voting also occurs during treaty negotiations, but emphasizing that, in contrast to statutes, “[t]he drafting of international agreements is a consensual exercise”).

compromise can be greater,²⁸⁰ the requirement of subsequent ratification by sovereign states often mandates unanimous, or near unanimous,²⁸¹ acceptance of each element of a treaty's text.²⁸² The very process of negotiating and drafting treaties, therefore, also means that the legal product may be fundamentally different from other forms of law, especially statutes.

One of the core functions of the internationalist approach reflected in the doctrine of treaty good faith is to mark for judicial interpreters this sharp contrast with statutes. Indeed, the Supreme Court explicitly recognized this in the early age of the flowering of good faith and its liberal interpretation companion. In a 1929 opinion reaffirming the need for an accommodating approach to treaty interpretation, the Court observed:

The narrow and restricted interpretation of the treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed, so as to effect the apparent intention of the parties.²⁸³

The drift on this score in modern Supreme Court treaty jurisprudence unnecessarily endangers this essential difference in the interpretation of treaties and statutes. Admittedly, its more flexible approach to permissible interpretive evidence (such as drafting history and subsequent agreed practice) is responsive to this difference.²⁸⁴ But even if unintended, the Court's modern omission of the

280. For a comprehensive review of the drafting process for multilateral treaties in the private-law field, see Peter H. Pfund, *Contributing to Progressive Development of Private International Law: The International Process and the United States Approach*, in 249 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9 (1996).

281. For multilateral treaties, subsequent unanimous international ratification is rarely feasible. The standard goal of such a treaty project, therefore, is to gain approval on the widest possible basis. Where a final negotiation occurs at an international conference, final approval of the treaty's text may occur through a vote of "two-thirds of the States present and voting." Vienna Convention on the Law of Treaties, *supra* note 16, art. 9(2). Because the goal is broad international acceptance, however, the premise of the drafting process remains to achieve consensus, for dissenting states need merely refuse to ratify.

Alternatively, objecting states may choose to attach reservations, understandings, or declarations (so-called "RUDs") to limit the effect of specific treaty provisions or interpretations for those specific states. See Vienna Convention on the Law of Treaties, *supra* note 16, art. 19; see also Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000) (examining the practice of the United States with regard to the attachment of RUDs to human rights treaties). There are important limitations on this practice, however, including the right of other ratifying states to object to such reservations. See Vienna Convention on the Law of Treaties, *supra* note 16, arts. 19–21.

282. See *Bederman*, *supra* note 134, at 1022 (observing that "[i]nternational agreements are the product of consensus" and that even broad multilateral treaties "are fashioned in a contractual sense, frequently with the very selection of words and phrases being the result of unanimous approval by the signatory States").

283. *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929).

284. See *supra* notes 136–137 and accompanying text.

internationalist doctrine of good faith interpretation of treaties has had distinct negative consequences.

The principal effect is the unnecessary confusion in the lower courts examined above.²⁸⁵ Given the modern void in guidance, declarations even by federal appellate courts that they “construe treaties just as they do statutes”²⁸⁶ perhaps should not come as a surprise. But it is precisely here that an affirmation of the need for good faith interpretation of treaties can play an important, positive role. For the doctrine serves as a reminder that the birth, drafting, and ultimate legal effect of treaties is fundamentally different from that of purely domestic-law statutes.

An explicit revival of good faith will also carry important practical consequences. Even when limited to the import of drafting history, it will enable treaty interpretation to focus on the special characteristics of the international negotiation process.²⁸⁷ More broadly, a constant reminder of the contrast with statutes will caution courts to avoid infecting treaties with the peculiar methods of domestic statutory interpretation,²⁸⁸ retreating to familiar domestic-law rules for interpretive guidance,²⁸⁹ and relying solely on domestic precedent in construing international norms.²⁹⁰

3. Good Faith and the Judicial Role

The final structural benefit from a revitalization of good faith in treaty interpretation, while embedded in the first two, is nonetheless worthy of separate emphasis. The message of good faith in treaty interpretation is primarily addressed to the courts themselves. When a treaty is designed to have domestic-law effect, a court finds itself in the unusual role of fulfilling the undertakings of the United States to a foreign sovereign.²⁹¹ As a result, by giving content to a treaty, a court ironically can be the activating institution in a breach of the nation’s international obligations. To state the proposition bluntly, under international law a domestic court can breach a treaty just like any other governmental institution.²⁹²

285. See *supra* notes 238–243 and accompanying text.

286. *Cannon v. United States Dep’t of Justice*, 973 F.2d 1190, 1192 (5th Cir. 1992); see also *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 215 (2d Cir. 1999) (“Treaties are construed in much the same manner as statutes.”).

287. See *Bederman*, *supra* note 134, at 1022–24 (examining the different drafting processes for treaties, in particular the primary role of the executive branch, and the consequences for the interpretation of the drafting records of treaties).

288. See *infra* Part III.B.1.

289. See *infra* Part III.B.2.

290. See *infra* Part III.B.3.

291. See *supra* notes 108–116 and accompanying text (describing treaties whose very purpose is to create rights or obligations directly enforceable in the domestic law of the treaty partners).

292. See, e.g., *Loewen Group, Inc. v. United States*, No. ARB(AF)/98/3, at 14 (ICSID 2003), available at <http://www.state.gov/documents/organization/22094.pdf> (last visited Apr. 3, 2005) (holding the United States “responsible” for actions by a Mississippi trial judge that violated protections of

The judicial responsibility remains, of course, to interpret and apply the law. Moreover, the basic interpretive paradigm is a familiar one: a contract between consenting institutions. The observation that a treaty is “in the nature of a contract between nations”²⁹³ only serves, however, to bring the significance of the judicial role into sharper focus. For contracts governed by domestic law, courts serve as impartial arbiters in private disputes. By contrast, in interpreting treaties, domestic courts also function as agents of the United States in fulfilling and enforcing the country’s international obligations. When applying treaty law, therefore, courts are confronted with the unusual (and often uncomfortable) fact that their actions may result in a breach of the very treaty they are called on to interpret.

This does not mean that the notion of good faith interpretation somehow confers on courts a hidden power to craft substantive treaty commitments. There is substantial merit in the formalist point that courts do not have authority, through citation of “good faith” or otherwise, to create new treaty obligations under the guise of interpretation.²⁹⁴ A particular treaty may explicitly²⁹⁵ or implicitly authorize courts to fill gaps as a matter of federal common law, a subject I have explored elsewhere in detail,²⁹⁶ but such a power does not flow from the broad background norm of good faith interpretation alone.

Rather, the doctrine of good faith functions as a meta-norm, a caution directed to the courts that more is at stake with the interpretation of treaties than with the more standard forms of federal law. This, in turn, again serves to underscore the difference between treaties and statutes. If a court errs in the interpretation of a statute, Congress retains the power of unilateral correction,²⁹⁷ without international law implications.²⁹⁸ Interpretive error for treaties, how-

foreign investors required by the NAFTA treaty); *id.* at 42 (holding that under international law “[a] decision of a court of a State is imputable to the State because the court is an organ of the state”).

293. *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 533 (1987) (quoting *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984); see also *supra* notes 143–146 and accompanying text (analyzing and expanding upon this Supreme Court precedent).

294. Justice Scalia advanced this point forcefully in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989) (“[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.” (quoting *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821))).

295. See Van Alstine, *supra* note 18, at 954–67 (arguing that an express delegation of lawmaking powers through treaties violates neither federalism nor the separation of powers doctrine).

296. See *id.* at 971–86 (analyzing the circumstances under which treaties implicitly empower federal courts to engage in interstitial lawmaking with regard to treaties).

297. For a review of this phenomenon, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

298. Judicial error in the interpretation of a subsequently enacted statute may result in a conflict with a treaty. Under the so-called “last-in-time rule,” the statute would then supersede the earlier treaty. See, e.g., *Breard v. Greene*, 523 U.S. 371, 376 (1998) (plurality opinion) (observing that “when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null” (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957))); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that when an act of legislation conflicts with the self-executing provisions of a treaty,

ever, involves a divergence between their domestic and international law force. Reconciling this divergence requires the cooperation of sovereign entities external to our polity (namely, the treaty partners). And because treaties are purely consensual, such a renegotiation can be difficult²⁹⁹ and is practically impossible for multilateral treaties.³⁰⁰

In this light, the long-term absence of good faith from Supreme Court treaty jurisprudence is a matter of noteworthy concern. Judicial error in the interpretation of treaties can occasion significant international discord,³⁰¹ even for the increasingly common private-law treaties. One prominent example is the controversy engendered by allegations that German courts have failed to give effect in good faith to custodial rights under the Hague Child Abduction Treaty.³⁰² An even greater controversy is brewing over divergent international and domestic court interpretations of certain protections for foreign criminal defendants under the Vienna Convention on Consular Relations.³⁰³

Of course, even with treaties, the primary interpretive material remains the text (as colored by context, drafting history, and subsequent agreement).³⁰⁴ The significant, now unfortunately faded, message of the doctrine of good faith is that treaty interpretation requires courts to view even these materials through an internationalist prism. In the process, the doctrine highlights the fact that a failure to do so may have serious implications for the broader perception of the good faith of the United States in its relations with foreign nations.

“the one last in date will control the other”). As explained below, however, the Supreme Court has adopted a rule of statutory interpretation—which parallels the norm of good faith treaty interpretation—to protect against inadvertent treaty breaches in this fashion. *See infra* notes 342–344 and accompanying text.

299. *See* Bederman, *supra* note 134, at 1024 (arguing with regard to judicial interpretive error that “[t]o reconcile the internal and international meanings of a treaty, the United States government would be forced to renegotiate the agreement” and “[b]ecause any process of negotiation is consensual, there is no guarantee that a reconciliation could occur”).

300. *See* Van Alstine, *Dynamic Interpretation*, *supra* note 23, at 777 (“[L]egal and logistical obstacles effectively make a formal amendment of [a multilateral] international commercial law convention impossible.”).

301. *See* Bederman, *supra* note 134, at 1024 (“[C]onflicts over treaty interpretation can have very real, and irremediable, consequences.”).

302. *See* Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, 23 T.A.I.S. 11,670, 1343 U.N.T.S. 89. For an introduction to these controversies—which came to involve government representatives at the highest levels—see William Drozdiak, *Germany Bows to U.S. on Custody Disputes*, WASH. POST, May 30, 2000, at A1 (describing the controversy); Cindy Loose, *German Promise of Visitation Applauded; U.S. Parents of Abducted Children Caution Limited Access Is Only “First Step,”* WASH. POST, May 31, 2000, at A22 (same).

303. Vienna Convention on Consular Relations, *supra* note 41. *See* cases cited *supra* note 42 and accompanying text (discussing the divergent views of the International Court of Justice and the United States on this issue).

304. *See supra* notes 132–137 and accompanying text.

B. RESTORING THE INTERNATIONALIST PERSPECTIVE IN TREATY INTERPRETATION

1. The Requirement of Autonomous Interpretation

The foundational role of the doctrine of good faith interpretation examined above also has a variety of mutually reinforcing consequences for the concrete application of treaty law. We begin here with the most direct: As creatures of international law, treaties must be interpreted free from the influence of norms of a purely domestic origin. This notion of “autonomous interpretation” of treaties admonishes courts that treaties arise out of a different, international legal system and thus that the interpretation of treaties must proceed free from the influence of domestic-law norms and procedures. Unfortunately, in the reigning uncertainty over the role of good faith, even this simple message has sometimes been lost on the lower courts.

In the height of the era of good faith, the Supreme Court often declared that the interpretation of treaties must occur within the context of their international law origins. As early as 1817—even before the broader notion of good faith became firmly established³⁰⁵—the Court recognized that “the language of the law of nations . . . is always to be consulted in the interpretation of treaties.”³⁰⁶ The definitive statement of this proposition came with the 1890 opinion in *Geofroy v. Riggs*, one of the Court’s most famous treaty cases.³⁰⁷ In analyzing whether the District of Columbia qualified as a “State of the Union” for purposes of an 1853 treaty with France, the Court made clear that domestic-law (even constitutional law) definitions do not control:

As [treaties] are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended.³⁰⁸

Good faith in this sense serves a separating and elevating function. It calls on domestic courts to recognize that treaties proceed from an entirely different, international dimension that is separate from domestic law. This required “autonomous interpretation,”³⁰⁹ in turn, has two distinct elements.

305. See *supra* Part II.A.1.

306. *The Pizarro*, 15 U.S. (2 Wheat.) 227, 246 (1817).

307. 133 U.S. 258 (1890).

308. *Id.* at 271; see also *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (“As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning ‘as understood in the public law of nations.’” (quoting *Geofroy*, 133 U.S. at 271–72)); *Grin v. Shine*, 187 U.S. 181, 184 (1902) (observing with regard to extradition treaties that “[i]n the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws”).

309. Some scholars have noted the concept of an “autonomous” interpretation in connection with the United Nations Convention on Contracts for the International Sale of Goods. See JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 208 (2d ed. 1991); Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT’L & COMP.

The first is that the very methods of interpretation for treaties—i.e., the appropriate techniques, the permissible evidence—must be free from the influence of domestic-law concepts and practices. On this score, there is much to compliment in the most recent Supreme Court treaty precedent. After some initial uncertainty,³¹⁰ the Court has now settled on the proposition that courts should interpret treaties flexibly, at least as compared to the traditional approach to private contractual texts.³¹¹ More specifically, through the recent emphasis on shared intent and explicit reliance on drafting history and subsequent agreed practice,³¹² the Court has seemingly accepted that the judicial application of treaties requires the application of independent interpretive principles.

Unfortunately, most often the Court has done so only implicitly. Its modern case law does not make clear that the interpretive enterprise for treaties is fundamentally different from that for statutes. Nor has it examined the formal and functional reasons for enforcing this distinction. The consequence has been an express adoption by some lower courts of the precise opposite proposition.³¹³

The second message of autonomous treaty interpretation relates to substance. In light of its origins in international process and law, domestic-law norms and meanings simply should not be relevant in interpreting a treaty.³¹⁴ The risk here is one of so-called *faux amis*—false friends whose facial similarity conceals a difference in substance.³¹⁵ When a treaty provision seemingly parallels local terminology, the danger is that courts will readily retreat to familiar domestic-

L. 183, 200 (1994). For a broader examination of the autonomous interpretive regime in this self-executing treaty, see Van Alstine, *Dynamic Interpretation*, *supra* note 23, at 731–37, 740–53.

310. See *supra* notes 133–136 and accompanying text (examining the initial attempts by Justice Scalia to extend textualist interpretive approaches to treaties).

311. See *supra* notes 228–229 and accompanying text.

312. See *supra* note 136 and accompanying text.

313. See *supra* notes 267–275 and accompanying text. This trend is exemplified by some fairly recent decisions. See *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1251 (D.C. Cir. 2003) (“[T]reaty interpretation should be ‘guided by principles similar to those governing statutory interpretation.’” (quoting *Ice. S.S. Co. v. Dept. of Army*, 201 F.3d 451, 458 (D.C. Cir. 2000))); *Croll v. Croll*, 229 F.3d 133, 136 (2d Cir. 2000) (“Treaties are construed in much the same manner as statutes.” (quoting *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 215 (2d Cir. 1999))).

314. It is entirely possible, of course, for the drafters of a treaty to base a provision on the domestic law of a particular country. In such a case, it may be appropriate to look to the corresponding domestic law for interpretive guidance. An example might be the German law notion of a “additional notice” (*Nachfrist*) adopted in the United Nations Sales Convention. See CISG, *supra* note 49, arts. 47, 63 (providing a right to “fix an additional period of time of reasonable length for performance” of obligations by the party); see also JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* § 290 (2d ed. 1991) (observing that the CISG notion of *Nachfrist* “was inspired by a provision of German law”). Even here, however, the relevance of the domestic law norm arises solely from its deliberate incorporation into the international law treaty—not from the simple fact of similarity between domestic law and a particular treaty provision.

315. For a review of this phenomenon, see Nicholas Kasirer, *Lex-Iconographie Mercatoria*, 47 AM. J. COMP. L. 653, 658 (1999) (noting that “[d]ivergent national legal lexicons can obscure meaningful connections between legal traditions at the level of substance” and that observing in this regard that “[l]egal lexicographers are quick to point out *faux amis* between laws’ languages”).

law precedent. When good faith still flourished, the Supreme Court was well aware of this risk. As the Court declared in *Geofroy*, for example, courts should not subject treaties to “any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended.”³¹⁶

Unfortunately, the record on this element of autonomous interpretation has been uneven at best, even in the Supreme Court. A case decided by the Court just this past term, *Olympic Airways v. Husain*,³¹⁷ provides a good illustration. At issue in *Husain* was whether the term “accident” in the Warsaw Convention on International Air Transportation³¹⁸ also embraced a carrier’s refusal to assist a passenger with a pre-existing medical condition.³¹⁹ The Court’s opinion addressed this issue without any hint of the international origins of the treaty. It even dispensed with the standard reference to the contractual nature of treaties.³²⁰ Limiting its inquiry to the meaning of terms used in an earlier opinion on the subject,³²¹ the Court instead relied on “the ordinary and usual definitions” as found in American dictionaries (and more recent ones at that) for its interpretation of an international treaty.³²² And it was apparently only because of a vigorous dissent by Justice Scalia that the majority—in a footnote—even referred to the existence of contrary international interpretations of the very same language.³²³

As will be examined in greater detail below, some Court opinions have been more careful on the related issue of foreign court precedent.³²⁴ Because of the doubt over the basic message, however, we again return to our common theme: confusion in the lower courts—this time on the principle of autonomous interpretation. There is perhaps no better example of this confusion than federal court opinions concerning one of the most successful private-law treaties in the last quarter century, the United Nations Convention on Contracts for the International Sale of Goods (“the CISG”).³²⁵ This treaty, which broadly displaces the

316. *Geofroy v. Riggs*, 133 U.S. 258, 271–72 (1890); see also *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 263 (1984) (Stevens, J., dissenting) (“Constructions of treaties yielding parochial variations in their implementation are anathema to the *raison d’être* of treaties, and hence to the rules of construction applicable to them.”).

317. 540 U.S. 644 (2004).

318. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, reprinted in note following 49 U.S.C. § 40105 (2000).

319. 540 U.S. at 646.

320. The closest the opinion came to any recognition of the special nature of treaties was a citation to an earlier opinion of the Court on the interpretation of the Warsaw Convention. See *id.* at 650 (noting that in *Air Fr. v. Saks*, 470 U.S. 392, 399 (1985), the Court recognized its “responsibility to read the treaty in a manner ‘consistent with the shared expectations of the contracting parties’”).

321. *Id.* (citing *Saks*, 470 U.S. at 399).

322. *Id.* at 655 (citing—with regard to terms used in *Saks*, 470 U.S. at 405—the AMERICAN HERITAGE DICTIONARY 635 (3d ed. 1992) and BLACK’S LAW DICTIONARY 554–55 (6th ed. 1990)). This reliance on a dictionary occurred despite an express recognition in *Eastern Airlines, Inc. v. Floyd* “that dictionary definitions may be too general for purposes of treaty interpretation.” 499 U.S. 530, 537 (1991).

323. *Olympic Airways*, 540 U.S. at 655 n.9 (citing 540 U.S. at 658 (Scalia, J., dissenting)).

324. See *infra* notes 388–390 and accompanying text.

325. See CISG, *supra* note 49.

domestic Uniform Commercial Code for international sales transactions,³²⁶ entered into force in 1988 and now has sixty-six member states.³²⁷

The express purpose of this self-executing treaty is to secure international legal uniformity for transactions within its scope.³²⁸ Unfortunately, when confronted with difficult interpretive issues in this treaty, lower courts have quickly turned to seemingly similar language in the domestic Uniform Commercial Code. Thus, one finds the court in *Claudia v. Olivieri Footwear Ltd.*³²⁹ declaring that “[c]aselaw interpreting Article 2 of the Uniform Commercial Code (‘UCC’) may also be used to interpret the CISG where the provisions in each statute contain similar language.”³³⁰ (Notice also the court’s assumption that a treaty is the mere equivalent of a “statute.”) A number of other U.S. courts have decided likewise,³³¹ without any explanation for why the peculiarities of our domestic law (sub-national state law, in fact³³²) should govern a treaty negotiated and crafted in cooperation with countries as diverse as Ghana, New Zealand, and Russia.³³³

326. *Id.*

327. See <http://www.uncitral.org/english/status/status-e.htm> (listing the present member states of the CISG) (last visited June 2, 2005).

328. CISG, *supra* note 49, Preamble (stating the goal that “the adoption of uniform rules which govern contracts for the international sale of goods . . . would contribute to the removal of legal barriers in international trade and promote the development of international trade”).

329. No. 96 Civ. 8052(HB)(THK), 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998).

330. *Id.* at *4.

331. See, e.g., *Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc.*, No. 00-1125, 2002 WL 1357095, at *3 (4th Cir. June 21, 2002) (stating that “[c]ase law interpreting provisions of Article 2 of the Uniform Commercial Code that are similar to provisions in the CISG can also be helpful in interpreting the convention”); see also *Raw Materials, Inc. v. Manfred Forberich GmbH & Co.*, No. 03C1154, 2004 WL 1535839, at *3 (N.D. Ill. June 7, 2004). The Second Circuit’s opinion in *Delchi Carrier SpA v. Rotorex Corp.* may represent the first step in the wrong direction. 71 F.3d 1024, 1028 (2d Cir. 1995) (stating that “[c]aselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code (‘UCC’), may also inform a court where the language of the relevant CISG provisions tracks that of the UCC”). But the court there at least made clear that “UCC caselaw ‘is not *per se* applicable.’” *Id.* (quoting *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 (Ct. Int’l Trade 1989)).

332. A reference to the law of the individual states of the United States in the interpretation of a treaty is particularly misguided. As the Supreme Court recently made clear in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* in interpreting one treaty, “the nation-state, not subdivisions within one nation, is the focus of the [treaty] and the perspective of our treaty partners.” 525 U.S. 155, 175 (1999); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (“The only government of this country, which other nations recognize or treat with, is the government of the Union The Constitution of the United States speaks with no uncertain sound upon this subject.”).

333. For a similar error on a different treaty, see *Croll v. Croll*, 229 F.3d 133, 138 (2d Cir. 2000) (using American dictionaries, including Black’s Law Dictionary, to interpret the meaning of the Hague Child Abduction Treaty). Other courts have properly recognized that local law is not relevant for the interpretation of treaties. See, e.g., *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001) (observing with regard to the Hague Child Abduction treaty that the drafters “wished to avoid linking the determination of which country should exercise jurisdiction over a custody dispute to the idiosyncratic legal definitions of domicile and nationality of the forum where the child happens to have been removed”); *Tufts v. Tufts*, 877 F. Supp. 285, 289 (E.D. Va. 1995) (rejecting an attempt to “equate” similar phrases in a federal statute and the Vienna Convention on Diplomatic Relations because the

The function of the principle of autonomous interpretation is to avoid such parochial interpretive approaches for treaties. By emphasizing that treaties arise in an entirely different legal system, this principle focuses judicial attention on the distinct interpretive evidence for an international treaty. Autonomous interpretation thus calls on courts to refrain from a reflexive retreat to familiar domestic-law norms in giving content to norms of an international origin. In so doing, this facet of the doctrine of good faith interpretation also operates to protect against creating a divergence between the domestic interpretation and the force of treaty obligations under international law.

2. Interpretation to Avoid Judicial Treaty Breach

A second concrete application of the overarching doctrine of good faith interpretation is a modern manifestation of the familiar, but unfortunately now tarnished, liberal interpretation canon. This canon, as we have seen, arose in an era of concern over real forms of international retribution.³³⁴ As recent events have revealed, however, the need for amicable international relations secured by faithful adherence to the nation's treaty obligations is hardly less important today.³³⁵

At its most basic, the liberal interpretation canon is a prudential norm aimed at avoiding what might be termed "judicial treaty breach." If a court construes the domestic-law incidents of a treaty in a manner consistent with its international law obligations, no violation occurs. But as observed more generally above, if the interpretation misfires, it is the court's action (not the international conduct of the executive branch) that breaches the treaty.³³⁶

Domestic courts mitigate such a risk by first anchoring treaty interpretation carefully to the text and supporting contextual evidence.³³⁷ Not incidentally, this is also the international premise reflected in the Vienna Convention on the Law of Treaties.³³⁸ The problem is that just like other forms of law, a treaty may

statute was "enacted by the legislative bodies of the United States, while the Vienna Convention is a treaty among foreign sovereigns").

334. See *supra* notes 187–192 and accompanying text.

335. See *supra* notes 40–41 and accompanying text (noting contemporary controversies over the interpretation and application of the Geneva Convention on Prisoners of War and the Vienna Convention on Consular Relations).

336. See *supra* notes 291–292 and accompanying text.

337. See *supra* notes 132–137 and accompanying text.

338. See Vienna Convention on the Law of Treaties, *supra* note 16, art. 31 ("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."); *id.* art. 32 (authorizing resort to "supplementary means of interpretation . . . 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: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."). Although the United States has not ratified this convention, its interpretive provisions in Article 31 "represent[] generally accepted principles and the United States has also appeared willing to accept them despite differences of nuance and emphasis." RESTATEMENT OF FOREIGN RELATIONS, *supra* note 16, § 325 cmt. a.

suffer from indeterminacy, ambiguity born of clumsy compromise, or inartful terminology. It is in such circumstances that the risk of judicial treaty breach is most pronounced.

The liberal interpretation canon operates in these situations to minimize the risk of international friction occasioned by judicial error. In cases of interpretive uncertainty, it counsels courts to prefer a result that errs in favor of the rights a treaty was designed to protect. This does not mean that courts have the authority to create new substantive treaty obligations, or to otherwise expand upon unambiguously defined rights. Rather, in cases of doubt, the preference for promoting—rather than constricting—a treaty’s overall design seeks to lessen the chance of judicial encroachment on the justified expectations of our treaty partners.³³⁹

This prudential norm is also fully consistent with a variety of other well-established meta-norms of interpretation. Indeed, the Supreme Court has created a nearly complete web of rules designed to ensure that lower courts are sensitive to the international ramifications of their actions. The broadest of these meta-norms, the so-called *Charming Betsy* canon, protects against violations of international law in general. Established by Justice Marshall in 1804, this canon instructs courts that acts of Congress “ought never to be construed to violate the law of nations if any other possible construction remains.”³⁴⁰ Most recently, the Supreme Court has broadened this concept to embrace the proposition that ambiguous statutes generally should be construed “to avoid unreasonable interference with the sovereign authority of other nations.”³⁴¹

These interpretive sentiments apply with particular force to the possible violation of treaties. It is “a firm and obviously sound canon of construction,”³⁴² the Supreme Court has declared, that “‘a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.’”³⁴³ Not surprisingly, this doctrine is also

339. See Bederman, *supra* note 134, at 1033 (arguing that if a review of available textual and contextual evidence fails, “an interpreter should construe the treaty so as to reasonably ensure that the United States will not be charged later by another country with breaching the agreement” and noting that “[t]his is a normative restatement of the canon of good faith”).

340. See, e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The Supreme Court reaffirmed this proposition as recent as this past term. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

341. *Empagran*, 542 U.S. at 164 (citing *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 20–22 (1963); *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 382–83 (1959); and *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953)).

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

343. *Id.* (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)); see *Washington v. Wash. Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 690 (1979) (“Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights.”); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–13 (1968) (“[T]he intention to abrogate is not to be lightly imputed to the Congress” (quoting *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934))); see also RESTATEMENT OF FOREIGN RELATIONS, *supra* note 16, § 114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”)

expressly grounded on the recognition that a statutory abrogation of treaty rights would compromise the nation's "good faith with the government or people of other countries."³⁴⁴

At the foundation of this web of interpretative principles is a desire to avoid a treaty breach through erroneous judicial judgments of congressional intent. The foundation should apply with equal—if not greater—vigor for the interpretation of a treaty itself. As a matter of judicial prudence, courts should resolve ambiguities in treaties in a way that minimizes the risk of friction with the nation's treaty partners. A desire to avoid inadvertent breaches of international law is all the more important for treaties, for which correction of judicial error can be a difficult enterprise.³⁴⁵ This was the precise function of the liberal interpretation canon before it fell into desuetude in the modern Supreme Court.

The rhetoric of some recent Court opinions has properly emphasized the objects or purposes of a treaty.³⁴⁶ In actual practice, however, the Court frequently adopts a restrictive approach to the interpretation of a treaty's substantive provisions.³⁴⁷ Moreover, it has done so most often without any examination of the purpose of the treaty at issue, nor of any broader desire to avoid judicial treaty breach. The Court may indeed intend its "objects" and

344. *Chew Heong v. United States* 112 U.S. 536, 549 (1884) (noting the statute at issue was designed to implement the treaty and thus declaring that the Court would reject "any interpretation . . . which imputes to congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty"). The proposition that statutes should not be interpreted to restrict substantive treaty rights is particularly well-established with regard to procedural legislation designed to implement self-executing treaty rights. See *Bishop v. Reno*, 210 F.3d 1295, 1299 (11th Cir. 2000) ("Procedural legislation which makes operation of a treaty more convenient cannot amend or abrogate a self-executing treaty.") (quoting *Cannon v. United States Dep't of Justice*, 973 F.2d 1190, 1197 (5th Cir.1992)); see also *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1305 (11th Cir. 2003) (same).

345. See *supra* notes 299–300 and accompanying text. It is possible, under the last-in-time rule, *supra* note 298, for a congressional statute to overturn a judicial interpretation of a treaty. The problem with this option, is that the meaning of a treaty is then subject to the vagaries of the domestic legislative process, and the effect of such an action under international law is uncertain in any event.

346. See *United States v. Stuart*, 489 U.S. 353, 368 (1989) (citing a form of the traditional liberal interpretation that "a treaty should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it'" (quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940))); see also *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (emphasizing the importance of "[t]he cardinal purpose of the Warsaw Convention" in interpreting this treaty); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (rejecting an interpretation of a statute that implemented an international convention in part because "[i]t would also be out of keeping with the objects of the Convention"); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993) (acknowledging that the court "must, of course, be guided by the high purpose" of a refugee treaty, but concluding that the purpose did not preclude a restrictive interpretation).

347. For negative commentary on the restrictive approach to treaty interpretation of the modern Supreme Court see *supra* note 216; see also *Bederman*, *supra* note 134, at 972 (observing in the 1990s that "[t]here is greater conflict today than ever before between U.S. practice and more international approaches to treaty interpretation"); *Van Alstine*, *Dynamic Interpretation*, *supra* note 23, at 724 (1998) (observing in 1998 that "[f]or more than a decade, the Court has consistently applied a restrictive approach to the construction of international conventions" (citing *Société Nationale Industrielle Aérospatiale vs. United States Dist. Court*, 482 U.S. 522, 534 (1987); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988); and *Zicherman v. Korean Airlines* 516 U.S. 217, 229 (1996))).

“purposes” rhetoric to accomplish the same end as the traditional liberal interpretation canon. If so, its scattered rhetoric is a poor and confusing substitute. The express rejection of liberal treaty interpretation in recent lower court opinions makes this point amply clear.³⁴⁸

The doctrine of liberal interpretation to avoid judicial treaty breach is not of equal validity for all types of treaties. Its most valuable application is for the interpretation of treaties with a clearly defined object. Thus, for example, when confronted with ambiguities in treaties designed to protect the civil and commercial rights of foreign citizens—the context in which liberal construction first arose³⁴⁹—courts should prefer an interpretation that is more protective of those rights. Doubts in treaties whose purpose is to avoid double taxation likewise should be resolved in favor of limiting tax liability.³⁵⁰

The premise of expanding, rather than constricting, a treaty’s purpose should not be limited to private rights, however. Some treaties, for example, have as their purpose the enhancement of administrative cooperation among the treaty partners (so-called “Mutual Legal Assistance Treaties”³⁵¹). For these treaties as well, a desire to limit the risk of judicial treaty breaches counsels for a more expansive interpretation of the government’s authority to assist foreign nations with relevant legal matters in this country.

Liberal interpretation makes less sense, however, for purely private-law treaties.³⁵² A range of mostly multilateral (and now increasingly common) conventions are designed not to protect a particular class of persons or rights,

348. See *Kreimerman v. Casa Veerkamp S.A. de C.V.*, 22 F.3d 634, 638–39 (5th Cir. 1994) (“Courts commonly declare that treaties are more ‘liberally construed’ than contracts. This does not mean, however, that treaty provisions are construed broadly As treaties establish restrictions or limitations on the exercise of sovereign rights by signatory States, courts should interpret treaty provisions narrowly.”); *United States v. Duarte-Acero*, 208 F.3d 1282, 1285 (11th Cir. 2000) (declaring that liberal construction of treaties “does not mean . . . that treaty provisions are construed broadly” (quoting *Kreimerman*, 22 F.3d at 638–39)); see also *supra* notes 240–243 and accompanying text (examining this case law in greater detail).

349. See *supra* notes 186–192 and accompanying text.

350. Over fifty such double taxation treaties are in force for the United States. See IRS, *Income Tax Treaties*, <http://www.irs.gov/businesses/corporations/article/0,,id=96739,00.html>. (last visited Apr. 5, 2005).

351. The United States has concluded nearly fifty such treaties designed to facilitate the cross-border investigation of criminal activity. See U.S. Dep’t of State, *Mutual Legal Assistance in Criminal Matters (MLATs) and Other Agreements*, at <http://travel.state.gov/mlat.html> (cataloguing these treaties); see also *In re Request from Can. Pursuant to Treaty Between the U.S. and Can. on Mut. Legal Assistance in Criminal Matters*, 155 F. Supp. 2d 515, 517–18 (M.D.N.C. 2001) (holding that because the Treaty Between the United States of America and Canada on Mutual Legal Assistance in Criminal Matters was self-executing, the treaty could be enforced by the government against individuals).

352. See also RESTATEMENT OF FOREIGN RELATIONS, *supra* note 16, § 325 cmt. d. (observing that “[d]ifferent types of agreements may call for different interpretative approaches Agreements involving a single transaction between governments, such as a transfer of territory or a grant of economic assistance should be construed like similar private contracts between private parties. Different approaches to interpretation have developed for particular categories of agreements such as extradition treaties, tax treaties, etc.”).

but rather to regulate the international interaction between private parties.³⁵³ Where the purpose is merely to ensure parity between private actors, the premise of liberal interpretation of treaty rights will often be lacking. Nonetheless, the general mandate to advance the purpose of a treaty operates here in cooperation with a final implication of the internationalist approach to treaty interpretation: respect for the interests of uniformity in judicial application. This final concrete consequence of the doctrine of good faith interpretation is examined immediately below.

3. Respect for Foreign Interpretations and the Premise of Uniformity

“[E]ven if we disagree, we surely owe the conclusions reached by appellate courts of other [treaty] signatories the courtesy of respectful consideration.”³⁵⁴ It might surprise even the most careful observer of the modern Supreme Court to discover that the author of this passage is Justice Antonin Scalia. In recent years, Justice Scalia has famously railed against any reference to the views of foreign nations in domestic constitutional interpretation.³⁵⁵ It is all the more ironic, then, that Justice Scalia himself would be left to defend the interests of respect for foreign treaty interpretations. Indeed, in his dissent in *Olympic Airways v. Husain*³⁵⁶ Justice Scalia chastised the majority—led, interestingly, by his typical ally, Justice Clarence Thomas—for their “sudden insularity” in “fail[ing] to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us.”³⁵⁷

Generally, the rhetoric of the Court with regard to respect for foreign views in treaty interpretation has been commendable. Recent opinions have included a boilerplate statement that “the opinions of our sister signatories [are] entitled to considerable weight.”³⁵⁸ Unfortunately, however, the Court again has never

353. Prominent examples include CISG, *supra* notes 151, 325–328 and accompanying text; Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 302; and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

354. *Olympic Airways v. Husain*, 540 U.S. 644, 661 (2004) (Scalia, J. dissenting).

355. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1226 (2005) (Scalia, J., dissenting) (observing with regard to the majority’s decision prohibiting the juvenile death penalty that “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand”); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (criticizing a similar reference to the law of “foreign nations”); *Atkins v. Virginia*, 536 U.S. 304, 345 (2002) (Scalia, J., dissenting) (objecting to references to foreign opinions in constitutional interpretation); *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (declaring with regard to the juvenile death penalty that “where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution”).

356. 540 U.S. at 658–67.

357. *Id.*; see generally Sean D. Murphy, *Supreme Court’s Use of Court Decisions of Treaty Partners*, 98 AM. J. INT’L L. 579 (2004) (reviewing the *Husain* opinion on this issue).

358. *Air Fr. v. Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins v. British Euro. Airways*, 572 F.2d 913, 919 (2d Cir. 1978)); see also *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 550–51 (1991) (“we must also consult the opinions of our sister signatories in searching for meaning of [treaty]”); *Vimar*

offered any serious guidance on the formal and functional imperatives for doing so. Scholarly examination is also largely absent.³⁵⁹ Other than passing references there is no scholarly analysis at all of the Supreme Court's barren statement on the relevance of prior foreign court precedents.³⁶⁰ And even while it has pursued relative consistency in rhetoric, the Court's application of its own directive, as the controversy in *Olympic Airways v. Husain* demonstrates, has been uneven.³⁶¹

Respect for prior foreign opinions flows from a recognition that uniformity of interpretation is inherent in the design of treaties.³⁶² From its very nature, a treaty begins its life with a single, uniform content shaped by the mutual design of the treaty parties.³⁶³ The task of subsequent judicial interpreters from the treaty member states, therefore, is fundamentally the same: to pursue uniformity in the identification and application of the treaty's content.³⁶⁴ Respect for substantive interpretations by the courts of treaty partners thus is not merely a good idea, it is an essential element of the reciprocal international obligation undertaken by the United States through the treaty itself. It is, in other words, another manifestation of the doctrine of treaty good faith, which for the federal courts flows from their constitutional obligation to interpret and give effect to

Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 537 (1995) (relying on foreign courts' interpretation of Carriage of Goods by Sea Act (COGSA)); *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 173–74 (1999) (discussing rulings by the British House of Lords for purposes of establishing interpretation of treaty).

359. See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 512–13 (2003) (briefly examining the propriety of considering foreign court treaty opinions as an aid for a proposed “antiparochial, prodialogic rule that would foster international cooperation and compliance with international law”).

360. A review of the Westlaw electronic database reveals that only twenty-six articles quote the Supreme Court's observation in *Air France v. Saks* on the role of foreign court interpretations. None of these articles, however, undertakes a detailed examination of the formal and prudential grounds for affording respect to the opinions of foreign treaty courts.

361. See *Olympic Airways*, 540 U.S. at 655 n.9 (referring to foreign interpretations of a treaty only in response to a criticism in Justice Scalia's dissent); see also Bederman, *supra* note 134, at 1022 (observing that “[r]ecognition of foreign views and practices in treaty interpretation were expressly declined in *Floyd, Itel*, and *Haitian Centers*”) (citing *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 550–51 (1991), *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 65 (1993), and *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993)). For positive examples of a careful review of foreign court views, see *supra* note 358.

362. Justice Scalia recognized this, albeit without sufficient emphasis, in his dissenting opinion in *Olympic Airways*. See 540 U.S. at 660 (Scalia, J. dissenting) (observing that “it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently”).

363. See *supra* notes 129–131 and accompanying text (discussing the role of mutual intent in treaty interpretation); see also *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (stating that when interpreting a treaty, a court's “role is limited to giving effect to the intent of the treaty parties”); *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929) (“Treaties are to be liberally construed, so as to effect the apparent intention of the parties.”).

364. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 16, § 325 cmt. d. (“Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems.”)

the nation's international treaty obligations as a matter of supreme federal law.³⁶⁵

The propriety of deference for prior treaty interpretations should be particularly powerful with regard to authoritative judgments by the International Court of Justice (I.C.J.) within its jurisdiction. The termination by the United States in 1985 of its acceptance of compulsory jurisdiction of the I.C.J. means that opportunities for such an event should now be rare.³⁶⁶ Unfortunately, when recently called upon in one such rare case, the Supreme Court nonetheless described the appropriate deference due I.C.J. interpretations as merely "respectful consideration."³⁶⁷ What the Court failed to consider, however, is that because the I.C.J. is the international court of final appeal for issues within its consensual jurisdiction, the grounds for deference to authoritative I.C.J. interpretations are particularly compelling. Failure to defer to such interpretations means that domestic courts become active participants in direct violations of the treaty obligations of the United States under international law.

With regard to the substantially more common case of interpretations by domestic courts of our treaty partners, the problem is a failure by the Supreme Court to provide guidance on the formal and functional grounds for deference. The result, once again, is considerable indifference in the lower courts. Indeed, in most treaty interpretation cases, the lower courts have failed to consider—or even mention the existence of—foreign views at all. Though examples abound, the experience with the CISG noted above³⁶⁸ should suffice as an illustration. The courts of the sixty-six member states³⁶⁹ have already rendered at least 1200 reported decisions interpreting and applying this treaty.³⁷⁰ English language abstracts of these opinions, and in many cases full-text translations, are also readily available at a variety of public websites.³⁷¹ Moreover, the treaty's

365. For a discussion of treaties as supreme federal law, see *supra* Part I.B.

366. See Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, 24 I.L.M. 1742 (1985).

367. See *Breard v. Greene*, 523 U.S. 371, 375 (1998) (stating merely that "we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such"). In *Breard*, the Supreme Court refused to follow an earlier preliminary ruling by the I.C.J. requesting that the United States take action to prevent the execution of a Paraguayan national based on alleged violations of the Vienna Convention on Consular Relations (VCCR). Subsequently, the I.C.J. issued a final decision holding that the United States breached its obligation under the VCCR to Mexico and Mexican nationals convicted in United States courts and ordering a review of such convictions. See *Concerning Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (March 31, 2004). At least one federal district court has relied on subsequent decisions of the I.C.J. on VCCR violations to grant partial habeas corpus relief to a convicted foreign national. See *United States ex rel. MADEJ v. Schomig*, 223 F. Supp. 2d 968, 977–80 (N.D. Ill. 2002).

368. See *supra* notes 325–328 and accompanying text.

369. See http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (listing the sixty-six present member states of the CISG) (last visited Nov. 8, 2005).

370. See <http://www.cisg.law.pace.edu/cisg/text/case-annotations.html> (noting that there are over 1200 cases interpreting the CISG and over 5000 available case annotations) (last visited Nov. 8, 2005).

371. For example, in addition to the homepage of the United Nations Commission on International Trade Law (under whose auspices the Convention was negotiated), at <http://www.un.or.at/uncitral/>, the

express purpose,³⁷² and its express instruction to the courts,³⁷³ is to promote international legal uniformity.

This treaty, therefore, should present a clear case for the directive that domestic courts should respect the interpretive views of the courts of our nation's treaty partners. Unfortunately, the divergence on this score between Supreme Court rhetoric and lower court reality could hardly be starker. In the face of over 1000 foreign court interpretive opinions, the Fourth Circuit Court of Appeals recently asserted that "[c]ase law interpreting the [Convention] is rather sparse."³⁷⁴ With this, moreover, the Fourth Circuit was merely chanting a common refrain among federal courts,³⁷⁵ which in one iteration declares that there is "virtually no case law under the Convention."³⁷⁶ Even when limited to "*federal* caselaw,"³⁷⁷ the courts almost without exception have not cited any relevant foreign precedent, nor even referred to its existence.³⁷⁸

A particularly glaring example of this phenomenon is the Seventh Circuit's recent parochial application of the CISG in *Zapata Hermanos Sucesores v. Hearthside Baking Company*.³⁷⁹ At issue was whether the right to damages for breach in CISG article 74 includes attorneys' fees.³⁸⁰ Finding no express

decisions interpreting the Convention are available at the websites, among others, of the Institute of International Commercial Law of Pace University, <http://www.cisg.law.pace.edu/>, and the Institute of Foreign and International Private Law of the University of Freiburg, Germany, <http://www.jura.uni-freiburg.de/ipr1/cisg/>.

372. CISG, *supra* note 49, Preamble (stating the treaty's goal that "the adoption of uniform rules which govern contracts for the international sale of goods . . . would contribute to the removal of legal barriers to international trade and promote the development of international trade").

373. *Id.* art. 7(1) (instructing courts that "[i]n the interpretation of this Convention, regard is to be had to its international character and the need to promote uniformity in its application . . .").

374. *Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc.*, 37 Fed. Appx. 687, 691 (4th Cir. 2002).

375. *See, e.g.*, *Supermicro Computer, Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147, 1151 (N.D. Cal. 2001) ("The caselaw interpreting and applying the CISG is sparse."); *Claudia v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052(HB)(THK), 1998 WL 164824, at *4 (S.D.N.Y. Apr. 7, 1998) (same); *Helen Kaminski Pty., Ltd., v. Marketing Australian Prods., Nos. M-47 (DLC)*, 96B46519, 97-8072A, 1997 WL 414137, at *3 (S.D.N.Y. July 23, 1997) (stating that there is "little to no case law on the CISG in general"); *see also* *Filanto, SpA. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992) (making a similar claim, but at a time when it was marginally more accurate).

376. *Mitchell Aircraft Spares, Inc. v. Euro. Aircraft Serv. AB*, 23 F. Supp. 2d 915, 919 (N.D. Ill. 1998) (quoting *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir.1995)).

377. *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, No. 01 C 5938, 2003 WL 223187, at *2 (N.D. Ill. Jan. 30, 2003) (stating that "*federal* caselaw interpreting and applying the CISG is scant") (quoting *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002) (emphasis supplied)).

378. For the rare positive exceptions to this practice, see *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702, 711-14 (N.D. Ill. 2004) (examining foreign court interpretations of the CISG with regard to a disputed interpretive issue); *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002) (same); and *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support GmbH*, No. 00 Civ. 9344(SHS), 2002 WL 465312, at *3 (S.D.N.Y. Mar. 26, 2002) (reviewing decisions of German courts on a disputed issue and noting that in interpreting the CISG "regard is to be paid to comity and interpretations grounded in its underlying principles rather than in specific national conventions").

379. 313 F.3d 385 (7th Cir. 2002)

380. *Id.* at 387-88.

reference to attorneys' fees, the court simply, and almost reflexively, retreated from the supreme federal law of the CISG to the domestic law of the State of Illinois to reject any such right.³⁸¹ Unfortunately, in reaching this result, the court failed even to note that voluminous interpretive authority—over ninety digested opinions³⁸²—from foreign courts and arbitral tribunals already exists on CISG article 74.³⁸³ At least seven such opinions have expressly concluded that the full compensation principle in Article 74 includes, at a minimum, a right to pre-litigation legal expenses.³⁸⁴ Whichever substantive result is correct, the point is that Seventh Circuit's opinion brought the United States into conflict with the views of some treaty partners without even considering the merit of prior foreign court interpretations.

At the core of this and similar examples lies, once again, a failure of domestic courts to appreciate the seriousness of their interpretive task for treaties.³⁸⁵ At a minimum, consideration of foreign opinions can provide valuable interpretive evidence on the original treaty design.³⁸⁶ But consideration of the views of treaty partners is more than a marginally relevant interpretive technique; it is also another expression of the fact that, beyond the domestic-law effect, judicial interpretation of treaties also involves the application of the nation's international obligations. By affording good faith deference to the views of treaty partners, therefore, courts in this country can minimize the risk of a divergence between the domestic and international force of treaties.³⁸⁷

Supreme Court case law is by no means devoid of positive examples on this score. Perhaps the best recognition of the appropriate role of foreign court opinions is the Court's decision in *El Al Israel Airlines, Ltd. v. Tsui Yuan*

381. *Id.*

382. See <http://www.cisg.law.pace.edu/cisg/text/anno-art-74.html> (listing ninety cases in its digest of interpretive opinions on CISG article 74); see also John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, 15 PACE INT'L L. REV. 91, 119–20 (2003) (observing that nearly 275 opinions have made reference to CISG article 74).

383. For an analysis of the issue of attorneys' fees under CISG article 74, see Harry M. Flechtner, *Recovering Attorneys' Fees as Damages under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos v. Hearthside Baking*, 22 NW. J. INT'L L. & BUS. 121 (2002); see also John Felemegas, *supra* note 382, at 114–28.

384. See Flechtner, *supra* note 383, at 128–30; Larry A. DiMatteo, *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 34 NW. J. INT'L L. & BUS. 299, 421–22 (2004) (noting the conflict in authority).

385. See Martinez, *supra* note 359, at 512 (observing that although there may be a few positive examples of courts using foreign precedent to interpret the Warsaw Convention on air travel, "the practice of lower courts in interpreting other international treaties has been much more mixed").

386. See *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J. dissenting) (observing that "[f]oreign constructions are evidence of the original shared understanding of the contracting parties").

387. See also Bederman, *supra* note 134, at 968 (arguing that one manifestation of good faith is "the judicial desire to give credence to the meaning ascribed by one of our treaty partners" and that in so doing "the courts believe they are serving the interests of United States foreign policy by ensuring that a treaty is given domestic effect consistent with its terms, thus protecting the United States from a charge of treaty breach").

Tseng.³⁸⁸ In interpreting the Warsaw Convention on international air transportation, the Court carefully examined prior interpretive opinions by the British House of Lords, two Canadian courts, and the New Zealand and Singapore Courts of Appeal.³⁸⁹ Moreover, the Court properly emphasized that “[t]he cardinal purpose of the Warsaw Convention . . . is to ‘achiev[e] uniformity of rules governing claims arising from international air transportation.’”³⁹⁰

The problem arises, however, not from this precedent, but from the absence of emulation in the lower courts. To be sure, positive examples exist there as well.³⁹¹ But, as the experience with the CISG amply illustrates, the Supreme Court’s stance on respect for foreign interpretations of treaties and the power of uniformity has either been insufficiently clear or insufficiently convincing to bring about consistent adherence in the lower courts.

Respect for interpretive uniformity, finally, does not mean unthinking acquiescence or that foreign court precedent somehow obtains formal *stare decisis* effect. Moreover, the interests of uniformity do not alone sanction judicial gap-filling.³⁹² The proper approach is, rather, one of controlled deference, which at a minimum requires respectful consideration of the persuasive force of

388. 525 U.S. 155 (1999).

389. 525 U.S. at 175–76 (observing that “[d]ecisions of the courts of other Convention signatories corroborate our understanding of the Convention’s preemptive effect”).

390. 525 U.S. at 169 (quoting *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991)). At issue in *El Al* was the scope of an express uniformity directive in the Warsaw Convention with regard to the preemption of state law claims. Absent careful examination, one might incorrectly conclude from the Court’s analysis that uniformity is appropriate only when sanctioned by a treaty’s express terms; what the Court failed to make clear, however, is that *uniformity of interpretation is inherent in the design of all treaties*.

391. See *Gitter v. Gitter*, 396 F.3d 124, 131 (2d Cir. 2005) (observing that the Supreme Court has instructed lower courts to give “considerable weight” to the opinions of courts of other treaty member states); *United States v. Jimenez-Nava*, 243 F.3d 192, 199–200 (5th Cir. 2001) (observing with regard to violations of the Vienna Convention on Consular Relations that “[i]f suppression becomes the remedy in the United States, the treaty would have an inconsistent meaning among the signatory nations. Thus, refusing to resort to the exclusionary rule promotes ‘harmony in the interpretation of an international agreement’” (quoting *United States v. Lombera-Camorlinga*, 206 F.3d 882, 888 (9th Cir. 2000))); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 620–21 (7th Cir. 2000) (observing on the same issue “that to impose judicially such a drastic remedy, not imposed by any other signatory to this convention, would promote disharmony in the interpretation of an international agreement”); *Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172, 176 n.5 (2d Cir. 1984) (“[W]hen a case concerns the interpretation of a treaty, the desirability of international uniformity suggests the wisdom of following a thoroughly considered decision of the highest court of an important signatory, particularly one which has attracted acceptance elsewhere, if the scales are fairly balanced.”).

392. See *Zicherman v. Korean Airlines Co.*, 516 U.S. 217, 229–30 (1996) (holding that although the general goal of the Warsaw Convention on International Air Transportation was international uniformity, the specific issue in dispute was “not an area in which the imposition of uniformity was found feasible” and that the Convention did not “empower us to develop some common-law rule . . . that will supersede the normal federal disposition”). As I have observed elsewhere, the Court’s narrow factual analysis in *Zicherman* may be justified. The difficulty is that the Court failed to analyze fully whether that Convention reflected an implied delegation of lawmaking powers to the federal courts in cooperation with the courts of other member states. See Van Alstine, *supra* note 18, at 990–91.

a foreign court's interpretive analysis.³⁹³ For implicit in the international law obligation of good faith interpretation is a directive that each nation's courts view their own interpretive discretion as influenced by prior judicial decisions of its treaty partners.³⁹⁴

C. GOOD FAITH AND THE ROLE OF THE EXECUTIVE BRANCH IN TREATY INTERPRETATION

A final word is necessary on the role of the executive branch in treaty interpretation. The Supreme Court has long emphasized that, from the combined effect of a variety of express constitutional powers,³⁹⁵ the President controls the "vast share of responsibility for the conduct of our foreign relations."³⁹⁶ The doctrine of good faith similarly is directed at the need for judicial sensitivity to the foreign affairs implications of their interpretive decisions. One may be misled to conclude from this that fidelity to good faith mandates ultimate executive branch control over treaty interpretation.³⁹⁷

This simple syllogism overlooks, however, the fact that treaties (provided, as

393. For a positive example see *Onyeanusi v. Pan Am. World Airways, Inc.*, 952 F.2d 788, 791-92 (3d Cir. 1992) (observing that the court was "confronted with an apparent conflict between a French and an American case" over the interpretation of a treaty, but concluding after analysis that the American court's view was "more sound"); see also *Martinez*, *supra* note 359, at 512-13 (advocating "an antiparochial, prodialogic rule that would foster international cooperation and compliance with international law" under which "national courts interpreting international law should consider relevant decisions of foreign courts interpreting the same treaty . . . and should not depart from those precedents without articulating clear reasons for doing so").

394. Of course, not all provisions of all treaties reflect precisely reciprocal obligations. Treaties ceding land from one nation to another, for example, may impose obligations only on the acquiring nation. See, e.g., *United States v. Percheman*, 32 U.S. 51 (1833) (analyzing private rights protected under an 1819 treaty with Spain which ceded Florida to the United States); *Foster v. Neilson*, 27 U.S. 253, 314-16 (1829) (same). Nonetheless, although a particular obligation may be one-sided, the need for uniform interpretation by different courts remains the same. Moreover, it is precisely where the interpreting court is an agency of the obligated state that the canon of liberal interpretation to avoid treaty breach plays its most prominent role.

395. Principal among these powers is, of course, the power to make treaties with the advice and consent of the Senate. See U.S. CONST. art. II, § 2, cl. 2; see also *id.* art. II, § 2, cl. 1 (declaring that "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.* art. II, § 2, cl. 2 (delegating to the President the authority, with the advice and consent of the Senate, to appoint ambassadors); *id.* art. II, § 2, cl. 3 (conferring the power to "receive Ambassadors and other Public Ministers").

396. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)); see also *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion) (stating that the President has "the lead role . . . in foreign policy"); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (observing that the President has "unique responsibility" regarding matters of "foreign and military affairs").

397. Professor John Yoo has offered the opinion that the President has "unilateral authority" to interpret (and reinterpret) treaties, even with respect to their domestic-law effect. See Yoo, *Treaty Interpretation*, *supra* note 23, at 868. For my critical response to this argument, see Van Alstine, *Treaty Delegation*, *supra* note 23, at 1275-80 (rejecting the contention that the mere placement of the treaty power in Article II means that the interpretation of treaties is exclusively an executive power).

always, that they are self-executing³⁹⁸) also have the status of formal federal law.³⁹⁹ Bolstered by the inclusion of treaties within the judicial power of Article III,⁴⁰⁰ federal courts have formal and final authority over their interpretation as a matter of domestic law.⁴⁰¹ Indeed, as the Supreme Court made clear in *United States v. Alvarez-Machain*,⁴⁰² if a treaty is self-executing, “it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other.”⁴⁰³ The constitutional role of federal courts as final arbiters of federal law means, in short, that treaty interpretation is not subject to the fleeting whims of executive branch officials.⁴⁰⁴ Neither the mere situation of the treaty power in Article II,⁴⁰⁵ nor the prime role of the executive in foreign relations generally⁴⁰⁶ changes this conclusion.

The proper approach, as the Supreme Court’s most recent formulation properly reflects,⁴⁰⁷ is merely judicial respect for the reasonable views of the

398. See *supra* notes 117–118 and accompanying text.

399. See *supra* notes 57–61 and accompanying text (analyzing the significance of the express reference to treaties in the Supremacy Clause of Article VI).

400. See *supra* notes 67–70 and accompanying text (examining the impact of the inclusion of treaties in Article III).

401. See, e.g., *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (holding that “the courts have the authority to construe treaties”) (citing *Baker v. Carr*, 369 U.S. 1986 (1969)); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (declaring that “courts interpret treaties for themselves”); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 239 (1796) (holding with regard to the interpretation of a particular treaty that “the Courts, in which the cases arose, were the only proper authority to decide, whether the case was within the article of the treaty, and the operation and effect of it”).

402. 504 U.S. 655 (1992).

403. *Id.* at 667.

404. See Van Alstine, *Treaty Delegation*, *supra* note 23, at 1279–80 (arguing that absolute deference in treaty interpretation would leave the self-executing treaty aspect of federal law subject to the situation-specific, and changeable, whims of the executive branch). The Supreme Court recognized this point as early as 1801. See *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109–10 (1801) (“It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, superintended by the executive of each nation But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress.”)

405. See *supra* note 397 (citing the contrary argument of Professor John Yoo, based principally on the fact that the treaty power is located in Article II, that the President has the “unilateral authority” to interpret (and reinterpret) treaties). But see *id.* (citing my critical response to this argument).

406. See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”); *Hopson v. Kreps*, 622 F.2d 1375, 1380–82 (9th Cir. 1980) (rejecting an executive branch interpretation of a treaty in the face of arguments that such issues of foreign affairs are the responsibility of the executive branch).

407. In *El Al*, the Court observed that “[r]espect is ordinarily due to the reasonable views of the executive branch concerning” treaty interpretation. 525 U.S. 155, 168 (1999). This formulation is a noteworthy dilution of the traditional proposition that courts should accord “great weight” to the views of the executive branch in treaty interpretation. See *O’Connor v. United States*, 479 U.S. 27, 33 (1986) (stating this proposition); *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 184–85 (1982) (same); *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 16, § 326 (maintaining that courts should afford “great weight to an interpretation made by the Executive Branch”); see also *Bederman*, *supra* note 134, at 1015 (canvassing the treaty interpretation cases of the Rehnquist Court prior to 1994 and concluding that “in all but one the holding followed the express wishes of the executive branch of the government”).

executive branch. This respect, moreover, is properly directed not at the formal content of the law, but rather at the international implications of particular interpretive outcomes. The most important of these, of course, is the perspective of the nation's treaty partners.⁴⁰⁸ Viewed in this way, respect for the views of the executive branch fits comfortably within the framework of the broader notion of good faith treaty interpretation examined in this Article.

The result of this perspective on treaty interpretation is that courts should afford only calibrated deference to the views of the executive branch. The degree of this deference should vary according to the degree to which an issue affects foreign affairs⁴⁰⁹ and whether the continuing administration of the treaty at issue is expressly entrusted to a specific executive branch agency.⁴¹⁰ Thus, for example, the value of executive branch views may be greatest for bilateral treaties that regulate the international conduct of the treaty partners as sovereign entities (treaties of diplomacy, for example). In contrast, for the increasingly common multilateral treaties that address solely the relations between private parties,⁴¹¹ there should typically be little reason to give serious deference to the interpretive views of executive branch officials.⁴¹²

CONCLUSION

As the Supreme Court famously declared in *Martin v. Hunter's Lessee*,⁴¹³ its ultimate responsibility as the final arbiter of federal law is to "control the jarring and discordant judgments" of lower courts and "harmonize them into uniformity."⁴¹⁴ This responsibility is all the more acute for the treaty form of federal law,

408. See *supra* Part III.B.3.

409. Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.").

410. See *El Al*, 525 U.S. at 168 (noting that courts should accord great weight to the interpretive views of executive agencies charged with the enforcement of a treaty) (citing *Sumitomo Shoji Am.*, 457 U.S. 176, 184–85 (1982)); see also Van Alstine, *Treaty Delegation*, *supra* note 23, at 1298–1302 (arguing that one factor affecting the degree of respect courts should afford to executive branch interpretations of a treaty is whether its continuing enforcement is entrusted to a particular executive branch agency); Bradley, *supra* note 140, at 701–07 (arguing in favor of application to treaties of the "Chevron Doctrine," under which special deference is afforded the interpretive views of executive branch agencies charged with the administration of statutes).

411. See *supra* note 49 (noting prominent examples of this type of self-executing treaty).

412. For a more detailed analysis of this point, see Van Alstine, *Treaty Delegation*, *supra* note 23, at 1298–1302 (arguing that courts should give only calibrated deference to the interpretive views of the executive branch and that this deference should be at its lowest for purely private-law treaties that do not regulate the continuing international conduct of the executive branch).

413. 14 U.S. (1 Wheat.) 304, 347–60 (1816).

414. *Id.* at 348. The Supreme Court's powerful statement in *Martin v. Hunter's Lessee*—which as noted above *supra* note 83, involved the interpretation of a treaty—is worthy of quotation in full here:

Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into unifor-

for, by its nature, a treaty represents a single, unified obligation of the United States owed to a foreign sovereign. Each time a domestic court—whether federal or state—interprets a treaty, therefore, it risks breaching the nation’s international law obligations. Unfortunately, as Justice Scalia observed (caustically) in an opinion only last year, the Supreme Court has the ability to review “but a tiny fraction” of lower court opinions.⁴¹⁵

Because of this, the Court’s most powerful tools for the advancement of uniformity are clarity of rhetoric and coherence of doctrine. In treaty law, such was the fundamental function of the doctrine of good faith interpretation. Unfortunately, as this Article has chronicled, good faith has inexplicably disappeared from the high Court’s treaty jurisprudence. Some scattered residue exists; but even this has become dry and drained of meaning. The result, predictably, has been lower court confusion over the very nature of treaties and over the judicial role in their interpretation as a matter of federal law.

The distilled essence of this Article is a call for a revival of the doctrine of good faith in treaty jurisprudence. Viewed in isolation, the notion of “good faith” may appear to be a mere abstraction. This Article has argued, however, that an express resurrection of the doctrine will bring a variety of concrete benefits to the practice of treaty interpretation. Principal among these are the revival of the fundamental distinction between treaties and statutes; the reminder to courts that they should avoid infecting treaties with purely domestic legal norms; and the reinforcement of the need for respect for foreign court opinions in the interests of international uniformity.

Ultimately, the goal is to return the law of treaty interpretation to the sound foundation from which it began. That foundation, as was recounted at the very outset of this Article, is the admonition to federal and state courts that they must be ever faithful to the “fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by [treaty] stipulations shall be recognized and protected.”⁴¹⁶

imity, the laws, the treaties and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.

Id. at 348.

415. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (Scalia, J., concurring); see also *id.* (objecting to the majority’s approval of the application of international law norms under the Alien Tort Statute and observing that “[i]t would be bad enough if there were some assurance that future conversions of perceived international norms into American law would be approved by this Court itself[,] . . . [b]ut in this illegitimate lawmaking endeavor, the lower federal courts will be the principal actors”).

416. *Chew Heong v. United States*, 112 U.S. 536, 540 (1884).