

TREATY RIGHTS AND REMEDIES:
THE VIRTUES OF A CLEAR STATEMENT RULE

RYAN D. NEWMAN*

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* B.S. 1998, United States Military Academy at West Point; J.D. expected 2007, University of Texas. The author would like to express his gratitude to the *Texas Review of Law & Politics* for their diligent efforts editing this Note. He would also like to thank his wife Kayna and daughter Abigail for their support and encouragement.

I. INTRODUCTION

“Treaty law covers every imaginable subject.”¹ This is hardly surprising given the rapid pace and increasing scope of globalization. While it is certainly true that globalization in one form or another has long been at work in world affairs,² its contemporary form, as Joseph Nye pointed out, is “thicker and quicker.”³ Thomas Friedman in *The Lexus and the Olive Tree* described today’s globalization as going “farther, faster, cheaper and deeper.”⁴ In other words, modern globalization does not represent a mere expansion of markets and trade; rather, “[i]t also represents an acceleration of the speed of communications, computer networks, and transportation systems that makes possible not just world markets, but also the global dissemination of ideas, news, and values.”⁵ To harness the benefits as well as to address the challenges of globalization, states have increasingly relied on new forms of treaties and international agreements “that include multiple parties, that create independent international organizations, and that pierce the veil of the nation-state and seek to regulate individual private conduct.”⁶ The scope of international law has thus largely increased in tandem with the scope of globalization.⁷ For instance, the issue of war and peace among nation-states is no

1. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 582 (2002).

2. JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER* 78 (2002) (“Globalization—the growth of worldwide networks of interdependence—is virtually as old as human history.”).

3. *Id.* at 85 (internal quotation marks omitted).

4. THOMAS FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* 9 (1999).

5. JOHN YOO, *THE POWERS OF WAR AND PEACE* 296 (2005). Niall Ferguson wrote of globalization:

Economists and economic historians alike tend to focus their attention on flows of commodities, capital and labor when talking about the history of globalization. However, there are other flows that can also occur on a global scale, not only flows of technology and services but also flows of institutions, knowledge and culture.

NIALL FERGUSON, *COLOSSUS: THE PRICE OF AMERICA’S EMPIRE* 184 (2004).

6. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1968 (1999).

7. See David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1304 (2000) (stating that “international treaty practice has greatly expanded in the past half century and promises to expand further in the decades ahead as globalization proceeds”).

longer the only legitimate subject of treaties;⁸ now, they govern such far-ranging issues as arms control, international economics, environmental law, and human rights.⁹

The expanding scope of international law brought about by globalization is problematic to the extent that it infringes upon the usual processes of domestic lawmaking. According to Professor John Yoo, contemporary treaty arrangements and institutions “create difficulties because they intrude into what was once controlled by the domestic political and legal system.”¹⁰ Thus, for example, the World Trade Organization and the North American Free Trade Agreement each establish obligations and standards of conduct for domestic manufacturers.¹¹ Similarly, human rights treaties enlarge the duties states owe their citizens beyond that required by their domestic legislation or constitution.¹² Given the growing tendency for international law to penetrate the realm of domestic lawmaking,¹³ the question necessarily arises as to the extent courts should give effect to treaties that purport to operate domestically. Some countries, such as Germany, give the same effect to international law as they give to their national

8. See Yoo, *supra* note 6, at 1967 (explaining that international law in the late eighteenth century “involved relations among nation-states” but that “[m]atters today are quite different”); *id.* at 1958 (“International agreements are becoming more like the permanent statutes and regulations that characterize the domestic legal system, and less like mutually convenient, and temporary, compacts to undertake state action.”).

9. *Id.* at 1968–69; see also Anthony D’Amato, *International Law*, in *THE OXFORD COMPANION TO AMERICAN LAW* 423, 424–26 (Kermit L. Hall ed., 2002) (noting that “[t]he domain of present-day international law is vast” and governs such areas as the oceans, the polar regions, airspace, outer space, artificial satellites, the global environment, global markets, global communications, international crimes, terrorism and hijacking, humanitarian intervention, human rights, group rights, nationality, and the definition of the state).

10. Yoo, *supra* note 6, at 1968; see also YOO, *supra* note 5, at 296 (“With regard to treaties, globalization places stress on existing legal doctrines by prompting international agreements that—in order to effectively coordinate international cooperation—regulate conduct within Congress’s control or conduct usually thought of as within the jurisdiction of the states.”).

11. Yoo, *supra* note 6, at 1968.

12. *Id.* at 1968–69 & n.59.

13. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 397 (1998) (“Because treaties now regulate matters that countries traditionally have considered internal, there is an increasing likelihood of overlap, and conflict, with domestic law.”); see also PHILIP BOBBITT, *THE SHIELD OF ACHILLES* 362 (2002) (noting “the fact that international norms of human rights and supranational regional regulation have intruded as never before into state sovereignty”).

law.¹⁴ In the United States, however, the relationship between international law and domestic law is more complex.¹⁵

This Note addresses the judicial enforceability of treaty-based rights and remedies. The emergence of human rights treaties and other treaties that purport to create individual rights raises the issue as to the circumstances under which state and federal courts should recognize and enforce these rights. As this Note will argue, domestic courts should remedy violations of treaty-based individual rights only when the parties to the treaty clearly provide for judicially enforceable remedies. In other words, courts should apply a “clear statement rule”—that is, they should enforce an individual, treaty-based right only when specifically authorized to do so by the unmistakable intentions of the parties.

The Supreme Court evaded this issue regarding the judicial enforceability of treaty rights most recently in *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*,¹⁶ cases involving Article 36 of the Vienna Convention on Consular Relations. Article 36 requires “competent authorities” to notify the relevant consulate at the request of any foreign national who is arrested and to allow communication between the consulate and the detained individual.¹⁷ It further provides that “the said authorities shall inform the [detained person] without delay of his rights.”¹⁸ *Sanchez-Llamas* and *Bustillo*, both foreign nationals, were arrested by state law enforcement authorities and ultimately convicted of violent crimes.¹⁹ At no time, however, did authorities inform *Sanchez-Llamas* or *Bustillo* that they could request to have their respective consulates notified.²⁰ Counsel for both men challenged the convictions at various points in the litigation process on grounds that state officials violated the right to consular notification under Article 36 of the Vienna

14. D’Amato, *supra* note 9, at 426.

15. *Id.* For example, although Article VI of the Constitution makes treaties the supreme law of the land, the question as to whether an individual may bring a lawsuit under a treaty depends on whether or not the treaty is “self-executing.” *Id.*

16. 126 S. Ct. 2669 (2006). Because both cases raised the same issues, the Supreme Court consolidated the two and decided them together.

17. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

18. *Id.*

19. *Sanchez-Llamas*, 126 S. Ct. at 2675–76.

20. *Id.* at 2676.

Convention.²¹ This, of course, raised the threshold question: “[D]oes Article 36 create rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding?”²² The Supreme Court, however, avoided the issue altogether. By concluding that Sanchez-Llamas and Bustillo were not in any event entitled to the relief they sought, the Court found it “unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights.”²³

In *Jogi v. Voges*,²⁴ the Seventh Circuit addressed the same basic question except in the context of a private civil action.²⁵ The case involved Jogi, a citizen of India residing in the United States, who was charged and convicted of aggravated battery in Illinois.²⁶ After serving his sentence, Jogi filed a suit for damages on grounds that state officials violated the Vienna Convention by failing to inform him of his right to contact the Indian consulate.²⁷ “[R]elying on the language of Article 36, the purpose of the Article, and the need to interpret the Vienna Convention in a manner consistent with the other states party to the Convention,” the Seventh Circuit held that there is an implied right of action to enforce Article 36 rights,²⁸ thus becoming “one of the first courts in the country to allow

21. *Id.*

22. *Id.* at 2674.

23. *Id.* at 2677. Refusing to decide whether an individual right exists under the Vienna Convention on grounds that the remedies available to criminal defendants are not appropriate is a common practice among lower courts as well as the Supreme Court. *See, e.g.,* *Breard v. Greene*, 523 U.S. 371, 376–77 (1998) (per curiam) (noting that Article 36 “arguably confers on an individual the right to consular assistance following arrest” but concluding nonetheless that the Vienna Convention claim was procedurally defaulted); *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001) (“Even if we assume *arguendo* that De La Pava had judicially enforceable rights under the Vienna Convention—a position we do not adopt—the Government’s failure to comply with the consular notification provision is not grounds for dismissal of the indictment.”); *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc) (“We hold that irrespective of whether or not the treaties create individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment.”).

24. 425 F.3d 367 (7th Cir. 2005).

25. *Id.* at 380.

26. *Id.* at 369–70.

27. *Id.* at 370.

28. *Id.* at 385.

monetary damages as a remedy for breach of the ‘right to consul.’”²⁹

The outcome in *Jogi* reflects the emerging internationalist view in academia that treaties are automatically enforceable in state and federal courts by reason of the Supremacy Clause.³⁰ Professor Carlos Manuel Vazquez, for instance, has posited that “the Framers adopted the very same mechanism for enforcing treaties, federal statutes, and the Constitution itself.”³¹ In effect, according to Vazquez, the Supremacy Clause makes treaties, like federal statutes and the Constitution, “operative on individuals and enforceable in the courts by individuals.”³² Thus, when a treaty creates a right and affords particular remedies to individuals for violations of that right, the Supremacy Clause mandates that courts make available those remedies to individuals whose rights have been violated.³³ To the extent that a treaty purports to create an individual right but fails to provide for a judicially cognizable remedy, Vazquez contends that under the appropriate circumstances courts should imply a right of action.³⁴ This is precisely what the Seventh Circuit did in *Jogi*; it held that there was an implied right of action under Article 36 of the Vienna Convention.³⁵ Vazquez and the *Jogi* court differed only with respect to their interpretive approaches as to when an implied right of action is warranted. Vazquez, for instance, argued that courts should imply a right of action in a manner

29. Recent Case, *International Law—Treaty Remedies—Seventh Circuit Finds Implied Right of Action in Vienna Convention on Consular Relations.*—*Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005), 119 HARV. L. REV. 2644, 2644 (2006).

30. See Yoo, *supra* note 6, at 1976–77 (noting the emerging academic consensus that “international agreements and law ought to be directly merged into the domestic legal system” and citing Professor Henkin for the proposition that “the Supremacy Clause makes treaties ‘the supreme Law of the Land’ on par with the Constitution and federal statutes”). According to Professor Louis Henkin, the Supremacy Clause “was interpreted early to mean . . . that treaties are law of the land of their own accord and do not require an act of Congress to translate them into law.” LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 199 (2d ed. 1996).

31. Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1108 (1992).

32. *Id.* at 1109.

33. *Id.* at 1155 (citing *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489, 496–97 (1824); *Harden v. Fisher*, 14 U.S. (1 Wheat.) 300, 301 (1816); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 627 (1812)).

34. See *id.* at 1157 (explaining that if the failure to afford a remedy “would produce (or exacerbate) the international responsibility of the United States to the state of the individual’s nationality,” then “a private right of action to obtain that remedy under domestic law should be considered to be implicit in the treaty”).

35. *Jogi v. Voges*, 425 F.3d 367, 385 (7th Cir. 2005).

similar to the approach the Supreme Court has adopted with respect to constitutional claims;³⁶ whereas, the Seventh Circuit concluded that “[t]reaty-based claims are better analyzed in a manner analogous to claims under statutes.”³⁷

Although the Supremacy Clause puts treaties on par with both the Constitution and federal statutes as supreme law of the land, it does not follow that treaties are to be construed in a similar manner. Indeed, just as the problem of interpreting the Constitution is distinctive from the problem of interpreting statutes,³⁸ so too is the problem of interpreting treaties distinctive from the problem of interpreting both the Constitution and statutes. Putting aside the unique rules of construction pertaining to treaties because they are contracts between sovereign nations,³⁹ there are nonetheless both structural and institutional reasons for interpreting them differently from other classes of federal law when they purport to operate domestically by creating individual rights enforceable in domestic courts.

The structural reasons are threefold. First, the Constitution, federal statutes, and treaties are not equivalent with respect to each other.⁴⁰ They are not equivalent in the sense that they do not require the same level of democratic participation for enactment or amendment—that is, they do not have the same “democratic pedigree.”⁴¹ Of the three primary classes of federal law, treaties are the least democratic. Second, unlike statutes, treaties may regulate matters beyond the reach of Congress’s enumerated powers and within the traditional domain of the states. Third, treaty-makers may exercise Article I legislative powers vested in Congress, even though treaty-making is an

36. Vazquez, *supra* note 31, at 1155–56. The Court first implied a damages cause of action for violations of the Constitution in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

37. *Jogi*, 425 F.3d at 384.

38. See Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37 (Amy Gutmann ed., 1997) (noting that the problem of constitutional interpretation is distinctive from the problem of statutory interpretation, “not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text”).

39. See *infra* Part IV.A.

40. See Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1485–86 (2006) (articulating the thesis that “the Constitution is superior to both statutes and treaties, and statutes are superior to treaties”).

41. See *infra* Part IV.B.1.a.

Article II power vested in the President. To construe treaties as if they were either statutory or constitutional provisions would thus pit the Supremacy Clause against other important constitutional norms such as democratic accountability, federalism, and the separation of powers.

In addition to these structural reasons, there are also institutional reasons for interpreting treaties differently than statutes or the Constitution. First, courts are less competent institutionally to decide matters bearing on the nation's foreign affairs than to decide matters relating primarily to domestic affairs. Second, in light of the special role that the political branches play in the conduct of the nation's foreign policy, treaties should be interpreted in such a way that gives the political branches maximum flexibility in carrying out that foreign policy.

Coupled together, these structural and institutional considerations suggest at the very least that treaties should be construed cautiously when they purport to create individual rights. Specifically, state and federal courts should employ a clear statement rule to determine whether a treaty confers judicially enforceable rights—that is, courts should remedy violations of treaty-based rights only when the intentions of the parties unequivocally provide for judicial relief. Thus, to the extent that the parties create an individual right but fail to specify any judicially cognizable remedies, a clear statement requirement would preclude courts from enforcing the right. This, of course, does not bar the parties from creating judicially enforceable treaty rights so long as they provide for such enforcement either by mandating that domestic courts are to remedy violations of the rights or by specifying remedies such as damages that are traditionally enforced in courts.

The body of this Note proceeds in four parts. It begins in Part II with a brief primer on the enforcement of treaties. Specifically, this Part explores the nature of treaty enforcement in both the international and domestic realms and shows how the Constitution has blurred the well-established distinction that existed before the framing between treaties, as instruments of international law enforceable by diplomacy or war, and legislation, as the instrument of domestic law enforceable by judicial processes. Part III focuses more narrowly on how individuals might enforce treaty-based rights when the treaty

does not clearly provide for a right of action or remedies. In particular, this Part describes by way of analogy to statutes and the Constitution the various means by which courts may infer rights of action or remedies from treaties that do not otherwise provide for judicial relief. Part IV proposes a rule of construction barring state and federal courts from enforcing treaty-based individual rights unless the unmistakably clear intentions of the treaty parties provide for such enforcement or for judicially cognizable remedies and argues that this clear statement rule is justified by important structural and institutional interests. By way of application, Part V briefly analyzes Article 36 of the Vienna Convention in light of the proposed clear statement requirement and concludes that the Convention, despite creating an individual right to consular notification, does not explicitly provide judicially cognizable remedies that aggrieved individuals can seek in state or federal court.

II. ENFORCING TREATIES—A PRIMER

A. *The “Classic Model”: Treaties as International Law*

It is axiomatic that treaties regulate conduct between nations. But recent history, particularly since the end of World War II, has seen a gradual, but nonetheless significant, expansion of the subject matter of treaties.⁴² No longer do they concern merely the external relations among nation-states; they now go so far as to regulate the internal conduct of nations as well.⁴³ As Professor Curtis Bradley described it, “While many treaties continue to concern matters traditionally viewed as inter-national in nature,

42. Bradley, *supra* note 13, at 396.

43. Curtis Bradley and Jack Goldsmith described the evolution of treaties in this way:

In the late eighteenth century, treaties were primarily bilateral agreements that focused on relations between nations, regarding such issues as trade and peace. Nations entered into reciprocal relationships with other nations to achieve mutual gain. By contrast, many modern treaties do not regulate relations between nations and do not confer specific reciprocal benefits on the parties. Instead, they are multilateral instruments, open for ratification by all nations and designed to regulate the intra-national relations between nations and their citizens.

Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 400 (2000); *see also* Yoo, *supra* note 6, at 1958 (“International agreements are becoming more like the permanent statutes and regulations that characterize the domestic legal system, and less like mutually convenient, and temporary, compacts to undertake state action.”).

numerous others concern matters that in the past countries would have addressed wholly domestically.”⁴⁴ This is particularly evident in the area of international human rights law, “which purports to regulate the relationship between nations and their own citizens.”⁴⁵ The Supreme Court, at least in dictum, has limited the subject matter of treaties to “any matter which is properly the subject of negotiation with a foreign country.”⁴⁶ But this supposed limitation on the content of treaties rings hollow in a rapidly globalizing world where, in the words of Louis Henkin, “[h]uman rights law has shaken the sources of international law, reshaped its character, [and] enlarged its domain.”⁴⁷

44. Bradley, *supra* note 13, at 396.

45. *Id.* Bradley writes:

There is now general agreement “that how a state treats individual human beings, including its own citizens, in respect of their human rights, is not the state’s own business alone . . . but is a matter of international concern and a proper subject for regulation by international law.” As a result, there are today a host of multilateral human rights treaties that purport to confer a variety of rights that individuals can assert against their own governments. These treaties address issues such as racial and gender equality, criminal procedure and punishment, and religious freedom.

Id. at 396–97 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. VII, introductory note, at 144–45 (1987)).

46. Geofroy v. Riggs, 133 U.S. 258, 267 (1890). In his *Manual of Parliamentary Practice* prepared for the Senate, Thomas Jefferson noted that a treaty “must concern the foreign-nation party to the contract, or it would be a mere nullity.” 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 646 (3d ed. 2000) (quoting S. DOC. NO. 92-1, at 516–18 (1971)). According to Professor Laurence Tribe, “It is generally accepted that the Treaty Clause procedure is legitimate only for international agreements related genuinely, and not just pretextually, to foreign relations.” *Id.* at 646–47 n.16.

47. Louis Henkin, *Human Rights and State “Sovereignty,”* 25 GA. J. INT’L & COMP. L. 31, 36 (1995); see also Bradley, *supra* note 13, at 397 (noting that the transformation in terms of the content of treaties “is so fundamental that it alters the very essence of international commitments”). Even though he acknowledges that global interdependence now reaches across a broad spectrum of issues, Tribe nevertheless contends quite optimistically that the subject matter limitation on treaties remains a meaningful restriction. 1 TRIBE, *supra* note 46, at 646. He argues, for instance, that

human rights treaties . . . seem closely enough linked to the effective and humane operation of the international order—for example, by establishing norms of government conduct likely to guarantee humane treatment of persons traveling in foreign lands and thereby to foster international travel, commerce, and cooperation—that there would seem to be no comparable danger that the treaty power might be used in this context as a pretext to swell Congress’ authority beyond the realm of foreign affairs.

Id. at 647 n.16. The problem with human rights treaties that Tribe does not address, however, is that they also regulate the relationship between nations and their *own* citizens. To be sure, human rights treaties that guarantee humane treatment for persons traveling in foreign lands clearly fall within the realm of foreign affairs, but to the extent that they confer rights that individuals can assert against their own governments, these treaties intrude upon domestic matters in a way that pushes the boundaries of what may

The increasingly widespread practice of making treaties a source of individual rights—whether for citizens, foreigners, or both—raises a host of difficulties,⁴⁸ particularly in terms of enforcement. To fully appreciate the problem of enforcing treaty-based individual rights and the corresponding implications for American constitutional practice, it is necessary first to examine the historic role of treaties as instruments of international law. At the time the Constitution was framed, it was commonly acknowledged that treaties were binding contracts between sovereign nations. Thus, John Jay, one of the more experienced Framers in the field of foreign affairs,⁴⁹ described a treaty in *The Federalist No. 64* as “only another name for a bargain.”⁵⁰ Alexander Hamilton described treaties in *No. 75* this way: “[Treaties] are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.”⁵¹ This understanding of the contractual nature of treaties is reflected as well in a host of Supreme Court cases.⁵² One of the more notable cases, *Foster v. Neilson*, described the traditional view: “A

properly be considered the subject of foreign affairs. This is not to say that universal human rights can never be the proper subject of treaties. It is, after all, in the interest of the United States to promote some minima of human rights around the world. See NATAN SHARANSKY, *THE CASE FOR DEMOCRACY: THE POWER OF FREEDOM TO OVERCOME TYRANNY AND TERROR* xix (2004) (“Promoting peace and security is fundamentally connected to promoting freedom and democracy.”). Nevertheless, the content of universal human rights has a natural tendency to expand and thus penetrate more deeply into the realm of domestic affairs with each new human rights treaty. See MARGARET THATCHER, *STATECRAFT: STRATEGIES FOR A CHANGING WORLD* 255 (2002) (noting that the 1948 Universal Declaration of Human Rights “proclaims such ‘rights’ as ‘social security’ (Article 22), ‘the right to work . . . and to protection against unemployment’ (Article 23), ‘the right to rest and leisure’ (Article 24), ‘the right to a standard of living adequate for the health and well-being of [oneself] and [one’s] family’ and to ‘education’ . . . (Article 25)”); *id.* (listing the U.N. conventions that followed in the wake of the 1948 Declaration: the Political Rights of Women (1952); Racial Discrimination (1965); Economic, Social, and Cultural Rights (1966); Civil and Political Rights (1966); Discrimination Against Women (1979); Torture (1984); and the Rights of the Child (1989)). It is this inevitable expansion that renders any meaningful subject matter limitation on treaties illusory.

48. See Bradley & Goldsmith, *supra* note 43, at 400 (explaining that “[m]odern human rights treaties present . . . challenges for the U.S. constitutional system” in terms of substance, scope, and structure).

49. John Norton Moore, *Treaty Interpretation, the Constitution and the Rule of Law*, 42 VA. J. INT’L L. 163, 197 (2001).

50. THE FEDERALIST NO. 64, at 329 (John Jay) (Garry Wills ed., 1982).

51. THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 50, at 380.

52. Moore, *supra* note 49, at 201 (noting the line of Supreme Court cases extending from *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 104 (1801), to *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984)).

treaty is in its nature a contract between two nations, not a legislative act.”⁵³ In another well-known case, *Edye v. Robertson*, otherwise known as the *Head Money Cases*, the Court defined a treaty as “primarily a compact between independent nations.”⁵⁴ It went on to explain the means of enforcement:

[A treaty] depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.⁵⁵

Thus, at least on the international plane, treaties are binding agreements between sovereign nations and are enforced primarily by using the tools of international politics—namely, diplomacy or war—not by using domestic judicial processes.

As traditionally understood, individuals do not have rights or duties under international law; instead, only states have rights and corresponding duties.⁵⁶ According to Vattel, an early international law theorist of whom the Framers were well acquainted, states are “moral persons who live together in a natural society, subject to the law of nations.”⁵⁷ Professor Vazquez characterized this conception of international law as the “classic model”:

[W]hat persons are to municipal law, states are to international law. Just as persons are the subjects of the municipal law of a state, and thus only persons have rights and duties under municipal law, states are the subjects of the law of nations and only states enjoy rights and duties thereunder.⁵⁸

This does not mean that treaties may not impose obligations on states to recognize individual rights; instead, it simply means that these obligations cannot be enforced at the behest of the individuals affected.⁵⁹ In other words, the obligations are owed

53. 27 U.S. (2 Pet.) 253, 314 (1829).

54. 112 U.S. 580, 598 (1884).

55. *Id.*

56. Vazquez, *supra* note 31, at 1086.

57. *Id.* at 1087–88 & n.17 (quoting EMMERICH DE VATTTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS lv (Joseph Chitty ed., 1863)) (internal quotation marks omitted).

58. Vazquez, *supra* note 31, at 1088.

59. *Id.*

to the states of which the individuals are citizens, and the correlative rights are rights of the states, not of the individuals.⁶⁰ Thus, to the extent that individuals can be said to have rights under international law, they only have primary rights—that is, a right imposing obligations on others—but not secondary, or remedial, rights.⁶¹

That the ability to seek enforcement of an individual, treaty-based right is divorced from the right-holder follows from the nature of treaties as contracts between sovereign nations. The right-holders, after all, are not parties to the treaty and so lack the requisite interest to demand enforcement of its terms. To be sure, individuals benefit from treaties that confer individual rights, but they do so only indirectly. This is because nations generally enter into treaties, even treaties that regulate domestic affairs, not to benefit individuals per se but to achieve their foreign policy objectives.⁶²

Human rights treaties are illustrative. To the extent that they create rights enforceable by individuals against their own governments, human rights treaties lack the reciprocity normally associated with traditional treaties. In other words, human rights treaties create obligations between a nation and its own citizens, not just between a nation and the citizens of another. This raises the obvious question: If a human rights treaty regulates the

60. *Id.* The classic model holds:

[I]f state A is obligated to behave in a given way towards the nationals of state B, the obligation is thought to be owed to the aggregate of the individuals making up state B. If state A violates an obligation, it becomes responsible not to the national, but to state B as a society. If it does not repair the injury, only state B is permitted by international law to set in motion the machinery of international law for sanctioning violations of the relevant international law norm. State B, however, has the discretion not to pursue an international claim; it may subordinate the interests of the individual to those of the larger society. For the injured individual, the primary practical consequence is that he lacks the power to enforce obligations or remedy violations; the effectiveness of the rule of law is dependent on the willingness of the state to seek a sanction for the violation of the rule.

Id. at 1089.

61. *See id.* (“The statement that individuals do not have rights under international law is thus best understood as a statement that individuals do not under international law have what might be called secondary or remedial rights, as distinguished from primary rights.”). A secondary right is “a right to obtain a remedy or sanction upon the violation of a primary right; a primary right is one that does not arise from a prior breach of a legal duty.” *Id.* at 1089–90.

62. *See Kesavan, supra* note 40, at 1512 (“Statutes are intended to regulate domestic conduct, whereas treaties regulate domestic conduct only because that is the ‘price paid’ for promoting national interests with foreign nations.”).

relationship between a nation and its own people, then why agree to it when the same can be accomplished through domestic law? The likely explanation is that countries enter into human rights treaties for reasons having little to do with individual rights and much to do with their national interests.⁶³ Thus, for instance, countries may agree to participate in international human rights agreements in order to secure unrelated concessions from other countries, to appease opponents, to enhance influence abroad, or to gain international goodwill.⁶⁴ In this respect, treaty-based individual rights are distinguishable from rights arising from domestic constitutional or statutory law. The former are created to achieve the foreign policy goals of the contracting nations; whereas, the latter are created to regulate the relationship between the state and the people it governs.⁶⁵ Given this

63. See *supra* note 62 and accompanying text; see also THATCHER, *supra* note 47, at 255–56 (noting that the motives of the countries that agreed to the human rights conventions enacted after the 1948 Universal Declaration of Human Rights were “mixed”); KENNETH N. WALTZ, *MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS* 238 (1959) (“Each state pursues its own interests, however defined, in ways it judges best.”).

64. See, e.g., RICHARD A. MELANSON, *AMERICAN FOREIGN POLICY SINCE THE VIETNAM WAR: THE SEARCH FOR CONSENSUS FROM NIXON TO CLINTON* 101 (1996) (quoting Zbigniew Brzezinski, President Carter’s National Security Advisor, as saying that “by emphasizing human rights America could again make itself the carrier of human hope, the wave of the future,” and ‘restore America’s political appeal to the Third World’); *id.* at 101–02 (mentioning the Carter administration’s inclination to view human rights as a means to “sustain U.S. international influence at a time of relatively declining American power”); THATCHER, *supra* note 47, at 249 (“As part of the Soviet Union’s strategy of disarming the West while maintaining its own military superiority, Moscow was prepared to make some concessions [in the Helsinki Accords] in order to appease Western critics of its systematic abuse of human rights.”).

65. Vazquez argues that the emergence of human rights norms in international law has cast doubt on the validity of the classic model:

These norms impose obligations on states towards individuals as human beings, not just as nationals of other states, and they limit the discretion of states even with respect to their own nationals. The recognition of such norms means that a state’s obligations to behave in certain ways towards individuals are no longer thought to be owed to the state of the individual’s nationality for the collective benefit of the individuals comprising the state. This development of course represents a significant departure from the premises of the classic statist conception of international law.

Vazquez, *supra* note 31, at 1094. To be sure, human rights treaties purport to “impose obligations on states towards individuals as human beings, not just as nationals of other states, and they limit the discretion of states even with respect to their own nationals.” *Id.* But this in no way represents a fundamental departure from the premises of the classic model, because states as a practical matter enter into human rights treaties for the same reasons they have always entered into treaties—that is, to achieve their foreign policy interests. That nations are willing to submit their internal affairs to an international human rights regime in exchange for some implied benefit, whether unrelated or intangible, does not alter the basic contractual nature of treaties upon which the classic model is premised.

distinction, it makes considerable sense, at least in the international realm, that individuals lack the remedial right to seek enforcement of treaty-based primary rights because those primary rights are the product of negotiations between sovereign states that serve uniquely political ends.

B. “*Supreme Law of the Land*”: *Treaties as Domestic Law*

At the time of the framing, the founding generation understood that treaties, or international law in general, operated on a different plane than domestic law. Treaties acted on states as bodies politic and were thus dependent for their enforcement on either the good faith of the parties or war.⁶⁶ “In these respects,” according to Vazquez, “[the Framers] considered treaties to be different from ‘laws,’ which by their nature operated on individuals, had compulsive force, and were enforceable in the courts.”⁶⁷ In *The Federalist No. 33*, Alexander Hamilton articulated the distinction between laws and treaties:

A LAW by the very meaning of the term includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties.⁶⁸

The fact that treaties operate on a different legal plane and are thus enforceable by different means than domestic law creates a problem for the domestic enforcement of treaties. After all, if treaties do not act directly on individuals, do not have compulsive force beyond diplomacy or war, and are not

66. *Id.* at 1096–97.

67. *Id.* at 1101. In *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, Professor Yoo gives a thorough historical account of the distinction between treaties and domestic law evident in eighteenth-century political thought and practice prior to the framing of the Constitution. Yoo, *supra* note 6, at 1986–2024. For a critique of Yoo’s historical analysis, however, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095, 2105–20 (1999), and Kesavan, *supra* note 40, at 1515–29.

68. THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 50, at 157–58.

enforceable in domestic courts, then how can governments ensure treaty compliance within their borders?

This difficulty is compounded in the case of the United States, where treaties agreed to by the national government may impose obligations on the states, which are thought to retain some degree of autonomy from the national government.⁶⁹ Indeed, it is widely understood that the Continental Congress's inability under the Articles of Confederation to enforce its treaty obligations domestically was a primary impetus for constitutional reform.⁷⁰ To the extent that the Articles gave Congress no authority to compel the states to obey treaties, the states were free to ignore or even frustrate them.⁷¹ And this is precisely what the states did. The most notable example is the 1783 Treaty of Paris, which ended the Revolutionary War. The treaty provided that "creditors on either side shall meet with no lawful impediment' to the recovery of debts previously contracted in good faith."⁷² In effect, the treaty created an individual right for creditors. It further required Congress "to *recommend* that the

69. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 50, at 152 ("[A]s the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States.").

70. See, e.g., SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 245 (1993) (noting the complaint of nationalist critics of the Articles of Confederation that the national government "could not prevent the states from endangering national security by independently and separately making war on the Indians and violating treaties with foreign states"); THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 50, at 110 ("The treaties of the United States, under the [Articles], are liable to the infractions of thirteen different Legislatures The faith, the reputation, the peace of the whole union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed."); Susan Bandes, *Treaties, Sovereign Immunity, and "The Plan of the Convention,"* 42 VA. J. INT'L L. 743, 748 (2002) ("There is ample evidence that the states' refusal to enforce treaties was 'not only important in shaping constitutional reform [after the Articles of Confederation] but of overwhelming significance.'"); Carlos Manuel Vazquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 732–33 (2002) [hereinafter Vazquez, *Eleventh Amendment*] ("It is true that one of the principal vices of the Articles of Confederation, in the view of the Founders, was the lack of any mechanism for enforcing state compliance with treaties."); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 698 (1995) [hereinafter Vazquez, *Four Doctrines*] ("The repeated violation of treaties by the states was a prime concern of the Framers who gathered in Philadelphia to amend the Articles."); see also JACK N. RAKOVE, ORIGINAL MEANINGS 26 (1996) (noting that "the most serious doubts about the adequacy of the Articles of Confederation arose over the inability of Congress to frame and implement satisfactory foreign policies").

71. Yoo, *supra* note 6, at 2013.

72. RAKOVE, *supra* note 70, at 27.

states similarly permit British subjects and American loyalists to sue for the recovery of confiscated property.”⁷³ Despite Congress’s recommendation, individual states refused to comply with these treaty provisions, and Britain responded by retaining forts that it was obligated to surrender under the treaty.⁷⁴ Although it was generally accepted at the time that treaties and laws occupied distinctly separate spheres—the former regulating foreign affairs and the latter regulating domestic affairs—the inability of Congress to enforce domestic compliance with treaty obligations prompted a change in the legal status of treaties. According to Professor Jack Rakove:

The imperative need to make treaties legally binding on both the states and their citizens was widely recognized by 1787. The major consequence of this perception was the ready adoption of the supremacy clause, which gave treaties the status of law and made them judicially enforceable through the federal courts.⁷⁵

But at the time of the Constitutional Convention, it was not readily obvious that the Framers would adopt the Supremacy Clause. The problem of treaty enforcement was only part of a much larger problem concerning the enforcement of federal law generally.⁷⁶

The two plans under consideration by the Convention delegates—the Virginia Plan and the New Jersey Plan—each proposed a different solution. Edmund Randolph’s Virginia Plan incorporated Madison’s idea of a “negative” that would authorize Congress to invalidate state laws that violated the Constitution or treaties.⁷⁷ William Patterson’s New Jersey Plan, on the other hand, introduced, as an alternative to Madison’s negative, a version of the Supremacy Clause.⁷⁸ Ultimately, the

73. *Id.*

74. *Id.*

75. Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 *PERSP. AM. HIST.* 233, 264 (1984).

76. Vazquez, *Four Doctrines*, *supra* note 70, at 698.

77. Yoo, *supra* note 6, at 2028.

78. Wilson’s proposed supremacy clause stated:

[A]ll Acts of the U. States in Cong[ress] made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in the their decisions, any thing in the respective

Framers rejected Madison's negative and instead unanimously adopted the Supremacy Clause,⁷⁹ which now reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁸⁰

To compliment the Supremacy Clause command that all treaties shall be supreme law, the Constitution also extends Article III jurisdiction to cases arising from treaties: "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."⁸¹

By adopting the Supremacy Clause and its corollary in Article III, the Framers corrected the enforceability problem with respect to treaties in the same way that they corrected the enforceability problem with respect to federal statutes and the Constitution: "[T]hey declared all three to be the 'supreme Law of the Land,' and accordingly operative directly on individuals and enforceable in the courts."⁸² In doing so, they transformed treaties "from 'mere treaties'—in the international sense—into laws."⁸³ In other words, treaties are no longer operative just on

laws of the Individual States to the contrary notwithstanding; and that if any State, or any body of men in any shall oppose or prevent ye carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties.

Id. at 2029 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 245 (Max Farrand ed., 1911)).

79. *Id.* at 2031–32.

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

81. *Id.* art. III, § 2, cl. 1.

82. Vazquez, *supra* note 31, at 1104; *see also* THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 50, at 109 ("The treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations."); Vazquez, *supra* note 31, at 1108 ("[T]he Framers adopted the very same mechanism for enforcing treaties, federal statutes, and the Constitution itself. . . . The Supremacy Clause gave all three the status of law and instructed the judges in every state to give them effect. The Supreme Court was given appellate jurisdiction over cases arising under all three to monitor state court compliance with the clause.")

83. Vazquez, *supra* note 31, at 1108; *see also* EDWARD S. CORWIN, THE CONSTITUTION: AND WHAT IT MEANS TODAY 169 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978) ("It should be noted, however, that a treaty to which the United States is party is not only an international compact but also 'law of the land' . . ."); David J. Bederman, *Revivalist*

the international plane; the Supremacy Clause made them operative on the domestic plane as well.⁸⁴ By making treaties the

Canons and Treaty Interpretation, 41 UCLA L. REV. 953, 954 (1994) (“Born into legal limbo, treaties live a double life: one half as part of the American legal system, the other as an expression of an international undertaking with other nations.”).

84. Although the Supremacy Clause elevates treaties to the status of law—even without congressional action—not all treaties have immediate domestic effect. 1 TRIBE, *supra* note 46, at 644. In other words, some treaties are not “self-executing”—that is, they require congressional implementation before they become operative domestically. *Id.* For instance, a treaty that requires the appropriation of funds cannot be self-executing, because the Constitution requires Congress to appropriate funds. *Id.* The self-execution doctrine was affirmed as early as 1829 in an opinion by Chief Justice John Marshall, who incidentally was a delegate to the Virginia ratifying convention. In the seminal case *Foster v. Neilson*, the Supreme Court articulated the doctrine by first describing the nature of treaties:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument.

27 U.S. 253, 253–54, 314 (1829). Having established the contractual nature of treaties as a historical matter, the Court abruptly reversed course: “In the United States *a different principle is established*. Our constitution declares a treaty to be the law of the land.” *Id.* (emphasis added). But, notably, the Court did not end here; instead, it proceeded to qualify this characterization of treaties as law of the land. According to Marshall, a treaty is “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*.” *Id.* (emphasis added). He concluded by further explaining that “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.” *Id.* In sum, *Foster* holds that a treaty is self-executing in the sense that it attains the status of domestic law when it operates of its own terms without the need for further legislation, particularly when the treaty addresses itself to the judicial department. When the terms of the treaty require future action by the political branches, however, Congress must enact implementing legislation to give the treaty domestic effect. Courts, for their part, have generally held that the intent of the treatymakers is the central factor in determining whether a treaty is self-executing. Vazquez, *Four Doctrines*, *supra* note 70, at 704; Yoo, *supra* note 6, at 1971.

The issue as to the circumstances under which a treaty may be deemed self-executing has inspired considerable scholarly debate. On one hand are internationalists like Professors Vazquez and Flaherty who contend that all treaties are presumptively self-executing by virtue of the Supremacy Clause. Flaherty, *supra* note 67, at 2152; Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2169 (1999). On the other hand are scholars like Professor Yoo who argue that treaties are presumptively non-self-executing and thus require implementing legislation. Yoo, *supra* note 6, at 2091, 2224. Between these two poles is Vasan Kesavan, who has recently advocated a partial self-execution thesis whereby “treaties that conflict with existing federal statutory law do not have the force of domestic law unless and until implemented by Congress.” Kesavan, *supra* note 40, at 1503; *see also* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 306 (2005) (“[E]vidently, the delegates did not intend that every treaty be wholly non-self-executing. . . . But neither did the framers endorse the opposite idea that every treaty could execute itself by repealing contrary federal laws and creating the precise domestic-law equivalent of a federal statute.”).

If one thing is clear, it is that the legal effect of treaties in the domestic realm remains unclear. The Constitution itself is largely to blame, for on one hand, it commits the power to make treaties to the Executive Branch under Article II while on the other hand the Supremacy Clause elevates treaties to the status of law. To what extent the Supremacy Clause has expanded the domestic enforceability of treaties has important

supreme law of the land, therefore, the Constitution blurred, if not eliminated, the distinction that existed before the framing between treaties and legislation, where the former was enforceable only by diplomacy or war and the latter was enforceable by judicial processes.

III. IMPLIED TREATY-BASED RIGHTS AND REMEDIES

A. *Rights of Action*

Because treaties have the status of domestic law by virtue of the Supremacy Clause, it follows that individuals may seek an action in court to enforce obligations under the treaty so long as they have a right of action. Indeed, the Supreme Court in the *Head Money Cases*—an opinion often cited for its reference to treaties as “primarily a compact between independent nations”⁸⁵—contemplated such a possibility. Despite acknowledging the contractual nature of treaties as a general matter, the Court went on to explain that “a treaty may also contain provisions which confer certain rights . . . which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.”⁸⁶ This, of course, raises the question: Under what circumstances is a treaty-based right capable of judicial enforcement—that is, under what circumstances does an

ramifications for the role of treaties. If they are presumptively self-executing, as scholars like Vazquez and Flaherty suggest, then there will be no effective barrier to the rising tide of treaties that directly regulate domestic affairs. On the other hand, if treaties are presumptively non-self-executing, as Yoo argues, then treaties purporting to regulate domestic conduct will have far less effect on domestic affairs. In any event, this Note makes no attempt to resolve the debate between self-execution and non-self-execution; indeed, it assumes that the treaties at issue are self-executing. But the debate over self-execution is important for what it tells us about the nature of treaties in light of the Supremacy Clause. If the Supremacy Clause fundamentally altered the nature of treaties by making them directly enforceable in domestic courts without implementing legislation, as the advocates for presumptive self-execution insist, then what explains the long-standing reluctance of courts to enforce treaties in the same way they enforce domestic law? There is, after all, no corresponding self-execution doctrine for federal statutes. The obvious answer is that treaties are fundamentally different—that is, they are assigned to Article II not Article I, they are contracts between sovereign nations, and they are more acutely political in the sense that they involve foreign affairs. In effect, therefore, treaties straddle the line between international and domestic affairs as well as between executive and legislative powers in a way that laws do not.

85. *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 598 (1884).

86. *Id.*

aggrieved individual have a right of action under a treaty?⁸⁷ In *The Legal Process*, Henry Hart and Albert Sacks define a right of action as “a species of power—of remedial power.”⁸⁸ “It is,” according to Hart and Sacks, “a capacity to invoke the judgment of a tribunal of authoritative application upon a disputed question about the application of preexisting arrangements and to secure, if the claim proves to be well-founded, an appropriate official remedy.”⁸⁹ This capacity or power to secure a remedy in court must derive from some legal text; it is generally not enough to invoke a right and demand a remedy when no remedy is provided by any legal authority for violations of the right.⁹⁰ Of course, if a treaty creates an individual right and provides for a remedy, then aggrieved individuals have the capacity to invoke the judgment of a court to secure that remedy.⁹¹ But many, if not most, treaties that purport to create individual rights do not address matters of enforcement in any specific way.⁹² This merely reflects the presumption that treaties are made to benefit nation-states, not to benefit individuals by conferring individually enforceable rights.⁹³

Consequently, individuals seeking to enforce their rights under a treaty have two options. First, they may look to a law other than the treaty as the statutory vehicle for enforcing the

87. It is important to note that, according to the commentary for the *Restatement (Third) of Foreign Relations Law*, “whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) cmt. h, at 47 (1987). So, once a treaty is determined to be self-executing, the question then becomes whether the treaty creates individual rights that are enforceable in court. This was precisely the question at issue in both *Sanchez-Llamas* and *Jogi*. See *supra* text accompanying notes 22, 25.

88. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 137 (William N. Eskridge, Jr. & Philip P. Frickey eds., The Foundation Press, Inc. 1994) (tent. ed. 1958).

89. *Id.*

90. See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 766 (5th ed., 2003) (noting that “[f]ederal statutes sometimes make clear that private parties may sue to redress harm suffered as the result of another’s violation of statutory duties” but that “many federal statutes do not expressly authorize suit by persons injured as the result of statutory violations” because they say “nothing about remedies,” they “provide criminal sanctions but are silent about the availability of civil remedies,” or they “establish certain civil remedies . . . but say nothing about private actions”).

91. See *supra* note 33 and accompanying text.

92. Vazquez, *Four Doctrines*, *supra* note 70, at 719.

93. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a, at 395 (1987) (“International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts . . .”).

treaty.⁹⁴ According to Vazquez, for instance, a right of action for violations of a treaty might have its source in state common law⁹⁵ or, alternatively, in federal statutes such as § 1983⁹⁶ or § 702 of the Administrative Procedure Act (APA).⁹⁷ Second, they may ask the court to imply a remedy directly from the treaty where none is otherwise expressly provided.⁹⁸ It is this possibility that is the chief concern of this Note. Although it has generally been reluctant to do so, the Supreme Court has recognized implied remedies in both the statutory and constitutional contexts. To the extent that implying a remedy under a statute is doctrinally distinct from implying a remedy under the Constitution, each provides a potential framework for implying a remedy under a treaty.

1. The Statutory Analog

Like treaties, many federal statutes—particularly criminal and regulatory laws—impose standards of conduct but fail to expressly authorize civil causes of action.⁹⁹ Although its reasoning has varied, the Supreme Court has been willing at times to imply a right of action under federal statutes in order to

94. Vazquez, *Four Doctrines*, *supra* note 70, at 720.

95. See Vazquez, *supra* note 31, at 1144–45 (explaining that “[t]reaties imposing primary duties without specifying remedies, like similar federal statutory and constitutional provisions, have long been given effect through common law forms of action”).

96. See *id.* at 1146–47 (arguing that because treaties are the law of the land under the Supremacy Clause, they are enforceable through § 1983, which “confers a right of action for damages and injunctive or declaratory relief on persons who have been deprived under color of state law ‘of any rights, privileges, or immunities secured by the Constitution and laws’ of the United States”).

97. See *id.* at 1147–48 (“This provision affords a right of action for equitable or declaratory relief challenging the actions of federal agencies or officials as contrary to law. Treaties are of course federal law and their violation thus produces a ‘legal wrong.’”). It is a debatable point whether § 1983 or the APA are appropriate vehicles for enforcing treaties. According to Yoo, neither § 1983 nor the APA authorizes a cause of action for anything other than violations of constitutional or statutory rights. John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2256 n.140 (1999). For example, § 1983 permits suits against state officials for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” *Id.* (quoting 42 U.S.C. § 1983 (1994)). Similarly, court review under the APA extends to agency action that is “not in accordance with law,” that is “contrary to constitutional right, power, privilege, or immunity,” or that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” *Id.* (quoting 5 U.S.C. § 706(2)(A)–(C) (1994)). Neither statutory vehicle explicitly supports claims based on treaty rights.

98. Vazquez, *supra* note 31, at 1155.

99. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 381 (4th ed. 2003).

effectuate Congress's intent.¹⁰⁰ Professor Erwin Chemerinsky captured the doctrine's development in this way: "There is no dispute that the basic inquiry is whether Congress intended, explicitly or implicitly, to create a private right of action. The controversy has centered on what constitutes sufficient evidence of intent and how restrictive or liberal the Court should be in creating causes of action under statutes."¹⁰¹ In its latest pronouncement on the matter, the Court further retrenched the doctrine, giving it the most restrictive application to date. Writing for the Court in *Alexander v. Sandoval*,¹⁰² Justice Scalia stated that the "judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy" and that "[s]tatutory intent on this latter point is determinative."¹⁰³ The Court ultimately refused to recognize an implied right of action on grounds that the "rights-creating" language so critical to the Court's implied rights analysis was not evident in the statutory text.¹⁰⁴

Noting that "[t]reaty-based claims are better analyzed in a manner analogous to claims under statutes," the Seventh Circuit in *Jogi* adopted the statutory approach to implying rights of action: "[I]f there is an implied private right of action, the claimant can go forward; if not, he must rely on public enforcement measures to vindicate his rights."¹⁰⁵ The court concluded that the text of the Vienna Convention evinced an intention on the part of the drafters to make Article 36 rights individually enforceable.¹⁰⁶ In particular, the court relied on language in Article 36(2), which provides

that the rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, *subject to the proviso, however, that the said laws*

100. *Id.* (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964)). In *Transamerica Mortgage Advisors, Inc. v. Lewis*, the Supreme Court stated: "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction . . . [and] what must ultimately be determined is whether Congress intended to create the private remedy asserted." 444 U.S. 11, 15–16 (1979), *quoted in* CHEMERINSKY, *supra* note 99, at 381–82.

101. CHEMERINSKY, *supra* note 99, at 382.

102. 532 U.S. 275 (2001).

103. *Id.* at 286.

104. *Id.* at 288.

105. *Jogi v. Voges*, 425 F.3d 367, 384 (7th Cir. 2005).

106. *Id.* at 384–85.

and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.¹⁰⁷

Reasoning that no effect would be given to Article 36 without affording a damages remedy to Jogi, the court concluded that an implied private right of action was warranted.¹⁰⁸

2. The Constitutional Analog

Except for the remedy of habeas corpus and just compensation under the Fifth Amendment, the Constitution is noticeably silent with respect to remedies for violations of its provisions.¹⁰⁹ The Supreme Court responded in the seminal case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*¹¹⁰ by implying a private right of action for money damages against federal officers for alleged violations of the Fourth Amendment.¹¹¹ Over the last quarter-century, however, the Court has steadily limited the reach of *Bivens*.¹¹² The driving force behind this retrenchment is the view that the judicial implication of constitutional remedies is tantamount to judicial lawmaking in violation of the separation of powers.¹¹³ In *Correctional Services Corp. v. Malesko*,¹¹⁴ the last case to consider the doctrine, the Supreme Court reasoned that the availability of alternative remedies, whether derived from state tort law or from agency regulations, counseled against further extension of the *Bivens* doctrine.¹¹⁵

107. *Id.* at 385 (quoting Vienna Convention on Consular Relations art. 36(2), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261).

108. *Id.*

109. FALLON ET AL., *supra* note 90, at 796.

110. 403 U.S. 388 (1971).

111. *Id.* at 389.

112. CHEMERINSKY, *supra* note 99, at 595.

113. *See, e.g.,* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.”); *Carlson v. Green*, 446 U.S. 14, 34 (1980) (Rehnquist, J., dissenting) (“In my view, it is an ‘exercise of power that the Constitution does not give us’ for this Court to infer a private civil damages remedy from the Eighth Amendment or any other constitutional provision.”).

114. 534 U.S. 61 (2001).

115. *Id.* at 72–74 (stating that the Court is not “confronted with a situation in which claimants in respondent’s shoes lack effective remedies” and that the “respondent is not a plaintiff in search of a remedy”).

Contrary to the reasoning of the *Jogi* court, Vazquez contends that the test for implying a right of action from treaties should more closely approximate the approach used for constitutional claims.¹¹⁶ It is important to note that at the time he adopted this position, the Court had not yet decided *Malesko*.¹¹⁷ In any event, while *Malesko* might be seen as a significant curtailment of the *Bivens* doctrine in the constitutional context, its reasoning is nevertheless quite expansive when analogized to treaties. If *Malesko* stands for the proposition that an implied right of action is warranted when no alternative remedies are available,¹¹⁸ then courts, applying this proposition to treaties, could imply a right of action from a treaty only when no alternative remedies were available, regardless of the intentions of the parties. Aside from determining whether an individual right exists, this would effectively divorce all further consideration of implied rights of action from any consideration of the treaty's text or the parties' intentions. Even if we accept the more limited application of the *Bivens* doctrine articulated by Vazquez—that is, an implied right of action is appropriate in the absence of a clear legislative intent to make other enforcement mechanisms exclusive¹¹⁹—it is still more far-reaching than in the statutory context where the key consideration is not the absence of a congressional intent to foreclose rights of action but the presence of an affirmative congressional intent to create a right of action.¹²⁰

Vazquez offered four reasons for favoring the more generous constitutional test over the statutory test. First, he argued that treaties more closely resemble the Constitution in that their broad provisions, unlike complex regulatory statutes, do not “partake of the prolixity of a legal code.”¹²¹ Second, he posited

116. Vazquez, *supra* note 31, at 1155–56.

117. In fact, Vazquez cites *Bivens* for the proposition that “courts generally impl[y] a right of action for damages or other appropriate relief, in the absence of a clear legislative intent to make other enforcement mechanisms exclusive.” *Id.* at 1155. This, of course, is a more expansive interpretation of the *Bivens* doctrine than the Court's reasoning in *Malesko*, which appears to foreclose *Bivens* relief unless effective alternative remedies are unavailable. See *Malesko*, 534 U.S. at 72, 74 (rejecting a *Bivens* claim on grounds that the Court is not “confronted with a situation in which claimants in respondent's shoes lack effective remedies” and that the “respondent is not a plaintiff in search of a remedy”).

118. See *supra* notes 115, 117 and accompanying text.

119. See *supra* note 117.

120. See *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (“The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.”).

121. Vazquez, *supra* note 31, at 1156 (internal quotation marks omitted).

that the Framers intended the courts to be the primary enforcers of treaties in the same way that they intended the courts to be the primary enforcers of the Constitution.¹²² Third, unlike statutes but like the Constitution with its rigorous amendment process, Congress cannot easily correct a decision denying a right of action under a treaty.¹²³ Moreover, according to Vazquez, it would be even “less appropriate to impose a clear statement obligation on our treaty partners even with respect to future treaties.”¹²⁴ Finally, he emphasized the need to uphold the nation’s treaty obligations:

[T]he consequences of denying beneficiaries of treaty obligations the power to enforce them in court through a private action are, or should be, of greater concern to the nation, as the failure of the courts to remedy a violation of a foreign national’s primary rights under a treaty would render the United States responsible on the international plane to the state of the individual’s nationality.¹²⁵

Taken together, these reasons call for analogizing treaties to the Constitution when determining whether to imply a right of action for treaty violations. And indeed, Article 36 of the Vienna Convention would easily satisfy Vazquez’s test to the extent that nothing in the language of the Convention itself or in the intentions of the parties signals a clear intent to foreclose an individual right of action in domestic courts. In fact, the proviso in Article 36(2) that the “laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended”¹²⁶ could reasonably be read to invite rights of action in court, not to make other enforcement mechanisms, like diplomacy or war, exclusive.

B. *Defenses*

Thus far, this Note has examined the various possibilities by which a right of action might be implied from the terms of a treaty that does not expressly provide for one. A right of action

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Jogi v. Voges*, 425 F.3d 367, 385 (7th Cir. 2005) (quoting Vienna Convention on Consular Relations art. 36(2), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261) (emphasis omitted).

is not always needed to enforce treaty obligations, however. As Vazquez has pointed out, individuals may enforce treaties defensively if they are being sued or prosecuted pursuant to a statute or in such a manner that is inconsistent with the terms of a treaty.¹²⁷ This was the case in both *Sanchez-Llamas* and *Bustillo* where both defendants asserted the Vienna Convention right to consular notification as a defense to prosecution or imprisonment.¹²⁸ As with rights of action, the problem with enforcing treaties in the context of a defense to suit or prosecution is, again, the absence of a specific remedy. Of course, it may be conceded that if enforcement of a state law would violate a treaty, then courts are obligated under the Supremacy Clause to enjoin further enforcement of the law.¹²⁹ Similarly, “if the beneficiary of a treaty-based primary right were deemed not to possess a right of action, he would nevertheless be free to resist a deprivation of liberty or property that violates the treaty and to invoke the treaty as a defense to a government coercive proceeding.”¹³⁰

In fact, courts have regularly enjoined either the enforcement of a state law or the continued imprisonment of an individual on grounds that such enforcement or imprisonment violated a treaty, even though the terms of the treaty did not expressly provide for injunctive relief.¹³¹ But the critical distinction here is that the relief sought is prospective—that is, the defendant is asking the court to enjoin further violations of the treaty. This mode of relief follows quite naturally from the Supremacy Clause’s mandate that treaties are supreme with respect to state

127. Vazquez, *Four Doctrines*, *supra* note 70, at 720.

128. *See supra* text accompanying note 21.

129. Indeed, if anything is clear from the history of the Supremacy Clause, it is that the clause was intended to preempt inconsistent state law. *See supra* Part II.B; *see also* Vazquez, *supra* note 31, at 1143 (stating that “it is clear that the Framers intended that a treaty would nullify any inconsistent state law” and that defendants being prosecuted or sued under that law are entitled to invoke the treaty in court to nullify the law without having to show that the treaty confers a right of action).

130. Vazquez, *supra* note 31, at 1143–44.

131. *See, e.g.,* *Asakura v. Seattle*, 265 U.S. 332, 343 (1924) (enjoining enforcement of a city ordinance against Asakura because it violated a treaty); *Johnson v. Browne*, 205 U.S. 309, 319–20 (1907) (invalidating Browne’s imprisonment on grounds that the relevant treaty prohibited trial for crimes other than the offense for which he was extradited); *United States v. Rauscher*, 119 U.S. 407, 422–23 (1886) (holding that under the extradition treaty at issue, Rauscher could only be tried for the crime for which he was extradited). It is well-established that courts have the power to enjoin governmental officials in order to halt further violations of federal law. *See, e.g., Ex parte Young*, 209 U.S. 123, 155–56 (1908) (holding that federal courts may enjoin officials acting under the color of state law from violating the Constitution).

law, but it is fundamentally different from a remedy that is retroactive, whereby the defendant seeks compensation for a past treaty violation.¹³² Sanchez-Llamas, for instance, did not challenge the prospective enforceability of the criminal statutes with which he had been charged; instead, he sought a retroactive remedy—the exclusion of incriminating evidence—for a discrete violation of the Vienna Convention that was no longer ongoing.¹³³ A “defense” in this sense is more akin to a right of action for compensatory relief, and to the extent that the treaty fails to specify a remedy, the court would need to imply one. In short, for purposes of the analysis that follows, it makes no difference whether individuals seek a right of action or whether they seek other relief, such as the exclusion of evidence in a criminal proceeding. If the remedy sought is retroactive, then courts must look to the treaty to determine whether it confers individual relief. If it does not, then they must consider whether or not to imply a remedy.

IV. TREATY-BASED RIGHTS AND REMEDIES AND THE CLEAR STATEMENT RULE

Although criticism of the doctrine is well documented,¹³⁴ the Supreme Court has nevertheless been willing, albeit reluctantly, to imply remedies in both the statutory and constitutional contexts.¹³⁵ Because treaties perform a dual role as instruments

132. This might seem to be a muddy distinction, but it is not superficial. Whether to enjoin further violations of the law only requires a determination that the law has been violated. Whether and how to remedy past violations of the law, however, requires considerations of policy that are generally the province of legislatures—that is, to what damages should the injured party be entitled, what level of deterrence is appropriate, and so forth. Indeed, the Supreme Court has distinguished between prospective and retroactive relief in other contexts—for example, when determining whether state sovereign immunity bars claims against state officers acting in their official capacity for violations of federal law. *See* *Edelman v. Jordan*, 415 U.S. 651 (1974) (limiting the rule announced in *Ex Parte Young*, 209 U.S. 123 (1908), which upheld an equitable cause of action against state officials acting in their official capacity, only to suits for prospective injunctive relief); *see also* *Breard v. Greene*, 523 U.S. 371, 377–78 (1998) (holding that state sovereign immunity barred Paraguay’s suit against a Virginia official to enjoin the execution of a Paraguayan national on grounds that the alleged violation of the Vienna Convention had no “continuing effect” and that the injunction to stop the execution would therefore be retroactive).

133. Specifically, Sanchez-Llamas moved to suppress statements that he made to police because the statements were made involuntarily and because the authorities failed to comply with Article 36 of the Vienna Convention. *See* *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2676 (2006).

134. *See, e.g., supra* note 113.

135. *See supra* Part III.A.

of both international and domestic law, however, there are structural and institutional concerns that counsel against implying remedies in the treaty context. To mitigate these concerns, courts must tread lightly when deciding whether to grant individual relief for violations of a treaty-based right. This Note proposes a clear statement rule: Courts should grant a remedy only when the unmistakable intent of the parties provides for judicial relief. Any ambiguity should be resolved by denying the remedy sought and leaving the matter to the political branches. In effect, this clear statement rule incorporates the long-established presumption that treaties are compacts among nations enforceable only on the international plane¹³⁶ by requiring the contracting parties to make explicit their intent to overcome the presumption.

A. Note on Treaty Interpretation

It is important to note at the outset that the rule of construction proposed here, which requires a clear expression of the parties' intent to authorize judicial relief for treaty violations, is not inconsistent with the prevailing canons of treaty interpretation. The Supreme Court has made clear that the intent of the parties is the controlling consideration: "The clear import of treaty language controls *unless* 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'"¹³⁷ Furthermore, in order to ascertain the parties'

136. See *supra* note 93 and accompanying text; see generally *supra* Part II.A.

137. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)) (emphasis added); see also Moore, *supra* note 49, at 202–03 (noting the line of Supreme Court cases "suggesting that treaties are to be interpreted according to the intention of the parties or the principles of public international law, and that the scope of the treaty power is related to agreement among nations"). Justice Scalia has justifiably criticized the Court's rule in *Sumitomo* that the intent of the parties trumps the obvious meaning of the treaty text. See *United States v. Stuart*, 489 U.S. 353, 371–73 (1989) (Scalia, J., concurring in the judgment) (arguing that the Court was mistaken to say in *Sumitomo* that "had the extrinsic evidence contradicted the plain language of the Treaty it would govern"); see also *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (writing for the majority that "[w]e must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history"). This has prompted an ongoing debate generally between those, like Justice Scalia, who prefer a textualist or formalist approach to treaty interpretation and those who prefer to interpret treaties in line with more flexible contract principles. For a comprehensive overview of the issues involved in the debate over treaty interpretation, see Bederman, *supra* note 83; Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998); Curtis J. Mahoney, Note, *Treaties as Contracts: Textualism, Contract*

intent, courts “may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.”¹³⁸ Neither of these interpretive canons is foreclosed by the clear statement rule at issue here. Indeed, the proposed rule invites consideration of the parties’ intent, which as a practical matter includes consideration of evidence beyond the four corners of the treaty. Nevertheless, the clear statement rule requires an unequivocal expression of the parties’ intent, where any ambiguity, whether in the text of the treaty itself or in the negotiation history, is resolved by withholding relief and deferring to the political branches. In other words, the clear statement rule does not limit what evidence may be considered; instead, it heightens the burden of proof required for a finding that the parties intended to authorize judicial relief.

In addition to making the parties’ intent the lodestar of treaty interpretation generally, the Court has long taken a rather liberal approach to the interpretation of treaty-based rights. For instance, in *Bacardi Corp. of America v. Domenech*,¹³⁹ the Court reaffirmed in dicta a presumption in favor of granting treaty rights: “[W]e should construe the treaty liberally to give effect to the purpose which animates it. 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.”¹⁴⁰ In other words,

Theory, and the Interpretation of Treaties, 116 YALE L.J. 825 (2007). In any event, this Note accepts as a given that the intent of the parties controls the meaning of the treaty in accordance with *Sumitomo*.

138. *Air France v. Saks*, 470 U.S. 392, 396 (1985) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943)); see also *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933) (“In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it . . .”).

139. 311 U.S. 150 (1940).

140. *Id.* at 163; see also *Air France*, 470 U.S. at 396 (“[Treaties] are construed more liberally than private agreements . . .” (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431 (1943))). This rule of treaty interpretation goes back well over a century. In *Geofroy v. Riggs*, a late nineteenth century case, the Court declared:

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. As they 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. And it has been held by this court that

ambiguity is resolved in favor of the broadest interpretation of the right at issue.

Despite appearances to the contrary, the Court's expansive interpretative approach to treaty rights is not necessarily inconsistent with the proposed clear statement rule. The former concerns the scope or existence of the right; whereas, the latter concerns the means of enforcement.¹⁴¹ Thus, a liberal interpretative approach for determining the existence of a treaty-based right does not necessarily warrant a similar interpretative approach for determining the existence of a treaty-based remedy. This is hardly a trivial distinction. After all, despite the normative proposition that every violation of a legal right deserves a remedy,¹⁴² it is a well-known fact of the legal system that rights oftentimes go unremedied, even when the relevant legal text expressly provides for relief.¹⁴³ This is because countervailing structural interests that restrain judicial power, such as democratic accountability, federalism, and the separation of powers, are at stake. Thus, for example, the state sovereign immunity doctrine implicates federalism interests,¹⁴⁴ and the Court's justiciability doctrines stem from separation of

where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred. 133 U.S. 258, 271–72 (1890).

141. This distinction is evident in the Seventh Circuit's decision in *Jogi v. Voges*. Citing the proposition that the more liberal interpretation is to be preferred, the court concluded that the Vienna Convention confers an individual right. *Jogi v. Voges*, 425 F.3d 367, 382 (7th Cir. 2005). Nevertheless, it proceeded to determine separately whether Jogi was entitled to enforce the right in a private action in court. *Id.* at 384. In short, the court treated whether the right existed as a distinct question from whether it could be enforced in the manner sought.

142. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); see also THE FEDERALIST NO. 43 (James Madison), *supra* note 50, at 220 ("But a right implies a remedy . . .").

143. See 1 TRIBE, *supra* note 46, at 599–600 (noting that the remedial power of courts is limited by such doctrines as standing and justiciability, rules of personal jurisdiction, statutes of limitations, pleading requirements, restrictions on the circumstances in which a judgment may be subject to collateral attack, restraints on appealability, and sovereign immunity); see also Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1780 (1991) ("[T]he structure of substantive, jurisdictional, and remedial doctrines that existed at the time of the Constitution's framing and that evolved through the nineteenth century by no means guaranteed effective redress for all invasions of legally protected rights and interests.").

144. See *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 760 (2002) ("The preeminent purpose of [sovereign immunity] is to accord States the dignity that is consistent with their status as sovereign entities.").

powers considerations.¹⁴⁵ To be sure, as Professor Laurence Tribe has pointed out, “[t]he fact that remedies are not available in *every* case does not mean that they need not be available as a general matter.”¹⁴⁶ Despite its normative appeal, however, the goal of making remedies generally available cannot come at the expense of the structural interests evident in the Constitution. These interests are particularly relevant when courts must decide whether to imply a remedy because the relevant legal text has failed to provide one.¹⁴⁷ Because the remedial power of courts is limited by constitutional design, it is therefore not inconsistent to apply a liberal interpretative approach to rights and a more restrictive approach to remedies.

Even if the clear statement rule at issue here constrains the courts’ ability to remedy violations as a practical matter, it will not necessarily undermine the Court’s precedent favoring the liberal interpretation of treaty-based rights. This is because courts still have the power to protect those rights by granting injunctive relief.¹⁴⁸ Furthermore, even if injunctive relief is unavailable in the courts, the aggrieved party—that is, the nation of the aggrieved individual—may still seek redress by resorting to the normal tools of international politics—namely, diplomacy or war.¹⁴⁹ In short, alternative means of enforcement, even if unavailable or impractical in certain circumstances, will nevertheless give courts sufficient reason to continue the practice of interpreting treaty-based rights liberally despite whatever restraining influence a clear statement rule regarding remedies might have.

In any event, even if both interpretative approaches are in tension with one another—and indeed, this is not an unreasonable conclusion to draw—then the liberal

145. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (explaining that the “words [‘cases and controversies’] define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government”).

146. 1 TRIBE, *supra* note 46, at 600.

147. See *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 508 n.9 (1990) (“Congress rather than the courts controls the availability of remedies for violations of statutes.”); *Carlson v. Green*, 446 U.S. 14, 34 (1980) (Rehnquist, J., dissenting) (“In my view, it is ‘an exercise of power that the Constitution does not give us’ for this Court to infer a private civil damages remedy from the Eighth Amendment or any other constitutional provision.”); see also CHEMERINSKY, *supra* note 99, at 380 (“The Court’s reluctance to create causes of action reflects both separation of powers and federalism concerns.”).

148. See *supra* note 131 and accompanying text.

149. See *supra* Part II.A.

interpretative approach, despite its pedigree, must give way to the clear statement rule. Quite simply, the clear statement rule must prevail because it stems, for reasons outlined below, from structural interests that underlie the Constitution. This is not the case with a rule of construction requiring that treaty rights be liberally construed. Such a rule stems largely from prudential, as opposed to constitutional, considerations regarding the need “to secure equality and reciprocity”¹⁵⁰ between the treaty parties.

B. *The Case for a Clear Statement Rule*

As a substantive canon of construction, clear statement rules are hardly anything new.¹⁵¹ The Supreme Court has relied on the clear statement canon in numerous contexts involving troublesome constitutional issues.¹⁵² In *Quern v. Jordan*, for instance, the Court insisted on a clear statement of congressional intent to abrogate state sovereign immunity.¹⁵³ In *Pennhurst State School & Hospital v. Halderman*, the Court imposed a clear statement requirement on congressional efforts to attach conditions on federal money flowing to the states.¹⁵⁴ In *Gregory v. Ashcroft*, the Court established a clear statement rule regarding congressional regulation of core state functions.¹⁵⁵ In *INS v. St. Cyr*, the Court required Congress to articulate “specific and unambiguous statutory directives” to effectuate a repeal of

150. *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890).

151. Unlike textual or linguistic canons of construction, clear statement rules are “substantive canons” that “encod[e] some sort of value judgment.” Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 745 (2004).

152. For an exhaustive accounting of the Court’s presumptions, clear statement rules, and “super-strong” clear statement rules, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

153. 440 U.S. 332, 345 (1979). In *Atascadero State Hospital v. Scanlon*, the Court concluded that “Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.” 473 U.S. 234, 242 (1985). According to Eskridge and Frickey, the clear statement rule governing congressional abrogation of sovereign immunity underwent a “steroidal transformation” as a result: “What had once been a presumption-based approach to resolve federal statutory ambiguity—after statutory language, legislative history, and other factors were consulted—became a super-strong clear statement rule focusing on statutory language alone and requiring a very clear statement by Congress.” Eskridge & Frickey, *supra* note 152, at 621.

154. 451 U.S. 1, 17 (1981) (“[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”).

155. 501 U.S. 452, 467 (1991) (holding that the federal Age Discrimination in Employment Act did not apply to a state’s choice of judges and that the Court would infer a congressional intent to do so only if it were “plain to anyone reading the Act that it covers judges”).

habeas jurisdiction.¹⁵⁶ The list goes on, of course, but the important point is that the Court relies on clear statement rules to balance competing constitutional interests and to avoid constitutionally troublesome interpretations of federal law that would otherwise upset the structural balance between federal and state governments or between the branches of government.¹⁵⁷ Thus, for instance, the Court protects state autonomy from excessive congressional interference by requiring a clear statement of Congress's intent to do a host of things ranging from abrogating state sovereign immunity to regulating core state functions.¹⁵⁸ Similarly, in the separation of powers context, the Court shields judicial autonomy from congressional intrusion by requiring a clear statement of Congress's intent to strip habeas jurisdiction.¹⁵⁹ This is not to say that Congress is powerless to abrogate sovereign immunity¹⁶⁰ or to strip courts of habeas jurisdiction; rather, clear statement rules help preserve structural boundaries by requiring Congress to consider carefully the implications of its actions vis-à-vis the states or other branches of the federal government. As Tribe explains, "[B]y refusing to construe ambiguous legislation expansively, the Court can effectively prevent Congress from avoiding hard questions" regarding important, and often underenforced, structural norms.¹⁶¹

156. 533 U.S. 289, 299 (2001).

157. See 1 TRIBE, *supra* note 46, at 856 ("Although only a principle of construction (even if constitutionally derived), the clear statement rule reshapes the judicial landscape by installing a strong presumption against changes in the traditional federal-state balance."). This rationale naturally applies to changes in the traditional balance between the branches of government as well.

158. See *supra* notes 153–155 and accompanying text.

159. See *supra* note 156 and accompanying text.

160. In *Fitzpatrick v. Bitzer*, the Court held that Congress could abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment. 427 U.S. 445 (1976). But in *Seminole Tribe of Florida v. Florida*, the Court refused to extend Congress's power to abrogate state sovereign immunity to Article I. 517 U.S. 44 (1996).

161. 1 TRIBE, *supra* note 46, at 856. According to Professors Eskridge and Frickey: [S]tructural constitutional protections, especially those of federalism, are underenforced constitutional norms. They are essentially unenforceable by the Court as a direct limitation upon Congress's power, and are best left to the political process. But the Court may have a legitimate role in forcing the political process to pay attention to the constitutional values at stake, and super-strong clear statement rules are a practical way for the Court to focus legislative attention on these values.

Eskridge & Frickey, *supra* note 152, at 597; see also Yoo, *supra* note 97, at 2257 (explaining that a clear statement rule "requires the political branches to deliberate before they decide to take an action that undermines the constitutional text and structure").

Not all clear statement rules are the same, however. Depending on the issues involved, the Court has imposed more stringent clear statement requirements in some situations and less stringent requirements in others.¹⁶² Professors William Eskridge and Philip Frickey have distinguished between clear statement rules and what they call “super-strong” clear statement rules. The super-strong rules “require a clearer, more explicit statement from Congress in the text of the statute, without reference to legislative history,” than the normal clear statement rules.¹⁶³

The clear statement rule proposed here, however, does not purport to be a super-strong rule. Unlike the super-strong clear statement rule that Eskridge and Frickey describe, the proposed rule accommodates well-established principles of treaty interpretation¹⁶⁴ by allowing courts to look beyond the text of the treaty to the negotiating history in order to discern the intent of the parties.¹⁶⁵ In this sense, it is no different than the normal clear statement rule, which permits courts to consider legislative history. Although this treaty-based clear statement rule does not limit what evidence may be used, it nevertheless raises the burden of proof needed to determine the parties’ intent. Thus, courts should not grant remedies for violations of treaty-based rights unless there is an unmistakably clear expression of the parties’ intent to provide for judicial enforcement either by mandating that domestic courts are to remedy violations of treaty rights or by specifying remedies that are traditionally cognizable by courts. Although the intent of the signatories is the determinative consideration, the text of the treaty itself must weigh heavily in the analysis. After all, as Justice Scalia has explained, “an agreement’s language is the best evidence of its purpose and its parties’ intent.”¹⁶⁶ Nevertheless, if the treaty language is ambiguous, the ambiguity may be resolved if there is an unmistakably clear expression of intent in the negotiating history to authorize judicial enforcement. Any reasonable ambiguity, however, must be resolved by withholding

162. See Eskridge & Frickey, *supra* note 152, at 597 (noting that the Court has created a series of new “super-strong clear statement rules” to protect constitutional structures, especially federalism).

163. *Id.*; see *supra* note 153.

164. See *supra* note 138 and accompanying text.

165. See *supra* Part IV.A.

166. *United States v. Stuart*, 489 U.S. 353, 372 (1989) (Scalia, J., dissenting).

relief and deferring to the political branches. In other words, courts may not infer treaty-based remedies from otherwise unclear text or negotiating history. Like all clear statement rules, the proposed rule does not bar the parties from creating judicially enforceable rights so long as they unequivocally provide for enforcement by domestic courts. This is not to say that individual remedies must be explicitly provided in the text of the treaty itself; rather, there must be, at the very least, an unmistakably clear expression in the treaty's negotiating history of the parties' affirmative intent to provide such remedies.¹⁶⁷ In this sense, the proposed clear statement rule is distinguishable from the Court's statutory and constitutional implied rights doctrines, both of which permit courts to infer rights of action in the absence of a clear, affirmative expression of the lawmakers' intent to do so.¹⁶⁸

To be sure, clear statement rules are not free of criticism. Justice Scalia, for instance, argues that "[t]o the honest textualist, all of these preferential rules and presumptions are a lot of trouble."¹⁶⁹ Specifically, he levels his criticism at the unpredictability and arbitrariness that these rules of construction engender:

It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight. . . . [H]ow clear is an "unmistakably clear" statement? There are no answers to these questions, which is why these artificial rules increase the unpredictability, if not the arbitrariness, of judicial decisions.¹⁷⁰

Indeed, this is a powerful criticism about which there is much to be sympathetic. Like so many other areas of human endeavor, there is imprecision in language. But it cannot be the case, as

167. Accommodating the long-standing rule of treaty interpretation whereby courts may look to the negotiating history when the text is ambiguous in order to discern the parties' intent will not undermine the clear statement rule proposed here. Indeed, given the back and forth of treaty negotiations, it is far more likely that the negotiating history will rarely, if ever, evince the clarity necessary to satisfy the clear statement requirement. As mentioned previously, any ambiguity in the negotiating history must be resolved by withholding relief.

168. See *supra* Parts III.A.1–2.

169. Scalia, *supra* note 38, at 28.

170. *Id.*

Justice Scalia seems to believe, that “[e]very statute that comes into litigation is to some degree ‘ambiguous.’”¹⁷¹ If this were so, then there would be no reason to be an honest textualist. After all, if all legal texts that enter litigation are reasonably susceptible to more than one interpretation, then judges must resort to other tools of interpretation to decide cases. This would hardly bring about predictability. If anything, clear statement rules enhance predictability by cabining judicial discretion. For instance, if a legal text is ambiguous and there is no clear statement rule, then judges have complete discretion to apply the interpretation they wish. However, if a legal text is ambiguous but a clear statement rule is in force, then there is only one outcome: judges are barred from giving effect to the ambiguous text.

Even if the clear statement canon brings about at least some predictability in judicial decisionmaking, there still remains the question of when it should apply. It certainly cannot apply in all cases, for even though many legal texts are not ambiguous, there are many legal texts that are. Ambiguity must be resolved somehow, and that responsibility generally falls to the courts. Certainly, judges should not have unfettered discretion to apply clear statement rules whenever they like; nevertheless, there are structural considerations, which derive from the Constitution, as well as institutional considerations that may at times counsel in favor of a clear statement requirement. Indeed, even Justice Scalia concedes that clear statement rules may be justified under certain conditions.¹⁷² For instance, he argues that some clear statement rules may simply be “exaggerated statement[s] of what normal, no-thumb-on-the-scales interpretation would produce anyway.”¹⁷³ By way of example, Justice Scalia points to state sovereign immunity: “[S]ince congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a ‘clear statement’ rule is merely normal interpretation.”¹⁷⁴ Of course, the same could be

171. *Id.*

172. *See id.* (noting that perhaps some clear statement rules “are a fair price to pay for preservation of the principle that one should not be held criminally liable for an act that is not clearly proscribed; or the principle that federal interference with state sovereign immunity is an extraordinary intrusion”).

173. *Id.* at 29.

174. *Id.*

said of treaty rights and remedies. Because the creation of judicially enforceable treaty-based rights is an extraordinary act given the traditional role of treaties as contracts between nations and given the significant structural and institutional interests at stake, one would naturally expect it to be explicitly decreed. In this sense, according to Justice Scalia, a clear statement rule would merely be normal interpretation. But even if this rationale is unsatisfying, some clear statement rules may nonetheless be justified as a means of enforcing otherwise underenforced structural and institutional norms relating to democratic accountability, federalism, and the separation of powers.¹⁷⁵ This would allow courts to use clear statement canons in order to protect important structural interests derived from the Constitution without giving judges unbounded discretion. The fact that these structural interests, coupled with institutional interests, are so strongly implicated in the context of treaty-based rights and remedies justifies the clear statement rule proposed here.

1. Structural Argument

By making treaties operative domestically, the Supremacy Clause invites structural disharmony on three fronts. First, it invites courts to make treaties equivalent to both the Constitution and federal statutes, even though treaties have an inferior democratic pedigree relative to those other classes of federal law. Second, it invites treatymakers to reach beyond the enumerated powers of Congress and thus regulate matters within the traditional jurisdiction of the states. Third, it invites treatymakers to exercise Article I powers vested in Congress, even though treaty-making is an Article II power vested in the President. In short, there is tension between treaty-making, on one hand, and important structural principles such as the democratic hierarchy of federal law, federalism, and the separation of powers, on the other. An expansive approach to treaty interpretation analogous to the implied right of action doctrines employed in the statutory and constitutional contexts would only exacerbate this tension. For this reason, courts should employ a clear statement rule of construction that forbids judicial implication of treaty-based remedies. This would

175. *See supra* note 161.

allow courts to give effect to clearly expressed treaty-based relief, while guarding against judicial interpretations of treaties that push the boundary between the treaty power, on one hand, and important structural principles, on the other.

a. *The Democratic Hierarchy of Federal Law*

It is the conventional wisdom that the Supremacy Clause makes treaties equivalent to federal statutes. As Professor Michael Van Alstine put it: “Contrary to the sovereign contract paradigm . . . , self-executing treaties are properly viewed as the formal and functional equivalent of Article I legislation. Like statutory law, these treaties by definition involve the government’s creation of individual rights (or obligations), and are enforceable in court at the behest of or against individuals.”¹⁷⁶ This is a quite reasonable view. After all, besides the caveat that the laws of the United States be made in pursuance of the Constitution and besides what might be implicit in the lexical ordering, the text of the Supremacy Clause itself makes no otherwise hierarchical distinctions between the Constitution, laws, and treaties; instead, it recognizes all three as the “supreme Law of the Land.”¹⁷⁷ Indeed, the Supreme Court has even declared that statutes and treaties are equal. In *Foster v. Neilson*, for instance, the Court made clear that a self-executing treaty was “to be regarded in courts of justice as equivalent to an act of the legislature.”¹⁷⁸ The Court in the *Head Money Cases* was more emphatic:

A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice,

176. Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1274 (2002); see also CORWIN, *supra* note 83, at 171 (“Being ‘law of the land’ the provisions of a treaty may . . . be enforced in court like any other law when private claims are based upon them”); Vazquez, *supra* note 31, at 1085 (“Consistent with the Supremacy Clause’s equivalent treatment of the Constitution, treaties, and the acts of Congress”); Vazquez, *Four Doctrines*, *supra* note 70, at 700 (“By virtue of the Supremacy Clause, treaties of their own force nullify inconsistent state laws and earlier federal laws, and the judicial mechanisms available generally to enforce laws in the United States are available to enforce treaties.”); Vazquez, *Eleventh Amendment*, *supra* note 70, at 733 (noting that the Supremacy Clause and Article III “make no distinction between statutes and treaties”).

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

178. 27 U.S. 253, 314 (1829).

that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.¹⁷⁹

In *The Chinese Exclusion Case*, the Supreme Court treated acts of Congress and treaties as legal equivalents by holding that, when a conflict arises between the two, “the last expression of the sovereign will must control.”¹⁸⁰ This “last-in-time rule” makes a later-enacted statute superior to a prior treaty and a later-enacted treaty superior to a prior statute.¹⁸¹

Although reasonable, the notion that treaties and statutes are equivalent is not a foregone conclusion.¹⁸² Indeed, upon closer examination, it is not at all clear that the text of the Supremacy Clause compels equivalence between the two. Article VI provides that the Constitution, laws of the United States, and all treaties “shall be the supreme Law of the Land.”¹⁸³ But even though the Constitution grants supremacy to all three forms of law, it does not follow that each are equivalent with respect to the others. As Henry St. George Tucker pointed out almost a century ago,

It would seem impossible that three unlimited, uncontrolled supreme powers could coexist in one constitution or in one government; for the grant of “supremacy” to one negatives the grant of the same “supremacy” to another; for if the grant of “supremacy” to the second be valid, it must operate as a denial of the grant to the first, for “supremacy” admits no superiority or control.¹⁸⁴

179. *Edey v. Robertson (Head Money Cases)*, 112 U.S. 580, 598–99 (1884).

180. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 600 (1889); *see also* *Cook v. United States*, 288 U.S. 102 (1933); *Whitney v. Robinson*, 124 U.S. 190 (1888); *Head Money Cases*, 112 U.S. at 580; 1 *TRIBE, supra* note 46, at 644–45.

181. *Kesavan, supra* note 40, at 1481. *Tribe* points out that a conflict between a non-self-executing treaty and a previously enacted statute may be illusory, “for the statute remains the law of the land until legislation is enacted implementing the treaty.” *TRIBE, supra* note 46, at 645. “At that point,” he says, “the earlier statute would be superseded by the later statute, rather than by the treaty itself.” *Id.* This may be so, but here, we are concerned with self-executing treaties. Based on the Court’s reasoning, therefore, a subsequent self-executing treaty would automatically trump a conflicting statute. *See* ROBERT T. DEVLIN, *THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES* 197 (Fred B. Rothman & Co. 1996) (1908) (noting that if there is an inconsistency between a statute and a treaty, “the one last in date will control the other, *if the stipulation on the subject in the treaty is self-executing*” (emphasis added)).

182. For a persuasive textual, historical, and structural argument that, contrary to the Court’s well-established jurisprudence, statutes are in fact superior to treaties, see *Kesavan, supra* note 40.

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

184. HENRY ST. GEORGE TUCKER, *LIMITATIONS ON THE TREATY-MAKING POWER* 77 (1915).

Unsurprisingly, the Supreme Court has held that, although the Supremacy Clause declares all three to be the supreme law, the Constitution is nevertheless superior to the others.¹⁸⁵ If this is so, then what basis is there for concluding that statutes and treaties are legal equivalents? It is difficult to find an answer. For their part, early decisions such as *Foster* and the *Head Money Cases* largely assumed without further explication that statutes and treaties were constitutionally equivalent. Extrapolating this general principle from the Supremacy Clause alone, however, fails to account for the Constitution as a whole. Tucker explained the basic problem: Erroneous interpretations of the Supremacy Clause “come from the consideration of this clause by itself as if it were an independent, separate paper, without the important consideration that it was a part, and only a part of an instrument, which must be construed in its relation to all other sections of it in its entirety.”¹⁸⁶

Looking beyond the text of the Supremacy Clause, therefore, one finds that the Constitution implicitly creates a democratic hierarchy of federal law. This is most evident in the level of democratic participation required to enact or amend each class of federal law. The Constitution, for example, is amended by two-thirds of each House of Congress and then by three-fourths of the states.¹⁸⁷ Statutes are enacted by a majority of both Houses with the consent of the President.¹⁸⁸ Treaties are enacted by the President with the advice and consent of two-thirds of the Senate.¹⁸⁹ It would make little sense that treaties would have the same legal status as the Constitution when all that is required for their enactment is the President with two-thirds of the Senate. Indeed, the Supreme Court has already held that the Constitution is superior to treaties.¹⁹⁰ This is largely because, as fundamental law, the Constitution has a “superior democratic

185. *See, e.g., Reid v. Covert*, 354 U.S. 1, 16 (1957) (stating that neither a treaty nor an executive agreement “can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution”); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (“The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument It would not be contended that it extends so far as to authorize what the Constitution forbids . . .”).

186. TUCKER, *supra* note 184, at 74.

187. U.S. CONST. art. V.

188. *Id.* art. I, § 7, cl. 2.

189. *Id.* art. II, § 2, cl. 2.

190. *See supra* note 185 and accompanying text.

pedigree” relative to treaties in the sense that more democratic participation is required to enact or amend the Constitution than to enact treaties.¹⁹¹ Similarly, it would make little sense to equate the legal status of treaties with the legal status of statutes when statutes require a majority of both Houses and the consent of the President.¹⁹² Just as the Constitution has a superior democratic pedigree relative to both treaties and statutes, so also do statutes have a superior democratic pedigree relative to treaties.¹⁹³ “After all,” as Professor Akhil Reed Amar has pointed out, “treaties cut the House of Representatives out of the loop.”¹⁹⁴

That the House is excluded from the treaty-making process is no small matter. As Amar notes, “Both English and colonial tradition regarded the lower branch of a bicameral legislature as the people’s house, the institution most closely in touch with the voters, thanks to direct election, wide membership, and short terms of service.”¹⁹⁵ Moreover, the fact that treaties require a two-thirds vote in the Senate does not cure the treaty-making process of its “democratic deficit” relative to the lawmaking process.¹⁹⁶ First, until the adoption of the Seventeenth Amendment in 1913, the senators were elected by state legislatures, not by the people directly.¹⁹⁷ That senators are now popularly elected does not change the original understanding that the treaty-making process was generally undemocratic.¹⁹⁸ Second, because the states have equal representation despite the dramatic population

191. AMAR, *supra* note 84, at 303.

192. Interestingly, despite proclaiming that a treaty is the “law of the land as an act of Congress is,” the Court in the *Head Money Cases* suggested that statutes might nevertheless be entitled to more respect than treaties:

A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate.

Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598–99 (1884).

193. AMAR, *supra* note 84, at 303; *see also* Kesavan, *supra* note 40, at 1612–15 (arguing in greater detail that “the lawmaking process may be justly characterized as more democratic than the treaty-making process”).

194. AMAR, *supra* note 84, at 303.

195. *Id.*

196. Kesavan, *supra* note 40, at 1613 (quoting Yoo, *supra* note 6, at 2073).

197. *Id.*

198. *See id.* (“The Founding generation would be shocked with any characterization of the treaty-making process as democratic, let alone equally democratic to the lawmaking process.”).

disparities that exist among them, the Senate is the least democratic house of Congress.¹⁹⁹ Third, a majority of the House is still more representative in quantitative terms than a supermajority of the Senate.²⁰⁰

Of course, the Senate's exclusive role in the treaty-making process was not an accident. Treaties, after all, are contracts between sovereign nations. Because they involve sensitive matters relating to foreign affairs, the Framers established a separate, more streamlined mechanism for enacting them.²⁰¹ The legal status of treaties relative to the Constitution and federal statutes is thus partly a function of the dual role of treaties as instruments of both international law and domestic law. In sum, once the Supremacy Clause is construed as merely one piece of a larger structural whole, a very different picture emerges, casting doubt on the longstanding conventional wisdom that treaties and statutes are created equal.

As for the text of the Supremacy Clause itself, the most that can be said definitively is that the Constitution, laws of the United States, and all treaties are supreme with respect to state

199. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 50–53 (2006) (explaining in detail why the central problem with the Senate is the requirement that each state, despite gross population disparities, has two senators with each having one vote).

200. See Kesavan, *supra* note 40, at 1613 (“At the Founding, the lawmaking process was roughly three times more participatory than the treaty-making process; today, it is roughly five times more participatory. On this basis, the treaty-making process’s two-thirds supermajority consent requirement (today, seventeen extra Senators) is a hopeless substitute for a majority of the entire House . . .”).

201. According to John Jay in *The Federalist No. 64*:

It seldom happens in the negotiation of treaties of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. . . . The convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

THE FEDERALIST NO. 64 (John Jay), *supra* note 50, at 327. In *The Federalist No. 75*, Alexander Hamilton explained why the House of Representatives should not share in the formation of treaties:

The . . . multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, *secrecy* and *dispatch*; are incompatible with the genius of a body so variable and so numerous. The very complication of the business by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection.

THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 50, at 381–82.

law.²⁰² It follows, therefore, that all three categories of federal law are equivalent in the sense that they are superior to state law, but it does not necessarily follow that they are equivalent with respect to each other. In fact, it might be said that the Supremacy Clause implicitly supports a democratic hierarchy among the three classes of federal law.²⁰³ Chief Justice Marshall implied as much when he noted that it is “not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned.”²⁰⁴ If this is so, then “[i]t is also worth observing that statutes are mentioned second and treaties third.”²⁰⁵ Although the textual ordering alone cannot be dispositive, it nevertheless lends weight to the structural argument that treaties are subordinate to statutes by virtue of their inferior democratic pedigree.

Precedent as well as historical understanding provide further evidence of the inferior status of treaties. The most notable example is the Court’s own self-execution doctrine:

[M]odern judges already do implicitly acknowledge the primacy of statutes over treaties, and the pivotal role of the House of Representatives, in one of the foundational doctrines of American treaty law, which deems certain treaties to be “non-self-executing.” Such treaties are understood to require

202. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and *the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*” U.S. CONST. art. VI, cl. 2 (emphasis added); see also Yoo, *supra* note 97, at 2220 (“The text of the Supremacy Clause . . . only declares that treaties, like the Constitution and federal statutes, are superior to state law.”).

203. See Kesavan, *supra* note 40, at 1499–1503 (arguing in greater detail that “there is a distinct ‘plus,’ or thumb on the scale, in favor of the three tiers of federal law thesis as a matter of textual argument”). Amar makes the point this way:

By allowing federal treaties to repeal federal statutes and, symmetrically, statutes to repeal treaties, the modern judiciary has paid insufficient heed to the text of Article VI itself, ignoring the apparent legal hierarchy implicit in that text. In *Marbury v. Madison*, Chief Justice Marshall, in emphasizing the legal priority of the Constitution, deemed it “not entirely unworthy of observation” that the Article VI supremacy clause listed the Constitution *first*. Isn’t it likewise worthy of notice that this very same clause listed federal statutes *ahead of* federal treaties, thereby implying a rank order between the two? Everywhere else in the supremacy clause, textual priority signified legal superiority. First came the Constitution, then federal statutes, then treaties, then state constitutions, then state laws.

AMAR, *supra* note 84, at 303.

204. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803), quoted in Kesavan, *supra* note 40, at 1500.

205. Kesavan, *supra* note 40, at 1500.

an implementing statute before they can operate fully as domestic law.²⁰⁶

Implicit in the self-execution doctrine is the idea that treaties, particularly those that operate domestically, have a democratic deficit of which the courts must take account when enforcing the treaty. That there is no corresponding self-execution doctrine for statutes only reinforces the structural argument that treaties are a subordinate class of federal law. In addition to the Court's historical adherence to the self-execution doctrine,²⁰⁷ there is evidence as well that prominent members of the founding generation understood that, while treaties were superior to state law, they were nevertheless inferior to federal statutes. In the Virginia debates, for instance, Francis Corbin argued that "it was 'as clear as that two and two make four' that treaties would be subordinate to 'the Constitution itself, and the laws of Congress' but paramount over state law."²⁰⁸ James Madison also joined Corbin in "reading Article VI to 'restrain[] the supremacy of [treaties] to the laws of particular states, and not to Congress.'"²⁰⁹

To the extent that there is a hierarchy of federal law predicated largely upon disparities in the level of democratic participation required to enact or amend them, it reasonably follows that courts should carry out the task of interpreting and applying each category of law in light of its status within the constitutional order. If the Constitution, statutes, and treaties

206. AMAR, *supra* note 84, at 304.

207. See *supra* note 84 for a brief discussion of the self-execution doctrine.

208. AMAR, *supra* note 84, at 307 (quoting Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 18, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 510 (Jonathan Elliot ed., 2d ed., 1907) [hereinafter ELLIOT'S DEBATES] (remarks of Francis Corbin) (emphasis added)).

209. *Id.* (quoting 3 ELLIOT'S DEBATES, *supra* note 208, at 515). James Wilson depicted treaties as inferior to statutes as well:

Though the treaties are to have the force of laws, they are in some important respects very different from other acts of legislation. . . . The House of Representatives possess no active part in making treaties, yet their legislative authority will be found to have strong restraining influences upon both President and Senate. In England, if the king and his ministers find themselves, during their [treaty] negotiation, to be embarrassed because an existing law is not repealed, or a new law is not enacted, they give notice to the legislature of their situation, and inform them that it will be necessary, before the treaty can operate, that some law be repealed, or some be made. And will not the same thing take place here?

Id. (quoting 2 ELLIOT'S DEBATES, *supra* note 208, at 506–07).

were equivalent in all respects, there would be little problem analogizing claims under one class of law to claims under another, but because they occupy different places in the democratic hierarchy, drawing analogies is problematic if not misguided.

As mentioned earlier, for example, Vazquez argues that claims under treaties should be analogized to claims under the Constitution.²¹⁰ Specifically, he contends that treaties resemble the Constitution in that their broad provisions do not “partake of the prolixity of a legal code” and that they are difficult to amend.²¹¹ That the Constitution may bear these similarities with treaties, however, does not justify treating claims under treaties similarly to claims arising under the Constitution. Vazquez is making the wrong comparison. It is not the form that each class of federal law takes—that is, the generality of their provisions or the difficulty of amendment—but rather their respective places within the democratic hierarchy that should form the basis of the comparison.

The issue thus becomes whether treaties and the Constitution have a similar legal status—that is, a similar democratic pedigree—such that doctrines applicable to the Constitution, like the *Bivens* doctrine of implied constitutional remedies, can be appropriately applied to treaties as well. Because the Constitution is fundamental law with a superior democratic pedigree, analogizing it to treaties—the least democratic category of federal law—is flawed.²¹² Indeed, the Court has already declared that treaties are inferior to the Constitution.²¹³ The same basic reasoning applies as well to comparisons between treaties and statutes. If treaties are legally equivalent to statutes, then the practice of analogizing claims under one to claims under the other, as the Seventh Circuit did in *Jogi*, becomes more compelling. But because treaties have an inferior democratic pedigree relative to statutes for reasons previously explained,²¹⁴ such an analogy is misplaced. Because they require less democratic participation than other categories of federal

210. See *supra* Part III.A.2.

211. Vazquez, *supra* note 31, at 1156; see also *supra* notes 121, 123 and accompanying text.

212. See *supra* notes 185, 191 and accompanying text.

213. See *supra* note 185 and accompanying text.

214. See *supra* notes 187–209 and accompanying text.

law such as the Constitution and statutes, treaties are a less accurate expression of the popular will. Accordingly, courts should apply a more conservative interpretative approach to treaties, particularly those that purport to operate domestically by creating judicially enforceable rights. In other words, courts should not go beyond the clearly expressed intentions of the treaty parties, because the treaty-making process is less democratic—that is, less likely to reflect the true public will—than other lawmaking processes.²¹⁵

b. *Federalism*

In a federal system like the United States, the overlap and conflict between international law and domestic law will often occur at the state level.²¹⁶ Unsurprisingly, as the scope of international law expands, the line where the treaty power ends and the states reserved powers begin will inevitably shift. Indeed, given the precedent set by *Missouri v. Holland*,²¹⁷ the line is bound to shift in favor of the treaty power. In *Holland*, the Supreme Court held that Congress could act beyond the bounds of its enumerated powers to enforce a treaty under the Necessary and Proper Clause.²¹⁸ According to Justice Holmes, who authored the opinion, “It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could.”²¹⁹ Presumably, an act of Congress would be unnecessary where the treaty was self-executing. Indeed, even Yoo concedes that his proposed presumption of non-self-execution²²⁰ would not apply to treaties that extend beyond Congress’s Article I powers into areas reserved to the states.²²¹ This puts the treaty power in conflict with the constitutional

215. See Yoo, *supra* note 97, at 2240 (“As a matter of accountability, when the government imposes rules of conduct on individuals, those rules ought to be made by members of the legislature who directly represent the people.”).

216. Bradley, *supra* note 13, at 397.

217. 252 U.S. 416 (1920).

218. *Id.* at 434–35.

219. *Id.* at 433.

220. See *supra* note 84.

221. “One could conclude that the best way to reconcile the Framers’ decision to include the Supremacy Clause in its present form with Article I, and with their concerns about the relationship between the legislative and treaty powers, is to consider treaties as non-self-executing in areas within Congress’s legislative powers, but as possibly self-executing in areas reserved to the states.” Yoo, *supra* note 97, at 2224.

norm of federalism in a way that statutes enacted pursuant to Congress's enumerated powers are not.

Moreover, because treaties are enacted by the President with only the advice and consent of the Senate, there are fewer structural checks available to guard the interests of the states and the people.²²² To the extent that treaties now extend not only to traditional international matters but to a host of domestic matters as well, it would be a perverse outcome indeed if the President with the consent of only one house of Congress could accomplish domestically what would otherwise have required both houses and the President.²²³ The possibility that treaties could reach beyond the powers enumerated in Article I or that fewer constitutional actors are required to enact them calls for a level of restraint in the interpretation and application of treaties that make demands against the authority and powers of the states. That this tension with federalism is less of a concern with respect to the interpretation and application of statutes or the Constitution demonstrates why analogizing treaty claims to statutory or constitutional claims is misplaced and why the proposed clear statement requirement is in order.

c. Separation of Powers

In addition to their uneasy relationship with federalism, treaties as instruments of domestic law conflict with separation of powers principles as well. This is because, on one hand, treaty-making is an executive power by virtue of its assignment to Article II,²²⁴ yet on the other, treaties are law by virtue of the Supremacy Clause.²²⁵ Undoubtedly, there is considerable scholarly debate on the nature of the treaty power—that is, whether treaty-making is fundamentally a legislative or executive power.²²⁶ But simply because treaties are law under Article VI

222. *See supra* note 189 and accompanying text. Additionally, the structural safeguards for protecting state interests have been further eroded by the adoption of the Seventeenth Amendment, which replaced the process of appointing senators by state legislatures with the direct election of senators by the people. U.S. CONST. amend. XVII.

223. As explained earlier, the fact that a two-thirds supermajority is needed to secure the advice and consent of the Senate does not fully compensate for the House's absence in the treaty-making process. *See supra* notes 196–200 and accompanying text.

224. U.S. CONST. art. II, § 2, cl. 2.

225. *Id.* art. VI, cl. 2.

226. *Compare* Moore, *supra* note 49, at 192–93 (“[T]he treaty power is placed in Article II, under the Executive, with a check in the Senate. It was not placed in Article I, under the Legislative branch, with a check in the Executive. The starting point for

does not render meaningless the treaty power's placement in Article II. By assigning the treaty power to Article II, the Constitution makes the President, not Congress, the primary constitutional actor in the treaty-making process.²²⁷ The President's superior role is evident in the language of the Treaty Clause itself, which states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."²²⁸ In effect, the text relegates the Senate to the task of checking the President,²²⁹ and indeed, this has been the established practice.²³⁰

Given the President's dominant role in the treaty-making process, courts should interpret and apply treaties more cautiously than statutes when treaties purport to operate

analysis under the United States Constitution, then, is that the treaty power is primarily executive in nature."); Yoo, *supra* note 97, at 2234 ("By its placement in Article II . . . treaty-making is clearly an executive power."); Yoo, *supra* note 6, at 1966 ("The Senate's participation alone does not convert treaties into legislation, just as the Senate's participation in appointments does not transform them into legislative acts."), with Van Alstine, *supra* note 176, at 1277 ("The observation that the treaty power is found in Article II and not in Article I . . . is a distinction without a difference. Like Article I legislation, the result of the cooperation of the executive and legislative branches in the creation of self-executing treaties under Article II is domestically enforceable federal law."). For his part, Alexander Hamilton in *The Federalist No. 75* argued that treaty-making partook of both the legislative and executive powers:

[I]f we attend carefully to its operation, [the power to make treaties] will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or in other words to prescribe rules for the regulation of the society. While the execution of the laws and the employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions of the executive magistrate. The power of making treaties is plainly neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enactment of new ones, and still less to an exertion of the common strength. . . . The power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive.

THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 50, at 379–80. Even if Hamilton is correct that treaty-making partakes of both the legislative and executive powers, that is all the more reason for courts to evaluate treaties differently than statutes or the Constitution.

227. Kesavan, *supra* note 40, at 1510.

228. U.S. CONST. art. II, § 2, cl. 2.

229. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 327 (2001) ("[T]he Senate's role was but a check on treaty-making.").

230. See Yoo, *supra* note 97, at 2242 ("The Senate's formal role in treaty-making has become one of after-the-fact consent, while the President assumes primary responsibility for setting foreign policy and conducting diplomatic negotiations.").

domestically. With the exception of non-self-executing treaties that require implementing legislation,²³¹ the President, with only the advice and consent of the Senate, may exercise Article I legislative powers that the Constitution otherwise assigns to Congress. It is for this reason that in the 1790s and early 1800s, allies of Thomas Jefferson argued that no treaty could operate of its own self-executing force over legislative areas reserved to Congress.²³² As Amar notes, this approach is problematic given the unprecedented reach of congressional power, because it “would make almost all treaties non-self-executing.”²³³ In any event, the fact that the President may effectively exercise Article I legislative power through the Treaty Clause demands, at the very least, that courts construe treaties that operate domestically as strictly as the language and intentions of the parties will permit. This will not bar the President from using the treatymaking process to exercise Article I legislative power in the domestic realm, but it will nevertheless minimize presidential encroachment on congressional lawmaking and so frustrate the President’s ability to circumvent the normal legislative process by resorting to the treaty power.

2. Institutional Argument

Constitutional structure is not the only reason for requiring treatymakers to speak clearly before creating judicially enforceable individual rights. In addition to the structural considerations arising from the democratic hierarchy of federal law, federalism, and the separation of powers, there are institutional considerations involving the respective roles of both the courts and the President in foreign affairs that counsel against the judicial implication of treaty-based rights or remedies. In other words, there are significant institutional considerations in the context of treaty interpretation that are not implicated when courts choose to imply rights of action in the statutory or constitutional contexts. One consideration is the institutional competence of courts to decide matters relating to

231. “For example, it is widely conceded that a duly enacted treaty cannot itself authorize a new expenditure, impose a new internal tax, create a new federal crime, raise a new army, or declare a war.” AMAR, *supra* note 84, at 304.

232. *Id.* For a contemporary defense of this position, see Yoo, *supra* note 6, and Yoo, *supra* note 97.

233. AMAR, *supra* note 84, at 305.

foreign policy, and the other is the unique role of the political branches in foreign affairs. Both considerations favor the clear statement rule proposed here to the extent that it constrains judicial discretion in matters that courts are particularly ill-suited to decide while at the same time maximizing the flexibility of the political branches to carry out the nation's foreign policy.

a. *The Role of Courts in Foreign Affairs*

According to Vazquez, the Supremacy Clause transformed treaties “from ‘mere treaties’—in the international sense—into laws,” making irrelevant “for domestic purposes those attributes of treaties that distinguished them from laws.”²³⁴ It is not at all clear, however, why elevating treaties to the status of law would make irrelevant the attributes that distinguish them from domestic law. Treaties, after all, are still contracts between nations.²³⁵ That is, they are instruments of foreign relations in the sense that they are used by sovereign nations to achieve their interests abroad.²³⁶ Indeed, the fact that they operate domestically at all is, according to Kesavan, “the ‘price paid’ for promoting national interests with foreign nations.”²³⁷ It should not be forgotten that the Framers incorporated treaties into the Supremacy Clause as a means of ensuring compliance with the nation's foreign obligations, not to achieve domestic goals.²³⁸

To the extent, therefore, that treaties as instruments of foreign affairs are functionally distinct from statutes as instruments of domestic affairs, there is good reason for courts to interpret and enforce treaties with an extra measure of care. This stems largely from the recognition that there are limits to judicial competence in the realm of foreign relations. Compared to the political branches, courts have been thought to lack the institutional knowledge and expertise that is necessary to satisfactorily resolve disputes bearing on foreign policy.²³⁹ Indeed, the Supreme Court itself has acknowledged the limits of

234. Vazquez, *supra* note 31, at 1108–09.

235. *See supra* notes 50–55 and accompanying text.

236. *See supra* notes 62–65 and accompanying text.

237. Kesavan, *supra* note 40, at 1512.

238. *See supra* Part II.B.

239. *See* Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 567 (1966) (arguing that many constitutional questions regarding foreign policy are nonjusticiable political questions because the other branches of government have greater information and expertise).

judicial competence in this area. For example, in *Oetjen v. Central Leather Co.*, the Court declared that “[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—‘the political’—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”²⁴⁰ In *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, the Court was more explicit regarding its competence to review the President’s foreign policy decisions:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility²⁴¹

Given its reluctance to intrude on foreign policy matters, the Court has extended the political question doctrine to foreign affairs.²⁴² Nevertheless, the Court has also made clear that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”²⁴³ Unlike the political question doctrine, however, the clear statement rule proposed here would not abdicate the judicial role to enforce treaty-based rights and remedies; instead, it would merely require courts to exercise great caution when interpreting treaties because of the potential impact on the nation’s foreign policy. To be sure, courts are no less competent to interpret legal texts merely because it might impact foreign relations; interpretation is what courts do, after all. The Supreme Court made this clear in *Japan Whaling Ass’n v. American Cetacean Society*, when it declared, “one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this

240. 246 U.S. 297, 302 (1918).

241. 333 U.S. 103, 111 (1948).

242. *See, e.g.*, *United States v. Belmont*, 301 U.S. 324, 330 (1937) (holding that the recognition of foreign governments is a political question assigned to the President); *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923) (stating that the power to decide when a war ends is vested exclusively in Congress); *Terlinden v. Ames*, 184 U.S. 270, 287 (1902) (holding that whether a treaty survives when one country becomes part of another is a political question).

243. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

responsibility merely because our decision may have significant political overtones” bearing on American relations with Japan.²⁴⁴ In any event, although it cannot be doubted that courts are competent to interpret legal texts as a general matter—whether the Constitution, statutes, or treaties—they are not competent to make predictions or judgments about the impact of their interpretations on the nation’s foreign affairs. It is for this reason that courts should not go beyond the clearly expressed intentions of the parties by inferring judicially enforceable rights from treaties. Allowing courts to take liberties with respect to treaty interpretation would unnecessarily expand the judicial role in foreign affairs—a role for which courts are poorly suited.²⁴⁵

That courts lack competence in matters relating to foreign affairs is predicated on the assumption that foreign affairs is fundamentally different than domestic affairs. Of course, how different the two are depends in part on one’s understanding of international relations. According to Professor Anne-Marie Slaughter Burley, for instance, the realist school of international relations theory—which posits that the external behavior of states is a product of power relationships wholly unrelated to their internal character—“argues for a radical break between domestic and foreign affairs.”²⁴⁶ Conversely, the liberal or idealist school—which explains international behavior by looking beyond the balance of power to the internal character of states—“implicate[s] and undermine[s] the alleged difference between domestic and foreign affairs”²⁴⁷ by suggesting a connection between the two.

That there might be a relationship between domestic and foreign affairs, however, does not change the reality that states act primarily in accordance with their perceived interests.

244. 478 U.S. 221, 230 (1986).

245. Thus, Vazquez’s claim that the Framers intended courts to be the primary enforcers of treaties in the same way that they intended the courts to be the primary enforcers of the Constitution is unsatisfying as an argument for applying the constitutional analog for implied rights of action to treaties. *See supra* text accompanying note 122. Although one might fairly argue that courts have a special claim of competence in terms of protecting constitutional rights such that implying rights of action under the Constitution would be reasonable, this certainly is not the case with respect to treaties.

246. Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 2000 (1993) (book review).

247. *Id.* at 2001.

Rather, it merely suggests that a state's internal character, or its domestic affairs, shapes its perception of its national interests. The foreign policy of the United States, for example, is undoubtedly shaped by its internal structure—that is, its democratic process. But this does not render courts any more competent to decide issues that affect the nation's foreign policy. On the contrary, it confirms that the political branches, which are responsive to the democratic process, are best suited to discern the national interest and to carry out the nation's foreign affairs.

In any event, even if domestic affairs is linked to foreign affairs as the liberal school suggests, the two spheres are nevertheless fundamentally different in character. In the domestic sphere, law is self-enforcing, but in the international sphere, law is enforceable only by the good faith of the parties or war.²⁴⁸ Thus, only the political branches have any ability to make claims against other treaty parties. In this respect, courts are not competent to gauge how treaty-based rights should be enforced domestically since they have no ability to affect how they are enforced abroad. Indeed, it would be perverse for domestic courts to unilaterally imply remedies at home that foreign courts refuse to imply abroad. At best, judicial competence is limited to the strict interpretation of the treaty party's intent as expressly provided in the text and the negotiating history. Implying judicially enforceable treaty-based rights, however, is beyond judicial cognizance.

One might certainly argue that the failure to imply remedies for clear violations of treaty-based rights, especially by the states, would undermine the primary purpose of the Supremacy Clause—that is, to ensure nationwide compliance with treaty obligations.²⁴⁹ Vazquez contends, for instance, that courts should imply a remedy when failure to do so “would render the United States responsible on the international plane to the state of the individual's nationality.”²⁵⁰ But to the extent that courts operate solely on the domestic plane, this is a judgment for the political branches to make, not the courts. Indeed, if the political branches determine that the absence of individual relief threatens the nation's international position, then they are well-

248. See *supra* text accompanying note 55.

249. See *supra* Part II.B.

250. Vazquez, *supra* note 31, at 1156.

equipped to pass legislation providing for such relief. In any event, the treaty parties' failure to expressly provide for a legal remedy suggests that any dispute arising under the treaty was intended to be resolved in the international arena.

b. *The Role of the Political Branches in Foreign Affairs*

It almost goes without saying that the political branches—that is, Congress and the President—are the primary constitutional actors in the realm of foreign affairs.²⁵¹ As between the two political branches, however, there is general agreement that the President is invested with considerable power that gives him the initiative in conducting diplomatic and military affairs.²⁵² As a member of the House of Representatives, the future Chief Justice John Marshall declared: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”²⁵³ In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court went so far as to describe the President’s foreign affairs power as “plenary and exclusive.”²⁵⁴ While there is much about which to disagree with *Curtiss-Wright*,²⁵⁵ its overarching theme that the President is first among equals in foreign affairs is more or less a truism. Indeed, this is evident in the treatymaking process itself, in which the Constitution gives the President the power to make treaties and relegates the Senate to the role of advice and consent.²⁵⁶

In light of the particular competency of the political branches in foreign affairs, especially the President,²⁵⁷ it makes practical sense that courts should not go beyond the clearly expressed intentions of the parties in construing treaties so as to afford maximum flexibility to the political branches in executing the

251. Yoo, *supra* note 97, at 2256 (“The Constitution undeniably vests the conduct of international relations in the President and Congress.”).

252. I TRIBE, *supra* note 46, at 637.

253. *Id.* (quoting then-Congressman John Marshall) (internal quotation marks and citation omitted).

254. 299 U.S. 304, 320 (1936).

255. For a critique of the *Curtiss-Wright* case, see LOUIS FISHER, *PRESIDENTIAL WAR POWER* 69–73 (2d ed., rev. 2004).

256. *See supra* notes 227–230 and accompanying text.

257. That the Executive Branch has particular competence in foreign affairs is shown by the willingness of courts to give “great weight” to the President’s interpretation of treaties. *See, e.g.*, *United States v. Stuart*, 489 U.S. 353, 369 (1989) (noting that “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)) (internal quotation marks omitted)).

nation's foreign policy. Apparently, this was of little concern to the Seventh Circuit in *Jogi*. In justifying its decision to imply a remedy under the Vienna Convention, the *Jogi* court explained that treaties often lack specific remedial language because they "are signed by countries with differing legal systems that provide different kinds of remedies."²⁵⁸ If this is true, however, then courts should be especially wary of implying remedies to the extent that doing so might unwittingly afford greater protection to aliens in the United States than American citizens receive abroad. Imbalances of this sort provide little incentive for foreign treaty partners to afford Americans equivalent protection and are thus likely to impede diplomatic efforts to secure equal treatment for American citizens. In any event, where the courts underenforce treaty violations relative to foreign treaty partners, the political branches may respond by enacting implementing legislation that provides for equivalent relief.²⁵⁹

The political branches should have complete flexibility unimpeded by interference from the judiciary to establish the appropriate level of individual relief necessary to satisfy the terms of the treaty while at the same time advancing the government's diplomatic objectives. Courts should not encourage treatymakers to avoid agreement on specific remedies by assuming the responsibility of implying them. On the contrary, courts should encourage treatymakers to agree on specific remedial mechanisms at the outset so that each party knows its international obligations and can be held accountable on the international plane for failure to observe them.

Additionally, the practice of unilaterally implying remedies when the President and the Senate by its advice and consent have not expressly agreed to them might also dissuade the political branches from entering into rights-based treaties in the first place. For example, after the International Court of Justice held in *Avena* that the Vienna Convention creates judicially

258. *Jogi v. Voges*, 425 F.3d 367, 384–85 (7th Cir. 2005).

259. Vazquez argued that courts should imply remedies from treaties in the same way that they imply remedies from the Constitution, because treaties are more like the Constitution with its rigorous amendment process than statutes. *See supra* text accompanying note 123. To the extent, however, that simple implementing legislation could authorize remedies for violations of both the Constitution and treaties, the extraordinary difficulty of amending both the Constitution and treaties can hardly be a justification for the judicial implication of remedies.

enforceable rights and demanded that American courts give review and reconsideration to certain convicted Mexican nationals,²⁶⁰ the Department of State summarily withdrew from the Optional Protocol, which subjects the United States to the jurisdiction of the ICJ on disputes arising from the Convention.²⁶¹ In other words, the implication of rights and remedies that were not thought by the government to exist prompted it to withdraw from the Optional Protocol altogether. Treaties that do not provide domestic remedial mechanisms are not wholly ineffectual. Whether they specify judicially enforceable remedies or not, rights-based treaties nevertheless establish important international norms that influence the conduct of nations. In fact, these treaties still create binding obligations both under the Supremacy Clause²⁶² and under international law.²⁶³ Courts, therefore, should not discourage the political branches from entering into these treaties by liberally implying remedies where none are expressly provided in the text or negotiating history.

V. THE CLEAR STATEMENT RULE AND THE VIENNA CONVENTION: A BRIEF PRACTICAL APPLICATION

Having attempted to make the case for creating a clear statement rule regarding the judicial enforceability of treaty-based rights and remedies, a practical application of the rule to the Vienna Convention is in order. The relevant provision is Article 36, which requires “competent authorities” to notify the relevant consulate at the request of any foreign national who is arrested and to allow communication between the consulate and the detained individual.²⁶⁴ In addition, Article 36 also provides that “the said authorities shall inform the [detained person] without delay of his rights.”²⁶⁵

The first issue to resolve is whether these provisions create an individual right. To the extent that the plain text of Article 36

260. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31).

261. *Jogi*, 425 F.3d at 383; Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1.

262. See *supra* notes 129, 131 and accompanying text.

263. See *supra* Part II.A.

264. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

265. *Id.*

refers explicitly to “rights,” the *Jogi* court correctly concluded that individuals had a right to consular notification.²⁶⁶ Indeed, the court noted that a number of judges have arrived at the same conclusion: “[T]he text emphasizes that the right of consular notice and assistance is the citizen’s’ and that this language is ‘mandatory and unequivocal.’”²⁶⁷ The fact that the preamble to the Vienna Convention declares “that the purpose of such privileges and immunities is not to benefit individuals”²⁶⁸ does not render Article 36 ambiguous. Citing Supreme Court precedent, the *Jogi* court made clear that “[c]ourts should look to materials like preambles and titles only if the text of the instrument is ambiguous.”²⁶⁹ To the extent that Article 36 expressly mentions rights, there is nothing to suggest any ambiguity. In any event, the Supreme Court’s long-standing rule of construction favoring the liberal interpretation of treaty-based rights would resolve whatever ambiguity might exist in favor of recognizing the individual right at issue.²⁷⁰ Because Article 36 confers an individual right to consular notification, it follows by virtue of the Supremacy Clause that an individual may seek to enjoin the prospective enforcement of state laws that would violate the right.²⁷¹

The availability of an individual right thus raises the second issue—namely, whether the Vienna Convention provides retroactive relief for past violations of rights guaranteed by Article 36. In *Jogi*, the remedy sought was a private right of action for damages,²⁷² and in *Sanchez-Llamas*, the remedy sought was the suppression of incriminating evidence.²⁷³ Under the proposed clear statement rule, however, neither form of relief would be available, because the parties to the Vienna Convention did not clearly express their intent in either the text

266. *Jogi v. Voges*, 425 F.3d 367, 384 (7th Cir. 2005).

267. *Id.* at 381 (quoting *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring)).

268. Vienna Convention pmb., 21 U.S.T. at 77, 596 U.N.T.S. at 261.

269. *Jogi*, 425 F.3d at 381 (citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 483 (2001); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 290–91 (2000); *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 158 n.13 (1982)).

270. *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.”).

271. *See supra* note 129, 131 and accompanying text.

272. *Jogi*, 425 F.3d at 370.

273. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2676 (2006).

or negotiating history to create judicially cognizable remedies. The relevant enforcement provision is Article 36(2), which provides:

the rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, *subject to the proviso, however, that the said laws and regulations must enable full effect to be given* to the purposes for which the rights accorded under this Article are intended.²⁷⁴

Article 36(2) is susceptible to at least two reasonable interpretations. The first is the interpretation adopted by the *Jogi* court that to “enable full effect to be given” means “that a country may not reject every single path for vindicating the individual’s treaty rights.”²⁷⁵ Thus, a court may authorize a damages action if there is no other avenue for obtaining relief.²⁷⁶

The second possible interpretation is that to “enable full effect to be given” means that no domestic law may bar detained individuals from exercising their right to consular notification. Thus, for instance, a state law prohibiting police from informing detainees of their consular notification rights would clearly be preempted. Similarly, a judge may not deny detainee requests to have their consulate notified. In other words, the Article 36(2) enforcement provision merely enjoins conflicting domestic law, but it does not affirmatively specify retroactive or compensatory relief, like damages or the suppression of incriminating evidence. Nor does it provide more generally that domestic courts may remedy violations of the right to consular notification. Were that the case, then courts would be free to grant traditionally cognizable remedies like damages.

Because the text of the enforcement provision is ambiguous, however, it is necessary to look to the Vienna Convention’s negotiation history. In this case, the negotiation history offers little in the way of a clear expression of intent to provide retroactive relief for past treaty violations. For instance, as the *Jogi* court noted, “[t]he negotiation history of Article 36 is replete with concern about the question of individual rights,”²⁷⁷

274. *Jogi*, 425 F.3d at 385 (quoting Vienna Convention on Consular Relations art. 36(2), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261).

275. *Id.*

276. *Id.*

277. *Id.* at 382.

yet there is little discussion of remedial mechanisms for enforcing those rights. Presumably, it is the absence of a clear intent to authorize judicial relief that forced the *Jogi* court to imply a damages remedy. In any event, as the brief for the State of Oregon in *Sanchez-Llamas* pointed out, “the British delegation intended that the amendment that became Article 36(2) would ensure only that the laws of the receiving state would not impede the consular rights of *the sending state*.”²⁷⁸ In other words, the delegation that proposed the Article 36(2) enforcement provision envisioned only that it would preempt contrary domestic law, not afford a basis for retroactive or compensatory relief. In short, the drafters embraced the second possible interpretation of the enforcement provision. While this is just a cursory examination of the negotiation history for purposes of illustration, it nevertheless reveals that there is far from sufficient clarity to justify either granting damages relief or suppressing evidence given a clear statement requirement.

VI. CONCLUSION

The tendency of modern treaty practice to penetrate the realm of domestic lawmaking will only gather steam as globalization proceeds. While it is certainly true that treaties, like both the Constitution and federal statutes, are the supreme law of the land, it is not the case that courts should interpret them in the same way when treaties purport to operate domestically. Ultimately, courts must harmonize treaty interpretation with important structural and institutional considerations. The clear statement rule proposed here does precisely this.

278. Brief for Respondent State of Oregon at 24, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 04-10566, 05-51).