PRIVATE REMEDIES FOR TREATY VIOLATIONS AFTER *SANCHEZ-LLAMAS*

by
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Sanchez-Llamas *did not decide when a private person may invoke a treaty provision in a case properly before a U.S. court. This Article argues that existing Supreme Court jurisprudence on this question is unsettled, and that the approach advanced by the four dissenters on this question—essentially a variant on the nineteenth century concept of "vested rights"—is unsatisfactory. Instead, the Court should enlist the techniques it uses to determine when private litigants may invoke legislative enactments.*

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I. INTRODUCTION

An amicus brief in *Sanchez-Llamas v. Oregon* proposed the following:

> At a minimum, a treaty should not be read as empowering private persons to obtain domestic judicial enforcement in circumstances where a

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> domestic statutory enactment would not be interpreted as authorizing a private suit.[1]

I wrote that sentence. In this essay, I will explore what this proposition means and what the Court's recent decisions suggest about its validity.

The companion cases of *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson* presented the Court with three questions. By a 6–3 vote, the Court resolved two, holding that a state could refuse to consider whether a violation of the Vienna Convention on Consular Relations affected a criminal accused's rights if his counsel did not adhere to the state's rules for timely presentation of a claim, and that a state did not have to exclude at trial testimonial evidence obtained after police had failed to comply with the Vienna Convention's consular notification obligations.[2] A majority did not address the third issue, namely whether a private person could invoke the Vienna Convention at all in a domestic judicial proceeding. Four Justices (the three dissenters plus Justice Ginsburg) did argue that, as a self-executing treaty, the Vienna Convention creates rights that individuals can invoke and thus supplies rules of decision that state (and presumably federal) courts must apply to cases before them.[3]

In *Hamdan v. Rumsfeld*,[4] the Court also faced a question about private enforcement of a treaty, namely the Third Geneva Convention.[5] The five-Justice majority finessed the issue by determining that the Uniform Code of Military Justice, an act of Congress, incorporated the treaty standards by reference, thus eliminating the need to apply the treaty directly.[6] Three Justices argued that precedent foreclosed private enforcement of the Geneva Convention in U.S. courts, and the Chief Justice did not participate.[7] Neither the majority nor the dissenting Justices proposed a general test to determine when to infer private enforcement from a treaty.

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[1] Brief of Professors of International Law, Federal Jurisdiction & the Foreign Relations Law of the United States as Amici Curiae in Support of Respondents at 4, Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006) (No. 04-10566).

[2] Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006).

[3] *Id.* at 2693–98 (Breyer, J., dissenting).

[4] 126 S. Ct. 2749 (2006).

[5] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[6] See in particular Justice Kennedy's concurring opinion, responding to Justice Thomas's reference to *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950), which had observed that the "obvious scheme" of the 1929 Geneva Convention was that "[r]ights of alien enemies are vindicated under it only through protests and intervention of protecting powers":

> Even assuming the *Eisentrager* analysis has some bearing upon the analysis of the broader 1949 Conventions and that, in consequence, rights are vindicated "under [those Conventions]" only through protests and intervention, . . . Common Article 3 is nonetheless relevant to the question of authorization under § 821. Common Article 3 is part of the law of war that Congress has directed the President to follow in establishing military commissions.

Hamdan, 126 S. Ct. at 2802 (Kennedy, J., concurring) (citation omitted).

[7] *Id.* at 2844–45 (Thomas, J., concurring).

What, then, should the five Justices who have not yet addressed the question of treaty enforcement do? The problem is subtle and complex. There are older cases that seem to point in one direction, but they are less compelling than one might think. The way remains open for the Court to assimilate the jurisprudence of treaty enforcement to that of statutory enforcement. Merging these bodies of law is not compelled by the Constitution or the structure of legislation or international agreements. But some good arguments support the move.

II. PRIVATE ENFORCEMENT IN THE ABSTRACT

Any legal rule—whether a constitutional provision, an act of Congress, a treaty adopted pursuant to Article II of the Constitution, or a common law rule of decision developed by the judiciary—poses an enforcement issue. Someone must decide both what sanctions attach to the rule—a non-exhaustive list might include criminal punishment, administrative penalties, civil sanctions such as damages, and the loss of a legal power or license—and who may invoke the rule to obtain a sanction. The U.S. legal system traditionally has limited the right to invoke some sanctions, such as criminal punishment and administrative penalties, to public officials. In other words, for some legal rules no private person has the power to seek a civil remedy or to use a legal rule as a defense or bar to the enforcement of some other legal rule. For other legal rules, some private persons have such powers but not others. A discussion of enforcement of any legal rule thus entails a determination of *who* can invoke *what* sanctions.

Unfortunately, the terminology often used to discuss the private enforcement issue can breed confusion. One concept is standing, which deals with the issue of who has the power to invoke a legal rule. But judicial use of standing doctrine, especially in the Supreme Court, is so incoherent and seemingly results-driven as to discourage any reliance on this doctrine to resolve any significant question.[8] Moreover, standing questions typically involve the issue of which private persons can seek a sanction, rather than whether any private person can. Thus, although some but not all questions of private enforcement involve standing, I will continue to talk about enforcement and not use the latter term.

Another concept that is bound up with private enforcement is that of a cause of action. This term collapses two distinct issues, namely the existence of private enforcement and the existence of a particular set of sanctions, namely civil remedies. As a matter of logic, it is possible for a legal rule not to serve as a basis for a private cause of action—that is to say, a private person may not initiate a lawsuit to enforce that legal rule—but still be privately enforced. A private person might invoke the rule, for example, as a defense against an otherwise authorized action taken by some other person. In the case of

[8] More than two decades ago, I argued that "a lack of clarity in the Supreme Court's decisions makes it impossible to say exactly when standing exists . . ." Paul B. Stephan, *Nontaxpayer Litigation of Income Tax Disputes*, 3 YALE L. & POL'Y REV. 73 (1984). I am unaware of any subsequent decisions of the Court that have improved the situation.

Sanchez-Llamas, defendants in criminal proceedings sought to invoke a provision of a treaty to exclude the introduction of certain evidence at trial and to challenge the fairness of a trial. The case involved private enforcement, but not a private cause of action.

Because the standing concept breeds more confusion than insight, and because the right-of-action concept does not encompass all forms of private enforcement, I will avoid using these terms. For purposes of this Article, private enforcement of a legal rule means that some private person can invoke that rule as a ground for deciding an issue in a legal proceeding. Thus private enforcement means that the rule in question serves as a rule of decision that a judge may apply. It does not matter whether the rule of decision provides a basis for a lawsuit or only for a defense against someone else's legal claim (including a criminal prosecution). What matters is the power of a private person to invoke the rule in a legal proceeding.

Treaties, as well as some other sources of international law, present a complication. With domestic law, public enforcement means the invocation of a rule by a government official, whether federal, state or local. Treaties and many other sources of international law involve collaborative lawmaking between the United States and some, perhaps many other states. When a foreign state seeks to invoke an international law rule in a U.S. domestic judicial proceeding, characterizing its capacity as public or private is not straightforward. On the one hand, as co-enactor of the rule, it has prerogatives that ordinary private actors may lack.[9] On the other hand, its decision about when and how to invoke a rule in U.S. litigation is not subject to any domestic political constraints, as are the choices of U.S. officials.

To limit the scope of my argument in this Article, I will treat enforcement by a foreign state as equivalent to that by a U.S. official. To be precise, when I look at private enforcement of a treaty, I consider only the invocation of the treaty in a legal proceeding by a person who does not act on behalf of one of the signatory parties. If in some circumstances a court will accede to such a person's request to use the treaty as a rule of decision in a dispute before it, then private enforcement, as I understand the concept, exists.[10]

Finally, if many persons can invoke a rule in a legal proceeding, the level of enforcement is likely to be greater than if only a limited class of persons can

[9] This point distinguishes the case where a foreign state seeks to invoke a domestic law, such as a statute. *See* Pfizer, Inc. v. India, 434 U.S. 308 (1978) (question of whether foreign state has a private right of action under the Sherman Act).

[10] This qualification distinguishes cases where a representative of a foreign government has invoked a treaty to avoid a tax or other imposition. *See, e.g.*, United States v. Al-Hamdi, 356 F.3d 564 (4th Cir. 2004) (diplomatic immunity from criminal prosecution under Vienna Convention on Diplomatic Relations); Gerritsen v. Consulado Gen. de Mex., 989 F.2d 340 (9th Cir. 1993) (immunity from civil suit under Vienna Convention on Consular Relations); 767 Third Ave. Assocs. v. Permanent Mission of Rep. of Zaire to United Nations, 988 F.2d 295 (2d Cir. 1993) (defense to an action of ejectment for nonpayment of rent under Vienna Convention on Diplomatic Relations); United States v. County of Arlington, 702 F.2d 485 (4th Cir. 1983) (defense to tax assessment on embassy property under Vienna Convention on Diplomatic Relations).

do so. But my interest is not the level of private enforcement (a question that standing doctrine typically addresses) but rather whether any private person has the right to have the rule apply in a legal dispute. I focus on whether there is any private enforcement, rather than how much.

III. PRIVATE ENFORCEMENT OF FEDERAL STATUTES: AN EVOLVING JURISPRUDENCE

At the risk of oversimplification, an account of federal statutes and private rights might go something like this: Some enactments provide expressly for private enforcement, but many others do not. Frequently a statute will include criminal or other publicly enforceable penalties but say nothing about whether private persons can invoke the statute's rules in litigation. What to do in the face of such silence becomes a significant problem.

Consider section 610 of the Federal Criminal Code. An earlier version provided:

> It is unlawful for . . . any corporation whatever, . . . to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for . . .[11]

This command seems absolute in its nature. Moreover, assuming no constitutional infirmity, the prohibition would seem to be a law of the United States that, according to the Supremacy Clause of the Constitution, "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."[12] Imagine a derivative suit brought by a shareholder against a corporation's officers, alleging that the officers exceeded their authority by unlawfully expending corporate funds on a federal election. Must a court use section 610 to determine that the officers acted unlawfully?

Evidently not, said a unanimous Supreme Court in *Cort v. Ash*.[13] A federal statute does not necessarily provide a rule of decision that judges, federal and state, must apply in all cases where it might seem relevant. Justice Brennan, writing for the Court, explained, "We are necessarily reluctant to imply a federal right to recover funds used in violation of a federal statute where the laws governing the corporation may put a shareholder on notice that there may be no such recovery."[14] As a result, the lawsuit was dismissed.

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[11] Act of June 25, 1948, ch. 645, § 610, 62 Stat. 723 (codified as amended at 18 U.S.C. § 610 (2000)).

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

[13] 422 U.S. 66 (1975).

[14] *Id.* at 84–85. Ash had brought a claim on behalf of himself and the corporation against officers who had used corporate funds to attack presidential candidate McGovern through public advertisements. Justice Brennan's opinion is not entirely clear as to whether the claim failed because of a lack of federal jurisdiction or the unavailability of the statute as a rule of decision in a private dispute, but the latter part of the opinion, including the quoted language, seems directed more toward the latter question.

Cort illustrates an important principle. In spite of the Supremacy Clause, a federal statute's binding effect does not automatically include private enforcement. An Act of Congress can be "the law of the land" and still not authorize judges to provide relief to individuals injured by its violation, even if the judge otherwise has jurisdiction over a dispute between the victim and violator. Not everyone can invoke all of the law of the land in all disputes. Moreover, some of the law of the land cannot be invoked as a rule of decision by any private person.

As *Cort* further demonstrates, in the world of federal statutes, judges take for granted the proposition that not all public law authorizes private enforcement. The harder question is which criteria courts should employ to decide when a statute, on its face silent on the question, does provide a rule of decision that binds judges in private disputes. The doctrine governing this issue has changed considerably over the years.

In the period before *Erie Railroad Co. v. Tompkins*,[15] federal courts that saw themselves imbued with general common law powers found it easy to regard statutes as supplying rules of decision that might apply to all cases. The judge could treat a statutory rule as defining a legal duty, and to deem any violation of that duty as *per se* negligent and therefore tortious. The judge then would look to the conventional remedies of tort law to determine the victim's enforcement powers. More generally, judicial comfort with the power to choose a rule of decision went together with a belief that judges had the capacity and authority to develop remedies for the violation of a rule. This common law power to develop federal remedies seemed to rest on the same set of assumptions about the judicial function as did the capacity to invoke general common law.

An early and significant instance of the tendency of early courts to regard statutory enforcement as a matter primarily for judicial determination is Chief Justice Marshall's decision in *Marbury v. Madison*.[16] While the case is famous for its ultimate holding that the judiciary could invoke the Constitution to invalidate an act of Congress, its penultimate holding also is important. Marbury claimed a right to a federal position based on an executive act (the signing and delivery of a commission) authorized by statute. The Court had to determine whether the courts had a role in enforcing that statute. Marshall, writing for a unanimous Court, explained:

> But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. . . . The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority.[17]

[15] 304 U.S. 64 (1938).

[16] 5 U.S. (1 Cranch) 137 (1803).

[17] *Id.* at 166–67.

If, in other words, a statute created a "vested right," the judiciary had the authority to provide a full array of remedies for any statutory violation. A determination of what counts as a vested right did all the critical work.[18]

To be sure, the link between this practice and common law powers is not self-evident. Before *Erie*, common law as expounded by federal judges did not bind state judges, while statutory rules, however expanded by judicial creativity, did. But the exercise of common law authority generally led federal judges to regard themselves as free to select among rules of decision when resolving a case properly before them. Partly this reflected a sense that the general powers of a judge included the ability to draw on the common law of remedies to determine the consequences of any violation of law, whatever its source.[19] The distinction between choices that bound only federal courts and those that bound the states received less attention.[20]

With *Erie*'s repudiation of general federal common law and the rise of the administrative state, roughly simultaneous developments in the United States, the relationship of public statutes and private remedies needed rethinking. For the New Deal Justices (especially Black, Clark and Douglas) it seemed easy enough to regard federal judges not as the enactors of common law, but as agents recruited to enforce statutory schemes of public benefit through private litigation. Assumptions about inherent judicial function morphed into concepts informed by administrative law. The apogee of this tendency was *J.I. Case Co. v. Borak*,[21] a decision authorizing a private lawsuit for damages based on an injury caused by a violation of section 14(a) of the Securities Exchange Act of 1934.

Justice Clark's opinion in *J.I. Case* was, to be generous, laconic, leaving readers puzzled as to when public laws would lead to private remedies and when they would not. A decade later the Court revisited the issue in *Cort v. Ash*.[22] As noted above, a unanimous Court held that the criminalization of corporate campaign contributions did not translate into private relief. In explaining this outcome, Justice Brennan, writing for the Court, offered a four-

[18] *See* Paul B. Stephan, *Redistributive Litigation—Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789, 816–19 (2002) (reviewing history of vested rights concepts in the Court's early jurisprudence).

[19] *Cf. Ex parte* Young, 209 U.S. 123 (1908) (inferring power of federal courts to provide equitable relief for constitutional violations). For more on the complex relationship between the Court's exercise of its common law powers and the enforcement of legislation, see EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 172–74 (1992).

[20] Although the Court established the basic principle that federal court interpretation of federal enactments binds the states early in the nineteenth century, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), it did not definitely settle the existence of a general obligation on the part of state courts to enforce federal statutory rights until after *Erie*. To be sure, earlier decisions had indicated that there existed a default rule of state enforcement. *Compare* Testa v. Katt, 330 U.S. 386 (1947), *with* Mondou v. N.Y., New Haven & Hartford R.R., 223 U.S. 1 (1912).

[21] 377 U.S. 426 (1964).

[22] 422 U.S. 66 (1975).

point test for determining whether courts could infer a power of private enforcement from a statute that did not expressly address the issue:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[23]

Brennan was famous for dropping time bombs into his work, i.e., carefully crafted language that, to the later surprise of his colleagues, would have consequences unrelated to the holding of the particular case. This was a classic example. In a decision that appeared to cut back on the device of judicial implication of private enforcement powers, he included a formula that, in essence, allowed a judge to infer private enforcement whenever a statute advanced an end that the judge found attractive. Although he did not use Marshall's terminology, the "federal right in favor of the plaintiff" seems the modern counterpart to vested rights. Not surprisingly (except perhaps to Brennan's colleagues in 1975), the lower federal courts promptly found a plethora of implicit private enforcement powers.[24]

Justice Powell's dissenting opinion in *Cannon v. University of Chicago*[25] marks the first sign of an alternative approach. In opposition to *Cort v. Ash*, he proposed that the Court apply a presumption against implication of private enforcement. His argument had three elements. First, the practice of judicial invention of remedies for federal statutes had little Supreme Court precedent. *J.I. Case* was the only decision that unambiguously endorsed the practice, and it was, to put it mildly, under-theorized. Second, the choice of enforcement mechanism is consequential and important, independent of the legal norm being created. Third, a court's decision to craft a remedial scheme constitutes an inappropriate arrogation of power properly exercised by the legislature.

The last step in this argument represented a significant break from the past. In particular, it implies a particular set of assumptions about judicial lawmaking. Powell acknowledged that courts exercise significant power when they interpret a statute's meaning and thereby affect its scope. But supplementing the remedial scheme put in place by Congress is an additional and significant step. "By creating a private action, a court of limited jurisdiction

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[23] *Id.* at 78 (citations omitted).

[24] For elaboration on this critique of Cort v. Ash and documentation of the response of the lower federal courts, see Cannon v. Univ. of Chicago, 441 U.S. 677, 739–42 (1979) (Powell, J., dissenting). I worked as Powell's law clerk at the time that he wrote this opinion, which may explain my attraction to his argument.

[25] *Id.* at 730–49.

necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve."[26] Accordingly, Powell would invoke a strong presumption against implying private enforcement powers: "Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes."[27]

Although writing only for himself on the losing side in a case that divided the Court 6-3, Powell clearly had an impact. Two of the members of the *Cannon* majority signaled their inclination to embrace Powell's approach in future cases.[28] Within months a majority of the Court rejected the implication of a private remedy from a provision of the Securities Exchange Act.[29] The academy quickly turned to the topic, some embracing and others attacking Powell's position.[30] By the end of the 1980s, Powell's presumption had become doctrine, as the Court, in cases not clearly covered by its earlier precedents, consistently rejected the implication of private enforcement of public law in the absence of clear indications of legislative intent.[31]

Cannon, one could argue, focused specifically on the issue of an implied cause of action, that is whether a statute by implication could provide a court with both jurisdiction over a suit brought by a private person and an applicable rule of decision. Portions of Powell's dissent focused on the particular difficulties presented when a federal court in effect invents its jurisdiction. But Powell also wrote about enforcement mechanisms, of which a private right of action is only one instance. Private enforcement, as the previous section explains, is not limited to initiation of a lawsuit. A person otherwise properly before a court (say, a criminal defendant) might argue that a statute supplies a rule of decision applicable to the matter (say, a defense). Invoking a statutory provision in any proceeding other than that expressly mentioned in the statute raises the same fundamental problem that concerned Powell, namely judicial initiative in the development of remedies at the expense of greater legislative

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[26] *Id.* at 746.

[27] *Id*. at 749.

[28] *Id.* at 717–18 (Rehnquist, J., joined by Stewart, J., concurring).

[29] Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

[30] *Compare* Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) (treating legislative bargains, including enforcement decisions, as contracts to be strictly interpreted), *and* Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 276 (1982) (same), *with* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1199 (1982) (criticizing Justice Powell's approach).

[31] *See*, *e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001); Alexander v. Sandoval, 532 U.S. 275 (2001); Thompson v. Thompson, 484 U.S. 174 (1988); Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804 (1986); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981); California v. Sierra Club, 451 U.S. 287 (1981); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981); Univs. Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981). *Cf.* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (following majority opinion in *Cannon* with respect to same statute).

guidance. The post-*Cannon* decisions at least suggest that the Court appreciates this point.

This brief history supports several observations:

First, the Court has approached the question of private enforcement of statutes conceptually, rather than wrestling with each and every statute on its own terms. Something like a jurisprudence about implied private enforcement exists.

Second, that jurisprudence has changed over time. In the 1960s and 1970s, the Court assumed that courts should play an important role in crafting the enforcement scheme for statutes, based ultimately on what judges thought would be the best way to attain underlying legislative purposes. Since then, the Court has regarded the design of enforcement as a substantive issue with politically significant outcomes and has sought to force Congress to play a greater role in making those choices.

Third, the baseline rule that the Court uses to force greater congressional participation is a presumption of no private enforcement. Other baselines are available, of course, and the choice of baseline has clear and substantive consequences. It is costly for Congress to act, so it will be relatively hard to enact statutes that depart from the baseline. The present baseline will lead to less overall enforcement of statutory rules than would a baseline that presumed full private enforcement.

IV. PRIVATE ENFORCEMENT OF TREATIES

The doctrine discussed in the preceding section all involved statutes, adopted by Congress pursuant to Article I of the Constitution, rather than treaties made by the President and approved by the Senate pursuant to Article II. There are several reasons to distinguish between these types of law. Formally, enactment of a statute requires the consent of simple majorities of the House and Senate plus the President, or supermajorities of both the House and Senate in the presence of presidential opposition. A treaty involves the consent of the President and a supermajority of the Senate.

More important are the functional differences between treaties and legislation. A treaty involves other parties besides the United States and thus implicates the expectations of those parties. A court will consider evidence of these expectations in interpreting a treaty, while it presumably would not consider the intentions of anyone other than a U.S. lawmaker in interpreting a statute. Finally, a treaty endows its signatories with expectations, and states can bring pressure—diplomatic, political, economic, and even military—when the behavior of a party has disappointed them. Foreign states, in contrast, have no particular reason to do anything to enforce another state's domestic statutes.

The existence of public and international enforcement mechanisms for treaties has two implications for private enforcement by domestic courts. On the one hand, the failure of a court to imply a domestic remedy does not mean that no remedy exists, but rather that vindication of rights created by a treaty

will depend on "protests and intervention of protecting powers."[32] But, on the other hand, failure of a court to imply a remedy might put the court in the position of causing a violation of international law and thus provoking "protests and intervention." In the case of a treaty addressing specifically the conduct of a judicial proceeding, for example, a court might face a stark choice: Apply the treaty as a rule of decision, thus arrogating to itself the political branches' function of designing treaty enforcement mechanisms, or put the United States in a position of default regarding its international obligations. In the broadest terms, then, treaty enforcement presents an issue that statutory enforcement does not: Should courts take over a responsibility that might best be exercised by the political branches to avoid international difficulties for the United States?

For some international lawyers, it might suffice to argue that a federal court should never aid or abet a violation of international law. The *Charming Betsy* doctrine, which holds that courts should seek to avoid any conflict with international law if possible, might be restated as requiring a court never to contribute to a violation of international law unless faced with an unmistakable constitutional or legislative command to do so.[33] But for all but international law absolutists, this argument proves too much. A court that has the power to stop a violation of international law, say by enjoining the offending act, but that refuses to do so, aids and abets the violation every bit as much as one that directly acts in a manner contrary to an international obligation.[34] Consider the *Head Money Cases*,[35] a decision that famously established the priority of a subsequently enacted statute over an earlier treaty. The plaintiffs sued to obtain a refund of a tax collected under authority of a statute but in violation of a treaty. In refusing to order a refund, the Court brought about a definitive violation of the treaty obligation. Its complicity in this breach of international obligation did not deter the Court from reaching the result that it did.

Neither logic nor doctrine justifies a distinction between positive judicial acts that put the United States in noncompliance with its obligations, and a failure to prevent noncompliance. Rather, one must continue to ask, in each instance where international law might apply to a dispute, whether a court has the authority to rely on that law to resolve the dispute. Unless one believes that international law always preempts national law, the fact that some resolutions

[32] Johnson v. Eisentrager, 339 U.S. 763, 789 n.14 (1950).

[33] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). For some scholars, the proposition is even stronger. They would have courts resist even clear legislative commands to violate an international obligation and would interpret the Constitution so as to bolster, rather than impede, compliance with international law. United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1471 (S.D.N.Y. 1988) (refusing to enforce federal statute because of earlier treaty commitment to United Nations); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2374 (1991) (praising the *PLO* case as a model of application of international law in domestic litigation).

[34] *E.g.*, Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) (refusing to enjoin U.S. conduct in Nicaragua found by the International Court of Justice to violate international law).

[35] 112 U.S. 580 (1884).

of a dispute might transgress an international obligation is not sufficient reason to authorize a court to apply the rule in question. We must always return to the question of whether a court is entitled to enforce a rule of international law in the case before it. And this question in turn rests on broader issues of judicial capacity and the responsibilities of the political branches.

How then should we resolve the tension between, on the one hand, the principle that the powers of federal courts are limited and dependent on legislative grants, and, on the other hand, the principle that courts should seek to advance compliance with international law when they can? Looking for an answer at the level of doctrine is not very helpful. The Supreme Court's case law regarding judicial implication of private enforcement powers from a treaty is scant and to some extent contradictory. In *United States v. Schooner Peggy*, a very early Marshall Court decision, the Court ruled that a supervening treaty with France required the reversal of a prize condemnation.[36] A U.S. court indisputably had jurisdiction in this admiralty proceeding. The question was whether the treaty supplied a rule of decision to determine the proceeding's outcome. Marshall invoked the Supremacy Clause to suggest that, from the perspective of the judiciary, a treaty and an enactment of Congress were equivalents: "[W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress."[37]

A later Marshall decision, however, introduced a complication: A treaty can commit the United States immediately to incorporate its provisions into domestic law, but it also is possible for a treaty only to obligate the United States to enact legislation to further some specified end. Courts, Marshall explained, must determine what kind of treaty is at issue before they can refer to its provisions to find a rule of decision.[38] Over time, the vocabulary became one of self-execution, distinguishing a treaty that "operates of itself without the aid of any legislative provision" from one that requires implementing legislation.[39]

Although the distinction between treaties that demand implementing legislation and those that do not is significant, it also is incomplete. A treaty, like a statute, can "operate" within the domestic legal system without necessarily authorizing the full array of enforcement mechanisms. It might, for example, authorize the national government or another state party to seek to enjoin state or local actions that violate the treaty but not provide a private person with similar authority or anyone with a right to damages. The leap from self-execution to full private enforcement is conceivable but not inevitable.

For the first century-and-a-half of the federal judiciary's history, the general common law powers of the courts obscured this point, just as they did in the realm of statutory enforcement. Simplifying somewhat, federal judges assumed that whenever they had jurisdiction over a dispute and no federal

[36] 5 U.S. (1 Cranch) 103 (1801).
[37] *Id.* at 110.
[38] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).
[39] *Id.*

statute directly applied, they had the authority to pick whatever rule of decision seemed best to fit the case. They thus saw no reason to consider whether a treaty of its own force supplied a rule of decision. Rather, they relied on what they understood to be inherent judicial power to choose a rule in cases over which they had jurisdiction to give them all the authority they needed. Throughout the Court employed a test that seems the direct descendant of Marshall's approach in *Marbury*: They asked whether the treaty created individual rights of a nature that a court would enforce.[40]

To be sure, treaties as much as statutes entail different judicial powers from those involved in the propounding of general common law. Interpretations of treaties bind the states as much as do interpretations of statutes, but pre-*Erie* general federal common law did not. As with the implication of private remedies from public statutes, however, the pre-*Erie* courts did not seem to focus on this distinction.

Given this assumed authority, the occasional discussion in the Court's decisions during this era about the legal effect of treaties is unhelpful. On the one hand, one can find many references to the proposition that treaties generally create rights and obligations on behalf of state parties rather than of individuals.[41] On the other hand, one also can find statements tracking Marshall's in *Schooner Peggy*, namely that treaties constitute part of the law of the United States and, when they create private rights, invite private enforcement.[42] What is missing is any effort to reconcile these propositions by explaining the significance of a treaty's status as U.S. law, and in particular whether its status as U.S. law leads to private enforcement.

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[40] For Supreme Court decisions illustrative of this position, see United States v. Rauscher, 119 U.S. 407 (1886); Chew Heong v. United States, 112 U.S. 536 (1884); Hughes v. Edwards, 22 U.S. (9 Wheat.) 489 (1824); Soc'y for Propagation of Gospel v. Town of New Haven, 21 U.S. (8 Wheat.) 464 (1823); Orr v. Hodgson, 17 U.S. (4 Wheat.) 453 (1819); Craig v. Radford, 16 U.S. (3 Wheat.) 594 (1818); Jackson v. Clarke, 16 U.S. (3 Wheat.) 1 (1818); Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259 (1817); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813); Fitzsimmons v. Newport Ins. Co., 8 U.S. (4 Cranch) 185 (1808); Higginson v. Mein, 8 U.S. (4 Cranch) 415 (1808); Hopkirk v. Bell, 7 U.S. (3 Cranch) 454 (1806); Ogden v. Blackledge, 6 U.S. (2 Cranch) 272 (1804); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); Moodie v. The Ship Phoebe Anne, 3 U.S. (3 Dall.) 319 (1796); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794). An interesting variant on this pattern is *Asakura v. City of Seattle*, 265 U.S. 332 (1924). The Court ruled that a Japanese subject could invoke a treaty between his country and the United States to enjoin a city ordinance forbidding noncitizens from working as pawnbrokers. *Id.* at 341. The question presented was virtually the same as that in the earlier case of *Truax v. Raich*, 239 U.S. 33 (1915), which held that an Arizona law barring noncitizens from various lines of work violated the Equal Protection Clause of the Fourteenth Amendment. Although the *Asakura* Court did not cite *Truax*, the blending of substantive nondiscrimination law seems significant; the exact source of the nondiscrimination rule did not seem to matter all that much to the Court. As I observe below, the case seems to anticipate the alienage equal protection decisions of the 1970s.

[41] *E.g.*, La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899); United States *ex rel.* Boynton v. Blaine, 139 U.S. 306 (1891); United States v. Weld, 127 U.S. 51 (1888); Alling v. United States, 114 U.S. 562 (1885); Great W. Ins. Co. v. United States, 112 U.S. 193 (1884); Frelinghuysen v. Key, 110 U.S. 63, 75 (1884).

[42] *E.g.*, Head Money Cases, 112 U.S. 580 (1884) (dicta).

After *Erie Railroad Co. v. Tompkins*,[43] however, it did not seem so obvious that self-execution automatically meant the provision of a rule of decision for all disputes, public or private. With the demise of the habits of mind induced by the concept of general federal common law, judges could not take for granted that they could apply any rule of decision that seemed relevant to a case within their jurisdiction, and in particular that they had a free hand to develop a federal common law of remedies. Instead, a federal court had to make an independent analytical step: It had to find an independent source of authority for the application of any particular rule of decision.

I know of only two post-*Erie* instances where the Supreme Court relied directly on a treaty (as distinguished from a statute that incorporated a treaty by reference) to find a rule of decision that a private person could invoke in a U.S. lawsuit. In several cases involving the Warsaw Convention, the Court assumed that this multilateral instrument provides the relevant substantive rules for litigated commercial disputes that come within its coverage.[44] None of these decisions identifies the basis of this assumption. The absence of discussion might be significant, if private enforcement is the default for self-executing treaties. But one does not need such a strong rule to defend the application of the Warsaw Convention in private suits. If any international instrument to which the United States is a party anticipates private enforcement, this one does. It purports to supply terms for a particular class of contracts, namely those involving international aviation.[45] Its rules have legal traction only in the context of private disputes over these contracts, in which litigation is the presumed dispute-resolution mechanism. In other words, the Warsaw Convention does no work other than to supply rules of decision to apply in private disputes.

The only other instance where the post-*Erie* Court has embraced private enforcement of a treaty is *Kolovrat v. Oregon*,[46] a suit challenging state inheritance law. An Oregon statute cut off the inheritance rights of a foreign beneficiary of an estate in cases where the beneficiary's home country interfered with the inheritance rights of U.S. citizens. Black, writing for a unanimous Court, ruled that Oregon's law violated a treaty that obligated the United States to grant Yugoslavian citizens the same right to inherit property as

[43] 304 U.S. 64 (1938).

[44] Olympic Airways v. Husain, 540 U.S. 644 (2004); El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999); Dooley v. Korean Air Lines Co., 524 U.S. 116 (1998); Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996); E. Airlines, Inc. v. Floyd, 499 U.S. 530 (1991); Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); Air Fr. v. Saks, 470 U.S. 392 (1985); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984).

[45] Convention for the Unification of Certain Rules Relating to International Transportation by Air [Warsaw Convention] art. 1, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11.

[46] 366 U. S. 187 (1961).

U.S. citizens enjoyed.[47] Black relied on the treaty without ever addressing the question of whether a private person could invoke it in a lawsuit.[48]

Because *Kolovrat*, like the Warsaw Convention cases, did not discuss the issue of private enforcement, one struggles to read much into the decision. Two factors confound the case's precedential significance. First, the Court also offered an alternative holding, namely that the Oregon law interfered with the ability of the United States to meet its obligations under the Articles of Agreement of the International Monetary Fund, an international agreement that Congress had implemented through legislation.[49] One thus can question whether the treaty argument did much independent work. Second, the facts closely resembled those of *Zschernig v. Miller*,[50] a case decided seven years later involving the same Oregon statute but a different treaty. There the Court ruled that the restriction on inheritance unconstitutionally interfered with the exclusive power of the national government to conduct foreign relations. In *Zschernig* the Court did not address the argument that the relevant treaty required the invalidation of the Oregon law.[51]

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[47] *Id.* at 191.

[48] In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), the U.S. subsidiary of a Japanese firm sought to invoke a treaty as providing a defense to a Title VII class action brought by its employees. The Court ruled that the treaty did not cover a U.S. corporation, even though it was a wholly owned by a Japanese parent, and thus did not address the question of whether the treaty authorized private enforcement. On occasion, the post-*Erie* Court has ruled that particular treaties did not authorize private enforcement. *E.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 734–35 (2004) (International Covenant on Civil and Political Rights); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442–43 (1989) (Geneva Convention on the High Seas and Pan American Maritime Neutrality Convention). In other instances, the Court found a treaty inapplicable without addressing the issue of private enforcement. *E.g.*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (Convention Relating to the Status of Refugees); United States v. Alvarez-Machain, 504 U.S. 655 (1992) (extradition treaty with Mexico); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) (Hague Convention on Service of Process Abroad); Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522 (1987) (Hague Convention on the Taking of Evidence Abroad); *In re* Yamashita, 327 U.S. 1 (1946) (1929 Geneva Convention on Prisoners of War). I put aside the numerous cases where the Court, exercising its authority to resolve disputes between the States and between the United States and states, has looked to a treaty to determine rights to land and similar allocations of authority. For similar reasons, I also disregard cases involving treaties with Indian nations. Finally, I do not review lower court precedent, to which the Court typically does not attach much significance.

[49] *Kolovrat*, 366 U.S. at 197–98.

[50] 389 U.S. 429 (1968).

[51] Justice Harlan joined the result, but not the majority opinion, on the basis of the applicable treaty. *Id.* at 443 (Harlan, J., concurring). For an earlier case that also invalidated a state inheritance law because of its inconsistency with a treaty, see *Clark v. Allen*, 331 U.S. 503 (1947). This decision can be read as using the treaty as a device for interpreting the Trading with the Enemy Act, which provided the principal basis for opposing the inheritance in question. The validity of this precedent is questionable, inasmuch as the Court's opinion, written by Justice Douglas, also held that a state law requiring reciprocity in inheritance rights did not violate the Constitution, a holding overruled in *Zschernig*, an opinion written by Justice Douglas.

About the only thing that seems clear from *Kolovrat*, as elucidated by *Zschernig*, is that the Court wished to invalidate a state law that expressed hostility to communism, and that the basis for invalidation, whether a treaty, a statute, or the Constitution, was of secondary importance. The decision appears to rest on a general concern about state discrimination against aliens, an impulse that blossomed a few years later into a separate strand of equal protection jurisprudence.[52]

This, then, was the precedent confronting the Court in *Sanchez-Llamas*. In no instance since *Erie* had the Court explained the basis for private enforcement of a treaty. Rhetoric indicating that treaties generally did not create rights that individuals could enforce coexisted with "treaties are part of the law of the United States" language. At no time did the Court try to identify the functional consequences of any particular approach to implied treaty enforcement. In particular, it never discussed the impact of a presumption for or against private enforcement on future treaty making or legislative implementation.

As noted above, five of the Justices in *Sanchez-Llamas* declined to resolve the question of private enforcement. Four did. In his dissenting opinion in *Sanchez-Llamas*, Breyer offered his own solution to the private enforcement quandary: Private enforcement should exist whenever a treaty "prescribe[s] a rule by which the rights of the private citizen . . . may be determined" and its obligations are "of a nature to be enforced in a court of justice."[53] Apparently it would be enough for these Justices to assume private enforcement if a treaty uses a suggestive term such as "right" and contains judicially manageable standards for applying a rule of decision.[54]

The quoted language in Breyer's opinion comes from the *Head Money Cases*.[55] His assertion that this case provides the template for deciding when a treaty requires private enforcement is odd, given that the *Head Money Cases* did no such thing. As noted above, the Court there declined to apply a treaty to a dispute over collection of a tax because a subsequent congressional enactment authorizing the tax superseded the treaty. The Court's language about private enforcement, which reflects the assumptions of pre-*Erie* federal jurisprudence, was dicta meant to strengthen the force of the Court's core holding, namely that, as a matter of domestic law binding on the judiciary, a later enacted statute has priority over an earlier treaty. The decision was about disregarding treaties, not enforcing them.

Much in the spirit of Brennan's opinion in *Cort v. Ash*, Breyer imported dicta from an earlier case standing for an entirely different principle to frame a

[52] Nyquist v. Mauclet, 432 U.S. 1 (1977); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973).

[53] Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2695 (2006) (Breyer, J., dissenting).

[54] For an influential article advocating this approach to treaty enforcement, see Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

[55] 112 U.S. 580, 598–99 (1884).

standard that maximizes the discretionary authority of judges. The divination of the "nature" of a treaty obligation is hardly a constrained inquiry, and readily can evolve into a determination as to whether, in the deciding judge's opinion, private enforcement of a particular provision will make the world a better place. Breyer did not speak of "vested rights," but the conceptual similarity to Marshall's *Marbury* test seems self-evident. What remains open is the possibility that a majority of the Justices will embrace Breyer's position.

To summarize: The history of the Court's thinking about private enforcement of treaties parallels its approach to private enforcement of statutes. In particular, the present Court faces a body of precedent that largely resembles the precedent applied to statutes at the end of the 1970s. Four members of the current Court have indicated a willingness to follow the model offered by Brennan in *Cort v. Ash*, which has a close family resemblance to the vested rights jurisprudence exemplified by *Marbury v. Madison*. The others have not yet indicated what they will do, and the current body of precedent does not dictate any particular choice.

V. LEGISLATIVE PRACTICE

Having concentrated on the parallels between the private enforcement of statutes and of treaties, I now consider the differences. First, it is relatively rare for Congress to enact a law that it intends to influence primary conduct—that is the behavior of private actors—without providing for some enforcement mechanism. Congress, normally, specifies criminal or administrative sanctions in instances where a statute does not advert to private enforcement. Many treaties (like many statutes) do not address primary conduct, but some do. Yet most treaties do not address enforcement issues, leaving it to each signatory to determine what changes in its domestic law will suffice to meet the treaty obligations. When a statute purports to affect primary conduct, normally the only issue left open for interpretation is whether supplemental enforcement measures (besides the express government-initiated sanctions) are appropriate. Treaties, in contrast, often present a prior choice of some domestic enforcement or none. As a result, a court is more likely to confront a treaty that purports to affect primary behavior but where nothing specifies how enforcement will work.

There also is an obverse point. Treaties, whether they contemplate domestic enforcement or not, come with international enforcement mechanisms—even if only diplomatic pressure—that domestic statutes lack. Thus the choice of no domestic judicial enforcement does not render a treaty pointless, as a similar choice might with regard to a statute.

Of course, a treaty might address judicial conduct, which means that a court has the power to put the United States in violation of its international obligations. But, as noted above, a distinction between sins of commission and omission, when considering judicial compliance in the violation of international law, ultimately makes no sense. Carrying out Congress' intent might also cause a court to violate international law, as in the *Head Money Cases*. Courts either

must seek to maximize international law compliance or show due regard for the responsibilities of the political branches.

As noted above, treaties carry with them not only the intentions of the relevant U.S. lawmakers (the President and the Senate), but also of the other parties. In interpreting a treaty, courts reasonably can take the signatories' intentions into account, although that accounting typically will require an act of construction more than an act of excavation. Documentation of intention usually is incomplete, which means that a court will have to infer intention on the basis of background expectations about state behavior. Determining that a general pattern exists for implementation leads to imputation of an intention to conform to this pattern, absent contrary indications.[56]

In the previous section, I argued that judicial practice, at least as crystallized in the Court's jurisprudence, does not itself establish a clear background pattern. What can be inferred from legislative practice? Does the United States normally look to the judiciary to take the first cut at creating treaty enforcement mechanisms, or does Congress step into the breach with authorizing legislation?

First, one should note that under some constitutional systems, the question cannot arise. As a matter of British law, for example, a treaty has no domestic consequences unless and until Parliament acts to implement it.[57] Given the Westminster structure of government, however, parliamentary consent is not that big a deal. The Prime Minister who negotiates a treaty normally leads the party that controls Parliament and can threaten his or her colleagues with dissolution if they fail to support the treaty.[58] In the United States, by contrast, we have come to accept the idea that at least some treaties can affect the primary rights and obligations of private persons without an intervening act of legislation.[59] Unlike the British, then, we must determine when, and to what

[56] One can find expression of this point in customary international law and the Vienna Convention on Treaties, which in the United States has the status of customary international law. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. I am not addressing, strictly speaking, the obligation of the United States under international law to create enforcement mechanisms. Rather, I am arguing that states that enter into treaties with the United States have a legitimate expectation that the United States will make changes in its domestic law that are consistent with similar domestic law changes it has taken in the past in response to similar treaty obligations.

[57] Maclaine Watson & Co. v. Int'l Tin Council, (1989) 3 All E.R. 523 (H.L.).

[58] Prime Minister Major, for example, made approval of the Maastricht Treaty creating the European Union a question of confidence in the government. This meant that Tory opponents of the Treaty faced the prospect of forcing an early election that some were likely to lose. Eugene Robinson, *Major Narrowly Prevails In House Vote on Europe; British Prime Minister Weathers Crisis*, WASH. POST, Nov. 5, 1992, at A3.

[59] Professor Yoo has argued that the original understanding of the Constitution required legislative implementation. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999). I remain unpersuaded, and in any event the Court's practice, both historically and at present, belies an absolute policy of no domestic legal effect for treaties.

extent, a treaty will have independent legal effect in the domestic legal system, and what kinds of enforcement mechanisms such legal effect entails.

Here, some familiarity with trade, investment, and commerce is useful. The United States has a long tradition of entering into treaties that promise nondiscrimination in trade, but since World War II they have come in two forms: multilateral agreements framed by the GATT members, and both multilateral and bilateral free trade agreements. The United States traditionally regarded private commercial arbitration with some ambivalence, but this changed with adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[60] Since the 1980s, the United States has entered into a network of treaties designed to protect foreign investors from expropriation and discrimination. Finally, the adoption of the federal income tax in 1913 quickly led to the making of an ever growing number of tax treaties designed to ease the burden of taxpayers confronting impost by multiple sovereigns.

The form of these international agreements differ somewhat. The United States, without exception since the end of World War II, has implemented trade agreements through legislation without prior submission to the Senate for supermajority approval. The most recent instances of this legislation, in turn, address comprehensively the issue of judicial enforcement.[61] Arbitration of commercial and investment disputes rests ultimately on two separate treaties, both of which the United States adopted with conventional Senate approval.[62] In both instances, Congress then adopted legislation to give domestic effect to the treaties' obligations.[63] In the case of tax treaties, Congress has embedded catch-all language into the Internal Revenue Code to provide for direct effect of treaty provisions.[64]

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[60] June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

[61] At least since 1993 all of the implementing statutes have made clear that none of these trade agreements permits private enforcement. Direct effect is limited to suits brought by the United States to enjoin state and local practices that violate an agreement. ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 172–74 (2006).

Professor Tribe has argued that the adoption of at least some of these agreements was unconstitutional because of the failure to obtain the supermajority approval of the Senate. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). I find his reasons for excluding the House of Representatives from adoption of certain laws as unconvincing as I do Professor Yoo's reasons for always including that body. In any event, the courts have not been impressed with Tribe's argument. *See* Made in the USA Found. v. United States, 242 F.3d 1300 (11th Cir. 2001).

[62] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 60; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

[63] *See* Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692 (codified at 9 U.S.C. §§ 201–207 (2000)) (implementing commercial arbitration convention); Convention on the Settlement of Investment Disputes Act of 1966, Pub. L. No. 89-532, 80 Stat. 344 (codified at 22 U.S.C §§ 1650, 1650a (2000)) (implementing investor protection convention).

[64] 26 U.S.C. § 894 (2000).

Of special interest (at least to those of us who roam the Internal Revenue Code) is the rather elaborate statutory scheme applicable to tax treaties. Section 894(a)(1) stipulates that provisions of the Code "shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer." Subsection (c) then withdraws these benefits for certain foreign persons that, although covered by a treaty, do not satisfy the Code's separate, more stringent test for treaty eligibility. Finally, section 7852(d)(1) states that:

> For purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law.

A strong suggestion that preferential status instead derives from the last-in-time rule comes from another provision of that subsection, which provides that the 1954 recodification of tax law should not be treated as a new enactment for purposes of applying that rule.[65]

Several things are noteworthy about these treaties. First, there are many of them and they have a great deal of practical importance for many people. Second, all have direct bearing on issues in which private persons have a clear interest and involve standards that are conventionally applied by courts. Breyer's approach thus would suggest that all should enjoy private enforcement in domestic law without legislative action. Third, in every case Congress has implemented these international agreements with legislation. Fourth, congressional implementation invariably implies a kind of fungibility of treaty and statutory provisions, with timing rather than origin the decisive factor in determining priority. This approach is explicit as to tax treaties.

All this practice would seem to suggest a background norm of legislative implementation, which requires the judiciary to wait on Congress before applying treaty provisions to disputes before them. A possible rejoinder would argue that all these examples involve commerce and money, rather than the core dignitary interests with which international human rights law is concerned. At least during the last half-century, the argument might go, U.S. courts have paid greater attention to dignitary rights that to mere money. What is the pattern of domestic implementation of human rights treaties?

The answer, as specialists in the field know, is that since the Eisenhower Administration the President and Senate have entered into several multilateral human rights agreements. In every case they have employed express reservations, understandings and declarations to the effect that the agreement itself would have no effect on domestic law. In some instances, such as the Torture Convention, the United States met its obligation with separate legislation.[66] In others, the United States declared that existing domestic law

[65] 26 U.S.C. § 7852(d)(2) (2000).

[66] 18 U.S.C. § 2340A (2000) (implementing Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85)..

already satisfied all that the international agreement required.[67] The Court has given at least glancing support to the proposition that these limitations are legitimate and effective.[68]

Indirect confirmation of the pattern also comes from the field of international humanitarian law. As noted above, in *Hamdan v. Rumsfeld* a majority of the Court (the four Justices who had argued that the Vienna Convention on Consular Relations provided a rule of decision for domestic courts plus Justice Kennedy) asserted that Common Article 3 of the Third Geneva Convention provided a standard for assessing the legality of the military commissions that were to be used to try persons held in Guantanamo. At first blush, this might seem to be an instance of translating a treaty directly into domestic law. But, as Justices Stevens' and Kennedy's opinions make clear, Common Article 3 was relevant because Congress by statute had made it so.[69] The Court did not hold that the treaty would apply absent statutory incorporation, although perhaps four of the Justices might have accepted that outcome. [70]

Does this mean that when a treaty contemplates implementation through the domestic legal system, the treaty makers invariably look to Congress to enact legislation? One clear modern counterexample is the Warsaw Convention, as I discussed in the prior section. Another is the Convention on the International Sale of Goods.[71] Both these instruments by their express terms provide rules of decision to determine certain kinds of private commercial disputes of the sort that, in the United States, courts typically decide. Neither even hints at any other kind of implementation. It should not be surprising that

[67] For accounts of this process, both supportive and critical, see Curtis A. Bradley, *Foreign Affairs and Domestic Reform*, 87 VA. L. REV. 1475 (2001); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 442–56 (2000); Louis Henkin, Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

[68] Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004).

[69] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786, 2794 (2006); *id.* at 2802 (Kennedy, J., concurring).

[70] Other modern treaties resting on domestic implementing legislation include the Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 98, implemented through the International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988), and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. No. 105-51, 32 I.L.M. 1139, implemented through the Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825. A more complicated example is Article 33 of the United Nations Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 150, which the United States adopted through joining the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, and which after the passage of more than a decade was implemented by section 203(e) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

[71] Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. No. 98-9 (1983), 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988)..

the makers of these treaties did not anticipate the need for implementing statutes.[72]

In sum, legislative practice (by which I mean both Senate participation in treaty formation and congressional responses to international agreements) since the end of World War II indicates a strong inclination to rely on legislation to implement treaty provisions that are directed toward the rights of persons or that are otherwise amenable to private enforcement (using Breyer's standard). Exceptions to this pattern exist, at least when a treaty's principal purpose is the provision of rules of decision governing private disputes. But the pattern of implementation through legislation rather than litigation nonetheless is clear.

VI. JUDICIAL PRACTICE REVISITED

What is the relevance of judicial implication of enforcement mechanisms for statutes to the question of treaty enforcement? I already have conceded that treaties and statutes are different, both in their adoption and their enforcement. At the same time, persuasive arguments exist for merging the jurisprudence of implied enforcement mechanisms for these two kinds of laws.

A good place to start is the language of the Supremacy Clause. Several writers have suggested that its "supreme Law of the Land" language requires judges to invoke any apparently relevant treaty rules in any case that comes before them.[73] But the point of that Clause is that treaties operate on the same basis as "the laws of the United States" made pursuant to the Constitution. And, as we have seen, statutes can be the "law of the land" without providing a rule of decision for private disputes. It would violate the spirit, if not the letter, of the Supremacy Clause to extend greater implied enforcement to treaties than that accorded statutory enactments.

I do not mean to suggest that the Supremacy Clause requires exact symmetry between the implementation of statutes and of treaties. Rather, it indicates a presumption of consistency in the enforcement of statutes and treaties. This message, moreover, informs not just the domestic judiciary, but also the treaty partners of the United States.

I already have argued that the expectations of our treaty partners should matter in the domestic application of an instrument. When, to take a nonrandom

[72] A mild counter-counter example is the Hague Rules (the Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading), Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155, which the United States adopted by enacting a conforming statute, the Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 207 (1936), without an independent joining of the treaty. The Hague Rules provided the template on which the later Warsaw Convention was modeled. *See* Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999). The United States joined the Warsaw Convention before it adopted COGSA; why it chose the conventional treaty process in the one instance and legislation in the other is something of a mystery. I attach no significance to the existence of these two approaches to the domestic implementation of nearly identical international agreements, other than to note that, in the alternative views of Professors Tribe and Yoo, one or the other must be unconstitutional.

[73] *See* Henkin, *supra* note 67, at 346; Vázquez, *supra* note 54, at 696.

example, the Vienna Convention on Consular Relations obligates the United States to give "full effect" to the rights that it creates,[74] the other signatories should expect that the United States will act consistently with the Supremacy Clause and its general pattern of translating an international obligation into domestic law. They should note that this Convention, unlike the Warsaw Convention or the Convention on the International Sale of Goods, does not specifically address the rules of decision to apply to private disputes. They should further note that as a general pattern the United States normally, although not inevitably, relies on legislation rather than litigation to translate treaty obligations into domestic law. Finally, they should observe that the Supremacy Clause implies symmetrical enforcement of statutes and treaties, and that the contemporary jurisprudence of the United States sets up a presumption against implication of private remedies for statutes that do not expressly provide for them.

This argument has a both a major and a minor premise. The major premise is that the judiciary should approach the issue of enforcing treaties with the same set of doctrinal tools and analytic constructs that they use when considering the enforcement of statutes. I do not argue that the Supremacy Clause requires this approach. Rather, the Supremacy Clause provides a textual basis for justifying this approach and also helps to inform the expectations of our treaty partners. The more functional point is that the practical differences between statutes and treaties—the former normally come with some express enforcement provision but do not give other countries an interest in their enforcement, while the latter typically lack express enforcement mechanisms but do invest other countries with at least some enforcement authority—do not justify different approaches.

My minor premise is that, since the 1980s, the Supreme Court has recognized that enforcement decisions are consequential and has chosen to put the onus on Congress to make these decisions. Not everyone thinks this stance is wise, as it leaves important decisions to a flawed political process and may result in underenforcement of objectively good laws.[75] Were the Court to approach the implication of remedies from statutes differently, my argument would admonish the judiciary to take the same stances toward treaties.[76] But, if

[74] Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36(2), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[75] *See* Stewart & Sunstein, *supra* note 30, at 1200.

[76] I reserve here other arguments that might point in favor of a more stringent presumption against implication of private remedies for treaties in comparison to that applicable to statutes. Judicial interpretation of statutes always remains subject to the corrective action of Congress. Technically, this is true of treaties as well, thanks to the last-in-time rule. But any subsequent legislation to alter a court's interpretation of a treaty obligation puts the United States in an awkward position with respect to its treaty partners. Legislation does not have this problem. Moreover, treaties, unlike statutes, cannot come about without the active participation of the Executive and the support of a supermajority of the Senate. Even though they bypass the House of Representatives, treaties in many instances are already harder for the United States to make than statutes. A default that makes treaties more costly to implement, by increasing the likelihood of private enforcement, will

the Court regards the path laid out in Powell's *Cannon* dissent as desirable, it should not stray from that path when confronted with a problem of treaty enforcement.

VII. CONCLUSION

The technical questions that underlie the issue left open in *Sanchez-Llamas* should not detract from the broader principles at stake. Fundamentally, the dispute is about international law exceptionalism. Should the judiciary, and in particular the Supreme Court, regard cases through a different jurisprudential lens when international law is in play? Or should the courts, when contemplating the domestic legal consequences of international legal obligations, try to resolve the matter at hand using the analytical apparatus and doctrines that generally apply to domestic cases?

The argument for exceptionalism, I believe, rests at bottom on ideas about the expressive function of law. By taking a particular position on an international issue, a court sends a message to the rest of the world as well as indicating to the domestic legal community how seriously it takes the United States' international commitments. Once one frames the issue this way, it seems irresistible to embrace expression of a sense of seriousness and purpose.

The alternative is to consider the deciding of cases as an instrumental matter. By this I mean that outcomes have direct consequences for litigants and indirect but significant implications for persons who look at decided cases as evidence of the rule that may be applied to their activities.[77] An instrumental perspective leads judges to consider not simply what message they might want to send, but also whether their actions represent the best means of achieving the end being sought. It also makes relevant the vast body of law that addresses the competence of federal judges generally.

From this perspective, my argument has a somewhat different slant. Over the last quarter century, the Court has come to see the instrumental consequences of judicial implication of private enforcement of federal statutes as a redistribution of wealth and power. This insight in turn has created some discomfort among judges who do not see themselves as especially suited to make such choices. Private treaty enforcement raises exactly the same issues and should trigger exactly the same reservations. For a court concerned with the consequences of its decisions, it is this problem, and not the question of what others in the world might think of us, that should determine the resolution of the treaty enforcement issue.

create at least some additional disincentive against the making of future treaties. This in turn will lead to fewer treaties, arguably an undesirable outcome.

[77] For more on the tension between expressive and instrumentalist concerns in judicial behavior, see Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627 (2002).