
Of Treaties and Torture: How the Supreme Court Can Restrain the Executive

Author(s): Jeffrey C. Goldman

Source: *Duke Law Journal*, Dec., 2005, Vol. 55, No. 3 (Dec., 2005), pp. 609-640

Published by: Duke University School of Law

Stable URL: <https://www.jstor.org/stable/40040526>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



is collaborating with JSTOR to digitize, preserve and extend access to *Duke Law Journal*

JSTOR

Notes

OF TREATIES AND TORTURE: HOW THE SUPREME COURT CAN RESTRAIN THE EXECUTIVE

JEFFREY C. GOLDMAN

INTRODUCTION¹

The Bush administration's original (and now superseded) "torture memos" strain contemporary understandings of the United States' obligations under the Convention Against Torture.² These documents also mock traditional understandings of the relationship between international law and treaties and of the executive's power to interpret and apply them.³ Perhaps most alarming are the administration's attempts to undermine the spirit of both domestic legislation and international law by employing a "strict constructionist" interpretive methodology while embracing an expansive view of executive power. The Bush administration's

Copyright © 2005 by Jeffrey C. Goldman.

1. The topic for this Note was inspired by an article written by Professors Derek Jinks and David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004), which concludes, in answer to its title, that the president is so bound.

2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987; entered into force for the United States Nov. 20, 1994) [hereinafter *Convention Against Torture*].

3. See Memorandum re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General 2 (Dec. 30, 2004) *available at* <http://www.usdoj.gov/olc/dagmemo.pdf> (superseding the August 2002 memorandum, interpreting the definition of torture, and reiterating "the President's unequivocal directive that U.S. personnel not engage in torture"); Memorandum re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President 1–2 (Aug. 1, 2002) *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter *Standards of Conduct for Interrogation*] (expounding the criminal definition of torture and concluding that torture may be permitted in the War on Terror under the president's war-conducting authority or justified by necessity).

approach weakens American law's carefully constructed system of checks and balances by aggrandizing power to the executive branch at the expense of both coordinate branches.

Short of impeaching the president and removing him from office—a drastic step that is likely to be both politically unpopular and ineffective in restoring the country's reputation as a leader in human rights issues—what other avenues exist for restraining the executive? This Note argues that the Supreme Court should take a far more activist approach in reviewing executive interpretation of international law and that it may do so while remaining consistent with judicial precedent. In particular, this Note focuses on the administration's conduct of the War on Terror and specifically on its application of, or threats to use, torture. It concludes that the president does not, in fact, have the power to terminate unilaterally the Convention Against Torture because treaties that embody human rights norms (especially peremptory norms like torture) are fundamentally different from other sorts of treaties.⁴

The interplay of traditional and contemporary understandings of international law—especially customary international law and peremptory norms—combined with well-established interpretations of the treaty power suggest that the balance of power between the executive and judicial branches should vary with the subject matter of a treaty. True, the United States Court of Appeals for the District of Columbia Circuit did state, in *Goldwater v. Carter*,⁵ that “[t]here is no judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance.”⁶ However, the development of international humanitarian and human rights law in the twentieth century, and especially in the twenty-five years since *Goldwater* was decided, suggests otherwise.

The recognition of some rules of international law as peremptory norms from which no derogation is permitted (*jus cogens*) provides a “judicially ascertainable and manageable method”⁷ of distinguishing treaties based on subject matter. These treaties provide the Supreme

4. As an aside, the arguments advanced in this Note would likely also apply to presidential statements purporting to interpret legislation implementing human rights treaties. Such application, however, is beyond the scope of this Note.

5. 617 F.2d 697 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

6. See *id.* at 707 (concluding that the president could unilaterally terminate the Mutual Defense Treaty with the Republic of China in accordance with the treaty's terms).

7. *Id.*

Court with legitimate, constitutional reasons to overrule congressional and executive treaty interpretations. Although U.S. courts long ago adopted a rule of construction that accorded treaties and statutes equal weight,⁸ jurists added a caveat: “[u]nless it is for some reason distinguishable from other laws, the rule which [a treaty] gives may be displaced by the legislative power, at its pleasure.”⁹

Treaties dealing with peremptory norms are categorically different from other treaties. Human rights treaties, and related implementing legislation, grant specific and far-reaching rights directly to individuals. These rights, by virtue of reason, should be held by courts as equal to constitutional freedoms and rights; like those freedoms and rights, neither the executive nor the legislative branch should be able to alter or infringe them in any but the most compelling circumstances (and certainly not unilaterally, as by executive order). The Supreme Court’s recognition of this equivalence would give it an axe to wield that it cannot carry into interpretative battles regarding other treaties.¹⁰ This axe can restore the balance of power between the executive, legislative, and judicial branches and ensure that the United States, which has led the world in recognizing and promoting human rights, retains its high moral ground.

This Note argues that because human rights are fundamental in nature, and because the exercise of constitutional rights is predicated on the enjoyment of more basic human rights, courts should treat human rights treaties differently than other international agreements the United States has signed or ratified. Part I of this Note reviews the judiciary’s understanding of the relationship between

8. See *Taylor v. Morton*, 23 F. Cas. 784, 785 (C.C.D. Mass. 1855) (No. 13,799) (holding that a congressional act granting preferences on hemp imported from India superseded a treaty granting most-favored-nation status to Russia because “[t]here is . . . nothing in the mere fact that a treaty is a law, which would prevent congress from repealing it”); see also *Chew Heong v. United States*, 112 U.S. 536, 547–50 (1884) (discussing Congress’s power to override a treaty with legislation, but disfavoring implied abrogation of treaties); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 115(1)(a) (1987) (“An act of Congress supersedes . . . a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.”).

9. *Taylor*, 23 F. Cas. at 785 (emphasis added).

10. See U.S. CONST. art. I, § 8, cl. 10 (giving Congress the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); *Taylor*, 23 F. Cas. at 785 (“Ordinarily, treaties are not rules prescribed by sovereigns for the conduct of their subjects, but contracts, by which they agree to regulate their own conduct.”).

international and domestic law. It then presents a brief overview of *jus cogens* norms in international law and demonstrates that torture has entered the canon of such norms. Part II begins with a discussion of the function and interpretation of treaties under U.S. law and argues that human rights treaties should be categorically distinguished from those dealing with other subjects. It then argues that equating human rights with constitutional rights is both appropriate and necessary if human rights treaties are to achieve their full potential. Part III suggests a limit for the executive's treaty interpretation power and specifically demonstrates that executive power to terminate treaties unilaterally does not extend to human rights treaties. Part III then argues that recognizing human rights treaties as a distinct category offers the judiciary a way to restrain the executive without running afoul of the political question doctrine.

I. INTERNATIONAL LAW, PEREMPTORY NORMS, AND TORTURE

This Part examines the relationship between international law, peremptory norms, and torture. Section A describes the history of U.S. courts' recognition of international law and the Supreme Court's understanding of the relationship between domestic and international law. Section B defines *jus cogens* (peremptory) norms and their place in the international law hierarchy and establishes torture as a *jus cogens* norm.

A. *Recognition of International Law by U.S. Courts*

International law "consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations . . . [including] some of their relations with persons."¹¹ These rules are derived from treaties, customs, and principles common to major world legal systems.¹² This definition, however, does not explain how U.S. courts have traditionally treated international law in general, and customary international law and *jus cogens* specifically. This Section briefly describes U.S. jurisprudence regarding international law.

11. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 101 (1987); *see also* Statute of the International Court of Justice, June 26, 1945, art. 38, para. 1, 59 Stat. 1055, 1060, T.S. No. 993, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/Basetext/istatute.htm> (delineating a commonly accepted list of major sources of international law).

12. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 (1987).

The Framers assumed that the American government would be based on a common law legal system similar to England's.¹³ According to Professor Michael Glennon, because the English law embraced principles of both natural and international law, the Framers intended that the U.S. legal system would embrace these same principles.¹⁴ Courts have generally reached a similar conclusion. An early case supporting this contention is *The Paquete Habana*,¹⁵ which dealt with whether fishing boats caught during the Spanish-American War should be exempt from capture as a prize of war.¹⁶ Speaking for a six-Justice majority of the Supreme Court, Justice Gray first noted that "[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law," boats captured in the course of fishing were exempt from capture.¹⁷ After a comprehensive review of the rule's history, including a review of English and French law, Justice Gray declared that this rule "has been familiar to the United States from the time of the War of Independence."¹⁸ Recounting adherence to the rule in the "modern" era¹⁹ (including by Japan, described as "the last State admitted into the rank of civilized nations"), Justice Gray wrote:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.²⁰

13. See MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 252 (1990) ("As the Framers met in Philadelphia to draft the Constitution, they worked against the backdrop of an American common-law system that had borrowed heavily from that of the English.").

14. *Id.* at 251–58 (using case law, English heritage and incorporation, and constitutional principles to conclude that customary international law is part of U.S. law).

15. 175 U.S. 677 (1900).

16. *Id.* at 686.

17. *Id.*

18. *Id.* at 689.

19. *Id.* at 689–701.

20. *Id.* at 700.

Concluding that a court²¹ “administering the law of nations” must, in the absence of a treaty on the same subject, judicially discern and apply international law, the court found in favor of the ship owners.²²

Interestingly, the dissent in *The Paquete Habana* did not deny the existence of the international rule cited by the majority. Instead, it disputed the force of the rule, downgrading it from a law to a mere matter of comity between nations, “an act of grace, and not a matter of right.”²³ The dissent, however, misconstrued the Court’s earlier opinion in *Brown v. United States*,²⁴ on which it relied.²⁵ Contrary to the dissent’s reading, in *Brown*, which dealt with confiscation of enemy property during the War of 1812, Chief Justice Marshall questioned only the legitimacy and implications of a specific rule of international law, but did not deny the persuasive authority of international law in general.²⁶ In fact, the Chief Justice did not abandon the notion of international law’s persuasive authority on U.S. courts at all. Earlier in the *Brown* opinion, he cited international law for the proposition that “tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated.”²⁷ Marshall also warned the Court against interpreting the Constitution to permit what would be generally prohibited under international law.²⁸

More than one hundred years later, U.S. courts are still citing *The Paquete Habana*. For example, a federal district court recently cited the case when holding that the court could “not ignore the

21. Technically, the case referred to prize courts, which specifically dealt with the (wartime) capture of a ship and its cargo at sea.

22. *Id.* at 708, 711–12, 714 (Fuller, C.J., dissenting) (reversing the lower court’s decision that the ships be treated as prizes of war).

23. *See id.* at 715, 719 (declining to find any such rule of international law and arguing that international law has no power in itself but rather provides a guide for a nation’s sovereign power).

24. 12 U.S. (8 Cranch) 110, 128 (1814).

25. *The Paquete Habana*, 175 U.S. at 715–16 (Fuller, C.J., dissenting); *see Brown*, 12 U.S. (8 Cranch) at 122–23 (discussing whether a declaration of war automatically confiscates enemy property or merely gives the sovereign the right to do so).

26. *See Brown*, 12 U.S. (8 Cranch) at 128–29 (holding that international law does not by its own force authorize confiscation of enemy property in a time of war but rather gives the sovereign the right to do so).

27. *Id.* at 125.

28. *See id.* (“In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere.”).

precepts of customary international law.”²⁹ Indeed, even the conservative Rehnquist Court acknowledged that “the domestic law of the United States recognizes the law of nations.”³⁰ The next Section of this Note turns to the concept of *jus cogens* norms—norms considered to be uniformly binding under international law—and demonstrates that torture has achieved *jus cogens* status.

B. *Jus Cogens Norms and Torture*

Certain norms under international law are deemed to be *jus cogens*, or “[c]ompelling law which is binding on parties regardless of their will and [that does] not yield to other laws.”³¹ As such, *jus cogens* norms should be, and usually are, accorded greater protection than other rights. A norm cannot be *jus cogens* unless both the principle and its universal, binding character are accepted by the international community.³² Although there is some disagreement at the margins, prohibitions on genocide, slavery, and apartheid are generally conceded to be examples of *jus cogens* norms.³³ Torture is recognized as such a *jus cogens* norm under both international and U.S. domestic law.³⁴ Torture is prohibited in all major legal systems and by almost all international human rights instruments.³⁵

29. See *Beharry v. Reno*, 183 F. Supp. 2d 584, 597 (E.D.N.Y. 2002) (reconciling customary international law and the Immigration and Nationality Act in evaluating a writ for habeas corpus), *rev'd sub nom.* *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

30. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (limiting application of the Alien Tort Statute, 28 U.S.C. § 1350 (2000), to a narrow set of claims arising under international law that does not include a right to be free of arbitrary detention).

31. CONG. RESEARCH SERV., LIBRARY OF CONG., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 54 & n.54 (Comm. Print 2001).

32. *Id.*

33. *Id.* at 55; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 cmt. k (1987) (“Some rules of international law are recognized by the international community as peremptory, permitting no derogation.”).

34. *E.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 cmt. n. The Restatement includes the prohibition against “torture or other cruel, inhuman, or degrading treatment or punishment” as a customary international law of human rights and notes that although not all customary human rights norms constitute *jus cogens*, torture does. *Id.*; see also Convention Against Torture, *supra* note 2.

35. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 reporter’s note 5 (listing human rights conventions prohibiting torture and noting that “torture as punishment is barred by the Eighth Amendment to the Constitution, and [that] confessions of crime obtained by torture are excluded” by the Fifth Amendment).

Domestically, the U.S. Senate acknowledged that torture is prohibited under international law when it gave its advice and consent to ratifying the Convention Against Torture.³⁶ The Senate Committee on Foreign Relations described the Convention as a codification of international law and indicated that “[r]atification . . . [would] demonstrate clearly and unequivocally U.S. opposition to torture.”³⁷ The Committee believed ratification was “consistent with long-standing U.S. efforts to promote and protect basic human rights and fundamental freedoms throughout the world.”³⁸ The Committee’s comments also suggested that regardless of torture’s peremptory-norm status at the time of the hearing, most of the obligations the United States assumed when acceding to the Convention were “already covered by existing law.”³⁹

At the Senate hearing, substantial evidence was presented that the Convention Against Torture recognized, rather than created, international law. For example, Judge Abraham D. Sofaer indicated that “[i]nternational law already condemns torture[, and i]n that sense, the Convention breaks little new ground.”⁴⁰ Testimony before the Committee also acknowledged that the United States was the only permanent member of the U.N. Security Council not to have ratified the Convention.⁴¹

Furthermore, U.S. courts have also recognized torture as a peremptory norm and not just as a domestically legislated prohibition. In the seminal case of *Filartiga v. Pena-Irala*,⁴² the United States Court of Appeals for the Second Circuit held that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human

36. Convention Against Torture, *supra* note 2. The Senate’s acknowledgement is not, of course, conclusive evidence that torture has obtained *jus cogens* status.

37. S. COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30, at 3 (1990) [hereinafter SENATE COMM. ON FOREIGN RELATIONS, CONVENTION AGAINST TORTURE REPORT].

38. *Id.*

39. *Id.* at 10.

40. *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 7 (1990) (statement of J. Abraham D. Sofaer, legal adviser, U.S. Department of State).

41. *Id.* at 45 (reprinting the statement of Winston Nagan, chairman, board of directors, Amnesty International USA).

42. 630 F.2d 876 (2d Cir. 1980).

rights.”⁴³ Recognizing that “courts must interpret international law not as it was in 1789, but as it has evolved and exists . . . today,” the court acknowledged that there were “few, if any, issues in international law . . . on which opinion seems to be so united as the limitations on a state’s power to torture.”⁴⁴ And, in discussing whether the United Nations Charter conveyed individual rights to citizens of member countries, the court added that “the guaranties include, at a bare minimum, the right to be free from torture.”⁴⁵ Interestingly, *Filartiga* was decided almost fifteen years prior to the United States’ accession to the Convention Against Torture, supporting the contention that torture had already achieved the status of a peremptory, binding norm prior to the Convention.⁴⁶

As a *jus cogens* norm, torture deserves greater protection than other rights—perhaps even greater protection than other constitutional rights. As discussed in Part II, this heightened protection suggests a way to distinguish treaties by subject matter.

II. DISTINGUISHING HUMAN RIGHTS TREATIES

The previous Part established that the U.S. is bound by international law and that torture is widely recognized as a *jus cogens* norm under international law. This Part discusses the relationship between international and domestic law, focusing on treaties, which bridge the two legal planes. Section A examines the concept of treaties and seeks to distinguish between those treaties that are contractual in nature and those that reflect international law, focusing on differentiating treaties dealing with international human rights

43. *Id.* at 878; *see id.* (finding a right of action in U.S. courts under the Alien’s Action for Tort (Alien Tort Statute), 28 U.S.C. § 1350, for Paraguayan citizens when their alleged torturer was physically present in the United States); *see also* *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1255–56 (C.D. Cal. 1999) (acknowledging that U.S. courts have found torture to be a *jus cogens* norm but declining to find a private right of action based on it); GLENNON, *supra* note 13, at 265–66 (quoting *Filartiga* and commenting that the prohibition against torture was found to be a settled rule of international law and a peremptory norm).

44. *Filartiga*, 630 F.2d at 881.

45. *See id.* at 882 (providing evidence of the guarantee of freedom from torture as defined under several multilateral international human rights agreements).

46. *See id.* at 890 (“[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader . . . an enemy of all mankind.”); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702(d) (1987) (“A state violates international law if, as a matter of state policy, it practices, encourages or condones . . . torture . . .”); *id.* reporter’s note 11 (stating that prohibition of torture is a nonderogable *jus cogens* norm under the International Covenant on Civil and Political Rights).

law. Section A also reviews U.S. courts' traditional understanding of treaties and the relationship between treaties, international law, and domestic law. Section B equates the substantive rights delineated in human rights treaties, especially *jus cogens* norms, with constitutional rights.

At the outset, the looming presence of *Goldwater v. Carter*⁴⁷ should be acknowledged. In *Goldwater*, a plurality of the Court held that a challenge to President Carter's unilateral termination of a commercial treaty with Taiwan was a nonjusticiable political question.⁴⁸ Although *Goldwater* has precedential value, its reasoning should apply only to certain types of treaties. Specifically, this Note argues that *Goldwater's* nonjusticiability rule should apply only to commercial treaties and should not apply to human rights treaties. As this Note explains in Section A and further develops in Part III.A, commercial and human rights treaties can be distinguished on the basis of purpose (contractual vs. codification) and subject matter (commercial vs. human rights). These distinctions are crucial in determining whether nonjusticiability should apply.

A. *Methods for Distinguishing Treaties*

A treaty is "[a]n agreement formally signed, ratified, or adhered to between two nations or sovereigns; an international agreement concluded between two or more states in written form and governed by international law."⁴⁹ A treaty is, essentially, a "contract between nations" and is usually treated like a contract rather than a legislative act.⁵⁰ Madison commented that "[t]he object of treaties is the regulation of intercourse with foreign nations and is external."⁵¹

47. 444 U.S. 996 (1979).

48. *Id.* at 1002 (Rehnquist, J., plurality opinion).

49. BLACK'S LAW DICTIONARY 1540 (8th ed. 2004). For purposes of this Note, "treaty" will generally refer to any international agreement entered into by the United States and will not be limited to those agreements executed under the president's Article II authority. *See, e.g.*, Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (defining a treaty as an international agreement between states, "whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"); *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912) (holding as a treaty, for jurisdictional purposes, "a compact authorized by the Congress . . . [and] negotiated and proclaimed" by the president).

50. 87 C.J.S. *Treaties* § 2 (2000).

51. HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER 41 (1915) (quoting James Madison at the Virginia Convention of 1788 called to ratify the Constitution).

However, although treaties often resemble contracts in form, they can sometimes perform statutory or legislative functions.⁵² Such is the case in the United States, where treaties are considered to be the law of the land.⁵³ Both contractual and lawmaking treaties are, in general, considered sources of international law; neither international nor U.S. domestic law, however, accords all laws equal standing.⁵⁴ For example, the consequence of breaching a contract (damages) is quite different from the consequence for breaking a law (often, incarceration). In the second half of the twentieth century, U.S. international agreements typically focused on economic, transportation-communication, cultural-technical, diplomatic, and military issues.⁵⁵

Historically, U.S. courts have interpreted treaties “in the manner and to the extent [to] which the parties have declared, and not otherwise.”⁵⁶ The Supreme Court has no power “to alter, amend, or add to any treaty, by inserting any clause” because that “would be to make, and not to construe a treaty.”⁵⁷ Treaties generally are deemed to have the same weight as federal law but are not superior to the Constitution.⁵⁸

The remainder of this Section describes the traditional classification scheme for treaties and suggests an alternate methodology. The Section concludes by asserting that human rights treaties can be clearly distinguished from other treaties based on their subject matter and applies the proposed methodology to prove the argument. Some treaties that seek to achieve multiple objectives or that take a comprehensive approach to problem-solving might be difficult to classify, but this Note is not concerned with such borderline cases. The classification scheme described in this Note will

52. See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 37 (7th rev. ed., 1997) (noting that treaties “can also perform functions . . . carried out by statutes [or] by conveyances”).

53. See U.S. CONST. art. IV, § 2 (requiring that treaties, federal law, and the Constitution be treated as the “supreme law of the land”); see also 87 C.J.S. *Treaties* § 2 (2000) (same).

54. MALANCZUK, *supra* note 52, at 38. But see *id.* at 37–38 (noting that some scholars believe that only “law-making” treaties should be considered sources of international law and that “contract-treaties” are not sources of law but merely legal transactions).

55. See LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS 16 (1984) (charting U.S. international agreements from 1946 to 1972 by subject-matter category).

56. *The Amiable Isabella*, 19 U.S. 1, 72 (1821) (interpreting a treaty dealing with ships captured as war prizes).

57. *Id.* at 71.

58. *Edye v. Robertson*, 112 U.S. 580, 598–99 (1884).

distinguish the majority of treaties—and can be applied easily to the Convention Against Torture and most other human rights treaties.

1. *Self-Executing vs. Non-Self-Executing Treaties.* Article II treaties—those negotiated by the president and ratified by the Senate—are sometimes said to have the force of law only once they are executed. A treaty can be either self-executing—meaning it has the force of law once ratified—or non-self-executing—meaning separate “implementing legislation” must be passed before the treaty has force.⁵⁹ Chief Justice Marshall elegantly explained that 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.”⁶⁰ At times, distinguishing a self-executing treaty from one that is not self-executing can be difficult. A four-part test is often used to distinguish the two, focusing on: (1) the purpose and objectives of the treaty; (2) the existence of domestic procedures for direct implementation; (3) the availability of alternative enforcement mechanisms; and (4) the social consequences flowing from a court’s decision whether the treaty is self-executing.⁶¹

When no implementing legislation has been passed, non-self-executing treaties do not create a private right of action under which a plaintiff can state a claim.⁶² To avoid infringing on the political branches’ authority to define crimes and to conduct foreign relations, courts have invoked non-self-execution to deny claims under international human rights treaties ratified by the United States.⁶³ Ostensibly, courts’ construction and delineation of treaties in this fashion serves the purpose of deferring as much as possible to the express will of the legislative branch and to the executive’s interpretations of statutes and international commitments.

Yet, it is not at all clear that the self-executing and non-self-executing dichotomy was intended to apply to international

59. See *Beharry v. Reno*, 183 F. Supp. 2d 584, 593 (E.D.N.Y. 2002) (reviewing U.S. treaty obligations and claims arising under treaties and other forms of international law).

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

61. *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985).

62. See, e.g., *Hawkins v. Comparet-Cassini*, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999) (holding the Convention Against Torture to be non-self-executing, and thus concluding that it created no private right of action).

63. See *id.* (holding that the Universal Declaration of Human Rights is not self-executing and, further, is not intended to be legally binding but rather to be merely evidence of existing customary international law).

agreements dealing with subjects like human rights. Although Chief Justice Marshall's comments in *Foster v. Neilson*⁶⁴ are the source of this dichotomy, those comments may have been intended to apply only to "contractual" treaties.⁶⁵ Marshall stated that "when either of the parties engages to perform a particular act, the treaty addresses itself to the political . . . department; and the legislature must execute the contract before it can become a rule for the Court."⁶⁶ Although Marshall emphasized that an international agreement remains inchoate until enacted by Congress, he prefaced that statement with the phrase "when the terms of the stipulation import a contract."⁶⁷ *Foster* involved two claimants to the same tract of land: one traced ownership to a grant when the land was under Spanish possession; the other to a grant once the land came under U.S. control.⁶⁸ The former claimed that the United States was bound by treaty to honor Spain's grant to the title holder.⁶⁹ Marshall parsed the treaty's language, holding that it did not automatically confer property rights on those who received grants when the land was under Spanish control; rather, such grants were only valid once confirmed by Congress.⁷⁰

Chief Justice Marshall, ever the savvy diplomat, primarily sought to avoid a dispute with the political branches that might have been caused by the Court's support for a foreign nation.⁷¹ Adopting a treaty

64. 27 U.S. 253 (1829).

65. *Id.* at 314.

66. *Id.*

67. *Id.* Marshall wrote:

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.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

Id.

68. *Id.* at 299.

69. *Id.* at 304-05.

70. *Id.* at 315.

71. Marshall wrote:

After these acts of sovereign [American] power over the [Spanish] territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are

construction that would invalidate actions the federal government had taken in reliance on a claim of sovereignty over the territory in question would have been “an anomaly in the history and practice of nations.”⁷² Marshall’s decision strengthened the early republic by consolidating control over what would eventually become a significant portion of the United States⁷³—and possibly anticipated and enabled the Manifest Destiny movement which would flourish in the 1840s.⁷⁴

Marshall’s distinction between self-executing and non-self-executing treaties, then, might not reflect an overarching judicial philosophy so much as a convenient fix for exigent circumstances.⁷⁵ Indeed, the Court itself has on occasion rejected Marshall’s dichotomy. For example, in the *Head Money Cases*,⁷⁶ the Court distinguished between contractual treaties, which conferred no individual rights, and statutory treaties, which did.⁷⁷ The *Head Money Cases* dealt with the validity of an excise tax on immigrants—a tax

entrusted with the foreign intercourse of the nation . . . have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question . . .

Id. at 309. Note that the treaty in question is of a contractual, rather than a lawmaking type, dealing as it does with possession of land—which is immediately recognizable as a real property transaction.

72. *Id.* (“If those departments which are entrusted with the foreign intercourse of the nation . . . have unequivocally asserted its rights of dominion over a . . . possession . . . it is not in its own courts that [a treaty interpretation taken by the political branches] is to be denied.”).

73. Marshall reached a similar decision, on similar grounds, in the earlier case of *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), in which he held a property claim raised by Indians invalid because their land was “discovered” by Europeans and “if an uninhabited country be discovered . . . the country becomes the property of the discoverers,” *id.* at 595.

74. Manifest Destiny was a nineteenth-century concept that presumed that “the United States had the right and duty to expand throughout North America.” THE AMERICAN HERITAGE COLLEGE DICTIONARY 825 (3d ed. 1993).

75. That Marshall’s judicial approach was pragmatic is not particularly controversial. See, e.g., Christopher L. Eisgruber, *John Marshall’s Judicial Rhetoric*, 1996 SUP. CT. REV. 439, 445 (describing and analyzing Marshall’s adjudicative style). As Professor Eisgruber comments:

John Marshall faced the task of demonstrating that crucial and difficult constitutional questions could be resolved without leaving American politics subject to the undisciplined play of either legislative or judicial discretion. An important part of Marshall’s response was tactical . . . Marshall aggressively took advantage of political circumstances to deflect attacks upon the Court and to secure useful precedents.

Id.

76. 112 U.S. 580 (1884).

77. *Id.* at 598–99.

that the plaintiffs claimed conflicted with various bilateral treaties.⁷⁸ The Court distinguished between treaties that are merely “compact[s] between independent nations,” under which courts can provide no remedy to an injured party, and those that “confer certain rights upon the citizens” of one party living in the territory of another, which are “capable of enforcement as between private parties in the courts.”⁷⁹ Thus, the distinction between self-executing and non-self-executing treaties, although long-standing, is not compelled in all instances; other treaty classification schemes are possible and, indeed, have been relied on by courts.

2. *Subject Matter.* If the structure of a treaty—its nature as a self-executing or non-self-executing instrument—is an inappropriate basis for determining when a treaty functions as a law and not as a contract (a distinction critical to knowing how a court should interpret its breach), what might be a better way to distinguish the two? The treaty’s subject matter may offer a more useful basis for distinction.⁸⁰ Chief Justice Marshall’s dichotomy may be useful for determining when treaties *incidentally* or *derivatively* confer individual rights, such as “treaties of peace, commerce, [and] alliance,”⁸¹ but only because the essential nature of such treaties is already obvious (they are contractual). Individual rights are not necessarily essential to the achievement of these treaties’ aims, and thus whether such rights are conferred by these treaties is not of primary importance. The situation, however, is very different with human rights treaties, which primarily and specifically seek to acknowledge or imbue individual rights. Analyzing such a treaty as self-executing (or not) might be academically interesting, but this approach misses the forest for the trees. An approach that first considers subject matter would, this Note proposes, be both more efficient and more effective.

Chief Justice Marshall, however, was not alone in his conception of the treaty power’s scope and nature. Alexander Hamilton, for example, believed that treaties had, as their object, contracts with

78. *Id.* at 597.

79. *See id.* at 597–99 (concluding that even when a treaty provided private rights such as those of property or inheritance, an act of Congress that contravened the treaty controlled).

80. MALANCZUK, *supra* note 52, at 38 (noting that “the only distinction between a law-making treaty and a contract treaty” is one of content).

81. THE FEDERALIST NO. 69, at 419 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

foreign nations, and that they did not encompass “rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.”⁸² A jurist who was a contemporary of the Framers commented, “The power ‘to make treaties’ . . . embraces all sorts of treaties, for peace or war; for commerce or territory; for alliances or succors . . . and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other.”⁸³ Another jurist opined that “[o]rordinarily, treaties are not rules prescribed by sovereigns for the conduct of their subjects, but contracts, by which [the sovereigns] agree to regulate their own conduct.”⁸⁴ He applied this rationale to hold that congressional legislation superseded a commercial treaty when a conflict arose between the two, despite the fact that individual merchants were inconvenienced by the change.⁸⁵ However, he qualified this rule of construction with the caveat that it might be inapplicable when a treaty is distinguishable from other laws—perhaps alluding to situations that do in fact prescribe conduct for sovereigns’ subjects.⁸⁶

Theoretical reinterpretations of history are one thing, but actual precedent is far more compelling. The Supreme Court itself has, in fact, distinguished a treaty based on subject matter.⁸⁷ In *United States v. Rauscher*,⁸⁸ the Court interpreted the Ashburton Treaty to hold that British defendants extradited to the United States could only be tried for crimes enumerated in the demand for extradition.⁸⁹ Of course, an extradition treaty might not be classified as a human rights treaty by modern standards. *Rauscher*, however, is notable for

82. THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 81, at 450–51.

83. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1502 (Fred B. Rothman & Co. 1991) (1833), *quoted in* HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER 41 (1915).

84. *See* Taylor v. Morton, 23 F. Cas. 784, 785 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, J.) (holding that Congress may repeal a treaty by enacting relevant legislation).

85. *Id.*

86. *See id.* (“There is therefore nothing in the mere fact that a treaty is a law, which would prevent congress from repealing it. Unless it is for some reason distinguishable from other laws, the rule which it gives may be displaced by the legislative power, at its pleasure.”).

87. *See* United States v. Rauscher, 119 U.S. 407, 412 (1886) (“Whether in the United States, in the absence of any treaty on the subject . . . a State can, through its own judiciary or executive, surrender him for trial to such foreign nation is a question which has been under consideration by the courts of this country without any very conclusive result.”).

88. 119 U.S. 407 (1886).

89. *Id.* at 409.

acknowledging that a treaty's subject matter, and not its self-executing nature, granted individual rights.⁹⁰

Rauscher is not the only example of the Supreme Court distinguishing treaties based on subject-matter classification. For example, in considering whether certain provisions of the Jay Treaty of 1794 between the United States and the United Kingdom survived the War of 1812, the Court unanimously held: "The doctrine . . . that war *ipso facto* annuls treaties of every kind . . . is repudiated by the great weight of modern authority; and the view now commonly accepted is that 'whether the stipulations of a treaty are annulled by war depends upon their intrinsic character.'"⁹¹ Specifically, the Court distinguished treaties "having a political character" from those dealing with substantive issues, such as possession of property by nationals, boundary decisions, and "provisions which represent completed acts."⁹² The Court ultimately distinguished treaty articles vesting rights "permanent in character" which were "by their very nature . . . fixed and continuing" from those rights which were "wholly promissory and prospective."⁹³

3. *Human Rights Treaties and the Subject-Matter Distinction.* Applying the distinction between treaties vesting personal and permanent rights (human rights treaties) and promissory rights (contractual agreements) to the *Goldwater* holding, a commercial treaty (like that in *Goldwater*) might confer derivative individual rights, but a human rights treaty clearly implicates rights "permanent in character."⁹⁴ Whereas nations might contract for certain privileges in a commercial treaty, such that the parties merit the benefits of their

90. *Id.* at 419. The Court cites the *Head Money Cases*, 112 U.S. 580, 598–99 (1884), as precedent for this analysis. In the *Head Money Cases*, the Court held that

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

112 U.S. at 598–99.

91. *Karnuth v. United States*, 279 U.S. 231, 236 (1929) (quoting 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 383 (1906)).

92. *Id.* at 236–37.

93. *Id.* at 239; *see also* *Made in the USA Found. v. United States*, 242 F.3d 1300, 1314 (11th Cir. 2001) (holding international commercial agreements such as NAFTA nonjusticiable on the ground that the Constitution clearly delegates authority over "foreign affairs and commerce" to the political branches).

94. *Karnuth*, 279 U.S. at 239.

bargains, to speak of treaties as creating bargained-for privileges of human beings seems offensive.⁹⁵ Unfortunately, in modern times, courts have generally relied on Chief Justice Marshall's dichotomy rather than the substance of treaties to determine whether treaties create individual rights. Sadly for both human rights activists and potential torture victims, Marshall's dichotomy quite often has been applied to human rights treaties. For example, a district court held that the United Nations Charter was non-self-executing and therefore did "not vest any of the plaintiffs with individual legal rights."⁹⁶ Similarly, the International Covenant on Civil and Political Rights (ICCPR)⁹⁷ has been found to be non-self-executing.⁹⁸ Specifically because of their non-self-executing nature, neither the ICCPR nor the Convention Against Torture were deemed to have created "a private right of action under which the plaintiff[s could] successfully state a claim."⁹⁹

In applying Marshall's dichotomy to human rights treaties, courts have created a quagmire of case law that is replete with exceptions. For example, in evaluating the applicability of the Geneva Conventions to General Manuel Noriega, a court noted that although most international treaties have been found to be non-self-executing, this determination must be made for each treaty individually.¹⁰⁰ Finding the Geneva Convention Relative to the Treatment of

95. The fact that certain negotiations, such as whether women are to have equal rights in a rebuilt Iraq, take place does not detract from the offensiveness of such a discussion. If certain "truths" (rights) are "self-evident," as the Declaration of Independence declares, then human understanding, rather than the nature of the rights themselves, changes.

96. *Pauling v. McElroy*, 164 F. Supp. 390, 393 (D.D.C. 1958) (concluding, as a matter of law, that no cause of action was available under the U.N. Charter for damage caused by atomic tests conducted by the United States in the Pacific Ocean).

97. International Covenant on Civil and Political Rights art. I, para. 1, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2, at 23 (1978), 999 U.N.T.S. 171, 173 (entered into force Jan. 23, 1976) [hereinafter ICCPR].

98. See, e.g., *Beharry v. Reno*, 183 F. Supp. 2d 584, 603 (E.D.N.Y. 2002) (noting that even though such treaties are non-self-executing, they have been employed in determining whether individual rights have been violated), *rev'd sub nom.* *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003); *Hawkins v. Comporet-Cassini*, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999) (holding that neither the ICCPR nor the Convention Against Torture are self-executing treaties).

99. *Hawkins*, 33 F. Supp. 2d at 1257; see also Richard B. Lillich, *The Constitution and International Human Rights*, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 145, 149 (Louis Henkin et al. eds., 1990) (noting that courts have generally construed human rights treaties narrowly, and suggesting that "human rights clauses are non-self-executing and hence not the source of enforceable rights").

100. *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992).

Prisoners of War (Geneva III)¹⁰¹ to be self-executing, the court stated that “it is inconsistent with both the language and spirit of the treaty . . . to find that the rights established therein cannot be enforced by the individual POW in a court of law.”¹⁰² Relying on the purpose of the Geneva Conventions to justify its conclusion, the court held that it was not designed “to create some amorphous, unenforceable code of honor among the signatory nations.”¹⁰³ Thus, the court held, “if a treaty expressly or impliedly provides a private right of action, it is self-executing and can be invoked by the individual.”¹⁰⁴ Such a torturous route to discerning individual rights from a treaty is helpful neither to individuals seeking protection under U.S. law nor to those burdened with the laws’ enforcement.

Rather than relying on a structural analysis of whether a treaty is self-executing, courts should use the content, substance, and purpose of the treaty to determine whether treaties confer private, individual rights. Human rights treaties are prime contenders for conferring private rights based on their content and purpose because “[h]uman rights conventions address the rights of individuals” by their very nature.¹⁰⁵ This proposal is not unprecedented: as the *Noriega* court noted, “[i]t must not be forgotten that the [Geneva] Conventions have been drawn up first and foremost to protect individuals.”¹⁰⁶

Categorically distinguishing human rights conventions and other international agreements is not too great a task for the judiciary. Traditionally, of course, the subjects of international law have been states—and only states.¹⁰⁷ But treaties and other international instruments have moved beyond the limited subject matter that the Framers envisioned, such as trade agreements, military or strategic

101. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135.

102. *Id.*

103. *Id.*

104. *Id.* Chief Justice Marshall’s point in *Foster* was the reverse, that only if a treaty is self-executing does it create individual rights. See *supra* notes 60–61 and accompanying text.

105. Elizabeth L. Larson, Comment, *United Nations Fourth World Conference on Women: Action for Equality, Development, and Peace (Beijing, China: September 1995)*, 10 EMORY INT’L L. REV. 695, 713 (1996).

106. *Noriega*, 808 F. Supp. at 799 (quoting INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS 23 (J. Picket ed., 1960)).

107. The dictionary, in fact, defines “international law” as “a body of rules that control or affect the rights of nations in their relations with each other.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 611 (Frederick C. Mish et al. eds., 10th ed. 2001).

alliances, and navigation privileges.¹⁰⁸ “[H]uman rights law . . . [differs] in that it focuses on the rights of individuals Because of this focus on individuals, human rights law necessarily must peer into the domestic laws of nations and into the private spheres of life.”¹⁰⁹

A functional argument also supports distinguishing human rights instruments from other kinds of international agreements. The Convention Against Torture, for example, is neither legislative nor contractual in nature. Instead, it “codifies international law as it has evolved.”¹¹⁰ In fact, the Senate Committee on Foreign Relations believed that “the majority of the obligations to be undertaken by the United States pursuant to the Convention [were] already covered by existing law.”¹¹¹ Therefore, the Convention Against Torture must have been ratified for reasons other than to create either contractual obligations or new legislation, such as to support public policy. For example, failure to comply with either human rights treaties or international law norms would weaken the ability of the United States to impose such norms on other nations.¹¹² Ratifying a treaty like the Convention Against Torture also bolstered the credibility of the United States in the human rights arena. In hearings related to the ratification, one witness told Congress that “[t]he United States has played a leading role in the development of the major human rights treaties, but has declined to ratify many of them.”¹¹³ Ratifying the Convention Against Torture signaled that the United States

108. See TUCKER, *supra* note 51, at 41 (“The object of treaties is the regulation of intercourse with foreign nations and is external.” (quoting James Madison at the Virginia Convention of 1788, called to ratify the Constitution)); see also *supra* text accompanying note 83.

109. Larson, *supra* note 105, at 713.

110. See SENATE COMM. ON FOREIGN RELATIONS, CONVENTION AGAINST TORTURE REPORT, *supra* note 37, at 3 (“The Convention codifies international law.”).

111. *Id.* at 10. Under the Convention, the United States had to establish personal jurisdiction for criminal prosecution purposes; this obligation required additional legislation. Convention Against Torture, *supra* note 2, art. 4; SENATE COMM. ON FOREIGN RELATIONS, CONVENTION AGAINST TORTURE REPORT, *supra* note 37, at 10. Later in its report, the Committee noted that “[a]cts of torture committed in the United States . . . would appear to violate criminal statutes under existing . . . law.” *Id.* at 18.

112. See *Beharry v. Reno*, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002) (highlighting policy reasons for honoring international human rights obligations), *rev’d sub nom.* *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

113. *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, *supra* note 40, at 45 (reprinting the statement of Winston Nagan, chairman, board of directors, Amnesty International); see also *id.* at 77 (reprinting the written statement of nonprofit organizations stating their belief that “ratification of the Convention Against Torture would send an important signal to the world about U.S. concern for human rights”).

would “practice what it preached.” The signal communicated by completion of the formal ratification process was especially strong given the many issues and causes that compete for congressional attention. A purely symbolic gesture, a court might reason, would not have been undertaken by either the president or members of Congress, given the demands on their time. Therefore, the signaling function might also serve to notify the judiciary that the political branches intended that the government be held accountable for violations of the torture prohibition, as embodied in the treaty.

B. Human Rights as Fundamental or Constitutional Rights

Distinguishing human rights treaties from other types of treaties is also consistent with both historic and modern notions of “rights.” Arguing that the treaty power granted to the political branches under the proposed Constitution was similar in its scope and limitations to that held by the British Crown, Patrick Henry asked rhetorically, “Can the English monarch make a treaty which [would] subvert the common law of England, and the constitution? . . . Dare he do anything . . . subversive of the great privileges[] of his people?” He then answered himself, “No, sir. If he did, it would be nugatory, and the attempt would endanger his existence.”¹¹⁴ As John Randolph Tucker, a nineteenth-century law professor and member of Congress, said, “A treaty . . . cannot take away essential liberties secured by the Constitution to the people.”¹¹⁵

Merely because a treaty may not detract from an “essential liberty,” however, does not mean that human rights treaties confer fundamental rights. Yet such an argument makes sense.¹¹⁶ After all, human rights derive from the same source as constitutional rights¹¹⁷—they are a necessary precondition to a government of free people, by free people, for free people. Like such judicially recognized

114. TUCKER, *supra* note 51, at 36 (quoting Patrick Henry at the Virginia Ratification Convention).

115. *Id.* at 14.

116. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (“[I]nternational law confers fundamental rights upon all people vis-a-vis their own governments.”).

117. See Louis Henkin, *International Human Rights as “Rights,”* 1 CARDOZO L. REV. 425, 434 (1979) (“International human rights derive . . . from national rights theories and systems, harking back through English, American, and French constitutionalism to John Locke . . . and earlier natural rights . . . theory.”).

constitutional rights as marriage and procreation,¹¹⁸ human rights need not be explicitly enumerated. If human rights treaties merely codify, rather than legislate, human rights derived from such treaties must be at least as judicially cognizable as nonenumerated constitutional rights. Furthermore, *jus cogens* norms ought to be recognized as a superior kind of right; it is logically inconceivable that a court would protect the right to marry but turn a blind eye to more fundamental threats to life and liberty, such as torture.¹¹⁹

Additionally, a ratified treaty can be said to embody the sovereign will of the United States. But such sovereignty “reside[s] in the people, for whom the President and the Senate [are] merely agents.”¹²⁰ At a minimum, then, human rights treaties should be able to add to the rights and liberties enjoyed by Americans, similar to the way in which other kinds of constitutive documents create obligations and privileges. Rights deemed to be fundamental, of course, include not only limitations prohibiting certain government actions but also positive government obligations.¹²¹

Given the Supreme Court’s reluctance, until the 1920s, to protect civil liberties, and its current bent toward strict constructionism, it is not surprising that the Court has failed to find many positive obligations created by international human rights agreements.¹²² But the Court’s reluctance to do so, and the slow development of domestic human rights jurisprudence generally, does not mean that the Court should, or will, turn a blind eye to human rights claims in the future—especially when such claims arise from treaties.¹²³ States may be the actors that draft and ratify human rights agreements, but

118. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing the right to marry); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (recognizing the right to use contraception).

119. Although slavery, also prohibited as a *jus cogens* norm, was embedded in, and perhaps even essential to the ratification of, the Constitution, the fact that the Framers failed to completely embody the ideals they drew upon in shaping a new country’s government should not be used to justify violating an analogous norm two hundred years later.

120. See Caleb Nelson, *The Treaty Power and Self-Execution: A Comment on Professor Woolhandler’s Article*, 42 VA. J. INT’L L. 801, 807 (2002) (discussing whether unauthorized treaties can be self-executing).

121. See Henkin, *supra* note 117, at 434 (discussing notions and kinds of fundamental rights).

122. See Norman Dorsen, *Foreign Affairs and Civil Liberties*, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION, *supra* note 99, at 134, 144 (noting that the Supreme Court did not protect civil liberties until the 1920s, and arguing that the Court has still not dealt with those issues in the context of foreign affairs).

123. See *id.* at 140–41 (proposing three situations in which courts could guarantee civil rights in a foreign affairs context).

individuals are the intended beneficiaries.¹²⁴ Indeed, most international human rights agreements speak in terms of individual rights. For example, the ICCPR uses phrases like, “Every human being has the inherent right to life,” and “Everyone shall have the right to hold opinions without interference.”¹²⁵

Additionally, as a matter of policy, viewing international human rights as individual rights on par with constitutional rights “may in fact help make it more likely that they will be enjoyed in fact,” as Professor Henkin notes.¹²⁶ The alternative view—denying that human rights are constitutional rights—may well lead society “down a road where Americans could lose some hard-won liberties,” especially if the courts automatically reject a claim based on human rights in the name of security and categorically deem such claims either ill-founded or nonjusticiable.¹²⁷

Finally, as consensus has developed that at least some international human rights norms—*jus cogens* norms like torture and genocide—do guarantee, at a minimum, the right to be free from the activity prohibited, it is entirely appropriate for courts to recognize such rights as coequal with constitutional rights.¹²⁸ In *Banco Nacional de Cuba v. Sabbatino*,¹²⁹ for example, the Court noted that “the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it.”¹³⁰

Recognizing *jus cogens* norms as coequal with constitutional rights would also be consistent with existing jurisprudence. Further, such recognition would not run afoul of the Court’s concerns that it would be infringing on the political branches’ spheres of influence.¹³¹ A bright-line test that recognized *jus cogens* norms as fundamental,

124. See Henkin, *supra* note 117, at 431 (discussing the rights and obligations created under international human rights agreements).

125. ICCPR, *supra* note 97, arts. 6(1), 19(1).

126. Henkin, *supra* note 117, at 445.

127. See Dorsen, *supra* note 122, at 144 (proposing reasons why the Supreme Court has not dealt with contentions of civil liberties violations in the context of foreign affairs).

128. *Id.* at 140–41 (suggesting situations in which courts could guarantee civil rights in a foreign affairs context, including procedural due process and free speech claims).

129. 376 U.S. 398 (1964).

130. *Id.* at 428; see also *id.* (concluding that the act of state doctrine is applicable even where international law has been violated and that it applies to expropriation of property of aliens residing in the United States).

131. See, e.g., *Baker v. Carr*, 369 U.S. 186, 211 (1962) (disclaiming that “every case or controversy which touches foreign relations lies beyond judicial cognizance”).

and as equivalent to constitutional rights, would not activate the political question doctrine because the political branches would have clear guidelines as to how far their power extended. The Court's contention that "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches" would seem to support political-branch exclusivity, given the important signal proclamation of adherence to human rights norms sends. Yet, in this context, the government's willingness to allow courts to enforce promises made by the political branches may send an even stronger signal.¹³²

Finally, treating *jus cogens* norms as constitutional rights could expand the class of individuals protected by those norms. Courts could feel comfortable extending the protection of the United States not just to American citizens but to anyone whose fundamental human rights are violated by an American national under the nationality and territorial principles. Under the nationality principle, "[a] state may prosecute its nationals for crimes committed anywhere in the world."¹³³ Under the territorial principle, "[e]very state [can] claim[] jurisdiction over crimes committed in its own territory."¹³⁴ Although these principles originated with regard to criminal activities, a strong argument can be made that violations of human rights constitute criminal acts.¹³⁵ On a purely domestic level, the Supreme Court has acknowledged that noncitizen residents, even if present on U.S. territory illegally, are entitled to some rights.¹³⁶ Surely fundamental human rights should rank among them.

III. CONSTRAINING THE EXECUTIVE, EMPOWERING THE JUDICIARY

If at least some international human rights are equivalent to constitutional rights under American law, and if courts are competent to hear cases arising under human rights treaties, to what extent can the president modify or terminate human rights treaties? Because of

132. *Sabbatino*, 376 U.S. at 428.

133. MALANCZUK, *supra* note 52, at 111.

134. *Id.* at 110–11.

135. For example, the Nuremberg Tribunal prosecuted Nazis for "crimes against humanity," which included enslavement, torture and genocide. *See, e.g., id.* at 356–61 (describing human rights prosecutions in general, the Nuremberg Tribunals, and the emergence of the new International Criminal Court).

136. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 210, 223 (1982) (recognizing that even illegal aliens are guaranteed due process and cannot be treated as a suspect class), *discussed in* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 746–47 (2d ed. 2002).

the unique nature of human rights treaties, the executive branch lacks the power to violate or abrogate them. Courts, therefore, when confronted with such an attempt, should not feel constrained by the political question doctrine but rather should step forward to protect individual rights. Further, courts should construe treaty interpretations or modifications as unconstitutional when inconsistent with binding international law. Under this theory, the president cannot unilaterally abrogate a human rights treaty or, at most, can only abrogate those treaties not dealing with *jus cogens* norms. Nor can the executive promulgate an interpretation of a treaty that is inconsistent with international law. In other words, human rights and related treaties can constrain the executive and empower the judiciary.

A. *Limitations on the Executive's Foreign Affairs Powers*

This Section contends that the president is not solely responsible for international affairs, suggests some limitations on the president's ability to interpret and execute treaties, and shows that the president lacks the power to abrogate human rights treaties codifying *jus cogens* norms.

1. *The President Is Not Solely Responsible for International Affairs.* Although the Constitution can be read as vesting the president with "primary constitutional authority over the conduct of foreign affairs,"¹³⁷ the president is not the "sole organ" of foreign affairs and does not wield a "blank check in the area."¹³⁸ True, the president might be viewed as the center of power for actions touching on "relations and intercourse with other countries,"¹³⁹ but human rights treaties, because they confer *individual* rights, do not implicate "intercourse" with other nations.

*United States v. Curtiss-Wright Export Corp.*¹⁴⁰ is commonly cited as supporting the theory of presidential dominance in foreign

137. H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 529 (1999).

138. See DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* 93 (1986) (arguing that the Framers did not vest the president with the exclusive power to make treaties).

139. Powell, *supra* note 137, at 555 (quoting *MacKenzie v. Hare*, 239 U.S. 299, 311 (1915)).

140. 299 U.S. 304 (1936).

affairs.¹⁴¹ The Court commented there that “the President alone has the power to speak or listen as a representative of the nation” and referred to the president’s “exclusive power . . . as the sole organ of the federal government in the field of international relations.”¹⁴² Yet, *Curtiss-Wright* dealt with whether Congress could delegate authority to the president to prohibit munitions sales to certain countries, not with treaty modification or abrogation.¹⁴³ Of the several categories into which foreign affairs powers can be divided, *Curtiss-Wright* most obviously implicates the recognition and international advocacy powers.¹⁴⁴ Conceptually, the arms sales policy was either related to recognition of governments involved in the Paraguayan-Bolivian war or was part of the United States’ overall foreign policy objectives.¹⁴⁵

2. *Limitations on the President’s Ability to Interpret and Execute Treaties.* Still, the president’s foreign relations powers surely include those of negotiating and executing treaties, which necessarily involve some interpretation.¹⁴⁶ Nevertheless, the treaty power has never been understood to be unlimited. Hamilton believed that both the Constitution and “natural principles” limited the treaty power—as they did for every other delegated power.¹⁴⁷ Indeed, regardless of the executive’s views on the subject, a congressional act that modifies, contravenes, or repeals a treaty following its entry into force is controlling.¹⁴⁸ In *Whitney v. Robertson*,¹⁴⁹ for example, the Supreme Court held that a commercial treaty is equivalent to any other statute

141. See *id.* at 316–19 (discussing the domestic and foreign powers of the political branches).

142. *Id.* at 319–20.

143. *Id.* at 322–27.

144. See Powell, *supra* note 137, at 555, 556, 564 (suggesting the division of the president’s foreign affairs powers into the powers of recognition, negotiation, treaty-making, international advocacy, and national security).

145. See SANDRA BAO ET AL., *LONELY PLANET, ARGENTINA, URUGUAY & PARAGUAY* 664 (4th ed. 2002) (providing a brief history of the Chaco War and suggesting the involvement of oil companies to secure exploration rights in South America).

146. See, e.g., Constitutionality of Legislative Provision Regarding ABM Treaty, 20 Op. Off. Legal Counsel 246, 248 (1996) (“It belongs exclusively to the President to interpret and execute treaties. This is a direct corollary of his constitutional responsibility to ‘take Care’ that the laws are faithfully executed.”).

147. See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1092 (1985) (describing Hamilton’s view on the limits of the treaty power).

148. See *Whitney v. Robertson*, 124 U.S. 190, 195 (1888) (“The duty of the courts is to construe and give effect to the latest expression of the sovereign will.”).

149. 124 U.S. 190 (1888).

and applied the maxim of *lex posterior derogat priori*—a later statute repeals an earlier one.¹⁵⁰ Although the executive's interpretation of a treaty carries great weight, it certainly is not controlling¹⁵¹ because Congress can check the executive branch's interpretation through legislative action. Likewise, the judicial branch should be able to gainsay the executive's interpretation of a treaty, especially if constitutional-level rights, such as human rights, are infringed.¹⁵² Put another way, if the executive "cannot make a treaty contrary to the constitution," neither should it be able to interpret a treaty in a way that opposes the Constitution or that "take[s] away essential liberties."¹⁵³

3. *Checking the Power to Abrogate Treaties.* If the executive cannot "interpret away" individual rights, could it simply abrogate or terminate a human rights treaty? The issue of unilateral treaty termination by the president has never been satisfactorily resolved, but it has occupied the attention of many legal scholars.¹⁵⁴ Unilateral termination has sometimes been justified under the theory that it does not create any obligations for the United States but merely brings obligations to an end.¹⁵⁵ Yet estoppel might be raised as an argument against unilateral termination with regard to those treaties that implicate contractual rights.¹⁵⁶ Similarly, human rights treaties,

150. See *id.* at 194 (applying the principle without articulating it in exactly the same terms).

151. See, e.g., *Charlton v. Kelly*, 229 U.S. 447, 468 (1913) ("A construction of a treaty by the political department of the Government, while not conclusive upon a court . . . is nevertheless of much weight."). *But cf. Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986) (accepting the argument that a controlling executive act preempts existing customary international law).

152. The executive branch, of course, can balance such judicial power by controlling judicial appointments, with the help of the Senate. Congress may be able to protect against excessive judicial aggrandizement through the impeachment process.

153. TUCKER, *supra* note 51, at 14, 37 (quoting George Mason and John Randolph Tucker, respectively, on the limits of the treaty power as extrapolated from similar limits on the British Crown).

154. See, e.g., Stefan A. Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CAL. L. REV. 643, 658, 660 (1937) (noting a long-standing controversy over the issue of unilateral treaty termination, and concluding that the "logical view" is that treaty termination should be accomplished in the same way that treaties are made).

155. See *id.* at 662 (arguing that treaty denunciation is indistinguishable from any other unilateral acts the president legally commits, such as "recognition of new states and governments").

156. *Cf. Oklahoma v. New Mexico*, 501 U.S. 221, 251 (1991) (Rehnquist, C.J., dissenting) ("The Court frustrates settled expectations by rewriting the [congressionally approved]

which create expectations of individual liberties or freedoms, might also be subject to an estoppel-style argument.

Even the executive branch has, on at least one occasion, adhered to the belief that once rights are created and vest, a president does not have the authority to revoke them. In an opinion on the subject of whether an act “within the jurisdiction of the President” could be revised by a successor, Attorney General Caleb Cushing concluded that President Franklin Pierce did not have “lawful authority to revoke the act of . . . President Polk.”¹⁵⁷ Cushing based his decision on the principle that if the opposite were true, “there would be no stability or security for any rights.”¹⁵⁸ The “rights” in question related to a property grant that the government sought to revoke and reassign to a different party. If property rights acquired under color of law cannot be revoked, then recognized human rights, which arguably are more fundamental for “stability,” should be accorded similar, if not greater, protection.¹⁵⁹

Although *Goldwater v. Carter*¹⁶⁰ can be read as tacitly approving unilateral termination, its application is limited. The Court relied on the political question doctrine to avoid reaching the case’s merits,¹⁶¹ but under the approach outlined in this Note, the Court could have concluded that termination of only certain types of treaties presented a nonjusticiable question. Instead, members of the Court declared that no “judicially manageable” standards existed because “different termination procedures may be appropriate for different treaties.”¹⁶² The one Justice who would have reached the merits implied that the president did have unilateral abrogation power—but hinted that such

Compact [between Oklahoma and New Mexico] to mean something other than what its language says.”).

157. Power of the President, 6 Op. Att’y Gen. 603, 606 (1854).

158. *Id.*

159. This example is not intended as an authoritative statement about whether a former president’s actions can bind a sitting president.

160. 444 U.S. 996 (1979).

161. *Id.* at 1003–04 (Rehnquist, J., concurring, joined by Burger, C.J., Stewart, J., and Stevens, J.).

162. *Id.* In this sense, these Justices affirmed the lower court’s statement that “[t]here is no judicially ascertainable . . . method of making any distinction among treaties on the basis of their substance. . . . [and] no standards to apply in making such distinctions.” *Goldwater v. Carter*, 617 F.2d 697, 707 (D.C. Cir. 1979), *vacated by* 444 U.S. at 996.

power might have been limited (or limitable, if the Court had dared to act) to certain categories of treaties.¹⁶³

To date, no alleged or actual unilateral terminations have dealt with a human rights treaty. Of the nine examples of unilateral presidential terminations cited by one scholar, all but one dealt with commerce-related issues; the other related to national defense.¹⁶⁴ Thus, neither judicial nor executive branch precedent, construed even on the most generous terms, supports unilateral termination of human rights treaties.

B. *How Activist Courts Can Protect Human Rights*

So, if treaties can be classified by subject, at least to the extent that human rights treaties can be distinguished from others as to overcome the political question hurdle, and if such treaties confer individual rights that are coequal with constitutional rights, why is the Court hesitant to restrain the executive? The Court may be hesitant to intervene, not because there is no manageable standard by which to classify treaties, but because the president asserts executive authority to terminate a treaty unilaterally—for example, by claiming executive branch responsibility for national security.¹⁶⁵ Yet, as Professor Glennon wrote, the Court has never explicitly upheld the

163. See 444 U.S. at 1006–07 (Brennan, J., dissenting) (“Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government Our cases firmly establish that the Constitution commits to the President alone the power to recognize . . . foreign regimes.”). But see GLENNON, *supra* note 13, at 150, 158 (arguing that there is no reason why termination of a mutual defense treaty should be treated differently from another kind of treaty, but suggesting that some treaties may not be terminable, such as the U.N. Charter).

164. See ADLER, *supra* note 138, at 181–90 (delineating treaties claimed to have been unilaterally terminated by the president). Since Professor Adler’s book was published, one other appellate case dealing with unilateral treaty termination might be added to the tally: President George W. Bush’s unilateral withdrawal from the 1972 ABM Treaty. The challenge brought by several members of Congress to protest the decision resulted in another court “decision” rendering the issue nonjusticiable, relying on *Goldwater*. See *Kucinich v. Bush*, 236 F. Supp. 2d 1, 16, 18 (D.D.C. 2002) (describing the ABM treaty as involving “national defense considerations”); see also *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1199 (D. Mass. 1986) (finding a challenge to an embargo imposed by the president on trade with Nicaragua nonjusticiable based on *Goldwater*, but emphasizing that adjudication would be helpful to determine what redress, if any, injured private individuals have when a treaty is terminated).

165. See Powell, *supra* note 137, at 555, 556, 564 (outlining and describing the five general categories of presidential powers, including national security).

president's right to terminate a treaty "on the basis of his sole judgment" that a treaty no longer serves a national security interest.¹⁶⁶

Perhaps, then, the Court wants to avoid a mere difference of opinion. One of the justifications for the Bush administration's strained definition of torture was that there was no international consensus regarding the degree of suffering required to constitute torture.¹⁶⁷ But, if the Convention merely codified international law and neither defined the offense nor legislated its prohibition, the Court surely would be able to ascertain some definition of what constitutes torture. After all, one Justice famously remarked, regarding obscenity, that he knew it when he saw it; surely torture, however difficult to define, is equally recognizable in the majority of cases.¹⁶⁸ And, if the Bush administration's definition conflicted with the commonly understood definition of torture, construing a human rights treaty as vesting individual rights would provide the Court with a clear rationale for rejecting the administration's definition. As the arbiter of the meaning of constitutional rights, the judicial branch, and not the executive, should bear responsibility for, and assert authority over, the interpretation of human rights treaties.¹⁶⁹

The Bush administration also claimed that a defense of "necessity" justified contravening not just the Convention Against Torture, but also relevant domestic legislation.¹⁷⁰ But the Convention itself indicates that "[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture."¹⁷¹ The Court should feel empowered to rely on the status of torture as a *jus cogens* norm and

166. GLENNON, *supra* note 13, at 149.

167. See Standards of Conduct for Interrogation, *supra* note 3, at 19–20 (citing Deputy Assistant Attorney General Mark Richard's testimony at the Senate ratification hearing on the Convention Against Torture that no such consensus existed).

168. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

169. Although the federal torture statute, codified at 18 U.S.C. §§ 2340–2340A (2004), criminalizes torture only outside the United States, the Convention Against Torture cannot be reasonably understood to permit torture committed by a government against its own people. If a human rights treaty is to mean anything, especially in the context of vesting constitutional rights, it must be understood as conferring protections domestically at least as great as those granted to individuals residing outside U.S. territory. Compare *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1255 (C.D. Cal. 1999) (noting that there are no reported cases recognizing a cause of action under any *jus cogens* norm for acts committed by U.S. government officials against U.S. citizens), with *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (stating that the court knows of "no assertion by any contemporary state of a right to torture its own . . . citizens").

170. Standards of Conduct for Interrogation, *supra* note 3, at 39.

171. Convention Against Torture, *supra* note 2, art. 2(2).

to reject any definition that derogates from it, even one proposed by the executive, to the degree required to protect such a norm's "penumbras and emanations."¹⁷² The Court would be acting consistently with its own precedent and could neatly avoid the political question doctrine by pointing to controlling authority, such as treaties, customs, and other sources of international law, giving it the kind of judicially manageable standard found lacking in *Goldwater*. Such an approach would give the Court a legitimate reason to supersede either political branch's opinion while simultaneously avoiding accusations of ideological or political bias.

Unfortunately, the Supreme Court has opted for none of these approaches to date. In 2004, in fact, it declined to interpret and apply international human rights law, accepting the Senate's declaration that the ICCPR is non-self-executing and therefore does not confer any individual rights.¹⁷³ Fortunately, the Court did not entirely close the door to such an approach. It merely insisted that "any claim based on the present-day law of nations . . . rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of . . . 18th-century paradigms"¹⁷⁴ and noted that "the door is still ajar subject to vigilant doorkeeping"¹⁷⁵ and "independent judicial recognition of actionable international norms."¹⁷⁶

A decision that human rights treaties, because of their unique nature and function, should be treated differently from other treaties, and specifically that *jus cogens* norms deserve special status, would allow the Court to constrain the executive without raising the fear of an out-of-control judiciary.

CONCLUSION

Understandings of both treaties and rights have evolved since the United States was founded. Foreign relations is indisputably more complex than it was in the eighteenth century; as a result, the nature

172. Vienna Convention on the Law of Treaties, *supra* note 49, art. 53; see Lobel, *supra* note 147, at 1138 (explaining Article 53 of the Vienna Convention on the Law of Treaties, which the United States accepts as binding even though it has not been ratified).

173. *Sosa v. Alvarez-Martin*, 542 U.S. 692, 727 (2004).

174. *Id.* at 725.

175. *Id.* at 729.

176. *Id.* But see *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) ("[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists . . . today.").

and purposes of treaties have changed. Similarly, conceptions of sovereignty have changed, and notions about individual rights, so revolutionary when asserted in the Declaration of Independence, have become established and have expanded to encompass areas of human activity the Framers would never have anticipated. And although positivists can question whether states practice what they preach, at least normatively, certain practices are no longer accepted, such as slavery, genocide, and apartheid. Such developments are unquestionably “advances.”

In a world in which a U.S. president might assert the need for extraordinary powers to face new and uncertain threats to domestic tranquility and national security, the Supreme Court should rely more heavily on international law than it has in the past to restrain further aggrandizement of presidential power. Doing so would be entirely consistent with judicial precedent because international law has always been part of American law. Nor should the Court fear to look beyond written texts to discern the content and scope of international law. Treaties often neither define nor create the law, especially when such treaties deal with human rights and behavioral norms about which consensus has already been achieved.

When a clear standard exists for adjudicating deviations from international norms or treaty obligations, the Court should not throw its hands up and seek refuge under the shelter of the political question doctrine. Quite the contrary. After all, in Chief Justice Marshall’s words, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹⁷⁷ Faced with such a case, the Court should step in to contravene presidential action contrary to a peremptory norm.

177. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).