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Sending the Self-Execution Doctrine to the Executioner

Aya Gruber*

INTRODUCTION

Justice Ginsburg, our inestimable keynote speaker, stated elsewhere that “[n]ational, multinational and international human rights charters and tribunals today play a key part in a world with increasingly porous borders,” such that “[w]e are the losers if we do not both share our experience with, and learn from others.”¹ In this day and age, internationalism is simply unavoidable. The years following 9/11 saw international law and the law of armed conflict rise to the forefront of our legal and national consciousness. Terms like “Geneva Conventions,” “war crimes,” and “international human rights” became entrenched in the American political vocabulary.² Indeed, the past few terms of the Supreme Court involved several cases touching upon issues of international law and norms.³ Recently, much has been

* Associate Professor of Law, Florida International University College of Law. I express my deepest gratitude to the organizers of the FIU Inauguration Symposium, “The Intersection of United States Constitutional Law with International and Foreign Law,” my fellow symposium participants, Harold Koh, Erwin Chemerinsky, Anthony D’Amato, Drew Days, III, Christopher Edley, Jr., Francisco Valdes, Elizabeth Foley, Stanley Fish, and Justice Ruth Bader Ginsburg, as well as the Dean, faculty, and administration of the FIU College of Law. In particular, I wish to thank Jorge Esquirol, who provided me valuable guidance on this subject. I am also grateful for the diligent work of my research assistant, Tom Werge.

¹ Justice Ruth Bader Ginsburg, *Looking Beyond our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL’Y REV. 329 (2004).

² See, e.g., John Mintz, *On Detainees, U.S. Faces Legal Quandary; Most Experts Say Al Qaeda Members Aren’t POWs but Taliban Fighters Might Be*, WASH. POST, Jan. 27, 2002, at A22; Paisley Dodds, *U.S. Legislators Visiting Guantánamo*, ASSOCIATED PRESS, Jan. 25, 2002; Katharine Q. Seelye, *A Nation Challenged: The Prisoners; Rumsfeld Lists Outcomes for Detainees Held in Cuba*, N.Y. TIMES, Feb. 27, 2002, at A10. See Norman J. Finkel, *Moral Monsters and Patriot Acts: Rights and Duties in the Worst of Times*, 12 PSYCHOL. PUB. POL’Y & L. 242, 265 (2006) (noting that “[t]he press, including the international press . . . has run critical stories about alleged abuse and/or torture of suspected terrorists in Iraqi prisons and at Guantánamo, violations of the Geneva Convention”).

³ See Beth Van Schaack, *International Law in the United States Legal System: Observance, Application, and Enforcement*, 45 SANTA CLARA L. REV. 807 (2005) (“[S]tarting with the Court’s 2002 Term, the quality and quantity of Supreme Court cases touching on international law has

made of the Court's burgeoning internationalism, rendering the topic a subject of frequent academic and popular discussion.⁴ Some rejoice at observations, like Justice Ginsburg's, that the Court's "'island' or 'lone ranger' mentality is beginning to change."⁵ Others decry the influence of foreign law and values on American domestic law as a precursor to total loss of sovereignty.⁶ Yet others feel that the Supreme Court's newly-minted commitment to international law may be more show than substance.⁷

Claims of the Supreme Court's increasing awareness and integration of international consensus and norms appear vindicated by decisions like *Roper v. Simmons*,⁸ which incorporates international opinion into the "evolving standards of decency" analysis of juvenile execution.⁹ The argument that the Supreme Court is still not fulfilling its potential as a validator of international law is supported by cases like *Sosa v. Alvarez-Machain*,¹⁰ in which the Court interpreted the Alien Torts Claims Act to permit private claims under federal common law for violations of customary international law, but defined customary international law narrowly with reference to the law of nations in 1789 (the year the Act was passed).¹¹

In this Essay, I contend the Supreme Court can never truly abandon its "island" mentality until it is willing to reaffirm the status of treaties as supreme federal law in the face of anti-internationalist low-

significantly raised the visibility of [the international law] tradition on the bench, in the academy, in the press, and among members of the general public.").

⁴ See, e.g., Jordan Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829 (2005); Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507 (2006); Mark Weston Janis, *The American Tradition of International Law: Exceptionalism and Universalism*, 21 CONN. J. INT'L L. 211, 212 (2006); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 46 (2004); John O. McGinnis, *Contemporary Foreign International Law in Constitutional Construction*, 69 ALB. L. REV. 801 (2006); Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 285-86 (2006).

⁵ Ginsburg, *supra* note 1, at 335.

⁶ See, e.g., Kochan, *supra* note 4, at 507 (asserting that "[t]his trend is inappropriate, undemocratic, and dangerous"). See also Delahunty & Yoo, *supra* note 4, at 329 (describing international law as product of "global networks" of elites that threatens "national sovereignty").

⁷ See, e.g., Paust, *supra* note 4, at 855 (noting that in 2004 term, Supreme Court viewed international law "obliquely" and often used it merely to supplement domestic construction).

⁸ 543 U.S. 551 (2005).

⁹ *Id.* at 554.

¹⁰ 542 U.S. 692 (2004).

¹¹ *Id.* at 732. See, e.g., Cohen, *supra* note 4, at 288 (explaining that in *Sosa*, "Justice Souter carefully avoids identifying any rules of customary international law that do meet the standards of wide acceptance and definite content necessary for new causes of action in ATS cases" and "adds numerous other caveats and considerations").

er decisions that have created a super-charged self-execution doctrine. The self-execution doctrine is a judicial invention¹² holding that a treaty only provides judicially-enforceable rights if it “operates of itself” or if Congress implements it through specific legislation.¹³ Over the past forty years, lower courts have substantially narrowed the class of treaties that operate of themselves and created a presumption of domestic unenforceability.¹⁴ Unless the Supreme Court is willing to sound the death knell of the modern self-execution doctrine, it cannot truly embrace the value of international law. Recently, the Court had two very good opportunities to declare the Geneva Conventions¹⁵ self-executing in *Hamdi v. Rumsfeld*,¹⁶ and *Hamdan v. Rumsfeld*.¹⁷ Unfortunately, the Court went to great lengths to avoid the self-execution issue, even though a resolution of the question of Geneva self-execution was clearly called for.

This Essay is an exhortation to the Court to take up the treaty self-execution issue and finally push back the rising tide of isolationism in the doctrine created by lower courts exhibiting a basic skepticism of international law. Part I of the Essay discusses the pervasive force of modern isolationist philosophies. It also examines the movement of the Court, or at least individual Justices, away from this philosophy. Part II examines the history of the self-execution doctrine and shows how it has morphed from a fairly straightforward contract-based doctrine into a mechanism that thwarts the enforceability of valid federal law, merely because it is set forth in an international instrument. Finally, Part III analyzes the Supreme Court’s stand on self-execution, noting the paucity of recent cases on the doctrine, and maintains that the Court should have taken the opportunity to discuss self-execution in the terrorism detention decisions.

I. ISOLATIONISM & INTERNATIONALISM

Professor Mark Westin Janis, states:

Crafting an international law that weaves the nations together while not dismissing their genuine and healthy diversity is a real challenge. In a word, American interna-

¹² See Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 766 (1988) (characterizing self-execution doctrine as judicial invention).

¹³ *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

¹⁴ See *infra* notes 112–30 and accompanying text.

¹⁵ By “Geneva Conventions” and “Geneva,” I refer primarily to the Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter “Third Geneva Convention”].

¹⁶ 542 U.S. 507 (2004).

¹⁷ 126 S. Ct. 2749 (2006).

tional lawyers need to translate international law universalism to America's exceptionalists, and to translate American international law exceptionalism to international law's universalists.¹⁸

To be sure, the question of isolation versus internationalism is a difficult one, as is the more abstract issue of universal human rights versus cultural values.¹⁹ On one hand, isolationism is closely associated with xenophobia, hostility to human rights, and the rejection of civilized advancement.²⁰ On the other hand, not even the most ardent internationalist would assert that international law should transplant all domestic legislation or that foreign countries' traditions should completely displace American values.²¹ Recently, in the legal academy, analysis of U.S. isolationism has given way to extensive discussion of a related phenomenon, American exceptionalism.²² Loosely,²³ exceptionalism denotes the United States' Janus-faced stance on international

¹⁸ Janis, *supra* note 4, at 212.

¹⁹ See generally Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COLUM. HUM. RTS. L. REV. 249 (1999) (deconstructing perceived relativism–universalism irreconcilability).

²⁰ Professor Anthony G. Amsterdam criticizes constitutional law scholars for failing to “enshrine the most enlightened and progressive ideals of the community of nations” because of a prevalent “[i]solationist thinking bred of the comfortable, cocky myth of American exceptionalism.” Anthony G. Amsterdam, *Remarks at the Investiture of Eric M. Freedman as the Maurice A. Deane Distinguished Professor of Constitutional Law*, November 22, 2004, 33 HOFSTRA L. REV. 403 (2004). See also Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 68 (2006) (“American Exceptionalism can carry connotations of xenophobia or downright lawlessness.”) (footnote omitted).

²¹ Justice Scalia states, “What’s going on here? Do you want [international law] to be authoritative? I doubt whether anybody would say, ‘Yes, we want to be governed by the views of foreigners.’ Well if you don’t want it to be authoritative, then what is the criterion for citing it not [sic]? That it agrees with you?” See Justices Antonin Scalia & Stephen Breyer, *Constitutional Relevance of Foreign Court Decisions* (Jan. 13, 2005) (Discussion at the American University Washington College of Law), transcript available at <http://domino.american.edu/AU/media/mediare.lnsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> [hereinafter Scalia–Breyer debate].

²² See, e.g., Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); Harold Honju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1513–15 (2003). Mark B. Rotenberg notes that “[t]he Bush administration’s response to the attacks of 9/11 . . . has revived exceptionalism as a leading theme for American politicians, social commentators, and international critics alike.” Mark B. Rotenberg, *America’s Ambiguous Exceptionalism*, 3 U. ST. THOMAS L.J. 188, 188–89 (2005).

²³ Given that this Essay is not generally about deconstructing the concept of isolationism and American exceptionalism, I use these terms quite loosely to describe hostility to the domestic influence of international and foreign laws and norms. In this sense, I must admit that I am readily subject to Dean Koh’s criticism that “the term ‘American exceptionalism’ has been used far too loosely and without meaningful nuance.” Koh, *supra* note 22, at 1482.

law.²⁴ One face of the United States touts itself as a leader in international human rights, engages in humanitarian and not-so-humanitarian military campaigns in the name of the rule of law, and signs international human rights treaties.²⁵ The other face holds that the United States ought to be exempt from international rules of law and uses legal mechanisms to undermine the enforcement of treaties.²⁶ Although the faces of American exceptionalism may appear inconsistent, there is a reconciling principle. Exceptionalism describes the tendency of the U.S. to view itself as a creator and validator of first legal principles.²⁷ Thus, internationalism is useful only to the extent that it helps the exportation of American-ness, but not for any internalization of foreign principles.²⁸

While this Essay does not seek to present an exhaustive critique of isolationism or exceptionalism, I will advance a normative argument against the prevailing isolationist philosophy. In its best light, exceptionalism has a couple of apparently positive aspects: First, the United States' promotion of "American" values, while certainly subject to criticism, can potentially further the rule of law and human rights.²⁹ Our distinguished symposium participant Dean Harold Koh notes that "the best face of American exceptionalism proves to be the face that promotes the rule of law."³⁰ Second, as Professor Janis asserts, exceptionalism can protect "genuine and healthy diversity."³¹ The first benefit of exceptionalism, while not all-together uncontro-

²⁴ See Koh, *supra* note 22, at 1482–83. President Bush is an exceptionalist in the sense that on one hand, he claims to embrace principles of international law, and on the other hand, he refuses to be constrained by those laws. See Philippe Sands QC, *Lawless World? The Bush Administration and Iraq: Issues of International Legality and Criminality*, 29 HASTINGS INT'L & COMP. L. REV. 295, 301 (2006) (describing Bush's "a la carte multilateralism").

²⁵ The negative aspect is America's aggressive military interventionism, while the positive is America's "exceptional global leadership and activism." Koh, *supra* note 22, at 1487.

²⁶ See MARGARET MACMILLAN, *PEACEMAKERS: THE PARIS CONFERENCE OF 1919 AND ITS ATTEMPT TO END WAR* 22 (2001) ("American exceptionalism has always had two sides: the one eager to set the world to rights, the other ready to turn its back with contempt if its message should be ignored."); Resnik, *supra* note 22, at 1582 (noting that some take exceptionalism as license for unilateralism); Koh, *supra* note 22, at 1482–83 (asserting that one face of exceptionalism is hostility to international law, including valid treaty law).

²⁷ See Resnik, *supra* note 22, at 1582–83 ("For some, as the exceptional nation, America should be a 'model . . . with a special and unique destiny to lead the rest of the world to freedom and democracy.'") (quoting INTRODUCTION TO IMAGINED HISTORIES: AMERICAN HISTORIANS INTERPRET THE PAST 4 (Anthony Molho & Gordon S. Wood eds., 1998)).

²⁸ See Koh, *supra* note 22, at 1497–98 (criticizing America's double standard approach to international law).

²⁹ While it is suspect for the United States to impose its version of the rule of law through military force, America's role as a moral and financial supporter of human rights and the rule of law is less problematic. See *supra* note 25 and accompanying text.

³⁰ Koh, *supra* note 22, at 1494.

³¹ See *supra* note 18 and accompanying text.

versial, is not a product of isolationism but of involvement in world affairs, albeit in an incredibly one-sided way.³² Consequently, the second perceived benefit is more germane to this Essay. The idea is that in order to protect its democratic values and even sovereignty, the United States must erect barriers to the influence of international laws and norms.³³ Otherwise, there will be only one set of “world” values and the international community will be devoid of its “healthy diversity.”³⁴

Indeed, the idea that accepting international law will destroy American values and autonomy is continually emphasized by conservative scholars and Supreme Court justices.³⁵ Dean Koh explains that this philosophy enables a “nationalist jurisprudence,” in which foreign law is considered “irrelevant, or worse yet, an impermissible imposition on the exercise of American sovereignty.”³⁶ Conservative Court members consistently repeat the mantra that international consensus and decisional law have *no place* in American jurisprudence.³⁷ The argument behind this conclusion is the hyperbolic assertion that consideration of international values and law will lead to the utter displacement of American law.³⁸ The quite obvious problem with this stance is that the premise of the argument does not support its conclusion. If the concern is a total loss of sovereignty, what follows is that

³² Hence the criticism is that even if American imperialism promotes the rule of law, it is a *priori* illegitimate to impose norms in a culturally monopolistic way. See *supra* note 26.

³³ See John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 327 (2006) (criticizing Court “for relying on international and foreign law, whose production process cannot be easily understood, let alone influenced, by the average citizen”).

³⁴ Former ABA President Frank Holman, architect of the Bricker Amendment, which sought to make treaties presumptively invalid, see *infra* notes 145–48 and accompanying text, justified the Amendment as marking the “line . . . between those Americans who believe in the preservation of national sovereignty and national independence and those who believe that our national independence . . . should yield to international considerations and some kind of world authority.” See FRANK E. HOLMAN, *STORY OF THE “BRICKER” AMENDMENT* 22 (1954).

³⁵ See, e.g., *infra* note 37 (statements by Justices Scalia and Thomas); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 58 (2004) (“Using global opinions as a means of constitutional interpretation dramatically undermines sovereignty.”).

³⁶ Koh, *supra* note 4, at 52.

³⁷ See *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (calling consideration of other nations’ opinions on death penalty “totally inappropriate as a means of establishing the fundamental beliefs of this Nation”); *Atkins v. Virginia*, 536 U.S. 347–48 (2002) (Scalia, J., dissenting) (same); *Foster v. Florida*, 537 U.S. 990, n* (2002) (Thomas, J., concurring in denial of certiorari) (stating that “this Court . . . should not impose foreign moods, fads, or fashions on Americans”).

³⁸ See e.g., Viet D. Dinh, *Nationalism in the Age of Terror*, 56 FLA. L. REV. 867, 879 (2004). (calling the internationalist “a rudderless person in search of a fundamental identity [who] may well find himself or herself in the comfort of zealotry and the community of terror”); Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1320–21 (2004) (arguing that incorporation has potential to reverse entire constitutional structure).

domestic law should place some justifiable limits on the influence of international law and norms in order to preserve domestic autonomy.³⁹ This is, however, precisely not the argument that conservative Court members make - they argue for a total elimination of international influence.

Take, for example, the internationalism-isolationism debate that played out in *Roper v. Simmons*.⁴⁰ The majority undertook a classic two-pronged “evolving standards of decency” examination to reject the continuing vitality of juvenile executions.⁴¹ This analysis consisted of a determination of the “national consensus” regarding juvenile execution⁴² and the “Court’s own judgment.”⁴³ The Court determined that consensus evidence established a national trend against juvenile death penalty.⁴⁴ Examining its own judgment, the Court cited sociological studies demonstrating that juveniles are not the “worst” offenders.⁴⁵ International consensus played the very limited role of “confirming” the Court’s own judgment that juvenile execution violated civilized standards, which itself only came into play *after* determining national consensus.⁴⁶

Justice Scalia, in dissent, however, characterized “the basic premise of the Court’s argument” as holding “that American law should conform to the laws of the rest of the world.”⁴⁷ It is this premise Scalia contends “ought to be rejected out of hand.”⁴⁸ Justice Scalia sets up a false dichotomy in which either international law counts for nothing or it totally usurps American values.⁴⁹ He states, “I do not believe that

³⁹ See *infra* notes 108–11 and accompanying text (discussing reasonable limits on the domestic enforceability of treaties); see also David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 4 (2002) (asserting that 19th century self-execution cases struck appropriate balance between competing rule of law and separation of powers principles).

⁴⁰ 543 U.S. 551 (2005).

⁴¹ *Roper*, 543 U.S. at 561; see *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion) (creating evolving standards of decency test).

⁴² *Roper*, 543 U.S. at 564–68.

⁴³ *Id.* at 568–75.

⁴⁴ *Id.* at 564–68.

⁴⁵ *Id.* at 569–75.

⁴⁶ *Id.* at 575–78. The Court states, “Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” *Id.* at 575.

⁴⁷ *Id.* at 624 (Scalia, J., dissenting).

⁴⁸ *Id.* (Scalia, J., dissenting).

⁴⁹ *Id.* at 628 (Scalia, J., dissenting). Under this construction, either the citation of international law entails total deference or it is just “meaningless dicta.” *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting). Kenneth Anderson argues that prior to *Roper* it was possible to believe that international law was just Stevens’ and Breyer’s “hobbyhorse,” but after the decision, we should be concerned about the viability of basic American values. He states:

approval by ‘other nations and peoples’ should buttress our commitment to American principles any more than (what should logically follow) disapproval by ‘other nations and peoples’ should weaken that commitment.”⁵⁰ Although displacement of U.S. law is the purported reason behind Scalia’s conclusions that international values should never be mentioned, there is obviously a deeper isolationism at work. Justice Scalia’s xenophobia rears its ugly head when he moves away from apocalyptic claims about foreign law taking over and discusses why foreign norms are inappropriate for even passing consideration. Justice Scalia takes pains to contrast our “centuries-old American” legal tradition with that of countries with “tyrannical political makeup[s]” and “subservient or incompetent . . . court system[s].”⁵¹

Conservative supporters of treaty non-self-execution suffer the same predicament when arguing signed and ratified treaties should not be the “Law of the Land,” as provided in the Supremacy Clause.⁵² Professor John Yoo, for example, advances a criticism of self-execution based in separation of powers and the fear that self-executing treaties will displace legislative enactments and give too much power to the executive.⁵³ The problem again is that this argument rests on unjustified melodramatic slippery slopism. There are many limiting mechan-

Justice Kennedy’s *Roper* majority opinion puts paid to the conceit that this is all just a bit of fluff exaggerated into something sinister and conspiratorial by Federalist Society right-wing ideologues. . . . [but *Roper*] is very far indeed from mere flirtation. It invites the deployment of a sweeping body of legal materials from outside U.S. domestic law into the process of interpreting the U.S. Constitution – and, moreover, invites it into American society’s most difficult and contentious “values” questions.

Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL’Y REV., June–July 2005, at 33.

⁵⁰ *Roper*, 543 U.S. at 628 (Scalia, J., dissenting).

⁵¹ *Id.* at 623 (Scalia, J., dissenting). Similarly, in *Lawrence v. Texas*, 539 U.S. at 598, 601, Justice Scalia describes American anti-homosexual sodomy laws as part of our “traditional notions of sexual morality” which necessarily form a rational basis for the law. By contrast, foreign laws that allow homosexual sodomy are merely “foreign moods, fads, or fashions” (quoting *Foster v. Florida*, 537 U.S. 990, n* (2002) (Thomas, J., concurring in denial of certiorari)); see also *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting) (“Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”).

⁵² U.S. CONST. art. VI, cl. 2 (providing that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).

⁵³ John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2236 (1999) (warning ominously that “[i]f the United States forges multilateral agreements addressing problems that were once domestic in scope, treaties could replace legislation as a vehicle for domestic regulation”).

isms in place to prevent treaty law from “taking over.”⁵⁴ Although sovereignty concerns might justify certain restrictions on treaties, for example, the requirement that they be consistent with constitutional provisions and have the status of statutory law, they do not seem to justify the all-out assault on treaty law represented by the modern intent theory of self-execution.⁵⁵

The modern construction of self-execution will be explained with far more nuance in the next section, but briefly, the modern trend has been to find treaties unenforceable domestically, even when they are otherwise constitutional and provide individual domestic rights, because the instruments do not clear the extra hurdle of evidencing a specific “intent-to-self-execute.”⁵⁶ The challenge to exceptionalists is to demonstrate why, in the absence of this extra hurdle, treaty law would somehow displace all domestic legislation and destroy our delicate balance of power. Like Scalia, it is obvious that treaty exceptionalists fear, not that treaty law will be the only law, but that it will be *any* law.⁵⁷ These scholars’ isolationist sentiments rise to the surface when explaining why foreign law should have absolutely no influence. Professor Yoo, for example, decries the influence of European values by observing:

Europe has been given to fluctuations of ideological extremes. In the Nineteenth Century, many European nations still considered monarchy the best system of government. Indeed, the other European powers intervened after the French Revolution to restore the Bourbon dynasty to power. In the Twentieth Century, monarchy was followed by fascism, socialism, and communism. As history has demonstrated, the performance of these regimes has been less than exemplary. In particular, fascism and communism, which were once viewed by some as advanced, modern ideologies, were adopted by regimes that murdered millions.⁵⁸

⁵⁴ Treaties are limited by justiciability rules, contract interpretation principles, and their status as federal legislative law. See *infra* notes 108–11 and accompanying text.

⁵⁵ See *infra* notes 112–15 and accompanying text (discussing modern intent theory).

⁵⁶ See *infra* notes 113–14 and accompanying text (discussing intent-to-self-execute).

⁵⁷ See Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 346 (1995) (asserting that democracy argument against self-execution “impugns the democratic character of every treaty made or that will be made by the President with the consent of the Senate”). Indeed, Professor Yoo believes that treaty law is never binding. It can only be given effect if Congress decides to pass a statute to enact its provisions. See Yoo, *supra* note 53 at 2218 (arguing that text and structure of Constitution justify presumptive non-self-execution). See also Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 94 AM. SOC’Y INT’L L. PROC. 47 (2003).

⁵⁸ Delahunty & Yoo, *supra* note 4, at 326.

Consequently, what appears to drive the modern self-execution doctrine is a primary belief that international and foreign law is illegitimate and valueless.⁵⁹

To be fair, one can entertain a very healthy skepticism of international processes, just as one should reasonably question domestic institutional behavior. Many scholars have noted the ways in which international processes can be inefficient, ineffective, corrupt, and easily manipulated for national interests.⁶⁰ While these may be reasons to argue for the reform of international institutions,⁶¹ they do not support the conclusion that treaties should be unenforceable. The United States voluntarily ratifies treaties after extensive negotiations and consent of the President and a supermajority of the Senate.⁶² Only after this process does the treaty become law enforceable through domestic or international mechanisms. The criticism of international processes might cause one to question whether the United States should submit to international procedures specified in treaties,⁶³ but it simply does not affect the issue of whether treaties should be enforced domestically.⁶⁴ When a person seeks redress under a treaty in federal court, our own judges, not these allegedly problematic international bodies, determine the fate of the case. Moreover, one should be skeptical of claims that international law is *per se* flawed. Those casting international law as less procedurally legitimate than domestic law, tend to establish their argument by tautology. They prove their point of domestic superiority simply by painting a picture of corrupt, self-

⁵⁹ See, e.g., McGinnis, *supra* note 33, at 317–18 (“The difficulty for international law is that nothing about its process of generation should lead us to believe that it should be used as a trumping factor over our own domestic processes, nor is there anything about international or indeed foreign law that should make us consider it intrinsically good.”). See also Larsen, *supra* note 38, at 1309 (arguing enforcing treaty rights is *per se* illegitimate because judges may only counter statutes by appealing to “supermajoritarian” Constitution).

⁶⁰ See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1558 n.2 (2003) (asserting that international legal institutions tend to interpret their own power broadly). See generally José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT’L L. 324 (2006) (discussing various criticisms of international organization from different groups and perspectives).

⁶¹ See *id.*

⁶² See U.S. CONST. art. II § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”).

⁶³ See *supra* note 60.

⁶⁴ Ironically, those opposed to treaty self-execution tend to assert that individuals should seek treaty remedies through international procedures in the very fora they consider *a priori* illegitimate. See *infra* note 110 (cases stating that remedies for treaty violations are exclusively international).

serving treaty negotiation processes contrasted with our purely-democratic, incorruptible domestic legislative system.⁶⁵

Despite the ready criticisms, however, isolationist sentiment is wildly popular. Many believe that the United States has its own traditions and should be exempt from the corrupting influence of liberal foreign ideals.⁶⁶ For sure, the “war on terror” has heightened Americans’ aversion, not only to international human rights restraints on executive power,⁶⁷ but also more generally to foreign cultures. I was nonetheless surprised that among my criminal law students last semester, out of all the politically-charged subjects we discussed - rape law, racial profiling, battered women’s syndrome, domestic violence - the one thing that riled them up most was the case *People v. Wu*,⁶⁸ in which a Chinese woman who had attempted a parent-child suicide (the child died, she lived) was permitted by the California appeals court to assert a “cultural defense.”⁶⁹ The court observed that Wu’s Chinese background was relevant to whether she was “reasonably provoked” into the killing.⁷⁰ The majority of my students, or at least the vocal ones, were extremely disturbed by the ruling, believing that the substitution of the reasonable Chinese woman standard for the typical “reasonable

⁶⁵ See, e.g., Joseph Keller, *Sovereignty vs. Internationalism and Where United States Courts Should Find International Law*, 24 PENN ST. INT’L L. REV. 353 (2005) (characterizing international legal actors as unaccountable and even rent-seeking as opposed to domestic legislators who are responsible to public). According to Keller, customary international law should be ignored because:

[a]n article by a law professor may appear in a prestigious journal, boldly and authoritatively declaring X to be a well established rule of customary international law, with great academic pomp and bravado, yet one cannot know if this article was put together hastily in a desperate attempt to meet a publishing deadline. Or perhaps more likely, given the strict criteria for law review articles (a topic should be “ripe” and present a new idea not “preempted” by another author), the professor merely espoused his/her theory because it was new or unique, and not because it is well supported logically or advisable as a matter of public policy.

Id. at 356. While the above is apparently a reason to reject customary international law all together, curiously, it is not a reason to disregard the writings of professors who support isolationism, argue in favor of federalism, revere originalism, and oppose treaty supremacy. See also McGinnis, *supra* note 33, at 308 (asserting that only “good” body of law can constrain democratic legislation and contrasting “bad” international law with “good” domestic constitutional law). *But see* Resnik, *supra* note 22, at 1574 (noting that process by which international norms become domestic law is often deeply democratic).

⁶⁶ See Cohen, *supra* note 4, at 273–75 (describing dramatic negative responses by Congress persons to citation of foreign opinion in *Roper*). See also Shane B. Kellbley, Note, *Reason Without Borders: How Transnational Values Cannot Be Contained*, 28 FORDHAM INT’L L.J. 1595, 1630–31 (2005) (discussing congressional response).

⁶⁷ See Martin S. Flaherty, “External” Versus “Internal” in *International Law*, 29 FORDHAM INT’L L.J. 447, 448 (2006) (noting that war on terror has fueled American exceptionalism).

⁶⁸ 286 Cal. Rptr. 868 (1991) (unpublished disposition).

⁶⁹ *Id.* at 879–80.

⁷⁰ *Id.* at 884–85.

man” standard was an assault on American-ness.⁷¹ In fact, many were so passionate that foreigners should “check their culture at the door” that they patently refused to argue the other side of the issue.

Popular sentiment against foreign law and cultures leads some to argue that internationalism is a product of the liberal elitism of self-aggrandizing law professors and judges. Professors Yoo and Delahunty, for example, assert that internationalism “appears to be linked to the emergence of what can be called a deterritorialized, ‘cosmopolitan’ moral sensibility, generally shared by governing elites of the advanced nations.”⁷² Similarly, Professor John McGinnis asserts:

Publicists [of international law] are essentially international law professors. As a group they are not required to be representative of the views of their nation’s citizens nor are they likely to be so. We have evidence, for instance, that elite international law professors in the United States are very unrepresentative of popular opinion, leaning Democratic rather than Republican by a ratio of over eleven to two.⁷³

One should, however, view liberal elitism arguments with a jaundiced eye. Such rhetoric has been a time-honored favorite of old segregationists and modern neo-conservatives to defeat measures that protect religious, racial, gender, and other minorities from subordination by an oppressive majority.⁷⁴ The trick is to switch characterizations, casting those who support minority subordination as “ordinary folk” who are oppressed by overbearing liberals wishing to curtail their freedom to support anti-minority policies.⁷⁵

⁷¹ Initially, some misread the case as allowing a foreigner to have a defense whenever an act is legal in his country of origin. I explained, however, that the case really was about how subjective the reasonableness standard should be and whether a jury should adopt the point of view of a reasonable person from a foreign culture. Many students answered with a resounding “no,” stating that immigrants have a positive obligation to assimilate to “American culture” as soon as they arrive in the United States. When I asked what “American culture” is, my majority–minority class replied that it is the culture the “average” American possesses.

⁷² Delahunty & Yoo, *supra* note 4, at 330.

⁷³ McGinnis, *supra* note 33, at 314.

⁷⁴ This tactic was used by Governor Wallace to drum up support for his pro-segregation campaigns. See THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 77 (1992) (“Wallace portrayed the civil rights issue... as the imposition on working men and women of intrusive ‘social’ policies by an insulated, liberal, elitist cabal of lawyers, judges, editorial writers, academics, government bureaucrats, and planners.”).

⁷⁵ See Kelbley, *supra* note 66, at 1632 (observing that conservatives argued against perceived “gay rights” opinion in *Lawrence* by asserting that “activist judges” were imposing personal beliefs on American population). See also Aya Gruber, *Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital, an Exercise in Praxis*, 35 SETON HALL L. REV. 1201, 1209 (2005). (discussing “the co-opting of minority status by privileged members of society”). In the 1992 Campaign, Vice Presidential nominee Dan Quayle famously

Another method of denigrating international law, an old favorite of Justice Scalia, is to argue that its sheer volume makes it susceptible to citation for any given principle.⁷⁶ Critics of international and comparative law assert that such law is essentially meaningless because jurists can pick and choose among foreign principles to cite just the ones they like.⁷⁷ Justice Breyer's response to this contention is smile-provoking:

How do we know we can keep [citation of international sources] under control? How do we know we cite both side[s]? How do we know we looked for everything? Well, I'd say that kind of a problem arises with any sort of citation. A judge can do what he's supposed to do, or not.⁷⁸

Despite charges, bordering on *ad hominem* attack, that they are misguided,⁷⁹ elitist,⁸⁰ power-hungry,⁸¹ and even nepotistic,⁸² certain Jus-

blamed the "cultural elite" for imposing un-American liberal ideals on the nation. He characterized gay and abortion rights as products of "cynical," "sneering" "Sophisticates" and their "radical" ideology and contrasted that with average "American" ideals. He stated, "Talk about right and wrong, and they'll try to mock us in newsrooms, sitcom studios and faculty lounges across America, but in the heart of America, in the homes and workplaces and churches, the message is heard." Andrew Rosenthal, *The 1992 Campaign; Quayle Attacks a "Cultural Elite," Saying It Mocks Nation's Values*, N.Y. TIMES, June 10, 1992, at A1.

⁷⁶ See *Roper*, 543 U.S. at 627 (Scalia, J., dissenting) (criticizing majority for "invok[ing] alien law when it agrees with one's own thinking, and ignor[ing] it otherwise").

⁷⁷ See, e.g., McGinnis, *supra* note 33, at 325-27 (asserting that malleable international law serves as cover for antidemocratic judicial activism).

⁷⁸ Scalia-Breyer debate, *supra* note 21 (Justice Breyer's statement). Breyer goes on to say:

With the legislative history I'd say, and I'd say with [foreign sources], you're a conscientious judge or you're not. And if you are going to apply it unfairly, why wouldn't you apply all kinds of things unfairly? There are plenty of opportunities to do that if you want to do it, but then if that's what you're going to do, go into some other profession, because I don't see what the reward would be in a profession like ours, the law, which prizes people being straightforward, I think, being honest and doing the job properly.

Id. It seems unchallengeable that the selectivity argument can be used against any basis of legal interpretation including Scalia's sainted originalism. See LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 300-13 (1988) (stating bluntly that "the Court has flunked history" and that "judges exploit history by making . . . it yield results that are not historically founded"); Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601 (1998) (criticizing Court's selective use of constitutional history in originalist arguments).

⁷⁹ The tenor of Scalia, Yoo, and others' criticisms seems to indicate that they believe "internationalist" Justices are foolish for failing to realize that they are either allowing foreigners to rule the Court or their citation of foreign law is meaningless. See *Roper*, 543 U.S. at 628 (Scalia, J., dissenting) ("Acknowledgment' of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court's judgment - which is surely what it parades as today."). See also Anderson, *supra* note 49, at 33 (referring to international opinion as Justice Stevens' & Breyer's "hobbyhorse").

tices are resolute that the American legal system has much to gain from an increased understanding and incorporation of foreign and international legal rules and norms.⁸³ Like Justice Ginsburg, Justice Breyer believes that the increasing comparativist nature of the Supreme Court:

reflects the “globalization” of human rights, a phrase that refers to the ever-stronger consensus (now near world-wide) as to the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as national constitutions and international treaties, and the related decision to enlist judges - i.e., independent judiciaries - as instruments to help make that protection effective in practice.⁸⁴

Other Justices, like Stevens and former Justice O’Connor, have likewise been supportive of the incorporation of international values into constitutional analysis.⁸⁵ These jurists therefore endorse a practice that many, like Scalia, characterize as radically and dangerously inter-

⁸⁰ See, e.g., Delahunty & Yoo, *supra* note 4, at 330 (stating that internationalist “Justices . . . stand at the very apex of [international] elites”).

⁸¹ See *id.* at 329 (speculating that Court cites international law to augment its own power).

⁸² Some critics go so far as to insinuate that the increasing internationalism of the Court is a product of global aristocratic nepotism:

Supreme Court judges interact with their peers in other nations on a more regular basis. Their long summer recess is a perfect time to make the acquaintance of justices in their favorite nations. Lake Como or the south of France provides a good atmosphere for bonding. All of us seek approval from our peers and the Justices would naturally regard foreign justices as their equals.

McGinnis, *supra* note 4, at 326–27. See also Delahunty & Yoo, *supra* note 4, at 329 (asserting that Court’s use of foreign law indicates its desire to be part of “transnational class of judicial and regulatory elites”).

⁸³ See Scalia–Breyer debate, *supra* note 21 (statements of Justice Breyer); Ginsburg, *supra* note 1. Cf. Mark Tushnet, “A Decent Respect to the Opinions of Mankind”: Referring to Foreign Law to Express Nationhood, 69 ALB. L. REV. 809, 810 (2006) (explaining that Court may have nationalist reason for such incorporation because “non–U.S. law might be a way of ensuring that the United States helps lead the world’s nations to a better way of governing themselves and their peoples”).

⁸⁴ Stephen Breyer, Assoc. Justice, Supreme Court of the U.S., The Supreme Court and The New International Law, remarks to the American Society of International Law (Apr. 4, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

⁸⁵ See *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (Stevens, J., concurring); Sandra Day O’Connor, Keynote Address at the 96th Annual Meeting of the American Society of International Law (March 13–16, 2002), in 96 AM. SOC’Y. INT’L L. PROC. 348, 350 (2002) (“Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.”).

national.⁸⁶ If they support internationalism to this extent, it is curious that these same justices have not been vocal in opposition to the modern self-execution doctrine. The modern intent theory of self-execution permits the government to be isolationist, not with respect to foreign norms in constitutional law, but regarding the very international human rights instruments to which it has vowed allegiance. Why are liberal Court members so much less passionate about the self-execution doctrine than about interpretive incorporation of international law?

The answer may be that the principles behind the modern self-execution doctrine are not as readily identifiable as isolationist as the arguments against international influence in constitutional law. Those opposed to treaty self-execution do not always denigrate the rights and obligations in the treaty as having been influenced by radical or corrupt foreigners.⁸⁷ Rather, they characterize self-execution as a doctrine with roots in contract interpretation and civil remedies law, and defend it by arguing that it preserves federalism and a delicate balance of power.⁸⁸ I will demonstrate, however, that the modern self-execution doctrine is isolationist at its very core. In fact, it goes further than arguments against constitutional incorporation because it asks courts to ignore international law, not in the interpretation of domestic constitutional rights, but in the very area where the constitutional structure requires judicial enforcement of international law.

II. SELF-EXECUTION: FROM CONTRACT INTERPRETATION TO ANTI-INTERNATIONALISM

Any analysis of the self-execution doctrine and domestic enforceability of treaties should start with the Supremacy Clause, which provides, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

⁸⁶ See *Lawrence*, 539 U.S. at 598 (calling citation of international opinion “dangerous dicta”); see also *supra* note 66 (discussing congressional response to *Roper*). See, e.g., Peter Rubin, American Constitution Society Supreme Court Roundup (July 1, 2003), available at <http://www.acslaw.org/pdf/SCOTUStrans.pdf> (describing references to European Court of Human Rights in *Lawrence* decision as “remarkable” and “quite extraordinary”); Tony Mauro, *Supreme Court Opening up to World Opinion*, LEGAL TIMES, July 7, 2003, at 1, 8 (noting recent “breakthrough term” regarding international law, in which “the ostrich’s head came out of the sand”); ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 15–25, 135–39 (2003) (discussing “insidious appeal of internationalism” in constitutional interpretation).

⁸⁷ But see John McGinnis, *The Limits of International Law in Protecting Dignity*, 27 HARV. J.L. & PUB. POL’Y 137 (2003) (arguing that human rights treaties are procedurally undemocratic and substantively invalid because they do not apply economic theory).

⁸⁸ See Yoo, *supra* note 53 *passim*.

Constitution or Laws of any state to the Contrary notwithstanding.”⁸⁹ This clause demonstrates, not only that treaties are enforceable domestic law, but also that they are federal law binding on the states. Many scholars much more proficient in legal history than I have discussed the events surrounding the drafting and ratification of the Supremacy Clause⁹⁰ and concluded that the Framers established a “monist” system, in which treaty law and domestic law are one in the same,⁹¹ to signal the young nation’s respect for international agreements.⁹² Thus, for the first fifty years of the republic, treaties were presumptively valid sources of domestic rights.

In 1829, the concept of self-execution was introduced into Supreme Court law in *Foster v. Neilson*.⁹³ The case involved land rights under a treaty between Spain and the United States.⁹⁴ The Court interpreted the treaty’s directive that Spanish land grants “shall be ratified and confirmed” as only obligating Congress to pass legislation in the future legalizing the land transfers. The Court subsequently found the treaty domestically unenforceable because it simply did not create any present rights.⁹⁵

The Court’s interpretive move is itself troubling. Ordinary contracts often state that parties “shall” commit future acts. When a party fails to fulfill the future contractual obligation, courts will either find the contract breached and order compensation or specific performance, or hold the contract unenforceable because the future obligation was too vague.⁹⁶ In *Foster*, the problem was not that the future obligation was too vague for judicial enforcement - the problem was the Court interpreted the future obligation as requiring Congress to

⁸⁹ U.S. CONST. art. VI, cl. 2.

⁹⁰ See, e.g., Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 697–700 (1995); Paust, *supra* note 12; Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999); *but see* Yoo, *supra* note 53, at 2231.

⁹¹ Monist systems are contrasted with “dualist” systems that always require implementing legislation before recognizing a treaty as domestically enforceable. See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 126 (2004). Britain is a commonly cited example of a “dualist” legal system. See Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI. KENT L. REV. 459, 48183 (1991).

⁹² See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 254 (1829) (stating that the “different principle” established by the U.S. declares a “treaty to be the law of the land”).

⁹³ *Id.*

⁹⁴ The treaty stated in pertinent part that “all the grants of land made before the 24th of January 1818, by his Catholic Majesty, & c. shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the domination of his Catholic majesty.” *Id.* at 276.

⁹⁵ *Id.* at 25455.

⁹⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. a (1981).

act.⁹⁷ The Court was then unwilling to force Congress to legislate to fulfill the treaty obligation because to do so would have opened up a separation of powers can of worms.⁹⁸

In the first instance, therefore, *Foster* set forth a somewhat questionable interpretation of the treaty. Why would the parties enter into a treaty that involved only an illusory promise to ratify land grants? The most straightforward reading of the treaty, and one the Court adopted four years later when it overturned *Foster* in *United States v. Percheman*,⁹⁹ is that the treaty obligated the U.S. government, as a whole, to recognize the validity of the land grants as of the signing of the instrument.¹⁰⁰ As a result, it could be that the whole of self-execution law arose because of an unfortunate treaty interpretation.¹⁰¹ Nonetheless, courts frequently cite *Foster* as the basis for the self-execution doctrine, relying on the following language:

[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. 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.¹⁰²

After *Foster*, some cases simply continued to reaffirm unqualified treaty supremacy,¹⁰³ while others distinguished between executory treaties, which only create future obligations and require implementing legislation to be enforceable, and executed treaties, which automatically operate as valid domestic law.¹⁰⁴ Early on, two other limita-

⁹⁷ *Foster*, 27 U.S. (2 Pet.) at 315.

⁹⁸ *Id.*

⁹⁹ 32 U.S. (7 Pet.) 51 (1833).

¹⁰⁰ *Id.* at 88–89.

¹⁰¹ See Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1128 (1992); Henry J. Richardson III, *Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 VILL. L. REV. 1091, 1110 (2000) (criticizing *Foster*'s treaty interpretation).

¹⁰² 27 U.S. (2 Pet.) at 254.

¹⁰³ See, e.g., *Hauenstein v. Lynham*, 100 U.S. 483, 488 (1879); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 372 (1857); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 593 (1832). See also Paust, *supra* note 12, at 771–73.

¹⁰⁴ See, e.g., *Terlinden v. Ames*, 184 U.S. 270, 285, 288–89 (1902); *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889); See also Paust, *supra* note 12, at 771 n.82 (citing cases). There are modern day offshoots of the executory-executed distinction. More recent lower court decisions have held overly ambiguous treaty provisions unenforceable because enforcing such provisions would strain judicial competence. See, e.g., *Am. Baptist Churches v. Meese*, 712 F. Supp. 756, 770 (N.D. Cal. 1989) (finding

tions on the domestic enforceability of treaty provisions emerged. The *Head Money Cases* of 1884 established that when a treaty's provisions create obligations only vis-a-vis sovereign states (horizontal obligations),¹⁰⁵ that treaty is non-self-executing because it does not establish judicially enforceable individual rights (through vertical obligations).¹⁰⁶ Other older cases established the equality of treaties to federal legislative law, thereby precluding the enforcement of treaties violative of the Constitution.¹⁰⁷

These early constructions of self-execution are fairly uncomplicated. Despite questionable interpretive moves, *Foster*, at most, stands for the relatively circumscribed principle that courts must give effect to the meaning of the terms of a treaty, as evidenced by its language.¹⁰⁸ It generally makes sense for an enforcing court to try to figure out the nature of obligations in the treaty.¹⁰⁹ The other early limitations also make sense. Treaties that simply do not create individual rights cannot be enforced by private individuals.¹¹⁰ Moreover, the choice to put treaties on the same level as federal legislative law seems beyond reproach. Treaty displacement of constitutional law would allow constructive amendment far removed from the process set forth in the Constitution. It is reasonable to believe, given the level of consensus required for constitutional amendment, that if the Framers had in-

article I of Geneva Conventions non-self-executing because its broad language does not provide "any intelligible guidelines for judicial enforcement").

¹⁰⁵ *Head Money Cases*, 112 U.S. 580, 598–99 (1884).

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g.,* *Geofroy v. Riggs*, 133 U.S. 258 (1890); *Reid v. Covert*, 354 U.S. 1, 16–18 (1957) (plurality opinion). The straightforward claim is that treaties, like statutes, may not infringe on constitutionally guaranteed rights. The more controversial claim is that treaties may not intrude on subject areas over which Congress has "exclusive" power. *See* *Edwards v. Carter*, 580 F.2d 1055, 1057 n.4 (D.C. Cir. 1978) (discussing whether treaty can conflict with "exclusive" congressional power and concluding that property clause does not grant Congress exclusive authority over transfer of U.S. property).

¹⁰⁸ Carlos Vázquez notes, "The Court's holding in *Foster* recognizes that the general rule established by the Supremacy Clause, under which treaties are enforceable in the courts without prior legislative action, is one that may be altered by the parties to the treaty through the treaty itself." Vázquez, *supra* note 90, at 702.

¹⁰⁹ This does not necessarily mean that a vague treaty is per se unenforceable. Courts are obligated to give effect to ambiguous treaty provisions as they would to ambiguous statutory provisions. *See id.* at 715. ("[T]here may be imprecise treaty provisions that the judicial branch is well suited to enforce directly.")

¹¹⁰ Unfortunately, lower courts in recent years have found treaties that appear to confer individual rights to nonetheless be exclusively between nations and therefore non-self-executing. *See, e.g.,* *Diggs v. Richardson*, 555 F.2d 848, 850–51 (D.C. Cir. 1976) (holding that Security Council resolution does not confer individual rights); *Kasi v. Commonwealth*, 508 S.E.2d 57, 64 (Va. 1998) (finding that Vienna Convention on Consular Relations and Optional Protocol on Disputes do not create individual rights).

tended to allow amendment through treaty process, they would have said so.¹¹¹

While the early constructions of self-execution continue to exist, the modern intent-based self-execution doctrine has really taken on a life of its own. These days, lower federal courts routinely endeavor, not only to discern the intent of the parties as to terms of a treaty, but also to discern the intent of United States treaty makers and their spokespersons as to whether the treaty should have domestic effect. As a consequence, courts now find that a prerequisite to treaty enforceability is a general “intent-to-self-execute” on the part of U.S. treaty makers.¹¹² This modern intent doctrine manifests in both milder and stronger forms. In its milder form, courts will not enforce a treaty if the language of the treaty or other evidence, such as statements from various U.S. treaty makers, indicate that U.S. drafters did not intend the treaty to be self-executing. Thus, evidence of “intent-not-to-self-execute” renders the treaty domestically unenforceable.¹¹³ In the stronger form, courts refuse to enforce a treaty domestically unless there is specific language in the treaty or from treaty makers that the treaty shall be self-executing. These cases take treaty and drafter silence as establishing non-enforceability,¹¹⁴ thus reversing the historical presumption that treaties are by their very nature supreme federal law.¹¹⁵

How did the quite straightforward concept that courts should enforce treaties by their terms morph into a doctrine creating specific evidentiary hurdles to the domestic enforcement of treaty law? The reasoning, which is necessarily related to the *Foster* court’s mistaken assertion that the Spanish treaty’s ambiguity involved future acts of Congress, goes something like this: (1) *Foster* held a treaty domestically unenforceable because it obligated Congress to pass implement-

¹¹¹ As a consequence, a treaty cannot abridge constitutional guarantees of free speech or equal protection. A harder question is whether a treaty may create law in an area reserved “exclusively” to Congress. See *supra* note 107.

¹¹² See, e.g., *Renkel v. U.S.*, 456 F.3d 640, 644 (6th Cir. 2006) (holding Convention Against Torture not self-executing because Senate and President intended no self-execution) & *infra* notes 113–14 (citing cases).

¹¹³ See, e.g., *Beazley v. Johnson*, 242 F.3d 248, 267 (5th Cir. 2001) (finding provisions of International Covenant on Civil and Political Rights non-self-executing because “[t]he Senate’s intent was clear – the treaty is *not* self-executing”); *U.S. v. Postal*, 589 F.2d 862, 881 (5th Cir. 1979) (finding intent against self-execution in part from statements of individual Senator).

¹¹⁴ See, e.g., *Igartua-De La Rosa v. U.S.*, 417 F.3d 145, 150 (1st Cir. 2005) (holding treaty self-executing only when “the treaty itself conveys an intention that it be ‘self-executing’”)

¹¹⁵ Vázquez asserts, “The courts that have suggested that treaties are judicially enforceable only if they were intended to be judicially enforceable have thus transformed the self-execution inquiry in a manner that seems fundamentally incompatible with the text of the Constitution.” *Supra* note 90, at 709.

ing legislation;¹¹⁶ and (2) therefore, before enforcing any treaty domestically, one must look at the parties' intent as to whether Congress must pass implementing legislation.¹¹⁷ This logic may seem appealing, but in the end it is incorrect. *Foster* simply held that a treaty failing to establish any present obligations cannot be enforced. It addressed neither a situation in which a treaty did establish current rights but nonetheless called them domestically unenforceable, nor a situation in which a treaty established current rights but other evidence indicated intent on the part of U.S. treaty makers to render it domestically unenforceable. Consequently, it does not follow from the proposition that the intent of drafters is relevant to determining the obligations within the treaty, that evidence of "intent-to-self-execute" must be a prerequisite to treaty enforceability.¹¹⁸ This is, however, precisely what modern courts hold.¹¹⁹ They find treaties unenforceable even when they confer present, individual rights and provide mechanisms for private enforcement.

Other modern approaches to self-execution determine treaty enforceability, not solely by intent, but by applying a multi-factored test or examining whether the treaty contains a private right of action.¹²⁰ Unfortunately, these tests also erect unjustifiable barriers to treaty enforceability, grounded in a presumption of treaty law inferiority rather than supremacy.¹²¹ In *Frolova v. Union of Soviet Socialist Republics*, for example, the Seventh Circuit set forth a number of considerations underlying self-execution analysis:

- (1) the language and purposes of the agreement as a whole;
- (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the

¹¹⁶ This thesis initially appears to be supported by language from *Foster* stating that "when the terms of the stipulation import a contract, when either of the parties engage 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." *Foster*, 27 U.S. (2 Pet.) at 314.

¹¹⁷ Sloss notes, "Commentators have generally understood *Foster* and *Percheman* to distinguish between treaty provisions that have no domestic legal effect in the absence of implementing legislation (non-self-executing) and provisions that do have domestic legal effect, even without implementing legislation (self-executing)." Sloss, *supra* note 39, at 21–22; see also Vázquez, *supra* note 90, at 701–02.

¹¹⁸ See Sloss, *supra* note 39, at 13 (arguing that *Foster* is not about "whether the treaty makers intended to create a non-self-executing treaty," but about type of international legal obligation they intended to create and whether it was possible to enforce it).

¹¹⁹ See *supra* notes 112–14 (citing cases).

¹²⁰ See, e.g., *Frolova v. U.S.S.R.*, 761 F.2d 370, 373 (7th Cir. 1985); *People of Saipan v. United States*, 502 F.2d 90, 97 (9th Cir. 1974).

¹²¹ See Vázquez, *supra* note 90, at 711 (criticizing multi-factored test as invitation for judges to "engage in an open-ended inquiry to determine on a case-by case basis whether judicial enforcement of a particular treaty is a good idea").

availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.¹²²

To the extent that prongs 1, 3, and 6 relate to the actual obligations in the agreement, they appear to be fairly straightforward extensions of *Foster*.¹²³ Courts must at some level decide what the treaty means, and the treaty must be practically enforceable.¹²⁴ Prongs 1 and 2, however, may relate to the requirement of “intent-to-self-execute,” and, as such, are subject to the criticism set forth above.¹²⁵ Prongs 4 and 5 appear, on their faces, to reflect a presumption of treaty illegitimacy. If a treaty creates rights and mechanisms for private enforcement, it should be irrelevant whether or not legislation or international processes provide alternate ways to vindicate similar rights. When a statute creates rights and remedies, it is not rendered unenforceable by the existence of similar rights or remedies under constitutional or common law. Holding that alternative mechanisms render a treaty unenforceable demonstrates a basic belief that treaty remedies are principally disfavored. The fifth prong is likewise gratuitously hostile to treaty law. Why are courts permitted to weigh the “costs” of enforcing a treaty, when doing so would be completely unjustified in the statutory context? If a statute validly creates rights, a court may not refuse to enforce it on the basis of the costs of litigation.¹²⁶ For treaties, however, courts are invited to undertake roving “cost” analyses that can be used to strike down duly enacted law. It seems like an absolute affront to the President and Senate that courts can strike down valid treaty law based solely on subjective cost determinations.¹²⁷

¹²² *Frolova*, 761 F.2d at 373.

¹²³ The sixth prong can be interpreted in a couple of different ways. One way is compatible with *Foster* in that it asserts certain treaty terms are so ambiguous that it would strain judicial competency to interpret and enforce them. *See id.* at 374 (UN Charter provisions are “phrased in broad generalities, suggesting that they are declarations of principles”). A more problematic way to interpret prong six is that the judiciary cannot enforce treaties if doing so interferes with “political processes.” *See Frolova*, 761 F.2d at 375 (holding present case involved “foreign policy matters” that “courts are ill-equipped to anticipate or handle”).

¹²⁴ *See supra* notes 108–09 and accompanying text.

¹²⁵ *See supra* notes 116–19 and accompanying text.

¹²⁶ The cost analysis serves to discourage treaty enforcement, given that courts are “exceedingly timid in enforcing treaties, particularly when individuals have sought to enforce them against the executive branch of the federal government.” *Vázquez, supra* note 90, at 717.

¹²⁷ This unjustified consideration of the costs of treaty litigation likely stems from Judge Bork’s concurrence in *Tel-Oren v. Libyan Arab Republic*, which is fairly obsessed with the burdens of treaty enforcement. He warns that permitting private Geneva claims would “flood courts throughout the world” and “create perhaps hundreds of thousands or millions of lawsuits.” 726 F.2d at 809 (D.C. Cir. 1984) (Bork, J., concurring).

Finally, lower courts sometimes find a treaty non-self-executing because it does not itself provide a “private right of action,” that is, it specifies rights, but not how to remedy them.¹²⁸ This private right of action problem is also confronted in the statutory and constitutional context. The idea is that not every statute that creates legal rights explicitly provides for aggrieved individuals to sue privately. Generally, however, individual rights from statutes or constitutions can be enforced privately so long as some law provides a mechanism for private suit, whether statutory or common law. Statutory and constitutional rights may be enforced through external cross-referencing statutory provisions even when the statute or constitution creating the right does not itself provide an internal private right of action.¹²⁹ When it comes to treaties, however, courts view the lack of an enforcement mechanism within the treaty as the end of the enforceability inquiry. They hold that a treaty lacking its own private right of action is non-self-executing and thus unenforceable even though a federal statute provides a private right of action or the individual seeks to invoke the treaty defensively.¹³⁰ Again, this signals a belief that treaty law is a subordinate form of law and must clear the higher hurdle of having an internal private right of action before enforcement.

It is relatively clear that the modern intent doctrine was not a necessary corollary of the principle set forth in *Foster*. Although some experts have characterized the doctrine as the culmination of years of poor legal analysis,¹³¹ I believe that isolationist sentiment was the driv-

¹²⁸ There is some confusion among the lower courts as to whether a treaty must show intent to provide a private right of action or an actual private right of action. *Compare*, *Goldstar v. United States*, 967 F.2d 965, 968–69 (4th Cir. 1992) (requiring “an intent to provide a private right of action”); *U.S. v. Bent–Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985) (same) *with* *United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir. 1991) (“A treaty is self-executing if it creates privately enforceable rights.”); *Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978); *Tel-Oren*, 726 F.2d at 808 (Bork, J., concurring); *Columbia Marine Serv., Inc. v. Reffet, Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988); *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 886 F. Supp. 306, 311 n.6 (E.D.N.Y. 1995) (same).

¹²⁹ For example, 42 U.S.C. § 1983 creates a private right of action for governmental violations of the Constitution. *See also* *Vázquez*, *supra* note 90, at 719 (noting that many enforceable laws specify rights without remedies).

¹³⁰ *See, e.g.*, *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003) (habeas corpus statute only applies to self-executing treaties); *Raffington v. Cangemi*, 399 F.3d 900, 903 (8th Cir. 2005) (“seriously doubt[ing]” whether a claim based on non-self-executing treaty is cognizable in habeas review); *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003) (same). *But see* *Atuar v. U.S.*, 156 Fed. Appx. 555, 563 n.12 (4th Cir. 2005) (unpublished disposition) (entertaining “the possibility that a habeas corpus petition may require a court to review a particular detention in light of a non-self-executing but constitutionally ratified treaty”); *Vázquez*, *supra* note 90, at 710 (asserting that treaty rights may be invoked defensively or through external mechanisms).

¹³¹ *See, e.g.*, Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1887 (2005) (calling modern “bad faith” treaty jurisprudence product of “combination of inattention and Supreme Court rhetorical ambiguity”).

ing force behind the modern self-execution doctrine. Consider the tangible results of the modern intent doctrine. The first practical effect of the doctrine is to allow the United States to sign and ratify treaties guaranteeing individual rights, typically human rights treaties, while simultaneously declaring that the treaty cannot be enforced by individuals domestically, either by expressly stating so in a non-self-execution declaration¹³² or otherwise indicating through more informal statements.¹³³ In essence, the United States can ratify treaties, appease international actors, and pretend to be a leader in human rights, while eliminating the only realistic mechanism for accountability.¹³⁴ While one might argue that international institutional mechanisms are sufficient for vindication of individual rights under, for example, the Convention against Torture or the Geneva Conventions,¹³⁵ that argument rings hollow in the face of a stream of unmitigated violations of these treaties by the United States since 2001.¹³⁶ It is quite evident that the best hope of curtailing violations is through individual lawsuits seeking relief.¹³⁷ Under the modern self-execution doctrine, such suits have little ability to check government abuse because they will be dismissed whenever a court finds some evidence of treaty maker intent against self-execution or even silence on the issue.¹³⁸

The second thing the modern intent doctrine accomplishes is the presumptive undermining of treaties signed before the modern doc-

¹³² See, e.g., 138 Cong. Rec. S4783–84 (daily ed. Apr. 2, 1992) (“[T]he United States declares that the provisions of Articles 1 through 27 of the [International Covenant on Civil and Political Rights] are not self-executing.”).

¹³³ See *Ortman v. Stanray Corp.*, 371 F.2d 154, 157 (7th Cir. 1967) (relying on post-ratification statement of Attorney General).

¹³⁴ Jordan Paust refers to the sign but reserve trend as “wretched” and criticizes the U.S. reservations to the International Covenant on Civil and Political Rights, stating, “Rarely has a formal attempt at adherence to a treaty been so blatantly meaningless and so openly defiant of its terms, the needed efficacy of its norms, and the very possibility of its direct application as supreme law of the land.” Jordan Paust, *Avoiding “Fraudulent” Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1257 (1993).

¹³⁵ See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, 469 (4th Cir. 2003) (asserting that Geneva’s “values are vindicated by diplomatic means and reciprocity”).

¹³⁶ See Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI. KENT. L. REV. 571, 631 (1991) (maintaining that sign but reserve trend is fundamentally incompatible with “America’s self-perception as a leading proponent of human rights”).

¹³⁷ Indeed, after their somewhat successful litigation, both Hamdi and Padilla were released from military detention.

¹³⁸ See Francisco Forrest Martin, *The Constitution and Human Rights: The International Legal Constructionist Approach to Ensuring the Protection of Human Rights*, 1 FIU L. REV. 71, 85–86 (2006) (characterizing non-self-execution as “weapon” that permits “international outlaw” U.S. to engage in “double-dealing by, on the one hand, agreeing to be bound by a treaty and, on the other hand, reserving the right to not give the treaty any effect”).

trine took hold in American law. Typically, when individuals enter into contracts, such contracts set forth specific terms that become enforceable when the contract is validly executed. It would be unusual for a contract signatory to assume that the contract is unenforceable unless it contains a provision explicitly stating that parties can enforce the contract. Why, then, would treaty makers add a specific provision to assert that the rights set forth in the treaty are domestically enforceable? The only reason they would do so is if they believed doing so was required for treaty enforceability. In the era prior to the advent of the modern self-execution doctrine, in which both the 1929 and 1949 Geneva Conventions ratifications took place, treaty makers would have had no reason to assume that ratified treaty provisions are not presumptive federal law.¹³⁹ As a consequence, looking for an explicit “intent-to-self-execute” will prove an impassable barrier for treaties ratified prior to the last fifty years.¹⁴⁰

There is also historical evidence that isolationist sentiment underlay the emboldened intent based self-execution doctrine. After World War II, there was dramatic expansion and development of international institutions and instruments.¹⁴¹ The UN Charter was promptly enacted, and ratification of the Genocide Convention lay on the near horizon. After the ratification of the UN Charter in 1945, a couple of cases tested the viability of the Charter as a substantive restraint on states’ abilities to discriminate against racial and ethnic minorities.¹⁴² Four Supreme Court justices even weighed in on the issue, asserting that the UN Charter could provide a legal vehicle for curtailing racial

¹³⁹ See Sloss, *supra* note 39, at 71 (noting that prior to 1965, there was little support for modern intent doctrine); David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez–Llamas*, 45 COLUM. J. TRANSNAT’L L. 20, 101 (2006) (noting that before World War II, Court recognized presumption of treaty enforceability and after War said very little about it). There is one pre–Geneva case, *Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39 (1913), in which the Court appears broadly to hold a treaty non–self–executing on the basis of intent, but that case seems to be exceptional in Supreme Court jurisprudence. See *infra* notes 179–84 and accompanying text.

¹⁴⁰ See Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive “Creativity,”* in Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 51, 71 (2006) (“[The Geneva Conventions] reflect an older conception of international law, which generally did not address how a domestic legal system should provide remedies or otherwise be ordered.”).

¹⁴¹ See David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 585 (2003) (noting that post–World War II period saw “the birth of the modern human rights era”).

¹⁴² See *Sei Fujii v. State*, 217 P.2d 481, 486–88 (Cal. Dist. Ct. App. 1950) (holding that “Alien Land Law must . . . yield to the treaty as the superior authority”); *Oyama v. California*, 332 U.S. 633, 649–50, 673 (1948) (discussing UN Charter in concurrences).

discrimination.¹⁴³ These cases were enough to cause concern to conservative politicians that international law might spell an end to segregation.¹⁴⁴

In 1951, Senator John Bricker, a Republican from Ohio, introduced a draft amendment to the Supremacy Clause to make all treaties unenforceable in the absence of implementing legislation.¹⁴⁵ Many experts conclude that Bricker's primary purpose for introducing the measure was to preserve white supremacy.¹⁴⁶ However, preservation of segregation was not the whole picture of the Bricker Amendment.¹⁴⁷ Statements of self-proclaimed "Brickerites" confirm that isolationism and hostility to international law also lay at the root of the pernicious amendment. Frank Holman, former ABA President and architect of the Bricker Amendment, argued that the Amendment marked the "line . . . between those Americans who believe in the preservation of national sovereignty and national independence and those who believe that our national independence . . . should yield to international considerations and some kind of world authority."¹⁴⁸

The Bricker Amendment eventually failed to pass, and Bricker abandoned his efforts after securing assurances from the Whitehouse

¹⁴³ 332 U.S. at 649–50 (Black, J., concurring (joined by Douglas, J.)) (asking, "How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"); *id.* at 673 (Murphy, J., concurring (joined by Rutledge, J.)) (stating that "inconsistency with the [UN] Charter . . . is but one more reason why the statute must be condemned").

¹⁴⁴ In Senator Bricker's view, *Oyama* and *Sei Fujii* signaled the looming threat of international human rights covenants "forcing unacceptable theories and practices upon the citizens of the United States of America." U.S. Congress, Senate, 82nd Cong., CONG. REC. 1st sess., 97, pt. 9: 11361. The quotation is an excerpt from a resolution adopted by the Tampa Rotary Club that Senator Bricker read into the Record.

¹⁴⁵ There were several versions of the amendment, but the basic premise of the amendment was to ensure that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty." S. Rep. No. 83–412, at 1 (1953).

¹⁴⁶ See, e.g., Henkin, *supra* note 57, at 348 ("The campaign for the Bricker Amendment apparently represented a move by anti-civil-rights and 'states' rights' forces to seek to prevent – in particular – bringing an end to racial discrimination and segregation by international treaty."); Stanley A. Halpin, *Looking Over a Crowd and Picking Your Friends: Civil Rights and the Debate over the Influence of Foreign and International Human Rights Law on the Interpretation of the U.S. Constitution*, 30 HASTINGS INT'L & COMP. L. REV. 1, 8 (2006) (stating that "real concern" of Brickerites "appeared to be defending state sovereignty and preserving the ability of southern states to maintain segregation and white supremacy in the face of the U.N. Charter"). *But see* Nelson Richards, Comment, *The Bricker Amendment and Congress's Failure to Check the Inflation of the Executive's Foreign Affairs Power*, 94 CAL. L. REV. 175, 177–78 (2006) (asserting that concerns over communism abroad and President Truman's amassing of executive power prompted Bricker Amendment).

¹⁴⁷ See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1989–90 (2004) (asserting that "while the U.S. Senate's refusal to ratify the early human rights conventions may well have reflected Southern racism, it also reflected something else").

¹⁴⁸ HOLMAN, *supra* note 34, at 22.

that the President would not sign the Genocide Convention or pursue other human rights treaties.¹⁴⁹ Nonetheless, that moment was very important in introducing a discourse pitting basic American-ness against treaty law.¹⁵⁰ It helped begin to erase the long-held presumption of treaty supremacy and create a whisper of treaty law illegitimacy that over time became a scream. Experts assert that current hostility to domestic treaty enforcement is the result of a continuing haunting by Bricker's ghost.¹⁵¹ Perhaps this is why for many jurists today, "the concept of individuals enforcing international law has the whiff of an unpleasant oxymoron, implying a role for individuals in a legal system in which, the traditionalists insist, only sovereign states are legitimate players."¹⁵² Domestic enforcement of treaty and customary international law is thus often characterized as the liberal creation of elitist law professors and judges, and treaty enforcement is contrasted with "time-honored" rules regarding separation of powers and executive priority in foreign affairs.¹⁵³ Moreover, the rhetoric of Bricker has been resurrected by modern law professors who decry the creation of "world" values that threaten to displace American sovereignty.¹⁵⁴

In sum, the early self-execution cases, although certainly not beyond reproach themselves, were at least narrow doctrines grounded in reasonable contract interpretation and constitutional construction. Today, self-execution has come to represent a separate, often impassable, independent barrier to treaty enforcement, grounded in a basic hostility to the domestic application of international law. This hostility is not seen in our constitutional structure, early legal history, or even early treaty case law. To the contrary, treaty supremacy seems to have been the traditional rule. Nonetheless, this hostility has been growing throughout the post-World War II era, and it reaches a fever pitch in the federal courts of appeals' opinions in *Hamdi* and *Hamdan*.

¹⁴⁹ Henkin, *supra* note 57, at 348–49. Eisenhower's secretary of state promised that the administration would not seek ratification of any of the various proposed human rights treaties. See *Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong (1953).

¹⁵⁰ See HOLMAN, *supra* note 34, at 104 (stating that "all lovers of America" should be concerned because "the Amendment is the greatest issue which faces America today, greater than taxes or inflation or even Communist infiltration").

¹⁵¹ See Henkin, *supra* note 57, at 349 (observing that Bricker's anti-human rights ideology infected future treaty law).

¹⁵² Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 433 (2002).

¹⁵³ See *id.* See also Brief for Respondents, *Hamdan*, 126 S. Ct. 2749, 2005 WL 2214766, at *26 (asserting that self-execution could only be found from "text or drafting and ratification history [that] suggest the *revolutionary* intent to create judicially enforceable rights") (emphasis added).

¹⁵⁴ See *supra* notes 51 & 79–82 and accompanying text.

III. MISSED OPPORTUNITIES

While the lower federal courts have been busy expanding the self-execution doctrine, the Supreme Court has been relatively reticent on the doctrine, declining to broaden it in a similar manner.¹⁵⁵ Over the last 100 years, many Supreme Court cases have held the treaties at issue self-executing, even allowing for private suits in the absence of explicit private rights of action. In the 1924 case, *Asakura v. City of Seattle*, the Court reviewed a suit brought by a pawnbroker of Japanese citizenship seeking to enjoin enforcement of a city ordinance prohibiting Japanese nationals from obtaining business licenses. Asakura claimed that the ordinance violated a treaty between Japan and the United States providing that citizens of each country had the right to reside, travel and carry on trade in the other's territory.¹⁵⁶ The Court held broadly that the treaty was enforceable as "the supreme law of the land" without searching for intent that the parties desired domestic enforceability.¹⁵⁷ Moreover, the Court did not question Asakura's ability to sue for injunction directly under the treaty.¹⁵⁸ *Asakura* supports the principle that a person who has rights under a treaty may sue to prevent the government from carrying out policies violating such rights. The Court came to a similar conclusion in *Bacardi Corporation of America v. Domenech*, a 1940 case that sustained the lower court's granting of Bacardi's request to enjoin a Puerto Rican law that violated the Pan American Trademark Treaty.¹⁵⁹

In the 1933 case, *Cook v. U.S.*,¹⁶⁰ the Court upheld the domestic enforceability of the Convention between the United States and Great Britain for the Prevention of Smuggling of Intoxicating Liquors.¹⁶¹ Cook was the owner of a British cargo ship seized en route to Nassau by the U.S. Coast Guard beyond the territorial waters of the United States. Finding liquor on Cook's ship, the government fined him \$14,286.18 and proceeded with an action to recoup the fine by forfeiture of the vessel.¹⁶² Cook defended against the forfeiture by arguing that the seizure of the ship violated the treaty, which only permitted seizures outside of U.S. territorial water if the seizure oc-

¹⁵⁵ See Vázquez, *supra* note 90, at 722 (noting that Supreme Court "has not said more than a sentence or two about the distinction in any case for nearly a century"); Sloss, *supra* note 39, at 73 ("[T]he Court has never stated or implied that the treaty makers have the power to countermand the Supremacy Clause") (footnote omitted).

¹⁵⁶ 265 U.S. 332 (1924).

¹⁵⁷ *Id.* at 341.

¹⁵⁸ *Id.*

¹⁵⁹ 311 U.S. 150, 162 (1940).

¹⁶⁰ 288 U.S. 102 (1933).

¹⁶¹ 43 Stat. 1761 (1924) [hereinafter Smuggling Convention].

¹⁶² *Cook*, 288 U.S. at 107–108.

curred within an area that “can be traversed in one hour by the vessel suspected of endeavoring to commit the offense.”¹⁶³

The Court held that the forfeiture action could not be maintained because the treaty was self-executing and Cook’s seizure was in violation of the treaty.¹⁶⁴ Interestingly, the Court noted that despite the seizure being warrantless, if the seizure was only domestically unlawful, the forfeiture action would have been maintainable. However, since the seizure violated treaty law, the forfeiture action could not stand because “[t]o hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.”¹⁶⁵ In this sense, the Court elevated treaty law over domestic law. In addition, the treaty itself prescribed specific international procedures for vindicating violation claims by British vessels suffering losses.¹⁶⁶ The Court never entertained the notion that this provision could preclude Cook from using the treaty to defend domestically against the forfeiture action.¹⁶⁷

There are two other more recent cases of note, in which the Court found the relevant treaties self-executing. In *Warren v. U.S.*, the Court was called upon to construe the Ship Owners Liability Convention which created general liability for sickness, injuries, and death on ships.¹⁶⁸ Article 2 of the Convention provided the caveat that “national laws or regulations may make exceptions in respect of . . . injury incurred otherwise than in the service of the ship.”¹⁶⁹ The plaintiff, an injured ship employee, argued ship owner liability was not limited by Article 2 because the Article was non-self-executing and no legislation had been passed implementing it.¹⁷⁰ The Court held that despite the reference to “national laws or regulations,” domestic implementing legislation was not required. Thus, the provision was self-executing and permitted exceptions under “general maritime law.”¹⁷¹

In the 1984 case, *Trans World Airlines, Inc. v. Franklin Mint Corp.*, the Court considered whether the Warsaw Convention’s liability limit on lost air cargo was modified by the repealing of the federal Par Value Modification Act.¹⁷² In answering that question in the negative, the

¹⁶³ *Id.* at 108.

¹⁶⁴ *Id.* at 119 n.19 & 121–22.

¹⁶⁵ *Id.* at 122–23.

¹⁶⁶ See Smuggling Convention, *supra* note 162, at art. IV.

¹⁶⁷ See *Cook*, 288 U.S. at 119–22.

¹⁶⁸ 340 U.S. 523 (1951).

¹⁶⁹ *Id.* at 525 (quoting The Shipowners’ Liability Convention, proclaimed by the President Sept. 29, 1939, 54 Stat. 1693, art. 2(2)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 526.

¹⁷² 466 U.S. 243 (1984).

Court observed that the Warsaw Convention was self-executing and not dependent on implementing legislation, despite its statement that the liability limit “may be converted into any national currency in round figures.”¹⁷³ As a self-executing treaty, it could not be overturned by the Par Value Modification Act because the Act did not express a clear purpose to abrogate the treaty.¹⁷⁴

Not every Supreme Court case in the last hundred years has found the relevant treaty self-executing. For example, in the 1984 case, *INS v. Stevic*, the Court, in dicta, asserted that Article 34 of the 1968 United Nations Protocol Relating to the Status of Refugees, which requires “nations to facilitate the admission of refugees to the extent possible,” was non-self-executing¹⁷⁵ because it was merely precatory and not intended to change the law.¹⁷⁶ This language in *Stevic*, however, is nothing more than the unexceptional claim, introduced in *Foster*, that merely aspirational provisions in treaties do not give rise to enforceable rights.¹⁷⁷

More problematic is the Court’s decision in the 1913 case, *Cameron Septic Tank Co. v. City of Knoxville*.¹⁷⁸ The Court was called upon to decide whether the Brussels Industrial Property Convention extended the term of a U.S. patent.¹⁷⁹ Apparently, the main ground for answering that question in the negative was that the American delegates to the Brussels Convention did not intend the treaty to enlarge patent terms. This assertion appears quite suspect because the language of the treaty unambiguously extended such patent terms, as even the Court admitted. Moreover, the Court’s divined intent of American drafters came from negotiation statements ultimately rejected prior to the signing of the treaty.¹⁸⁰ Notwithstanding the flawed interpretive argument, the Court went on to observe that the provision at issue was not self-executing. The Court apparently based this conclusion, not on whether the drafters intended the treaty to have domestic effect, but on the “sense of Congress” after ratification that the instrument was non-self-executing.¹⁸¹ Obviously, this is problemat-

¹⁷³ *Id.* at 247 (quoting Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 22(4), 49 Stat. 3000, T.S. No. 876 (1934), reprinted in Note following 49 U.S.C. § 1502).

¹⁷⁴ *Id.*

¹⁷⁵ 467 U.S. 407 (1984).

¹⁷⁶ *Id.* at 428 n.22.

¹⁷⁷ This “precatoryness” analysis has also been utilized by lower courts. See *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring); *Sei Fujii v. State*, 242 P.2d 617, 619 n.2 (Cal. 1952). Cf. *Vázquez*, *supra* note 90, at 714 (asserting courts have an obligation to construe vague treaty terms).

¹⁷⁸ 227 U.S. 39 (1913).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 44–49.

¹⁸¹ *Id.* at 49.

ic language because it allows the nebulous post-ratification sentiments of Congress to defeat the enforceability of a validly ratified treaty. Perhaps, the Supreme Court's reasoning can be explained by the fact that courts tend to regard patent law as an exclusive area of congressional prerogative.¹⁸² In the end, however, lower courts have not generally relied on *Cameron Septic* to bolster the intent doctrine, and the case may simply represent an anomaly in Supreme Court self-execution jurisprudence.¹⁸³

Looking at Supreme Court case law on self-execution over the last hundred years, one sees a Court neither hostile to treaty enforcement nor determined to find "intent-to-self-execute" as a prerequisite to enforcement. In fact, the Court has permitted the private litigation of treaty claims through a variety of mechanisms, without regard to whether the treaty provided an explicit private right of action. Justice Breyer recently summarized the Court's treaty precedents as holding:

(1) [A] treaty obligated the United States to treat foreign nationals in a certain manner; (2) the obligation had been breached by the Government's conduct; and (3) the foreign national could therefore seek redress for that breach in a judicial proceeding, even though the treaty did not specifically mention judicial enforcement of its guarantees or even expressly state that its provisions were intended to confer rights on the foreign national.¹⁸⁴

Consequently, it is fairly evident that the new anti-international self-execution rules were nearly exclusively a creation of lower courts. In the last several years, the topic of hostility to treaty law has filtered out of the courts and become more than merely a topic for academic rumination. As soon as the Guantánamo detentions came to light, the Geneva Conventions became the topic of popular discussion.¹⁸⁵ Presi-

¹⁸² See, e.g., *Robertson v. General Elec. Co.*, 32 F.2d 495, 500-01 (4th Cir. 1929) (creating special rule for enforceability of patent treaties).

¹⁸³ A Westlaw keycite search reveals only two non-patent cases that cite *Cameron Septic*. The Florida case, *Milliken v. State*, 131 So.2d 889, 891 (Fla. 1961), cites *Cameron Septic* only for the general proposition that "a treaty provision will not operate to supersede or suspend a state statute if the treaty is not self-executing and if no implementing legislation has been enacted." The New York case, *Garcia v. Pan Am. Airways*, 55 N.Y.S.2d 317, 322 (1945), refers to *Cameron Septic* to support its conclusion that the Warsaw Convention is self-executing.

¹⁸⁴ *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2696 (2006) (Breyer, J., dissenting). See Sloss, *supra* note 139, at 88 (observing that "[i]n more than 175 years since Marshall's decision in *Foster*, the Supreme Court has never applied the doctrine of non-self-executing treaties to deny a remedy to an individual whose treaty rights were violated").

¹⁸⁵ See also Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1213 (2005) ("Much sound and fury has been directed at memoranda leaked to the media, in which the President's legal advisers take broad views of the independent presidential power to combat terrorism, and in particular of the President's power to imprison and question enemy fighters."); J M

dent Bush quickly set forth the conclusory legal claim that the Geneva Conventions are non-self-executing,¹⁸⁶ and in the world opinion, the United States became synonymous with disrespect for treaty law.¹⁸⁷

Eventually, two terrorism cases made their way through the lower courts challenging President Bush's program of military detention and trial for terrorism suspects. In *Hamdi*, an American citizen designated as an enemy combatant challenged his classification and continued military detention as, among other things, in violation of the Geneva Conventions.¹⁸⁸ In *Hamdan*, a foreign national and Guantánamo detainee sought to have the Supreme Court declare President's Bush's military tribunals illegal, asserting they violated domestic law and the Geneva Conventions.¹⁸⁹ The federal courts of appeals' analyses of the detainees' Geneva Convention claims reflect unequivocally a fervent embrace of the modern anti-internationalist approach to treaty self-execution.

In *Hamdi*, the Fourth Circuit summarily dismissed Hamdi's Geneva claims on the ground that the Conventions neither contain an explicit private right of action, nor otherwise evidence intent to provide one.¹⁹⁰ Yet Hamdi had asserted the federal habeas corpus statute, which allows a litigant to challenge custody in violation of the laws and treaties of the United States, provided him a legal mechanism for suit.¹⁹¹ To this, the Fourth Circuit responded categorically that the treaty could not be enforced through any domestic legal mechanism because it was intended to be vindicated only through international pro-

Spectar, *Beyond the Rubicon: Presidential Leadership, International Law & the Use of Force in the Long Hard Slog*, 22 CONN. J. INT'L L. 47, 117 (2006) ("Non-governmental organizations around the world have played a critical role in critiquing Bush Administration policies on the treatment of detainees.").

¹⁸⁶ See Dep't of Defense, *The National Defense Strategy of the United States of America* 19 (Mar. 2005), available at <http://www.defenselink.mil/news/Mar2005/d20050318nds2.pdf>.

¹⁸⁷ See David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 653 (2006) (noting that Bush's policies are "widely viewed as a blatant disregard of basic principles of the laws of war and human rights law."). See, e.g., Amsterdam, *supra* note 20, at 415 ("If the dumb fiasco of the lawless mass detention of suspected terrorist operatives at Guantánamo Bay by the current administration has had any positive consequence at all, it is that the world-wide outcry of repugnance for this cowboy adventure into totalitarianism has reminded us that other nations around the globe have much to teach us about respect for liberty and its protection by the rule of law.").

¹⁸⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

¹⁸⁹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762 (2006).

¹⁹⁰ *Hamdi*, 316 F.3d at 468.

¹⁹¹ *Id.* See 28 U.S.C. § 2241(c)(3) (habeas statute). The Court had already resolved in *Rasul v. Bush*, 542 U.S. 466, 484-85 (2004), that non-citizen detainees at Guantánamo have the right to challenge detention under the habeas statute. The *Rasul* decision also states that the Guantánamo detainees' claims "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Id.* at 483 & n.15 (quoting 28 U.S.C. § 2241(c)(3)).

cedures.¹⁹² Here, the court assumed, without explanation, that the existence of some international procedure provisions within the Conventions necessarily precluded domestic enforcement.¹⁹³ In the end, the court's main legal stance was to mistake the question of self-execution with the question of justiciability,¹⁹⁴ and find the Geneva Conventions unenforceable merely for lack of an internal private right of action. The D.C. Circuit in *Hamdan* did much better on this issue, recognizing, "The availability of habeas may obviate a petitioner's need to rely on a private right of action."¹⁹⁵

In other respects, however, the decision of the D.C. Circuit in *Hamdan* elevates treaty law antipathy to new heights. The D.C. Circuit openly reversed the presumption that treaties are the supreme law of the land, through a patent misapplication, bordering on bad faith, of the holding in the *Head Money Cases*.¹⁹⁶ The court of appeals quoted *Head Money* for the proposition that "[a]s a general matter, a 'treaty is primarily a compact between independent nations,' and 'depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it.'"¹⁹⁷ Yet conspicuously absent from the D.C. Circuit's holding is the portion of *Head Money* that states that a treaty may "prescribe a rule by which the rights of the private citizen or subject may be determined," and a "court resorts to the treaty for a rule of decision for the case before it as it would to a statute."¹⁹⁸

The selective quotation of *Head Money* to create a presumption that treaties can only be enforced through international procedures is plainly unjustified. Relying on its created presumption that treaties do not affect individuals, the court of appeals did not bother to discuss the fact that the Geneva Conventions clearly obligate signatories to treat individual captures in a specific manner.¹⁹⁹ Rather, the Court

¹⁹² *Hamdi*, 316 F.3d at 468.

¹⁹³ See Sloss, *supra* note 139, at 96 (noting the "numerous cases in which the Supreme Court has approved domestic judicial enforcement of a treaty that was silent with respect to domestic judicial enforcement, but provided expressly for international dispute resolution") & n.395 (citing cases).

¹⁹⁴ See *supra* notes 128–30 and accompanying text.

¹⁹⁵ *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005).

¹⁹⁶ See John Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 *FORDHAM INT'L L.J.* 552 (2006) (calling court of appeals' selective reading of *Head Money* "misleading").

¹⁹⁷ *Hamdan*, 415 F.3d at 38 (quoting *Head Money Cases*, 112 U.S. at 598).

¹⁹⁸ *Head Money Cases*, 112 U.S. at 598–99.

¹⁹⁹ See, e.g., Third Geneva Convention, *supra* note 15, arts. 13, 15, 18, 22, & 25–31; see David L. Sloss, *International Decision: Rasul v. Bush*, 98 *AM. J. INT'L L.* 788, 797–98 (2004) (contending that Geneva Conventions "differ from some treaties in that they are manifestly intended to create primary rights for individuals").

dismissed any domestic enforceability argument on the inapposite ground that Geneva contains provisions setting forth international procedures to resolve claims by signatories against fellow signatories.²⁰⁰ However, this is clearly neither the principle set forth in *Head Money*, nor one from any other Supreme Court case. *Head Money* makes clear that so long as the Geneva Conventions create rights “of a nature to be enforced in a court of justice,” they are so enforceable.²⁰¹ The existence of international procedures does not control the question.

Lurking within the courts of appeals’ analyses is the modern intent thesis. The courts interpret the existence of international procedures as an indication that treaty makers intended for the Geneva Conventions to be non-self-executing. The D.C. Circuit in *Hamdan* asserts that it is constrained to this analysis by a footnote in the Supreme Court decision in the World War II case *Johnson v. Eisentrager*, which states, “It is . . . the obvious scheme of the [Geneva Conventions] that responsibility for observance and enforcement of these rights is upon political and military authorities.”²⁰² The *Eisentrager* opinion, however, substantively resolved the treaty claims at issue, and the dicta on which the D.C. Circuit relies is unexplained and troubling.²⁰³ The provisions for international procedures in the Geneva Conventions regard disputes between nations over treaty interpretation and inter-sovereign allegations of violations.²⁰⁴ The Conventions simply do not say one way or another how individual claims should be processed. There is plainly no language in the treaty indicating that the rights set forth are not domestically enforceable.²⁰⁵

Moreover, there is a good explanation for why the Conventions would remain silent about domestic enforcement mechanisms - the signatories had differing legal systems and varied approaches to domestic treaty enforcement.²⁰⁶ This does not mean, however, that the Convention negotiators intended to preclude domestic enforcement in every signatory country.²⁰⁷ Consequently, the existence of international

²⁰⁰ *Hamdan*, 415 F.3d at 38.

²⁰¹ *Head Money Cases*, 112 U.S. at 598.

²⁰² *Hamdan*, 415 F.3d at 39 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950)).

²⁰³ *Eisentrager*, 339 U.S. at 790. See *Hamdan*, 126 S. Ct. at 2793 (noting that *Eisentrager* rejected the Geneva Conventions claims “on the merits”).

²⁰⁴ See, e.g., Third Geneva Convention, *supra* note 15, art. 132.

²⁰⁵ See Flaherty, *supra* note 140, at 71 (observing that “[a]t worst” Geneva Conventions “leave the decision regarding whether a sovereign government should add complementary domestic remedies or defenses to the sovereign”).

²⁰⁶ See *id.* (explaining that older treaties did not generally address domestic enforceability).

²⁰⁷ Unfortunately, some lower courts have held that the diversity of international views on self-execution means that signatories have a greater obligation to specify domestic enforcement mechanisms. See, e.g., *Postal*, 589 F.2d at 878. This approach is criticized by many experts. See

procedures does not demonstrate, as a matter of plain language or drafter intent, that domestic enforceability is precluded. Moreover, such a conclusion appears unequivocally at odds with the Supreme Court's holding in *Cook*.²⁰⁸

In *Hamdi* and *Hamdan*, the Supreme Court had the opportunity to reaffirm the supreme status of treaty law, clarify the distinction between self-execution and justiciability, and send a message to the world that the United States does take international law seriously.²⁰⁹ Unfortunately, the Court took pains to avoid these issues, finding by hook or crook, only domestic remedies for the detainees. International law played a small but interesting role in *Hamdi*. Writing for the plurality, Justice O'Connor held that President Bush's military detention of alleged enemy combatants, including citizens, had been authorized by Congress' Joint Resolution Authorizing the Use of Military Force (AUMF), which simply provides that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."²¹⁰

Although the AUMF says absolutely nothing about military detention of citizens, the Court concluded that such action was part of using "necessary and appropriate" military force.²¹¹ As support, the Court looked to law of war treatises, previous cases, and international instruments, including the Geneva Conventions.²¹² Thus, the Geneva Conventions were used, not to limit the President's use of war power, but to help justify it.²¹³ *Hamdi* only limits Presidential discretion by requiring

Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 Am. J. Int'l L. 892 (1980) (criticizing this aspect of *Postal*); John M. Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447, 465 (1987) (asserting other signatories' dualist systems should not affect self-execution issue in monist systems); Vázquez, *supra* note 90, at 704.

²⁰⁸ See *supra* notes 166–67 and accompanying text (discussing *Cook* and international procedures).

²⁰⁹ It would thereby quell the criticism engendered by the perception that that United States flouts Geneva law. See Press Release, Amnesty Int'l USA, Annual Report: Americas Regional Overview 2004, available at <http://www.amnestyusa.org/annualreport/americas.html> (condemning United States for failing to apply Conventions to detainees).

²¹⁰ *Hamdi*, 542 U.S. at 518 (quoting Authorization of Use of Military Force, Pub. L. No. 107–40 (September 18, 2001) [hereinafter AUMF]).

²¹¹ *Id.* at 519 (stating that "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here").

²¹² *Id.* at 520.

²¹³ *Id.* See also *Ex parte Quirin*, 317 U.S. 1, 26 (1942) (defining Article II power with reference to the law of nations). Thus, *Hamdi* follows the Bush administration's strategy of "invoking

that the procedure used to classify citizens as enemy combatants complies with constitutional due process.²¹⁴ The Court determined the process due to Hamdi by applying the test from *Mathews v. Eldridge*, a case involving social security benefits.²¹⁵ Having laid out the process due to Hamdi under the *Mathews* test, the Court summarily declared that it need not determine “whether any treaty guarantees him similar access to a tribunal for a determination of his status.”²¹⁶

The Court, however, never entertained the notion that the Conventions might provide procedures different from those laid out by the Court.²¹⁷ In addition, conspicuously absent is any mention of the Geneva Conventions’ prescribed conditions of detention, other than access to a tribunal.²¹⁸ It is quite clear that the President’s treatment of Hamdi did not comply with the prisoner of war conditions required by the Geneva Conventions.²¹⁹ Because Hamdi had challenged the legality of his detention, the Court had an obligation to resolve whether or not the Geneva Conventions applied to him and rendered his detention illegal.²²⁰ Moreover, the Court ignored the probability that the “law of nations,” on which it relied in interpreting the AUMF, does not consider detention in violation of Geneva’s dictates to be “necessary and appropriate.” The Court likely ignored this point because it might have led to a finding that Congress had not authorized Hamdi’s detention.²²¹ O’Connor’s conclusion that Congress had authorized the President’s detention program was what allowed her to steer clear of the thorny issue of executive unilateralism. Consequently, the Court managed to avoid the self-execution issue, and all substantive interna-

the law of war to avoid prosecuting terrorist suspects in civilian courts, while ignoring the limits that the law of war imposes on the detention, treatment, and trial of prisoners.” Jonathan Hafetz, *The Legacy of Hamdan v. Rumsfeld*, 31-WTR FLETCHER F. WORLD AFF. 25 (2007).

²¹⁴ *Hamdi*, 542 U.S. at 536–39.

²¹⁵ *Id.* at 528 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

²¹⁶ *Id.* at 534 n.2.

²¹⁷ The Fourth Circuit had grappled with this issue briefly. *Hamdi*, 316 F.3d, at 469.

²¹⁸ Hamdi had argued that “his prolonged indefinite solitary confinement” violated article 5 of the Third Geneva Convention. Brief for the Petitioner, *Hamdi v. Rumsfeld*, 542 U.S. 507, 2004 WL 378715 at *17.

²¹⁹ Justice Souter asserted in his concurrence that acts like holding Hamdi incommunicado demonstrated that the government was not in compliance with the Geneva Conventions. *Id.* at 549–50 (Souter, J., concurring). See also Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307, 392 (2006) (stating that *Hamdi* approved of treating war detainees like criminals).

²²⁰ See Jinks & Sloss, *supra* note 91, at 101 (noting that *Hamdi* failed to answer “crucial” question of whether Geneva regulated President’s conduct of warfare); Laura E. Little, *Transnational Guidance in Terrorism Cases*, 38 GEO. WASH. INT’L L. REV. 1, 11 (2006) (calling *Hamdi*’s avoidance of self-execution issue “remarkable”).

²²¹ See *Hamdi*, 542 U.S. at 551 (Souter, J., concurring) (“[T]here is reason to question whether the United States is acting in accordance with the laws of war it claims as authority.”).

tional law claims, even though a discussion of the Geneva Conventions' status and provisions was clearly warranted.

By contrast, in *Hamdan*, the Supreme Court did undertake an extensive discussion of the Geneva Conventions, finding the military trial procedures unlawful as violative of Geneva Common Article 3, which requires military tribunals to be "regularly constituted court[s], affording all the judicial guarantees which are recognized as indispensable by civilized peoples."²²² In doing so, the Court adopted an internationalist interpretation of Common Article 3, contrary to the one proffered by the President.²²³ Amazingly, the Court was able to reach the conclusion that Common Article 3 rendered the tribunals unlawful without touching the issue of Geneva self-execution. In order to do so, the Court had to engage in an exercise of incredibly bold legislative interpretation, reading the Geneva Conventions into the Uniform Code of Military Justice (UCMJ).²²⁴ The Court's basic argument was that the UCMJ requires the procedures used to try detainees like Hamdan to comply with the "law of war," including the Geneva Conventions, and the President's procedures did not so comply because of their failure to comport with Common Article 3.²²⁵

The Court held that Article 21 of the UCMJ acted as implicit congressional authorization, with limitations, of the President's power to establish and employ military commissions to try enemy combatants.²²⁶ Article 21 reads:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute

²²² The Court opines, "Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict 'in the territory of' a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not)." *Hamdan*, 126 S. Ct. at 2796 (quoting Third Geneva Convention, *supra* note 15, at art. 3 [hereinafter Common Article 3]).

²²³ The President had maintained that Common Article 3 did not apply to the "international" war with al Qaeda. See Memorandum of President George W. Bush (Feb. 7, 2002), in Final Report of the Independent Panel to Review DOD Detention Operations (Aug. 2004), Appendix C, available at <http://wid.ap.org/documents/iraq/040824finalreport.pdf>. See also *Hamdan*, 126 S. Ct. at 2795 (noting the government's argument).

²²⁴ *Id.* at 2794 (analyzing the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.* (1950) [hereinafter UCMJ]).

²²⁵ *Id.* at 2796–98.

²²⁶ *Id.* at 2794.

or by the law of war may be tried by military commissions, provost courts, or other military tribunals.²²⁷

The Court interprets this sentence as an authorization of the President to use military commissions with the qualification that such commissions comport with “the law of war.”²²⁸

This interpretation of Article 21 is quite problematic, and to be sure, it incurred the wrath of conservative members of the Court.²²⁹ Experts are in fair agreement that Article 21 was not meant to authorize or limit the President’s common law authority to establish military commissions during wartime.²³⁰ Rather, Article 21 represents Congress’ desire that the UCMJ’s establishment of court martial procedures leave unchanged whatever common law power the President already had to try enemies for statutory violations or war crimes.²³¹

There are additional problems with the Court’s interpretation of Article 21. Even if Article 21 does operate to limit the President’s military commission authority, a plain reading reveals that it only limits the kind of offenses that may be tried - statutory or law of war offenses - not the procedures that may be used.²³² As much was recognized by the Court in the World War II case *In re Yamashita*, when it stated that Article 21 “left the control over the procedure . . . where it previously had been, with the military command.”²³³ Finally, the assumption that the UCMJ meant to incorporate Geneva procedural rights seems unsupported by the history of the Code.²³⁴

Consequently, by bringing Geneva into the *Hamdan* case solely through the domestic UCMJ, the Court was able to scrupulously avoid

²²⁷ 10 U.S.C. § 821 (2006).

²²⁸ *Hamdan*, 126 S. Ct. at 2786 (“The UCMJ conditions the President’s use of military commissions on compliance . . . with the ‘rules and precepts of the law of nations.’”) (quoting *Quirin*, 317 U.S. at 28).

²²⁹ See *id.* at 2840–41 (Thomas, J., dissenting).

²³⁰ See, e.g., David Stoelting, *Military Commissions and Terrorism*, 31 DENV. J. INT’L L. & POL’Y 427, 429 (2003) (asserting that Article 21 does not authorize tribunals but rather “simply preserves the well-established jurisdiction of military commissions over crimes as established by statute or by the laws of war”). Indeed, General Crowder, the drafter of Article 21’s predecessor, Article 15 of the Articles of War, testified to the Senate that the Article “just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial.” S. Rep. No. 64–130, at 40–41 (1916) (testimony of General Crowder).

²³¹ Scott Silliman explains that “[t]he word ‘recognized’ is key to an accurate understanding [of Article 21] because it implies only acknowledgment, not establishment.” Scott L. Silliman, *On Military Commissions*, 36 CASE W. RES. J. INT’L L. 529, 535 (2005).

²³² The Article preserves jurisdiction with respect to “offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.” 10 U.S.C. § 821. It does not state that the procedures of such military commissions, provost courts, or military tribunals must comply with the law of war.

²³³ *In re Yamashita*, 327 U.S. 1, 20 (1946).

²³⁴ See *supra* notes 230–31 and accompanying text.

the self-execution issue. The questionable nature of the Court's legislative interpretation shows the length to which the Court was willing to go to avoid the self-execution question. Perhaps, the Court's methodology can be understood as mere judicial restraint. However, the Court clearly believed the Bush administration was violating international law.²³⁵ Placing the fate of the Geneva Conventions in Congress's hands, especially when the Military Commissions Act (MCA), which approves the President's (illegal) interpretation of Geneva,²³⁶ was about to be enacted, cannot be rationalized as mere judicial moderation. Jordan J. Paust criticizes the Court's approach:

This roundabout use of the laws of war may seem appropriate in terms of normal judicial caution, but when a judge realizes that every violation of the laws of war is a war crime and war crime activity by the Executive against a habeas petitioner who is before the Court is apparent, such caution in the face of international crime is less than satisfying. The Court should have mandated that the Executive comply with particular laws of war when it was apparent that they were being violated.²³⁷

Moreover, declaring the Conventions self-executing would have bolstered the United States' credibility as a defender of human rights.²³⁸ Thus, the Supreme Court's avoidance of self-execution cannot be understood as mere accident or cautious temperance. The Court's jurisprudential choices reveal that it had internalized the view, created by isolationist lower court activism, that treaty self-execution is illegitimate. The Court's avoidance evidences that it believed declaring a humanitarian treaty like the Geneva Conventions self-executing would have been too ambitious, liberal, or difficult.

CONCLUSION

This Essay has sought to demonstrate that the development of a new isolationist approach to self-execution is a barrier to true interna-

²³⁵ See *supra* notes 222–23 and accompanying text (Court's Common Article 3 analysis).

²³⁶ Military Commissions Act, Pub. L. No. 109–366, 120 Stat. 2600 (2006); codified at 10 U.S.C. § 948(a) *et seq.* Section 6(a)(3)(A) provides that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions.” The Act appears to set forth procedures for military commissions that are not commensurate with UCMJ procedures, which, according to the Court, violates Common Article 3. See Aya Gruber, *Who's Afraid of Geneva Law*, 39 ARIZ. ST. L.J. 1017 (2007).

²³⁷ Paust, *supra* note 4, at 841 (footnote omitted).

²³⁸ Academics note, “The perception of the United States as a human rights leader has been ruined.” Mark D. Kielsgard, *A Human Rights Approach to Counter Terrorism*, 36 CAL. W. INT'L L.J. 249, 292 (2006).

tionalism in American law. Over the past few decades, lower courts have actively expanded the self-execution barrier to treaty law, thereby rendering ineffective older treaties and providing the U.S. government a mechanism to avoid human rights and humanitarian obligations in new treaties. Meanwhile, the Court has largely sat by passively, allowing lower courts to chip away systematically at the letter and spirit of the Supremacy Clause. Today, however, the Court's avoidance and passivity on the self-execution issues is more than just grounds for academic dissatisfaction. In the midst of the "war on terror," the status of human rights and humanitarian treaties is of dire import. The United States has become synonymous with international law violations, and President Bush continues to flout the letter and spirit of the Geneva Conventions by his treatment of the Guantánamo detainees. Yet all is not lost. As the Guantánamo detainees' cases make their way up through the lower courts, now challenging detention under the newly-passed Military Commissions Act, the Supreme Court may yet have another chance to declare the Geneva Conventions self-executing and affirm that treaties are the supreme law of the land.