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Treaty Interpretation, the Constitution and the Rule of Law

JOHN NORTON MOORE*

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I. INTRODUCTION: GREAT CASE AND BAD LAW

“Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate over-whelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.”¹

Justice Holmes, dissenting in *Northern Securities*, 1904

Imagine a new doctrine in the foreign relations law of the United States. This new doctrine would require, whenever it were applicable,

1. *Northern Securities v. United States*, 193 U.S. 197, 400-401 (1904) (Holmes, J., dissenting with the concurrence of the Chief Justice, Justice White, and Justice Peckham). The common law maxim, of course, is “hard cases make bad law.”

either that the United States violate its treaty obligations or that it be held to obligations not incurred by our treaty partners. Never mind *pacta sunt servanda* or mutuality of obligation. It would adopt the practice toward other nations of following internal deliberations in our domestic ratification process rather than the treaty as internationally negotiated and binding. Never mind the general international law rule limiting invocation of internal law to violations that are "manifest and concern . . . a rule of . . . internal law of fundamental importance."² If other nations were to follow our lead on this practice, they, in turn, could assert that they were not going to adhere to an agreement as negotiated with the United States or other nations since their Executive, or members of their Duma or equivalent, had stated a different interpretation at the time of internal consideration.

This new doctrine would declare as binding, domestic conditions attached in internal ratification debates absent conveyance to the other party for their agreement, or even absent identification of the interpretation as a domestic condition attached to a resolution of advice and consent. It would mandate that the United States not follow international law interpretations of international courts if such interpretations were inconsistent with even expressed views of participants during internal advice and consent deliberations. Its most extreme version would actually bar the Executive Branch and United States courts from reviewing treaty interpretation materials not before the Senate during the internal advice and consent process, as is frequently the case with *travaux préparatoires* and foreign language versions of treaty texts, and as is usually the case with subsequent practice of the parties.

This remarkable new doctrine would do all of this in the face of a long history of Supreme Court decisions treating treaties not as legislation, but as contracts or compacts among nations, and adopting the intent of the parties to a treaty as the basic standard for interpretation, much as is reflected in the contemporary international law of treaty interpretation.³ It would proceed despite the 1898 Supreme Court decision refusing to apply an unpublished proviso to a treaty and stating what one would assume to be the common sense understanding that it

2. See Article 46 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 46, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679. And see the even stronger general rule embodied in Article 27 of the Vienna Convention, subject only to this Article 46 exception. It provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

3. See, e.g., the line of Supreme Court cases from *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 104 (1801); *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1 (1821); *Geofroy v. Riggs*, 133 U.S. 258 (1890), to the present. And for the international law rules, see, e.g., Articles 31-33 of the Vienna Convention on the Law of Treaties, *supra* note 2.

“shocks the conscience [to put forth a treaty] . . . as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties.”⁴ Indeed, it would do all of this in the face of absolutely no authority for the new doctrine prior to its recent appearance.

Other strange departures for the new doctrine would include domestic lawmaking by Executive Branch testimony or statements of a few members of the Senate, quite counter to the normal requirements for domestic federal legislation as reflected in Article I Section 7 of the Constitution and the *I.N.S. v. Chadha*⁵ and recent *Clinton v. City of New York*⁶ cases, and with little or no regard for the two-thirds of a quorum for treaty approval requirement as reflected in the classic *Fourteen Diamond Rings Case*.⁷ It would seek to make binding national law through examining legislative intent in the absence of any domestic legislative vehicle to which the intent could attach. It would convert a constitutional “veto” in the advice and consent process into an undefined domestic lawmaking power. No doubt this effect of the new doctrine would come as a surprise to the House of Representatives, which has assumed it was part of that general domestic lawmaking process, and to the President, who has failed to realize that his “veto” power would presumably also carry with it an undefined general domestic lawmaking power should the general theory of the new Senate power be followed. It would assert this domestic conditions lawmaking power despite the fact that in apparently the only case in which this issue of the validity of domestic conditions has actually been fully argued and briefed to a court, the Court of Appeals for the District of Columbia Circuit held, in a two-to-one opinion by Judge Bazelon, that even a clear “reservation” attached to a treaty by the Senate which concerned only domestic policy had no legal effect,⁸ and this despite the domestic condition being formally conveyed to and accepted by the other treaty party *and* its being simply a “non-self-executing” condition, certainly the strongest such setting for the permissibility of “domestic conditions.” And this new doctrine would require departure from the interna-

4. *New York Indians v. United States*, 170 U.S. 1, 23 (1898).

5. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 917 (1983).

6. *Clinton, President of the United States v. City of New York*, 524 U.S. 417 (1998).

7. *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

8. *See Power Authority of the State of New York v. Federal Power Commission* (the Niagara Reservation case), 247 F.2d 538 (D.C. Cir. 1957); *vacated as moot sub. nom.* in *American Pub. Power Assn. v. Power Authority of the State of New York*, 355 U.S. 64 (1957). Further, even the dissent in this case made it clear through his reasoning that his support for the condition only went to its status as a “non-self-executing” condition. *See* the dissenting opinion of Circuit Judge Bastian 247 F.2d at 544-53, particularly at 547 and his conclusion on page 552.

tional legal obligations of the United States with minimal evidence of general intent to do so, quite counter to the normal requirement in the foreign relations law of the United States for even a solemn legislative act not to be interpreted as in violation of the international law obligations of the United States "if any other possible construction remains..."⁹

Perhaps most remarkably, this new doctrine would be zealously espoused to remedy the problem of a President intentionally lying to a Senate during the advice and consent process as to the meaning of a treaty, a problem said to be urgently in need of a remedy despite absence of a single example of the problem occurring in the constitutional history of the United States.¹⁰ And it would be pursued in the face of numerous available options to protect the integrity of the advice and consent process, including the quite powerful remedies of subsequent legislation, public hearings, future noncooperation, invoking existing criminal sanctions against lying to the Senate, or in extreme cases of intentional effort of a President to mislead a Senate, the impeachment process. And it would be pursued for the purpose of protecting the intent of the Senate during the advice and consent process even though its implementation would never be able fully to carry out the intent of any consenting Senate as to both *meaning* and *bargain*, and, even more perversely, its implementation would seem in many, if not most, cases to comply less well with likely priorities in Senate intent given the choices then available, than the traditional rules looking to the intent of the parties. Most remarkable of all, in light of the above effects on the foreign relations law of the United States and the Nation's ability to comply with its international legal obligations, this new doctrine would be said by its proponents to serve the rule of law.

It seems likely that few neutral observers would find merit in the proposed new rule or agree that it would serve the rule of law. Yet astonishingly, and almost certainly without recognizing some or all of the above problems, the United States Senate has begun a practice of routinely attaching an ambiguous condition to advice and consent of important treaties, which if it does anything, would largely have the effects discussed above.¹¹ Even more astonishingly, leading scholars in our pro-

9. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

10. Despite the heated debate about interpretation of the ABM Treaty in the "broad-narrow" dispute, no one argued that President Nixon had sought to mislead the Senate about the meaning of the ABM Treaty when submitting the Treaty to the Senate in 1972. Nor has anyone in the debate cited a single example of a President intentionally lying to the Senate about the meaning of a treaty when submitting it for advice and consent.

11. The first such condition, emerging from the background of the "broad-narrow" debate,

was known as the "Biden Condition," and was attached to the INF Treaty in a process significantly polarized along party lines. See ACDA Briefing Memorandum, Final Senate Action on the INF Treaty (May 31, 1988); *Senate Approves Historic INF Treaty on 93-to-5 Vote*, WASH. POST, May 28, 1988, at 1, col.5. The condition was adopted by the Senate on May 26, 1988, and provides in relevant part:

that the Senate's advice and consent to ratification of the INF Treaty is subject to the condition, based on the Treaty Clauses of the Constitution, that—

(1) the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification;

(2) such common understanding is based on:

(A) First, the text of the Treaty and the provisions of this resolution of ratification; and

(B) Second, the authoritative representations which were provided by the President and his representatives to the Senate and its Committees, in seeking Senate consent to ratification, insofar as such representations were directed to the meaning and legal effect of the text of the Treaty; and

(3) the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute; and

(4) if, subsequent to ratification of the Treaty, a question arises as to the interpretation of a provision of the Treaty on which no common understanding was reached in accordance with paragraph (2), that provision shall be interpreted in accordance with applicable United States law.

See also 27 I.L.M. 1406, 1407 (1988) for the condition as attached to the I.N.F. Treaty.

In announcing ratification of the I.N.F. Treaty, President Reagan made an ambiguous statement with respect to the Senate "condition" on treaty interpretation, the thrust of which seems to be to affirm that treaties are international agreements to be interpreted in accordance with the international law standard as traditionally applied by U.S. and international courts, and to deny that the Senate can unilaterally alter these principles of treaty interpretation or other rights and duties under the Constitution. 27 I.L.M. 1406, 1413 (1988). The President's statement, however, also contained a vague and ambiguous statement about "authoritative" executive statements, apparently designed to appease the Senate treaty condition hawks. *Id.* Administration spokesmen were forced into several other ambiguous statements over the course of the full "Biden Treaty Interpretation Condition" debate. For the full context see JOHN NORTON MOORE, *supra* note *.

From 1992 to 1996, in the Start I, Open Skies, and Start II Treaties, the Senate attached this treaty interpretation condition as a "declaration" attached to the resolution of advice and consent, as opposed to an attached "condition." Possibly this reflected some Senate doubt about the legal basis of the use of "domestic conditions." See 102 CONG. REC. S15956, S15957 (Oct. 1, 1992) (Start I); 103 CONG. REC. S10800 (Aug. 6, 1993) (Open Skies); 104 CONG. REC. S461, S462 (Jan. 26, 1996) (Start II).

During 1997 and 1998, however, the Senate reverted to attaching the treaty interpretation condition to treaties as a "condition." Such a condition was attached to the Chemical Weapons Convention, the CFE Flank Agreement, and the NATO Protocols on the accession of Poland, Hungary and the Czech Republic. See 105 CONG. REC. S3651, S3656 (April 24, 1997) (Chemical Weapons Convention); 105 CONG. REC. S4476, S4477 (May 14, 1997) (CFE Flank Agreement); 105 CONG. REC. S4217, S4220 (May 4, 1998) (NATO Protocols).

The current blanket treaty interpretation condition seeks to establish that its rules of interpretation apply to *all* treaties, not just those to which it is appended. It reads: "The Senate affirms the applicability to all treaties of the constitutionally-based principles of treaty interpretation set forth in condition (1) in the resolution of ratification of the INF Treaty..." See, e.g., 105 CONG. REC. S4220.

This general condition will be referred to from time to time in this article as the "Biden Treaty

fession, unquestionably committed to the rule of law, have supported this Senate action and, again I believe without recognizing some or all of the associated problems, have offered theoretical justification for it.¹² One Federal District Court Judge reached out to embrace the doctrine in the absence of the parties fully briefing or arguing it, and was apparently unaware that the only prior precedent was in his D.C. Circuit where, as we have seen, the Court of Appeals went the other way.¹³ Even the United States Supreme Court became involved, again interestingly in a case where apparently the issues were not briefed or argued to the Court. Here, however, the test the Court seemed to apply, as opposed to an ambiguous footnote dictum attached to the majority opinion, was the traditional rule of treaty interpretation rooted in the intent

Interpretation Condition" or simply the "Biden Condition," after the practice of one of its principal authors. For Senator Biden's use of the term "The Biden Condition" to describe this condition, see Joseph R. Biden, Jr. & John B. Ritch III, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U. PENN. L. REV. 1529, at 1544 (1989).

12. See, e.g., David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PENN. L. REV. 1353 (1989). This volume of the *University of Pennsylvania Law Review* contains a variety of views on the treaty interpretation issue, written at the height of the "broad-narrow" debate about the proper interpretation of the ABM Treaty, including views of the principal protagonists in the debate, Abraham D. Sofaer and Senators Sam Nunn and Joseph R. Biden, Jr. For a view supporting the traditional approach to treaty interpretation, see, e.g., Eugene V. Rostow, *The Reinterpretation Debate and Constitutional Law*, 137 U. PENN. L. REV. 1451 (1989). And for the views of three Senior-Attorney Advisors in the Office of Policy Development, United States Department of Justice, critical of Professor Koplow's approach, the position of the *Restatement (Third)*, and the "dual" approach to treaty interpretation in general, see Lawrence J. Block, Lee A. Casey & David B. Rivkin, Jr., *The Senate's Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. PENN. L. REV. 1481 (1989).

For other supporters of the "dual" approach to treaty interpretation, including the power of the Senate to achieve a domestic lawmaking effect solely through informal legislative history not even embodied in the resolution of advice and consent, see Sam Nunn, *A Common-Sense Definition of "Common Understanding"*, 137 U. PENN. L. REV. 1523 (1989); Joseph R. Biden, Jr. & John B. Ritch III, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U. PENN. L. REV. 1529 (1989); Michael J. Glennon, *The Constitutional Power of the United States Senate to Condition Its Consent to Treaties*, 67 CHI.-KENT L. REV. 533 (1991).

For the principal Congressional hearings on these issues, see *The ABM Treaty and the Constitution: Joint Hearings before the Committee on Foreign Relations and the Committee on the Judiciary, United States Senate*, 100th Cong. 1st Sess. (Comm. Print 1987).

13. See *Rainbow Navigation, Inc. v. Department of the Navy*, 699 F. Supp. 339 (D.D.C. 1988) (merits). Importantly, this decision by Judge Harold H. Greene in *Rainbow Navigation* was overturned by a unanimous Court of Appeals which included Judge Ruth B. Ginsburg, now a Justice of the Supreme Court. See *Rainbow Navigation, Inc. v. Department of the Navy*, 911 F.2d 797 (D.C. Cir. 1990). The Court of Appeals did not address the constitutionality of "domestic conditions" but did apply the traditional treaty interpretation rule of "the intent or expectations of its signatories" to decide the case. 911 F.2d at 800. And it said in response to Judge Greene's argument that Executive Branch statements made during Senate consideration were binding: "Ambiguous ratification history cannot be allowed to obscure the meaning of clear Treaty language." 911 F.2d at 802. The Supreme Court denied certiorari in 1991. See 499 U.S. 906 (1991).

of the parties. Further, Justices Kennedy and O'Connor joined in a concurring opinion in which they highlighted this issue as not ready for implicit comment, and Justice Scalia concurring, explicitly rejected an approach to treaty interpretation rooted in the intent of the legislature of one of the parties rather than agreement between the parties.¹⁴ Perhaps saddest of all, the *Restatement (Third) of the Foreign Relations Law of the United States* seems to give aid and comfort to this extraordinary new Senate assertion, although not focusing on the key issue, and almost certainly without embracing all of the effects I believe the doctrine would produce.¹⁵ An exuberant defense of the *Restatement (Third)* position against Justice Scalia's criticism of it in this Supreme Court battle of the dictum was featured in the pages of *The American Journal of International Law*, sadly, without alerting the reader to the real issue in what is a most serious struggle for the rule of law in United States treaty practice.¹⁶

It would be tempting to brand this Senate assertion of a new constitutional doctrine of its treaty powers as part of an all too frequent "neo-know-nothing-ism" in foreign policy that has produced, among other lapses, the non-payment of United States financial obligations to the United Nations. That, however, would be wrong, as paradoxically the original motivation of its movers in the Senate was to promote United States adherence to its treaty obligations. No doubt it was, at least in part, a product of a general resurgence of congressional activism in foreign affairs in the post-Vietnam era in which we have seen similar congressional efforts to mark off turf in the war powers, treaty modalities, treaty termination, information flow, executive privilege, and the conduct and control of intelligence and secrecy matters.¹⁷ That this back-

14. See *United States v. Stuart*, 489 U.S. 353 (1989). For a detailed analysis of this case, including its ambiguous footnote 7, the concurring opinions of Justices Kennedy and O'Connor, and the concurring opinion of Justice Scalia in which he emphasized that the appropriate standard for treaty interpretation is "what the two or more sovereigns agreed to, rather than what . . . the legislature of a single one of them, thought it agreed to" (489 U.S. 374), see JOHN NORTON MOORE, *THE NATIONAL LAW OF TREATY INTERPRETATION*, *supra* note *. See also Part VI (C) of JOHN NORTON MOORE, *TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW*, *supra* note *.

15. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. d and Reporters' Note 4 and § 314 (2) cmts. b & d. See also *id.* § 326 cmt. a and Reporters' Note 1.

16. See Detlev F. Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INT'L L. 546 (1989) (Editorial Comment).

17. Eugene V. Rostow, former Dean of the Yale Law School and a former Under Secretary of State and Director of the Arms Control and Disarmament Agency, concluded in his 1989 critique of Professor Koplow's support of the "dual" approach that "[the ABM interpretation debate] became part of the campaign by Congress and particularly by the Senate to take over large areas of presidential power in the field of foreign affairs." E. Rostow, *supra* note 12, at 1453.

ground struggle between the branches is still with us is evidenced by the recent address of a Chairman of the Senate Foreign Relations Committee to the United Nations followed by hearings before the Senate Committee for foreign national representatives to the Security Council.¹⁸ In the words of my colleague Robert F. Turner, we live in an age in which the original understanding concerning the primary authority of the President in foreign affairs has been lost as though there were a collective hard drive crash of previous conceptions of constitutional authority and practice.¹⁹ Yet again, while playing a role, this too is not the principal source of the Senate's asserted new doctrine. Rather, the principal source of the new doctrine takes meaning from the common law maxim "hard cases make bad law," or Justice Holmes's even more appropriate variation "great cases like hard cases make bad law." For this doctrine was rooted in the contentious debate during the 1980s about the correct interpretation of the 1972 Anti-Ballistic Missile (ABM) Treaty with the then USSR, adopted in Salt I by President Richard Nixon.

This debate, which has come to be known as the "broad-narrow" debate about the meaning of the ABM Treaty, remains the single most complex and contentious legal debate in the history of United States foreign policy. It was truly a "great debate" in our national life. The core of the debate concerned whether it was legally permissible under the Treaty to test and develop mobile ABM systems based on "other physical principles" (OPP), such as lasers or particle beams. It occurred in the context of President Ronald Reagan's speech, dubbed "Star Wars" by the media, in which he raised the possibility of an effective missile defense of the United States, quite possibly involving space based, and thus mobile, ABM systems. At its height this debate had split both the Executive Branch and the Senate. It became most public and

18. That there was a problem with this hearing in United States foreign relations practice seems implicit in the thin veneer that such representatives were before the Committee solely in their individual capacities, a veneer not followed at least by the Representative of the Netherlands. In fairness to the Chairman of the Senate Foreign Relations Committee, these activities seem to have had the blessing, or even encouragement, of the Administration, and particularly the United States Ambassador to the United Nations.

19. Robert F. Turner, currently the Associate Director of the Center for National Security Law at the University of Virginia School of Law and formerly the Deputy Assistant Secretary of State for Congressional Relations, completed his SJD at Virginia on the respective powers of the President and Congress in foreign affairs, and has written and spoken widely on the separation of powers in foreign affairs. Indeed, he has written more on this issue than any other and is responsible for the modern "rediscovery" of the Executive power clause in art. II, § 1 of the Constitution. See, e.g., ROBERT F. TURNER, NATIONAL SECURITY AND THE CONSTITUTION: AN INQUIRY INTO THE SEPARATION OF POWERS (unpublished 1996); ROBERT F. TURNER, *The Constitutional Framework for the Division of National Security Power Between the Congress, the President, and the Court*, in NATIONAL SECURITY LAW (John Norton Moore, Frederick S. Tipson & Robert F. Turner eds., 1990), ch. 17.

personalized, however, with respect to the debate between its two principal antagonists, Senator Sam Nunn and Judge Abraham Sofaer, both of whom produced massive analyses to support their positions. Senator Sam Nunn, the powerful Chairman of the Senate Armed Services Committee, supported by most academic commentary, most of the arms control community, and some of his colleagues in the Senate, believed that the correct legal interpretation was that testing and development of such OPP based mobile systems were not permitted, a view known as the "narrow" interpretation of the Treaty. Judge Sofaer, on the other hand, a former Federal District Judge and then Legal Adviser of the Department of State, supported by Senator Hollings, some arms control experts in the Administration, and some academics, believed that the correct legal interpretation permitted testing and development of OPP based mobile systems, a view known as the "broad" interpretation.²⁰

The constitutional dimension of this debate was presented when proponents of the "narrow" view noticed that an Executive Branch spokesman had supported the "narrow" interpretation during the Senate consideration of the ABM Treaty and that several Senators seemed also to have held that view during the hearings or floor statements. In view of that record, Senator Nunn and other Senators strongly objected to Judge Sofaer's testimony that: "When . . . [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of explanations it is provided."²¹ This was taken as a denigration of the Senate's role in advice and consent, requiring response. And, of course, the existence of a separate constitutional argument for their conclusion on the merits offered an additional and independent argument for their position, regardless of the underlying dispute about the correct international legal interpretation. That is, if the proper constitutional standard for treaty interpretation is the view believed to be correct by the Senate during advice and consent hearings, or even the view of an Executive Branch spokesman or individual Senators during such hearings, as opposed to the internationally binding meaning rooted in the intent of the treaty parties, then this would serve as an alternate basis for their position and would also, they seemed to believe, give proper deference to the Senate role. Since they believed the correct international legal inter-

20. This abstruse issue was made all the more difficult for even the expert observer by the ease with which it could be confused with issues of *research* on OPP based systems, mobile or fixed; development and testing of *fixed* land based systems, OPP based or otherwise; development, testing or deployment of *mobile systems not based on OPP*; *deployment* of OPP based mobile systems; and research, testing, development or deployment of *theater* systems, among other complexities all presenting different issues under the ABM Treaty.

21. See the letter from Senators Robert C. Byrd and Sam Nunn to Secretary of State George P. Shultz, Feb. 5, 1988, reprinted in JOHN NORTON MOORE, *supra* note *.

pretation was the “narrow” interpretation, they believed that this new doctrine would also serve the rule of law in United States adherence to the ABM Treaty. They did not seriously reflect, as far as I can tell, on the fact that, regardless of the correct interpretation of the ABM Treaty in the “broad-narrow” dispute, this new doctrine would only have legal effect where it *differed* from the correct international legal interpretation, and that in those settings where it mattered it would either require the United States to violate its treaty obligations or hold the United States to a higher obligation than bargained for under the treaty. It was this highly charged legal debate, and a climate in which proponents believed they were serving the rule of law, which almost certainly triggered the attention of Judge Harold Greene in the *Rainbow Navigation* case,²² and which subsequently was likely responsible for the peripheral debate in dictum within the Supreme Court in the *Stuart* case.²³ Sadly, proponents of the new constitutional doctrine in treaty interpretation seem not to have understood in any of these settings the real legal effect of the new doctrine as undermining rather than supporting the rule of law.

A second ingredient in the mix leading to the new Senate espoused doctrine is a little noticed debate going back to the only case to have fully argued and addressed the authority of the Senate to attach “domestic conditions,” that is, those affecting only domestic law, to a treaty before the Senate. This case, the *Niagara Reservation* case, was decided in the Court of Appeals for the District of Columbia Circuit in 1957, and, as has been seen, Judge Bazelon wrote an opinion for the two-to-one majority holding that even a clear reservation by the Senate concerning domestic law had no legal effect.²⁴ This case seems, at least indirectly, to have pitted Professors Philip C. Jessup and Oliver J. Lissitzyn, then senior international law faculty at Columbia, against Professor Louis Henkin, then a more junior member of the faculty but one who became one of the Nation’s top experts on the foreign relations law of the United States. Professors Jessup and Lissitzyn argued in a lengthy brief for the New York Power Authority in the case that: “the operation of a treaty as the supreme law of the land cannot be dissociated from its existence as an agreement or contract between nations...”²⁵ Professor

22. *Rainbow Navigation, Inc. v. Department of the Navy*, *supra* note 13. For a full discussion of the interrelation of the decision by Judge Harold Greene in this case with the then “broad-narrow” debate about the ABM Treaty, see JOHN NORTON MOORE, *supra* note 4.

23. *United States v. Stuart*, *supra* note 14.

24. *Power Authority of the State of New York v. Federal Power Commission* (the *Niagara Reservation* case), *supra* note 8.

25. P. JESSUP & O. LISSITZYN, OPINION OF PHILIP C. JESSUP AND OLIVER J. LISSITZYN WITH RESPECT TO THE UNITED STATES SENATE’S ATTEMPT TO REPEAL THE FEDERAL POWER

Henkin, however, in a law review article dated before the decision of the Court and cited favorably by the dissenting Justice, disagreed and posed "several grounds for questioning the conclusion that the provision [the domestic condition] . . . is invalid."²⁶ Some years later, the *Restatement (Third) of the Foreign Relations Law of the United States*, with Professor Henkin as Chief Reporter, adopted the views that: "The Senate may also give its consent on conditions that do not require change in the treaty but relate to its domestic application..."²⁷ and, "When the Senate gives its advice and consent to a treaty on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate's understanding."²⁸

Thus, the new *Restatement (Third)* seems to tilt toward both at least some Senate lawmaking power to attach "domestic conditions" to treaties, and that even informal Senate understandings as to the meaning of a treaty, not embodied in the Senate resolution of advice and consent, would be binding. Again, however, there is no identification or discussion of the real crunch issue for the rule of law, that is, which interpretation governs when the Senate and internationally correct interpretations differ.

The "dual" approach to treaty interpretation under the foreign relations law of the United States, that is, an approach that would follow a

ACT IN ITS RELATION TO THE NIAGARA THROUGH THE USE OF THE TREATY-MAKING POWER (Power Authority of the State of New York, Dec. 1955).

26. See Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COL. L. REV. 1151, 1181-82 (1956).

27. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. d (1987). This comment does seem to limit the scope of such domestic conditions to those "having plausible relation to the treaty," although it does not explain how a power rooted in "the Senate's constitutional authority to grant or withhold consent to a treaty" (as explained in Reporters' Note 4 to § 303), which it seems to regard as the basis of this power, can be so limited. Nor does it seem to be aware of the implications of even this test that, for example, the Senate could attach domestic implementing legislation to its resolution of advice and consent. This would seem likely a considerable surprise to the House of Representatives, which has assumed it had a role to play in such domestic implementing legislation.

28. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 (2) (1987). See also § 339 cmt. a, which takes the position that the Senate could condition a treaty on requiring the consent of Congress or the Senate for termination of the treaty. This further assertion of a Senate "domestic condition" power is accompanied by an even more startling conclusion in relation to the asserted subsequent termination power of the Senate. In connection with this termination power, the *Restatement* fails to address the question of whether such a *unilateral Senate treaty terminating power* would be exercised by a simple majority, or a two-thirds majority, of the Senate and, if by a majority, how it would be consistent in general with the treaty power approval requirement or, if by a two-thirds majority, how it would be consistent with the Framers' intention to make it difficult to enter into treaties as opposed to exiting from them. This is yet an additional difficulty with the theory that the Senate has general domestic lawmaking power attached to its treaty advice and consent power as espoused in the treaty termination setting by the *Restatement*.

conventional approach under our international legal obligations and, if it differed, an approach based on Senate intent as binding on both the President and domestic courts, is wrong as a matter of both law and good policy as to what that law ought to be. The correct approach is that there is but a “unitary” standard for treaty interpretation under the foreign relations law of the United States and that standard is coextensive with the international legal standard for assessing the obligations of the Nation. I believe also that this issue is of the utmost importance for the rule of law among nations. And, as an issue raised incidentally by this primary “unitary-dual” theory debate, I believe that the Senate does not have an independent lawmaking power to attach “domestic conditions” to treaties during the advice and consent process.²⁹ When these issues

29. The one exception may be the ability of the Senate to declare a treaty non-self-executing, that is, as requiring subsequent legislation for domestic lawmaking effect. In general, I believe that the best standard for determining whether a treaty is self-executing is also the intent of the parties, but this seems to be a sufficiently *sui generis* category as to make an exception at least arguable. Most such statements by the Senate concerning the self-executing effect of a treaty, of course, would seem to fall within one of the categories of settings where there would be no separate legal effect under domestic law varying from the treaty itself. Thus, to the extent that the Senate statement that the treaty is non-self-executing is simply consistent with the intent of the parties under the treaty, it is not really a reflection of a separate domestic lawmaking power. Similarly, if the statement is conveyed to the other treaty parties and accepted by them as an accurate description of the treaty it simply reflects the normal process of treaty approval. Finally, if the statement reflects a highly visible requirement under the Constitution, for example, perhaps the art. I, § 7 requirement concerning the House role in raising revenues, which then meets the Vienna Convention requirement of “manifest and concerned a rule of its internal law of fundamental importance,” again, there would be no discrepancy between the international treaty obligation and the Senate statement. Moreover, as noted in the dissent in the *Power Authority* case, the effect of even a self-executing real domestic condition is generally not to permanently bypass the constitutional framework for lawmaking by the House and the Senate and presentment to the President, but rather to postpone the domestic legal effect of the treaty pending such subsequent legislative action.

To the contrary, however, it should be noted, even on this question of a limited domestic condition power to declare a treaty non-self-executing, that the only case to yet address this issue, the *Power Authority of the State of New York v. Federal Power Commission* (the *Niagara Reservation* case), set out above, declared a domestic condition as of no legal effect even though it related solely to whether the treaty with Canada would be self-executing or would take effect in the United States only subsequent to an Act of Congress, and even though it was a special variant of a Senate non-self-executing condition actually conveyed to the other party as a formal “reservation” and so accepted by the other party. This may well be the better rule even with respect to this limited form of “condition.” Further, one problem with Senate non-self-executing conditions when inconsistent with the intent of the parties that the treaty be self-executing but not conveyed to and accepted by the other treaty parties, is that such conditions may place the United States in violation of its international legal obligations, at least if subsequent implementing legislation is unreasonably delayed or never enacted. For a fuller discussion of non-self-executing “domestic condition” issues, see the text at section IV(D) of this article.

There has been increasing criticism directed at Senate declarations to the effect that particular treaties are not self-executing, on the grounds that the Senate has in many such cases not acted consistent with the treaty or any other basis viewed as appropriate. See, e.g., Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-*

Executing” Treaties, 67 CHI.-KENT L. REV. 515 (1991). And for a clear rejection of the power of the Senate with respect even to “non-self-executing” “domestic conditions,” 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 (1991). See also Thomas Burgenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT’L L. 211, 222, n.36 (1997); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law in the United States*, 20 MICH. J. INT’L L. 301, 324-35 (1999).

Professor Malvina Halberstam takes the position that “a non-self-executing declaration with respect to a treaty (or treaty provision) that would be self-executing by its terms is a violation of Article VI of the Constitution.” Letter of December 5, 2000, from Professor Malvina Halberstam to the author (on file at the University of Virginia School of Law). See also Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT’L LAW & ECON. 49, 64-70 (1997).

For the *Restatement* view as to when an international agreement of the United States is “non-self-executing,” see § 111 (4). RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (1987). The *Restatement* specifically adopts the position that the Senate may give its consent on the domestic condition “that the treaty shall not be self-executing.” See *id.* at § 303, cmt. d. Its flat comment here provides no immediate cross-reference to the *Niagara Reservation* case, which held to the contrary, as even ambiguously discussed in § 303, Reporters’ Note 4.

For a thoughtful analysis of policy issues in a combination of treaties as both “self-executing” and of “higher status . . . than later-enacted statutory law,” the latter of which is not the United States rule, see John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310 (1992).

A more recent debate about the self-executing and non-self-executing nature of treaties has been triggered by Professor John C. Yoo, who has argued, initially based largely on his analysis of the origins of the treaty power in the Constitutional Convention and the state ratification debates, and subsequently in rejoinder to criticism advancing textual and structural arguments, that despite the Supremacy Clause, treaties were not intended to be self-executing. That is, he seems to be arguing for a rule analogous to that in the United Kingdom in which treaties must be incorporated into domestic law through subsequent Acts of Parliament. See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COL. L. REV. 2218 (1999). I regard this admittedly “revisionist” thesis about the foreign relations law of the United States, as with many such “revisionist” theses generally, as *clearly* wrong as a statement of the law (as this article urges in Part III [A] constitutional interpretation involves more than historical analysis, and certainly includes the principal flow of decisions of the United States Supreme Court and constitutional practice). It is also *clearly* wrong as to what the law ought to be, and historically inaccurate as to the author’s principal conclusion. For example, there is a huge difference between Madison’s understanding that the reality of the legislative power in Congress would serve to “influence” the exercise of the treaty power, and Yoo’s at least initial implication that contrary to the clear text of the Supremacy Clause, treaties were never intended to have direct effect in the courts of the United States. For a rebuttal to the Yoo thesis, see, e.g., Carlos Manuel Vazquez, *Laughing At Treaties*, 99 COL. L. REV. 2154 (1999). A core effort in the now quaintly dated Bricker Amendment debate of the early 1950s was to prevent treaties from ever being self-executing, as well as overturning *Missouri v. Holland*, 252 U.S. 416 (1920), as to the scope of the federal treaty power. Hopefully, not every generation has to refight this battle, whether presented as a proposal for a constitutional amendment, as in the Bricker debate, or as a newly discovered constitutional interpretation which escaped the Bricker generation. For the testimony of the then Administration in opposition to the Bricker Amendment, see the Statement by the Honorable Herbert Brownell, Jr., Attorney General of the United States, before the Senate Committee on the Judiciary, on S. J. Res. 1 & S. J. Res. 43, 83d Cong., 1st Sess. (April 7, 1953), reprinted in TREATIES AND EXECUTIVE AGREEMENTS,

are squarely presented to the United States Supreme Court, I believe they will reach these same conclusions. The remaining sections will discuss these issues, which arose most sharply in the emotive "Dionysian moment" of the great ABM Treaty interpretation debate.

II. ISSUES AND NON-ISSUES: THE WHEAT, THE CHAFF, AND THE HIDDEN VIRUS

So much confusion has surrounded the debate about treaty interpretation and the Constitution, and there has been so little understanding of the really important core of the issue, that it is useful to briefly state what the debate is *not* about as well as what it *is* about.

The debate is not really about whether United States courts have cited or referred to Senate materials in treaty interpretation cases. They have, and the collection of cases breathlessly revealed by Professor Detlev Vagts in his uncharacteristic tilting at the windmill of overly broad language in Justice Scalia's concurring opinion in the *Stuart* case contain examples.³⁰ It is no more remarkable for United States courts to refer to Senate materials than it is for them to refer to law review articles or scholarly treatises. The question is whether in either case they do so because they regard the issue for decision as turning on the intent of the review or treatise writer or the intent of the Senate, as opposed, in an interpretation case, to the intent of the parties. The former *would* be truly remarkable in a treaty interpretation case and is not born out by Professor Vagts's cases. But Senate materials, as with law review articles or treatises, may contain the transmittal message of the President to the Senate, the State Department's article by article analysis of the treaty, statements of negotiators as to meaning, evidence of practical construction by the parties or other relevant information concerning the

HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 83d Cong., 1st Sess., on S. J. Res. 1 & S. J. Res. 43 at 901-34 (with interspersed comments from Committee members and a further dialogue on pages 934-47) (1953). The concern reflected in the ratification debates about avoiding a general legislative power lodged in the Senate via the treaty power, as opposed to the constitutional legislative process, and the concern as to the protection of state interests, however, *would* seem to support the conclusion of this article that there is no general unilateral "domestic conditions" lawmaking power in the Senate incident to the treaty advice and consent power. See the discussion in Part IV of this article.

30. See Detlev F. Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INT'L L. 546 (1989). See, e.g., *Immigration and Naturalization Service v. Stevic*, 467 U.S. 407 (1984) (although not itself principally a treaty interpretation case). See the discussion of *Stevic*, in Part VI (E) of JOHN NORTON MOORE, TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW, *supra* note *. For a full discussion of Justice Scalia's concurring opinion in *Stuart* and Professor Vagts's comment on it, see Parts VI (C), (D), and (E) of JOHN NORTON MOORE, TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW, *supra* note *.

intent of the parties. Citing or referring to such materials in Senate sources is simply to use a convenient source for quite ordinary interpretative materials.

Nor is the debate about whether the record of Senate non-formal action in consideration of a treaty is entitled to *no weight* in treaty interpretation. Any competent international lawyer, familiar with the looseness of Articles 31-33 of the Vienna Convention on the Law of Treaties, generally said to reflect customary international law in treaty interpretation, can find a host of ways to get most relevant information from such settings before an international Court.³¹ For example, the need to take Senate materials into account to establish the "special meaning" of a term, or where an interpretation otherwise "leaves the meaning ambiguous or obscure." Again, however, this is *not* the same as looking at the Senate materials for the purpose of ascertaining the Senate intent of one of the parties as the basis for decision, as opposed to the shared intent of all the parties, as is well established under both international law and the foreign relations law of the United States.³²

Conversely, the issue is not whether materials not before the Senate during advice and consent can be taken into account in treaty interpretation. Of course they can, and United States courts have repeatedly done so. The implication to the contrary, suggested by Professor Laurence Tribe during Senate hearings in the context of the "broad-narrow" dispute, is both uninformed as to the foreign relations law of the United States and plain silly.³³ Indeed, *travaux préparatoires* and foreign lan-

31. Professor W. Michael Reisman, one of the Nation's top international lawyers, points out in this connection:

International law does not have restrictive rules of admissibility. In my view, *anything* aired in advice and consent procedures that becomes available is going to be used in international performance interpretation. Of course, in all matters of evidence, questions of admissibility are distinct from those of credibility and weight.

W. Michael Reisman, *Necessary and Proper: Executive Competence to Interpret Treaties*, 15 YALE INT'L L. J. 316, 322 (1990).

32. There are, of course, continuing debates concerning the best approaches for interpreting statutes or constitutions or ascertaining the shared intent of treaty parties, including particularly the weight to be given to "text" and full "context," and these debates continue apace in both international and domestic law. That is, again, not the core issue here. Rather, the issue is whether the referent for interpretation is the intent of the Senate or an Executive statement to the Senate of one of the parties, or the shared expectations of *all* the parties.

33. Professor Tribe says in his prepared statement for the ABM Treaty interpretation resolution hearings:

Whatever one's view as to the proper place of legislative history that is theoretically public but practically unavailable, there can be but one answer to the question of what place an indisputably secret negotiating history can have in the meaning of any law—whether domestic legislation passed by Congress and signed by the President or passed by a two-thirds vote over his veto, or a treaty negotiated by the President and consented to by a two-thirds vote of the Senate. *Such secret histories cannot be taken*

guage texts are not reliably before the Senate,³⁴ and subsequent practice, by its very nature, is rarely before the Senate. Yet these sources are frequently taken into account in treaty interpretation. Thus, the decision of the Supreme Court in the 1985 case of *Air France v. Saks*³⁵ referred extensively to the *travaux préparatoires* of the Warsaw Convention, and specifically looked to the French text of that Convention even though it pointed out that the official American translation of the text was before the Senate when it ratified the Convention. The Court said: "We look to the French legal meaning for guidance as to these expectations [the shared expectations of the contracting parties] because the Warsaw Convention was drafted in French by continental jurists."³⁶ Similarly, in

into account because they were not part of the record on which the legally decisive votes were taken.

Prepared Statement of Laurence H. Tribe, in *THE ABM TREATY AND THE CONSTITUTION: JOINT HEARINGS BEFORE THE SENATE COMMS. ON FOREIGN RELATIONS AND ON THE JUDICIARY*, 100th Cong., 1st Sess. 412, 416 (1987) (emphasis added).

One commentator characterizes Professor Tribe as arguing "that treaties constitute a contract between the executive and the Senate, and that the intent of only those parties can determine its meaning." Paul B. Stephan III, *Revisiting the Incorporation Debate: The Role of Domestic Political Structure*, 31 VA. J. INT'L L. 417 (1991) (footnote to Professor Tribe's testimony omitted). Professor Stephan adds a "[b]ut see" reference in this footnote to *Eastern Airlines, Inc. v. Floyd* 499 U.S. 530 (1991), describing the case as "interpreting treaty by reference to understanding of other State Parties and the negotiating history."

Eastern Airlines v. Floyd, is, in fact, a superb example of a unanimous post-*Stuart* Supreme Court applying the French text of a treaty, its negotiating history, subsequent practice, the meaning of the treaty terms in question under French law (including an analysis of French treatises and scholarly writing), and even interpretations of the treaty by another signatory. Moreover, the Court used these materials in its interpretation after pointing out merely that an English translation of the text had been before the Senate when it ratified the Convention in 1934. There is no revisiting of footnote 7 from the *Stuart* case nor any apparent inquiry as to whether these other materials were before the Senate. 499 U.S. at 535-52.

See also David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 972, 992-96, 1002-1006 (1994) (describing the use of subsequent practice in treaty interpretation cases as "an accepted tool of treaty interpretation").

34. One of the best descriptions of records concerning Senate consideration of treaties is contained in the Introduction to 1 CHRISTIAN L. WIKTOR, *UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA* (1976): "The printed text includes the English version only. The foreign language text was included during the years 1825 to the mid 1860's, but was then discontinued." *Id.* at xx.

35. 470 U.S. 392 (1985).

36. *Id.* at 399; *cf. id.* at 397. Elihu Root, one of the most experienced international law and foreign policy experts the United States has produced, made an elegant speech to the Senate in 1914 reflecting the importance of *travaux* and full context in treaty interpretation. He urged:

If you would be sure of what a treaty means, if there be any doubt, if there are two interpretations suggested, learn out of what conflicting public policies the words of the treaty had their birth; what arguments were made for one side or the other, what concessions were yielded in the making of a treaty. Always, with rare exceptions, the birth and development of every important clause may be traced by the authentic records of the negotiators and of the countries which are reconciling their differences.

Speech in the Senate by Elihu Root (May 21, 1914), *quoted in* 2 C. C. HYDE, *INTERNATIONAL*

1967 in *Block v. Compagnie Nationale Air France*,³⁷ the United States Court of Appeals for the Fifth Circuit declared that “[t]he binding meaning of the terms [of the Warsaw Convention] is the French legal meaning,”³⁸ even though it simultaneously noted that “the text that was read to the Senate, and to which the resolution of ratification was directed, was a text in English originally published in a Treaty Information Bulletin of the Department of State.”³⁹ And, of course, the fifty year pattern of subsequent practice considered by the Supreme Court in, among other cases, the 1984 decision in *Trans World Airlines, Inc. v. Franklin Mint Corp.*,⁴⁰ clearly took into account information not before the Senate when it gave its advice and consent to the Warsaw Convention in 1934.⁴¹ The opinion of Justice Brennan, writing for the Supreme Court in the *Stuart* case, also expressly relies on subsequent practice, as well as the meaning attributed to treaty provisions by government agencies charged with their negotiation and enforcement, without inquiring whether such materials were before a consenting Senate. Indeed, they almost certainly were not. Just how seriously out of touch the Tribe view is with the historic practice of the Supreme Court in considering a wide range of materials in treaty interpretation without inquiry as to whether they were before the Senate, is indicated by an excerpt from the classic compendium of United States international practice by Charles Cheney Hyde.⁴² He writes in a section on treaty interpretation focused specifically on “The Attitude of the Supreme Court of the United States”:⁴³ “the conclusions of the Court as to the designs of contracting States have been expressed in terms revealing deference for what the evidence established rather than for any other consideration.”⁴⁴ And with respect to “Preparatory Work” he says:

The Supreme Court is not disposed to forbid recourse to, or to decline itself to rely upon, diplomatic exchanges or correspondence indicating the views of negotiators of a treaty... The significant thing is the readiness with which the Court turns to such

LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, 1471-72 n.3 (2d rev. ed. 1947). This statement is a far cry from urging that treaties should be interpreted, not by the intent of the parties, but rather by the intent of the Senate of one of the parties, or that materials, including *travaux*, not before the Senate can not be taken into account in treaty interpretation. Elihu Root would likely turn in his grave at either prospect.

37. 386 F.2d 323 (1967).

38. *Id.* at 330.

39. *Id.* at 330 n.19.

40. 466 U.S. 243 (1984).

41. See also *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35-36 (1975).

42. 2 C. C. HYDE, *supra* note 36.

43. *Id.* at 1478.

44. *Id.* at 1481 (footnote omitted).

forms of preparatory work as reasonable and applicable sources of interpretation. It relied upon them, for example, in construing Article II of the treaty with Russia of March 30, 1867, providing for the cession of Alaska; Article III of the treaty with Spain of February 22, 1819, establishing the boundary west of the Mississippi . . . ; Article I of the treaty with Japan of April 5, 1911; Article VII of the treaty with Denmark of April 26, 1826; and Article I of the extradition convention with Great Britain of July 12, 1889. In the case of *Cook v. United States*, decided January 23, 1933, the Court made fullest use of data leading up to the conclusion of the convention with Great Britain for the Prevention of Smuggling of Intoxicating Liquors of January 23, 1924, as an effectual means of ascertaining the design of the contracting parties.⁴⁵

The Tribe view is also inconsistent with the *Restatement of the Foreign Relations Law of the United States*, which does not restrict materials to be taken into account in treaty interpretation solely to those known to or before the Senate during consideration of advice and consent.⁴⁶ Finally, at least prior to 1919, during a period when it was Senate

45. 2 C. C. HYDE, *supra* note 36, at 1482 (footnotes omitted). There is no indication from Hyde that the Court used these materials in interpretation only after ascertaining that they were before the Senate during consideration of advice and consent. Hyde further shows that the Court did not hesitate to use a Spanish language version of a treaty over the English version. *Id.* at 1484. And he further points out: “[i]t may well be doubted whether the views of particular departments of a government, such as the legislative or executive, long subsequent to the negotiation and conclusion of a treaty are necessarily probative of the sense in which terms were employed when the arrangement was consummated.” *Id.* at 1485 (footnote omitted).

In *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), Justice Marshall, writing for the Court, relied on the Spanish version of an 1819 treaty of amity, settlement and limits with Spain, changing his position first enunciated in *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), then relying on the English version of the treaty. In doing so, Justice Marshall said:

In the case of *Foster v. Elam*, 2 Peters, 253, this court considered these words as importing contract. The Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, we believe it would have produced the construction which we now give to the article.

27 U.S. at 89. In doing so, Justice Marshall made no inquiry as to whether the Spanish version of the treaty had been presented to the Senate with the English version. Indeed, since the treaty was ratified by the United States in 1821, any Senate consideration preceded the period of 1825 to the mid 1860s, which Christian Wiktor says was a period in which foreign language texts of treaties were included in Senate executive documents. See CHRISTIAN WIKTOR, *supra* note 34, at xx.

46. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). Reporters' Note 5 to § 325 does not restrict such materials to those before the Senate. Similarly, the comments to § 325 include a cornucopia of materials to be taken into account in treaty interpretation, with no restriction appearing that they must have been before the Senate. These include the Vienna Convention Article 31(2) concept of context of agreement (cmt. b),

practice to consider treaties in closed session, the normal mode of Senate consideration itself did not even produce a public record as thought of today. Indeed, it was not until the 97th Congress in 1981 that Senate treaty history became routinely and broadly available to the public through inclusion in the Serial Set and the depository library program.⁴⁷

Further reflecting on this erroneous view expressed by Professor Tribe during the height of the ABM treaty interpretation debate, the author has observed in over a quarter of a century of working on constitutional issues in foreign relations that all too frequently some of the Nation's most respected constitutional generalists get it wrong when talking about constitutional issues concerning the foreign relations law of the United States.⁴⁸ To provide another example in the foreign rela-

subsequent practice and interpretations by the parties (cmt. c), *travaux préparatoires* (cmt. e), and non-English language texts (cmt. f).

47. According to Christian Wiktor: "Treaties are considered in the Senate first as in the Committee of the Whole. Since 1919 the sessions have usually been open." CHRISTIAN WIKTOR, *supra* note 34, at xiv. Wiktor also notes: "All major hearings are printed, as well as many less important ones. The first printed hearing appears to be those held on the Commercial Convention with Cuba of December 11, 1902." *Id.* at xiii.

The Librarian of the United States Senate confirms that hearings on treaties "as a printed item" seem to be available roughly from the turn of the Twentieth Century. There is, for example, a "CONFIDENTIAL" "Report No. 1 Executive" concerning "Cession of Danish Islands in the West Indies" from the Committee on Foreign Relations of the 57th Congress, 1st Session of Feb. 5, 1902. Early Senate action in consideration of treaties was apparently recorded in summary form in the *Journal of the Executive Proceedings of the United States Senate*. Conversation of the author with Gregory Harness, Librarian of the United States Senate, November 8, 2000.

48. Other examples, just to pick on top constitutionalists, would include Professor John Hart Ely's failure to even discuss the general grant of "The executive Power" in Article II, section 1, as a basis of Presidential power in foreign affairs in his important work on the war powers. It would be understandable, even if wrong, to argue against this grant of power as including the general foreign affairs power. But given the views of Madison, Hamilton, Jefferson, Washington and Jay, to the contrary, it seems simply indefensible to not even raise the issue. See JOHN HART ELY, *WAR AND RESPONSIBILITY* (1993). Ely writes: "Article II grants the president but four powers bearing on foreign relations—the power to receive ambassadors (which is his alone), the powers to appoint ambassadors and make treaties (each of which must be exercised jointly, with the advice and consent of the Senate), and the power to act as commander in chief..." *Id.* at 139 n.3. For a fuller discussion and critique of Ely on this point, see Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903 (1994); For general background on the views of Madison, Hamilton, Jefferson and Washington on the Article II, section 1 grant of "The executive Power," see JOHN NORTON MOORE, *supra* note *. Similarly, the author has never appreciated the title of Professor Harold Koh's book on selected constitutional issues concerning national security and foreign affairs, entitled *The National Security Constitution*. Quite simply and obviously, there is no "National Security Constitution," there is only "The Constitution of the United States." See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990). Professor Koh's accusation in support of his own revisionist views of congressional preeminence in foreign affairs are also quite remarkable, to the effect that those who believe, as did Madison, Hamilton, Jefferson, Washington and Jay, that the principal foreign affairs power under the Constitution was lodged in the Executive "are forced to engage in revisionist history to contend that the Framers did not originally draft the Constitution to promote congressional dominance in foreign affairs." *Id.* at

tions law forays of Professor Tribe, it may be instructive to quote Professor Bruce Ackerman, Sterling Professor of Law and Political Science at Yale, with respect to the ill-fated efforts of Professor Tribe to assert the unconstitutionality of the two-House procedure in approving United States participation in the World Trade Organization. He writes, with Professor David Golove:

As in the case of NAFTA, much of the debate [as to the permissibility of “executive-congressional” agreements or what the Department of State’s Circular 175 now calls “international agreements pursuant to legislation”] took the modern constitutional consensus for granted. But this time an odd coalition led by traditional protectionists like Jesse Helms and consumer advocates like Ralph Nader made a last-minute challenge to the Senate’s decision to consider the WTO under the two-House procedure of the Trade Act. And they enlisted a group of distinguished constitutionalists, led by Professor Laurence Tribe, to join the effort to reassert the senatorial monopoly over “advice and consent.” This campaign prompted a vigorous response from the Administration in defense of the congressional-executive agreement, kicking off a spirited debate. In the months before the Senate voted for the WTO in late November 1994, Professor Tribe launched an accelerating barrage of letters and memoranda on behalf of his new cause. Unfortunately, Professor Tribe did not enter the debate with a fully informed opinion. Not only was his new position at odds with the most recent edition of his treatise, but his legal views shifted from month to month as he learned

225 (italics in original). Koh might benefit from reviewing “Jefferson’s Opinion on the Powers of the Senate Respecting Diplomatic Appointments” in which Jefferson wrote in 1790:

The Constitution has divided the powers of government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy. The Legislative it has given completely to the Senate and House of representatives: it has declared that “the Executive powers shall be vested in the President,” submitting only special articles of it to a negative by the Senate; and it has vested the Judiciary power in the courts of justice, with certain exceptions also in favor of the Senate.

The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.

16 THE PAPERS OF THOMAS JEFFERSON 378-79 (Julian P. Boyd ed., 1961) (footnotes omitted). The notes to this memorandum in this edition of Jefferson’s papers go on to record:

Three days after TJ wrote the above opinion, Washington recorded in his diary: “Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay’s and Mr. Jefferson’s—to wit—that they have no Constitutional right to interfere with either, and that it might be impolitic to draw it into a precedent, their powers extending no further than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution.”

Id. at 380.

more about the history and complexity of the issues. As the Senate vote neared, Professor Tribe's emphatic certainties had dissolved into doubts:

In short the issue is a close one. Although I continue to believe that the constitutional concerns that I have previously raised are deeply important, I cannot say with certainty that my prior conclusions should necessarily be adopted by others or are the ones to which I will adhere in the end after giving the matter the further thought that it deserves.⁴⁹

Professors Ackerman and Golove describe this as a "retreat into uncertainty."⁵⁰ One can only hope that on the even clearer issue of the permissibility of the Executive and the courts considering a full range of material bearing on the intent of the parties to a treaty, and not just material considered by a Senate during the process of advice and consent, that "after giving the matter the further thought that it deserves," Professor Tribe will reach the right conclusion.

The issue also is not whether the United States would continue to be bound internationally by reference to the international law standard of treaty interpretation should we adopt some other rule for domestic law. Of course we would, unless, of course, the rule of internal law in question met the understandably high requirements for notice to other parties embodied in Article 46 of the Vienna Convention on the Law of Treaties. That is not remotely the case with the proposed new "dual" mode of treaty interpretation which would not even require anything attached to a resolution of advice and consent to create a binding requirement for the President to depart from the international meaning of the treaty. Indeed, this point of still being internationally bound by the meaning agreed between the parties is the gravamen of the problem, and why the "dual" approach would so seriously undermine the rule of law as it mandated non-compliance by the United States with its internationally binding treaty obligations as one of the logical consequences of the rule.

The issue is not whether the President and the Executive Branch in general have a good faith obligation to present the meaning of a treaty to the Senate as accurately and honestly as possible. Of course they do!

49. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 917-18 (1995) (footnotes omitted). At the time this article was published, David Golove was an Associate Professor of Law, University of Arizona College of Law. Currently, he is an Associate Professor of Law at Benjamin N. Cardozo School of Law, Yeshiva University. For an excellent short editorial comment on this WTO "international agreement modality" issue, see Detlev F. Vagts, *The Exclusive Treaty Power Revisited*, 89 AM. J. INT'L L. 40 (1995).

50. Bruce Ackerman & David Golove, *supra* note 49, at 918. The authors then generously write: "Professor Tribe's aggressive intervention had served the public interest." *Id.* at 918.

Despite the great debate surrounding the “broad-narrow” issue in interpretation of the ABM Treaty, to my knowledge no one has been able to produce a single example of a President seeking to mislead a Senate at the time of Senate consideration for advice and consent in the entire foreign relations history of the United States. This would simply seem a non-problem despite the implications to the contrary from the “broad-narrow” debate. As has been seen, should it ever be a problem, powerful remedies already exist including criminal liability and impeachment.

Nor is the issue whether the President has authority to interpret treaties. Of course the President has such authority. The Executive power, including the general foreign affairs power, and the obligation to “take Care that the Laws be faithfully executed . . . ,” among other Presidential powers, clearly include such authority. Nor is this in the slightest controversial. According to Section 326 (1) of the *Restatement (Third)*, “The President has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states.”⁵¹ Moreover, according to the *Restatement*, “Courts in the United States . . . will give *great weight* to an interpretation made by the Executive Branch.”⁵²

Nor is the principal issue whether the subsequent interpretation of a treaty unilaterally by the Senate *after* it has given advice and consent would be authoritative. The decision of the Supreme Court in the classic treaty case of *Fourteen Diamond Rings v. United States*⁵³ at minimum establishes that even a formal resolution of interpretation subsequent to ratification (and even by from only less than one to eight days in this case depending on whether the concurring or majority opinions of the time are accepted) will have no legal effect short of adoption by a two-thirds vote. And the case has been widely accepted, and probably should be, for the broader proposition that later efforts at unilateral treaty interpretation by the Senate are not legally binding.⁵⁴ The opinion of the

51. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(1) (1987).

52. *Id.* at § 326(2) and cmt. b (emphasis added). See also *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (“great weight,” citing “*Factor v. Laubenheimer*, 290 U.S. 276, 294-295”).

It is yet another paradox of the asserted “dual” approach to treaty interpretation, that under that approach, interpretations by the Executive, principally charged with the foreign affairs of the Nation, including the negotiation of treaties, and the duty to “take Care that the Laws be faithfully executed,” would not be conclusive in domestic courts but would only be entitled to “great weight,” whereas an even informal interpretation of the Senate at the time of advice and consent would apparently be binding.

53. 183 U.S. 176 (1901). See also *Jones v. Meehan*, 175 U.S. 1 (1899).

54. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 Reporters’ Note 1, concluding: “later interpretations [of a treaty] by the Senate have no special authority.”

Court in *Fourteen Diamond Rings* said:

We need not consider the force and effect of a resolution of this sort, if adopted by Congress... It is enough that this was a joint resolution; that it was adopted by the Senate by a vote of 26 to 22, not two thirds of a quorum: and that it is absolutely without legal significance on the question before us. The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it. What view the House might have taken as to the intention of the Senate in ratifying the treaty we are not informed, nor is it material; and if any implication from the action referred to could properly be indulged, it would seem to be that two thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated.⁵⁵

This case is also important in that it seems to imply that in a treaty interpretation case where the intention of the Senate may be relevant, the search for intention must be a search for the intention of an at least two-thirds of a quorum voting for the treaty and necessary for advice and consent. It is also relevant in this case that in his concurring opinion, Justice Brown said: "In its essence [a treaty] . . . is a contract. It differs from an ordinary contract only in being an agreement between independent states instead of private parties. . . ," and:

the treaty must contain the whole contract between the parties, and the power of the Senate is limited to a ratification [sic – advice and consent] of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty...⁵⁶

Justice Brown also quoted with approval the classic statement from the *New York Indians*⁵⁷ case that:

There is something . . . which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material

55. 183 U.S. 176, 180.

56. 183 U.S. 176, 182-84.

57. *New York Indians v. United States*, 170 U.S. 1 (1898). Some seek to dismiss this case as only applying to treaties with Indian tribes, but the language of the Court was explicit in referring to "foreign power[s]" as well as Indian tribes. Moreover, the moral, and sound foreign policy principles at stake are equally applicable to the two settings.

provision of which is unknown to one of the contracting parties...⁵⁸

Finally, the issue is not whether a Senate can, as a condition of advice and consent, attach understandings, reservations, international conditions to be agreed by the other party, or even require substantial amendment and revision of the treaty. Of course it can! In such cases the President must, where amendments or international conditions are present, obtain the consent of the other party or parties before the treaty can be ratified. And even in settings reflecting permitted reservations or understandings viewed as congruent with the treaty, the President would publicize the United States' reservations and understandings at the time of ratification. As such, there is always a modality available to a Senate which regards a particular amendment, reservation or understanding as important, to protect that interest in a legally effective and honorable way.⁵⁹ Indeed, it is *only* through such open and public action that the intent of the Senate can be really effective, for unknown understandings can have no effect on the international legal obligation. That is, in the real world they will be completely ineffective in the all too frequent struggle for law. One of the strange aspects of the Senate insistence on the "dual" approach in the apparent belief that it will protect its interest is that the only way to fully protect the interest of the Senate is to achieve effect on the *international* as well as the domestic legal plane. If the Senate believes that its interest can be protected solely by making an

58. 183 U.S. 176, 183-84.

59. If, for example, the Senate wants to ensure that a treaty will not take effect in the United States until subsequently approved or implemented by Act of Congress, it can insist on an *amendment* to the treaty that the treaty itself will not take effect until subsequent passage of the Act of Congress. When conveyed to and accepted by the other nation, such an amendment modifies the time of entry into force for *both* parties and thus avoids the necessity of any "domestic conditions" separate from the treaty. For an example, see *United States v. American Sugar Co.*, 202 U.S. 563 (1906) ("The treaty was a reciprocal arrangement and intended to go into effect coincidentally in the United States and Cuba. The two nations provided for this... This coincident operation is of the very essence of the convention.") 202 U.S. at 579. Note that the Senate action in this case, that the treaty should not take effect until approved by a subsequent Act of Congress, was effectuated as an *amendment* to the treaty, *ratified and approved by the other treaty party*. 202 U.S. at 567. It was not a "domestic condition" separate from the treaty. It seems likely that the House of Representatives concern for its authority in tariff matters, pursuant to its power over "Revenue," as reflected in art. I, § 7 of the Constitution, may have been a factor here in Senate insistence on non-entry into force until the Congress had acted.

Similarly, the Senate can simply specify in its resolution of advice and consent that the President should delay ratification on behalf of the United States until domestic implementing legislation is enacted. This would seem the preferred modality particularly for a multilateral treaty in which Senate insistence on an "amendment" might not be appropriate. Indeed, an approach along these lines seems to be the modern practice, as reflected in Senate consideration of the Genocide and Torture Conventions in 1986 and 1990 respectively. See LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACHTER & HANS SMIT, *INTERNATIONAL LAW* 627-28 (3d ed. 1993).

understanding binding under domestic law, it is very much mistaken, unless one assumes that members of the Senate, in considering advice and consent to a treaty, find of no consequence the international legal obligation to be created. That is, the "dual approach" seems to reflect a parochial view that it is protecting the Senate that is important, not the Nation, which can only be protected through affecting the international meaning of the treaty.

Having examined what the issue is not, it is easy to state what the issue is. It is: will the United States have a "unitary" approach to treaty interpretation which is rooted in the intent of the treaty parties? Or will the United States have a "dual" approach which will follow the intent of the parties and the standard foreign relations law in treaty interpretation, unless evidence of Senate intent or an Executive Branch statement during the Senate advice and consent process (with, not incidentally, an extraordinarily vague referent as to when either would be present) suggests a different interpretation, in which case the United States will be bound by one standard internationally and another domestically? We should also be clear about what such a "dual" approach would inevitably mean. Whenever it is relevant, that is, in settings in which the "Senate intent" differs from the correct international meaning, then it will *always* either require the United States to violate its solemn treaty obligations internationally or to be held to obligations not binding on the other treaty party or at least not bargained for.⁶⁰ *This* is the hidden virus

60. In a debate with the author on June 13, 1994, in Charlottesville, Virginia, Professor David A. Koplow, a principal proponent of what is here labeled the "dual" approach, took the position that the "dual" approach did not exist insofar as requiring *violations* of international law, but only in adding *additional constraints* on the United States. The author fails to understand how the logic of the approach supported by Professor Koplow limits the effect of the "dual" approach solely to adding additional constraints on the United States. If the intent of the Senate is controlling then it would equally control in both cases. Nor is it clear that in the real world this limitation would any more clearly carry out the intent of a consenting Senate. See the discussion of this latter point in Part V (C) of JOHN NORTON MOORE, TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW, *supra* note *.

Similarly, Senator Biden and John B. Ritch III, a co-author with the Senator of an article supporting the "dual" approach, don't seem to get it. They write:

Of course, it is possible to *hypothesize* a "two treaties" scenario in which the Executive, perhaps inadvertently, presents an overly restrictive interpretation to the Senate. Indeed, one can imagine such a case even under the Sofaer Doctrine, since it allows that some, albeit very little, executive testimony may be binding. But in practice "two treaties" has not proven to be a problem, and it was profoundly revealing that Sofaer and others were never able to point to a real-world example.

Joseph R. Biden, Jr. & John B. Ritch III, *supra* note 12, at 1543. The good Senator and his co-author simply fail to notice that it is a *requirement of hard logic* that whenever the "dual" approach would make a legal difference, thus whenever it has *any* meaning, it would *always* present what they are referring to as the "two treaties" scenario, either requiring the United States to violate its treaty obligations or to be held to obligations not binding on the other treaty party and/or

underlying much of the debate about these issues, but amazingly one not usually brought into the open in the debate. For example, in its at least arguable tilt toward the “dual” approach, the *Restatement (Third)* never reveals what is really at stake in the event of different international and “Senate intent” meanings. Perhaps the Reporters have simply not focused on this issue and would be horrified by the real implications of the “dual” approach. One can only hope so.

To make matters worse, it is probable that most real-world settings posing this issue under the “dual” approach would be settings of simple mistake. That is, our Executive Branch spokesmen or individual Senators thought the meaning was one thing when it turned out to be another when examined more thoroughly years later, or when we were surprised by developments, such as subsequent international practice or adjudication, which establish a different meaning. In such settings *nothing* can ever fully implement the original Senate intent because, when considering a treaty, the Senate intent always has a dual element. Thus, it believes the meaning is X, but it also believes that X is, as well, the meaning binding on the other party to the treaty. To focus on carrying out meaning X then, when internationally it turns out to be Y, forces us to either violate our treaty obligations or to be held to higher obligations than the other party, neither of which was the intent of the Senate. And to focus on the internationally binding meaning Y is to ignore the meaning X, also not the intent of the consenting Senate. And in most settings, even setting aside the treaty would not carry out the intent of the Senate, which may have regarded the issue as relatively small in relation to the whole treaty relationship. That is, since a treaty, unlike legislation, is a *contract between nations* or, as John Jay wrote in *Federalist* 64,⁶¹ a *bargain*, the Senate has an intent as to *meaning*, but it also has an intent as to the *bargain* or nature of the agreement between the nations. Settings in which the “dual” approach arises and would make a difference are inevitably settings where one of these intents cannot be realized.⁶²

The “dual-unitary” debate in treaty interpretation has also brought to

not bargained for. And their argument that it could not be a problem since no one can produce an example is simply incredible in view of the fact that the “dual” approach has never been the foreign relations law of the United States before, or since, this particular Senate “impulse of sudden passion,” to borrow a phrase from Madison in *Federalist* 62. Surely we can understand that passion in the midst of the heated debate about proper interpretation of the ABM Treaty, without accepting its wrong-headed prescription for the treaty interpretation law of the United States.

61. See THE FEDERALIST NO. 64, at 14-15 (John Jay) (E. G. Bourne ed., 1937).

62. Even in settings where the other treaty party voluntarily adheres to a practice not legally binding on it, the bargain is not as anticipated, because that state is legally free to pick and choose whether it will continue its voluntary practice.

the fore a related issue of whether the Senate has general lawmaking power through attaching “domestic conditions” to resolutions of advice and consent to treaties. It presents this issue because the “dual” approach itself, were it to have any legal effect, creates a domestic binding meaning apart from the underlying treaty. And, it presents it as well because the Senate has chosen to implement the “dual” approach, as a new domestically binding principle of treaty interpretation for the foreign relations law of the United States, through attaching it as a condition to resolutions of advice and consent. As with the hidden virus of the real effects of the “dual” approach, it seems likely that few members of the Senate were aware that they were raising an additional constitutional issue of significance in their push for the treaty interpretation condition.

The next two sections will address in turn these real issues of the “dual” versus “unitary” standards of treaty interpretation in the foreign relations law of the United States, and whether the Senate’s advice and consent power includes a general domestic lawmaking power.

III. DISARMING THE VIRUS: “DUAL” VERSUS “UNITARY” THEORIES OF TREATY INTERPRETATION

A. *General Note on Constitutional Interpretation*

“[T]here are more instances of the abridgment of the freedom of the people by gradual and silent encroachments . . . than by violent and sudden usurpations.”

James Madison, Speech in the Virginia Convention, 1788

The proper mode of treaty interpretation under the foreign relations law of the United States is an issue with substantial constitutional underpinnings. In assessing these underpinnings a range of factors are relevant.⁶³ First, the text of the Constitution and the totality of informa-

63. It is not my intention at this point to definitively engage in the lively, ongoing and diverse debate about constitutional interpretation and judicial review. But it may be helpful in permitting appraisal by others to briefly set out some of the parameters and factors I would regard as useful in the treaty interpretation debate. That is the purpose of this short “General Note on Constitutional Interpretation.”

With respect to the “case” for judicial review, the author would emphasize the central role of the Supreme Court in policing the basic fundamentals of our constitutional democracy. These include guarantees for protection of the individual, separation of powers/checks and balances, federalism, and protection of the integrity of the electoral process. Separation of powers/checks and balances are powerfully engaged in the “dual” interpretation and its associated undefined Senate domestic lawmaking power.

For a discussion of the fundamentals of the rule of law as presented by the author as Co-Chairman of the United States Delegation to the first talks between the United States and the

tion about the intent of the language and its purposes are important. The extreme view that would dismiss the intent of the Framers as an irrelevant, dead hand from the past fails both to understand the political genius of the American Constitution and to understand the fundament of "constitutionalism" itself in establishing certain elemental checks and balances *against* governmental action. If constitutions were simply infinitely variable and subject to change with shifting majority opinion, then they could not serve their purpose as checks, where needed, against governmental and even majority actions. A first amendment guarantee that protected only speech deemed "correct" by a changing majority would not be much of a guarantee for human freedom.

Second, primary authority as reflected in the flow of Supreme Court and other judicial decisions of relevance to the issues should receive substantial weight. The Supreme Court is the highest judicial interpreter of the Constitution in our system and a consistent flow of decisions, also representing constitutional practice and experience over the years, is of considerable importance. A strong pattern of such practice should not be lightly set aside. This, of course, is not to suggest that change is never appropriate. *Brown v. Board of Education*⁶⁴ is a living example to the contrary.

Third, one of the great geniuses of the common law has been reliance on and learning from concrete experience. Thus, while not decisive on its own, as the *Chadha*⁶⁵ decision properly shows, constitutional experience can substantially assist in interpretation, and a strong pattern of practice should be set aside only as a result of substantial clarity to the

Soviet Union on the Rule of Law, see John Norton Moore, *The Rule of Law: An Overview*, (Paper presented to the Seminar on the Rule of Law, Moscow and Leningrad, USSR, March 19-23, 1990) (talks Co-Chaired with the Associate Attorney General of the United States).

For a flavor of the robust debate about theories of constitutional interpretation and judicial review, see, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* (1985); MARK V. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988); Thomas Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1 (1984); William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849 (1989); Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 *HOW. L.J.* 983 (1987). And for an overview of a variety of issues and sub-issues in the debate, see MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* (1993).

64. *Brown v. Board of Education*, 347 U.S. 483 (1954) (Brown I); 349 U.S. 294 (1955) (Brown II).

65. *I.N.S. v. Chadha*, 462 U.S. 919 (1983). Justice Powell's concurring opinion in *Chadha* noted that "Congress has included the [legislative] veto in literally hundreds of statutes, dating back to the 1930s." 462 U.S. at 959, 959-60 (Powell, J., concurring in the judgment).

contrary in the underlying constitutional language, purpose or policy. As Justice Frankfurter pointed out in his concurring opinion in the *Steel Seizure* case: "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."⁶⁶ Justice Holmes was making much the same point when he said that "the life of the law has not been logic: it has been experience."⁶⁷

Secondary authority and policy consequences may also be relevant as we trace the effects of a particular practice. In this connection, we should certainly keep in mind that constitutions are not like simple statutes or administrative regulations. A constitution is intended to serve as a fundamental charter for the relation of a people to its government. And it is intended to serve through the years. As such, a knowledge of relevant circumstances and policies sought to be effectuated in those circumstances may be of great importance. As Chief Justice Marshall noted for the Court in *McCulloch v. Maryland*, "We must never forget that it is a *constitution* we are expounding."⁶⁸

B. *Constitutional Text and the Treaty Power*

It is possible to debate theoretically whether the power to make treaties is primarily executive or legislative, as did Hamilton and Madison in the famous "Pacificus-Helvidius" exchange.⁶⁹ Under *the Constitution of the United States*, however, there can be but one answer. For the treaty power is placed in Article II, under the Executive, with a check in the Senate. It was not placed in Article I, under the Legislative branch, with a check in the Executive.⁷⁰ The starting point for analysis under the United States Constitution, then, is that the treaty power is primarily

66. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952).

67. OLIVER W. HOLMES, *THE COMMON LAW* 1 (1886).

68. 17 U.S. (4 Wheat.) 316, 407 (1819).

69. See Alexander Hamilton, First *Pacificus* Letter 29 June 1793, reprinted in 1 W. GOLDSMITH, *THE GROWTH OF PRESIDENTIAL POWER* 398, 400-04 (1974); James Madison, First *Helvidius* Letter August-September 1793, reprinted in 1 W. GOLDSMITH, *supra*, at 405, 407-10. James Madison is perhaps the preeminent political theorist of all time, but he is simply arguing as an advocate in his *Helvidius* letter when he takes the position that the treaty power is primarily legislative. That is definitively not the case under his Constitution.

70. Nor was this placement in Article II an oversight of the Convention. For the August 6, 1787, draft from the Committee of detail vested the "power to make treaties," as well as the power "to appoint Ambassadors, and Judges of the supreme Court" solely in the Senate. When no agreement was reached, another Committee, sometimes referred to as the "Committee on postponed parts," proposed on September 4 language which became the present treaty clause located under the Executive and his powers. The Convention adopted this formulation on September 8. See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 183 (M. Farrand ed., 1911) (Report of the Committee of detail); *id.* at 473 (Journal); *id.* at 495 (Committee on postponed parts); *id.* at 540-41, 547-50 (Convention adoption).

executive in its nature.

It is also relevant in considering the text of the Constitution and the “dual-unitary” treaty interpretation debate, that the language of the Supremacy clause, art. VI, cl. 2 of the Constitution, and the Judiciary Article, art. III, § 2, both use the language: “Treaties made, or which shall be made.” That is, it is the *treaty* which is the supreme law of the land, not domestic conditions attached to treaties or a separate domestic interpretation of the Senate apart from the treaty. And the judiciary power extends to cases arising under *treaties*, not domestic conditions attached to treaties or separate legally binding Senate interpretations apart from the treaty. Interestingly, the *Restatement (Third)*, despite its support for “domestic conditions,” concedes that such conditions are not the Supreme Law of the Land within the Supremacy Clause. Thus, Reporters’ Note 4 to § 303 says: “A condition imposed by the Senate that does not seek to modify the treaty and is solely of domestic import, is not part of the treaty and hence does not partake of its character as “supreme Law of the Land.” Thus the *Restatement* view would seem to be that a “domestic condition” would not be binding on the states, a rather strange new hybrid of treaty law potentially giving rise to conflicting interpretations of treaties under the “dual” approach, as well as different legal effects for “domestic conditions,” depending on the court system.

C. *Constitutional Theory, History and Practice*

1. *Separation of Powers Theory Generally*

Separation of powers and checks and balances are a critical genius of the American Constitutional system. This Montesquieu mode of controlling power was chosen in the new democratic government as the preferred mode of protecting liberty and good government over the more traditional checks based on social class, as reflected in the Roman Republic, and even the now residual House of Lords in the United Kingdom.⁷¹ One of the fundamental principles of separation of powers is that no *one* department of government can set its own powers at the expense of the others. Said James Madison, in *The Federalist* No. 49, “The several departments being perfectly co-ordinate by the term of

71. Thomas Jefferson and John Adams engaged in an interesting discussion about government based on merit in their famous exchange of correspondence during Jefferson’s retirement. In that correspondence Jefferson powerfully makes the case for merit (“virtue and talents”) rather than status (“artificial aristocracy . . . [of] rank and birth”). See 2 *THE ADAMS-JEFFERSON LETTERS* 387-92 (Lester J. Cappon ed., 1959) (Letter of Jefferson to Adams of Oct. 28, 1813).

For an excellent history and discussion of constitutionalism, see SCOTT GORDON, *CONTROLLING THE STATE* (1999).

their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."⁷² Is this not precisely what the Senate (not even the full legislative department) is trying to do unilaterally with its treaty interpretation condition?

It is also relevant under general separation of powers theory that Madison, Hamilton and Jefferson all adopted the position that congressional powers which by their nature overlapped with the general grant of executive power in art. II, § 1 (which they believed included the general foreign affairs power), were to be strictly construed.⁷³ Further, one of the most important Supreme Court decisions in the separation of powers, *Myers v. United States*,⁷⁴ decided in 1926, explicitly adopted the Madison, Jefferson and Hamilton view that grants of authority to Congress overlapping the general grant of "the executive Power" to the President are to be strictly construed. And in dictum, the Court applied this doctrine to all of the blended powers in art. II, § 2, cl. 2, which, of course, includes the treaty power, and thus adopts the Hamilton position in his "Pacificus" letter. Chief Justice Taft wrote in his opinion of the Court:

Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, [and] . . . that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication...⁷⁵

2. *Bicameralism and the Presentment Clauses: I.N.S. v. Chadha and Clinton v. New York City*

The Supreme Court has sought to police parts of the legislative process from assuming general legislative powers without complying with the full constitutional scheme, which includes bicameralism and presentment to the President. In so doing, the Court has emphasized both that there are certain modes for lawmaking under the Constitution, each with its precise requirements, and that this is an essential part of the separation of powers. Thus, in *Immigration and Naturalization Service v. Chadha*, Justice Burger said in his opinion of the Court:

72. THE FEDERALIST NO. 49, *supra* note 61, at 339 (J. Madison).

73. See the materials cited in JOHN NORTON MOORE, *supra* note *.

74. 272 U.S. 52, 116-118, 127-28, 151-52, 163-64 (1926).

75. *Myers v. United States*, 272 U.S. 52, 116-118, 127-28, 151-52, 163-64 (1926).

We have recently noted that “[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787....”

....

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.⁷⁶

In a sense, this is also exactly what the Court was doing in the *Fourteen Diamond Rings*⁷⁷ case, when it refused to permit the Senate to make law in a manner not consistent with the Constitution.

In *Chadha*, the Court emphasized the great importance of both the presentment clauses and bicameralism, and the interrelation between them, in the full constitutional scheme. Thus, it said:

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President...

...

The bicameral requirement of Art. I, §§ 1, 7 was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation’s elected officials...⁷⁸

Most recently, in the “line item veto case” of *Clinton, President of the United States, v. City of New York*,⁷⁹ the Court demonstrated even

76. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 946, 951 (1983).

77. *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

78. 462 U.S. at 947, 948-49.

79. 524 U.S. 417 (1998).

greater sensitivity to the need for scrupulous adherence to the requirements of art. I, § 7 of the Constitution as the appropriate modality for domestic lawmaking under the United States Constitution. The Court struck down the Presidential cancellation procedure of the Line Item Veto Act. It did so despite the Act itself, including those procedures, having been duly enacted by action of both Houses of Congress and the President, and thus authorizing the challenged Presidential action in canceling certain provisions of the Balanced Budget Act of 1997. And it did so even despite what it regarded as Constitutional silence on the issue of Presidential action amending or repealing parts of duly enacted statutes, going quite beyond *Chadha*. Thus, the Court said:

There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." . . . Our first President understood the text of the Presentment Clause as requiring that he either "approve all the parts of a Bill, or reject it in toto." What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.⁸⁰

Justice Kennedy, concurring in *Clinton*, stressed the centrality of the principle of separation of powers under the Constitution. He writes:

Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."⁸¹

Of particular relevance to the issue of domestic lawmaking by unilateral Senate domestic conditions during the advice and consent process, the *Clinton* Court reiterated the *Chadha* language that there is but a "single . . . procedure" for the exercise of the federal legislative power.

80. *Id.* at 439-40 (*Chadha* citation and footnote omitted).

81. *Id.* at 450.

It should be noted that in its treaty interpretation condition, the Senate not only proposes to make its new theory of treaty interpretation domestic law by simply unilaterally attaching it as a one House condition to a resolution of advice and consent, but its new theory is even looser as it applies to individual interpretation issues. Thus, if the facts of the “broad-narrow” debate which gave rise to this Senate approach are an example of its operation, it proposes this lawmaking effect solely from an Executive Branch statement and/or expressed views of a few Senators. It is not, under the Biden Treaty Interpretation Condition, even necessary to attach the interpretation as a condition to the resolution of advice and consent, nor does it specify that the interpretation must be supported by adequate evidence suggesting that it is shared by two-thirds of a Senate quorum. Perhaps of importance in carrying out the Senate’s intent, it also does not suggest any standard that the members of the Senate intend to make domestic law, as opposed to give advice and consent to a treaty, with the knowing implication that if their interpretation is wrong and they write it into domestic law that they will either be requiring the United States to violate its treaty obligations or holding the United States to obligations not binding on the other party.

3. *Treaty Power Theory Generally*

John Jay, perhaps *the* most experienced foreign policy expert among the constitutional Framers, clearly regarded a treaty as a “bargain” between nations. And he emphasized that “treaties are made, not by only one of the contracting parties, but by both...” Thus, he wrote in *Federalist* 64:

a treaty is only another name for a bargain, and . . . it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them.⁸²

82. THE FEDERALIST NO. 64, *supra* note 61, at 14-15.

The Framers clearly understood the difference between the legislative process, with lawmaking by joint action of a majority of both Houses and presentment to the President, and the treaty process, an international bargain struck by the President with another Nation subject to advice and

There is also considerable evidence that the Senate role in the treaty power, as a check on Presidential authority parallel to the President's role as a check on legislative authority, was regarded principally as a veto. That is, with respect to the "consent" portion of the Senate role in advice and consent, there is considerable authority that the nature of the role is a "veto" or "negative," as earlier called, although it is clear that the Senate can attach to its consent, reservations, amendments or understandings *concerning the international obligation*. Thus, Thomas Jefferson wrote in the "Treaties" section of his *Manual of Parliamentary Practice for the Use of the Senate*, "By the Constitution of the United States, this department of legislation is confided to two branches only of the ordinary legislature; the President originating, and the Senate having a negative."⁸³ Similarly, Professor Edward S. Corwin, a giant in the field of American constitutional theory, writes in his classic treatise:

In short, the Senate's role in treaty making is nowadays simply the power of saying whether a proposed treaty shall be ratified or not, the act of ratification being the President's. Its power is that of *veto*, which may be exercised outright, or conditionally upon the nonacceptance by the President or the other government or governments concerned of such amendments or reservations as it chooses to stipulate...⁸⁴

Even a study in 1984 done for the Senate Foreign Relations Committee on *Treaties and Other International Agreements: The Role of the United States Senate* entitles a section "The Senate's Treaty Veto," and states that "[t]he Senate has used its veto sparingly," and that "[t]he Senate's treaty power is one of the few legislative vetoes that has been recognized as permissible by the Supreme Court."⁸⁵

It has also been stressed that the changes proposed by a Senate during the advice and consent process do not take effect until accepted internationally. This is yet another form of recognition that a treaty is a con-

consent of two-thirds of the Senate. In sharp contrast to treatment of the legislative process by the Constitutional Convention, proposals by James Wilson to include the House in the Treaty-making process and to eliminate the two-thirds requirement were overwhelmingly rejected by the Convention, in significant part because of concerns of the smaller states and of sectional interests. Shlomo Slonim, *Securing States' Interests at the 1787 Constitutional Convention: A Reassessment*, 14 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 1, 15-16 (Spring 2000).

83. T. JEFFERSON, *A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES* 169 (2d ed. 1812) (italics in original).

84. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 211 (4th rev. ed. 1957).

85. A STUDY PREPARED FOR THE SENATE FOREIGN RELATIONS COMM. BY THE CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 98th Cong., 2d Sess. *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE* 14-15 (Comm. Print June 1984).

tract or compact among nations and that the advice and consent power is not a general grant of domestic lawmaking authority. Thus, Florence Ellinwood Allen, a Judge of the United States Court of Appeals for the Sixth Circuit, writes in her 1952 monograph on the treaty power:

[T]he framing of treaties is a wholly executive function. The treaties, so far as form is concerned, are presented to the Senate as an accomplished fact. The Senate may reject them *in toto*, make reservations, or reject separate articles; but the changes that it proposes do not become effective until they are accepted by the country with which the treaty is made.⁸⁶

4. *Treaty Practice Under the Constitution*

There is considerable authority in the foreign affairs practice of the United States that it is the international obligation embodied in the treaty that is binding on the United States and the President. Indeed, it seems that this was overwhelmingly regarded as the rule until the Senate challenge coming out of the contentious “broad-narrow” debate in interpretation of the ABM Treaty. Examples of this practice supporting the “unitary” approach to treaty interpretation include the following:

A message of July 30, 1923, from Secretary of State Hughes to Ambassador Houghton is described in Hackworth’s *Digest*:

In a diplomatic interchange concerning the question whether the Treaty of Berlin automatically gave the United States rights accorded by the Treaty of Versailles, Germany referred to statements made by Senator Lodge in debate in the Senate upon the Treaty of Berlin. Concerning this Secretary Hughes wrote the Ambassador to Germany:

Should occasion arise, you may orally explain to the German Foreign Office that expressions of opinion as to the meaning of the treaty of August 25, 1921, such as those to which the Foreign Office refers, occurring in general debate, cannot be regarded as affecting the interpretation of that treaty.⁸⁷

In 1929, Secretary of State Kellogg expressed in telegrams to the Ambassadors to Great Britain and France that an interpretative report filed by the Senate Foreign Relations Committee during Senate consideration of the Kellogg-Briand pact “had no legal effect whatsoever upon the treaty.” As described by Green Hackworth, the Legal Adviser of the

86. F. ALLEN, *THE TREATY AS AN INSTRUMENT OF LEGISLATION* 6 (1952).

87. 5 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 262 (U.S. Dep’t of State Pub. No. 1927, 1943).

Department of State, in 1943:

When the Senate gave its advice and consent to the ratification of the Kellogg-Briand peace pact signed at Paris, August 27, 1928, the Foreign Relations Committee filed a report containing its interpretations of the treaty. The report was not put before the Senate for vote and was not included or mentioned in the resolution of ratification. It concluded with the following statement:

This report is made solely for the purpose of putting upon record what your committee understands to be the true interpretation of the treaty, and not in any sense for the purpose or with the design of modifying or changing the treaty in any way or effectuating a reservation or reservations to the same...

For a statement that the report of the Senate Committee had no legal effect whatsoever upon the treaty, see Secretary Kellogg to the Ambassador to Great Britain, telegram 12, Jan. 17, 1929, MS Department of State, file 711.0012 Anti-War/622; Mr. Kellogg to the Ambassador to France, telegram 25, Jan. 18, 1929, *ibid.* 1623...⁸⁸

These instances in which foreign governments sought to rely on Senate materials, statements or interpretations should remind us that adopting a "dual" approach would also empower *foreign governments* with an additional source of argument against Presidential determinations concerning treaty interpretations, when they did become aware of such materials.

More recent examples in the form of Executive Branch foreign affairs expert testimony to the Senate include the following:

On September 25, 1979, during a Senate Foreign Relations Committee hearing on SALT I compliance, Sidney Graybeal, a principal ABM negotiator, commented on the effect of Executive Branch presentations to the Congress in the following terms:

The language of the agreement, the agreed statements and the common understandings reflect what could be negotiated and what is binding on the two parties.

Presentations to Congress can help explain the language and how it was derived, but they should not change the meaning

88. 5 G. HACKWORTH, *supra* note 87, at 152-53 (citations omitted). A copy of the actual telegram sent from Secretary of State Kellogg to the American Embassy in Paris, as cited by Hackworth, was declassified by the Department of State on April 28, 1989, at the request of the author of this article, and appears in my study for the Arms Control and Disarmament Agency. See JOHN NORTON MOORE, *supra* note *.

of the language or the scope of the provisions of the agreement.⁸⁹

And in a series of “Answers to Questions for the Record on the Legal Status of the SALT II Documents Transmitted to the Senate,” prepared by the State Department Legal Adviser Herbert J. Hansell, it was said:

Q: If . . . [a separate resolution not part of the resolution of ratification] were adopted which set forth the Senate’s understanding or interpretation concerning various Treaty provisions, what would be its legal force and effect?

A: Statements of understanding or interpretation not included in the Senate’s resolution of ratification and the U.S. instrument of ratification accepted by the Soviet Union would not be legally binding *per se*. However, if provided to the Soviet Union prior to the exchange of instruments of ratification, and not contradicted by the Soviets, they would constitute persuasive evidence of the manner in which the Parties interpret the Treaty.⁹⁰

D. Primary Authority

Primary authority overwhelmingly supports the “unitary” approach to treaty interpretation. There is a long line of Supreme Court decisions referring to treaties as contracts or compacts among nations. This line runs from *United States v. Schooner Peggy*⁹¹ in 1801 to *Trans World Airlines, Inc. v. Franklin Mint Corp.* in 1984.⁹² Illustrative is *Foster v. Neilson*,⁹³ decided in 1829, where the Court said: “[a] treaty is, in its nature, a contract between two nations, not a legislative act.”⁹⁴ Or *Worcester v. Georgia*,⁹⁵ decided in 1832, where Chief Justice Marshall wrote: “What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government.”⁹⁶ And in the more contemporary *Trans World Airlines* case, the opinion of the Court and the dissenting opinion of Justice Stevens both clearly

89. *Briefing on SALT I Compliance: Hearing Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 13 (1979) (statement of Sidney Graybeal).

90. *Answers to Questions for the Record on the Legal Status of the SALT II Documents Transmitted to the Senate*, reprinted in M. NASH, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW*, 1979, at 697, 710, 713-14 (U.S. Dep’t of State Pub. No. 9374, 1983).

91. 5 U.S. (1 Cranch) 104 (1801).

92. 466 U.S. 243 (1984). For a fuller listing and discussion of the cases, see JOHN NORTON MOORE, *supra* note *.

93. 27 U.S. (2 Pet.) 253 (1829).

94. 27 U.S. (2 Pet.) 253, 314.

95. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

96. *Id.* at 581

indicated that a treaty was in the nature of a contract between nations.⁹⁷

There are also several lines of Supreme Court cases suggesting that treaties are to be interpreted according to the intention of the parties or the principles of public international law, and that the scope of the treaty power is related to agreement among nations. This line of cases runs at least from *The Pizarro*⁹⁸ in 1817. Examples include the 1890 decision in *Geofroy v. Riggs*,⁹⁹ where Justice Field wrote for the Court:

It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended...¹⁰⁰

In *Santovincenzo v. Egan*, decided in 1931, Chief Justice Hughes said for the Court: "treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations.'"¹⁰¹

And in *Factor v. Laubenheimer*, decided in 1933, the Court said:

Considerations which should govern the diplomatic relations

97. 466 U.S. at 253, 262.

98. *The Pizarro*, 15 U.S. (2 Wheat.) 227 (1817). See also the statement of Justice Story in 1821 in *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71, 72-73 (1821) ("We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it..." "this Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties... The same powers which have contracted, are alone competent to change or dispense with any formality.").

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

100. *Id.* at 271-72.

101. *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931). For other Supreme Court decisions using materials or approaches relevant to public international law modalities of treaty interpretation, including treaty negotiating history or *travaux*, see, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 223-28, 239 (1796) ("If the words express the meaning of the parties *plainly*. . . there ought to be no other means of interpretation; but if the words are obscure. . . recourse must be had to *other* means of interpretation."); *Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39, 50 (1913); *Reid v. Covert*, 354 U.S. 1, 61 (1957) (Frankfurter, J., concurring in result) (reference to I.C.J. case); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, at 699-703, (1988); *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991) (making no reference to footnote 7 in the earlier *Stuart* case).

between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them... In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it...¹⁰²

We have already encountered *New York Indians v. United States*,¹⁰³ *Fourteen Diamond Rings*¹⁰⁴ and *Power Authority of the State of New York v. Federal Power Commission* (the *Niagara Reservation* case),¹⁰⁵ all of which, in a variety of ways, lend support to the “unitary” approach.

Despite a brief flurry of judicial activity arguably tilting toward the “dual” approach during the contentious public debate over the ABM interpretation issue, primary authority continues overwhelmingly to support the “unitary” approach. As we have seen, the issue arose peripherally in two cases in 1988 and 1989, in neither of which it was fully briefed or argued by counsel, and in which quite likely its consideration was at least indirectly generated by the then highly visible ongoing public debate between Senator Sam Nunn and Judge Abraham Sofaer.

The first of these cases was the *Rainbow Navigation*¹⁰⁶ case in 1988, in which Judge Harold H. Greene seemed to uphold a Senate domestic lawmaking authority to formally and *even informally* adopt “domestic conditions” incident to advice and consent to a treaty and also seemed to regard Executive Branch representations made in such a setting as obligatory. That it is likely that Judge Greene’s opinion was influenced by the position of Senator Nunn in the “broad-narrow” debate is suggested by the context in which an initial Judge Greene opinion in the same case had been featured in the ongoing “treaty interpretation” debate and by a footnote specifically quoting Senate statements in “the

102. *Factor v. Laubenheimer*, 290 U.S. 276, 293, 295 (1933); *accord Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902); *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929); *Air France v. Saks*, 470 U.S. 392, 396 (1985).

103. 170 U.S. 1 (1898). It may be worthy of further note at this point with respect to the *New York Indians* case that the opinion of the Court delivered by Justice Brown also said: “[i]t [a treaty] cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate and House of Representatives.” 170 U.S. at 23.

104. *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901). *See also Jones v. Meehan*, 175 U.S. 1 (1899).

105. 247 F.2d 538 (D.C. Cir. 1957); *vacated as moot sub. nom. in American Pub. Power Assn. v. Power Authority of the State of New York*, 355 U.S. 64 (1957).

106. *Rainbow Navigation, Inc. v. Department of the Navy*, 699 F. Supp. 339 (D.D.C. 1988), *rev'd and vacated* 911 F.2d. 797 (D.C. Cir. 1990), *cert. denied* 499 U.S. 906 (1991).

debate over the ABM treaty." Not only was the issue not fully briefed or argued by council in the case, however, but Judge Greene was apparently also unaware that the only case then decided on the legality of domestic conditions, the *Niagara Reservation* case, had been decided by the Court of Appeals in his own Circuit and had decided against the legality of such conditions. Indeed, even the dissent in that case would not have supported the broad "domestic condition" authority, going beyond a non-self-executing condition, asserted by Judge Green. Judge Greene's decision was reversed on appeal in a unanimous opinion by the United States Court of Appeals for the District of Columbia Circuit in 1990.¹⁰⁷ In an opinion for the Court filed by Circuit Judge D. H. Ginsburg, and joined by Circuit Judge Ruth B. Ginsburg, now Justice Ginsburg of the Supreme Court, Judge Ginsburg said in response to the Senate consideration materials relied on by Judge Greene at the District Court level that: "Ambiguous ratification history cannot be allowed to obscure the meaning of clear Treaty language."¹⁰⁸ Further, the Court of Appeals decision, although itself not squarely facing the complex issues in the "dual-unitary" treaty interpretation debate, favorably quotes the Supreme Court decision in *Sumitomo Shoji America, Inc. v. Avagliano*,¹⁰⁹ indicating that the referent for decision in treaty interpretation is the language of the treaty and the intent of the parties. Thus, the opinion for the Court quotes *Sumitomo* as saying:

Our analysis "must, of course, begin with the language of the Treaty itself." ... The clear import of treaty language controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."¹¹⁰

The second case in which the issue arose, at least peripherally, in the climate of the same highly visible public debate about the proper interpretation of the ABM Treaty, is *United States v. Stuart*,¹¹¹ decided by the Supreme Court in 1989. It should be noted at this point, however,

107. *Rainbow Navigation, Inc. v. Department of the Navy*, 911 F.2d 797 (D.C. Cir. 1990).

108. 911 F.2d 802.

109. 457 U.S. 176 (1982).

110. *Id.* at 180. The second paragraph of this quote from *Sumitomo* is apparently quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963). *Rainbow Navigation* is visited in greater depth in Part VI (B) of JOHN NORTON MOORE, TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW, *supra* note *.

111. *United States v. Stuart*, 489 U.S. 353 (1989). I focus on this case in greater depth in Part VI (C) of JOHN NORTON MOORE, TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW, *supra* note *, because of an ambiguous dictum in footnote 7 in the majority opinion and a concurring opinion by Justice Scalia in which he addresses the real issue of the point of reference for treaty interpretation as the agreement between the parties.

that the issue of “dual” versus “unitary” standards of treaty interpretation was not fully, if at all, briefed or argued to the Court in this case, that is, the issue, though now stirring apparently as a result of the public debate, was still, for all practical purposes, a hidden virus. Most importantly, the majority opinion in at least two places itself adopts the traditional referent for decision, of the intent of the treaty parties, and it explicitly endorses reliance on subsequent practice of the parties which, by definition, could not be before a Senate during consideration for advice and consent. As such, even with the ambiguous footnote 7 dictum, the case seems to support the traditional “unitary” approach more than it does a “dual” approach.¹¹²

E. Secondary Authority

Many secondary authorities lend support to the treaty power as an agreement between nations, not a legislative act. For example, Professor Norman J. Singer writes in Sands Fourth Edition of *Sutherland Statutory Construction*: “[a] treaty is in its nature a contract between two nations, not a Legislative act.”¹¹³ Perhaps the most detailed relevant analysis in the secondary authority, however, is the detailed ninety-six page analysis by Professors Philip C. Jessup and Oliver J. Lissitzyn prepared as an opinion in support of the position of the Power Authority of the State of New York in the *Niagara Reservation* case.¹¹⁴ While not directly confronting the “dual” versus “unitary” issue in all its dimensions, since at the time it had not been heard of, this opinion did squarely relate to one such dimension, whether the Senate can attach a treaty condition operative only under domestic law, and it did address at length and adopt the most important theoretical consideration underlying the “unitary” approach; that is, the conclusion that the treaty power by its nature is a compact or contract between nations and not a legislative power going beyond the underlying agreement. Professors Jessup and Lissitzyn concluded:

A “treaty,” as that term is used in the Constitution, is an interna-

112. Treaties, of course, are subject to the restraints of the Constitution. In the classic case of *Reid v. Covert*, 354 U.S. 1 (1957), Justice Black said for the Court:

no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. . . . The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

354 U.S. 16-17.

113. 1A SUTHERLAND STATUTORY CONSTRUCTION § 32.01, at 539 (Sands 4th ed., N. Singer ed. 1985 rev.).

114. OPINION OF PHILIP C. JESSUP & OLIVER J. LISSITZYN, *supra* note 25.

tional contract which either creates rights and duties as between two or more nations, or modifies or abrogates pre-existing rights and duties in the relations of nations, or confirms and recognizes with binding effect an existing international legal situation;

. . . A declaration by one party must modify the legal effect of a treaty on the relations between the parties in order to constitute a reservation to a treaty;

. . . The so-called "reservation" to the 1950 Niagara Treaty does not have these requisite characteristics of a treaty or of a reservation and can not legally be considered as a treaty or part of a treaty. . .

and,

The inclusion of the "reservation" in the ratification of the Treaty was a mere colorable use of the treaty-making power and therefore derives no legal validity from the Constitution. . .¹¹⁵

As has been seen, the Court of Appeals decision in the *Niagara Reservation* case accepted the Jessup-Lissitzyn view as set out in these distinguished lawyers' opinion, and not the contrary Henkin view, as expressed by Professor Henkin in his 1956 article, which was cited favorably by the dissenting Justice.

Charles Cheney Hyde also points out that it is impermissible to use a standard of interpretation known only to one of the treaty parties, as, of course, would frequently be the case under the "dual" approach. Thus, he writes:

[i]t is not inconsistent with the principles stated to require that a contracting State be not permitted to enjoy recognition of a standard of interpretation known only to itself. It is the signification which both or all the parties have, or are to be regarded as having, attached to the words of their agreement which is alone the subject of investigation.¹¹⁶

In examining secondary materials, certainly the most important debate about such materials in the context of the "dual-unitary" debate, is the *Restatement (Third) of the Foreign Relations Law of the United States*. This *Restatement* is of general high quality and is heavily relied on by United States courts. In no small part that high quality comes from the high scholarship of its Chief Reporter, Professor Louis Henkin of the Columbia Law faculty and its distinguished Associate Reporters

115. OPINION OF PHILIP C. JESSUP & OLIVER J. LISSITZYN, *supra* note 25, at 96.

116. 2 C. C. HYDE, *supra* note 36, at 1470-71 (footnotes omitted).

and Advisers. It should be emphasized at the outset that the *Restatement* never squarely addresses the “dual-unitary” issue in treaty interpretation. This may well be because the real issues have been largely outside the visible, like the hidden virus in the e-mail. Thus, the *Restatement* never addresses what would happen should there be a discrepancy between the internationally binding meaning of a treaty, and a domestic understanding of the Senate during the advice and consent process. As such, it cannot be said to even have addressed the issue.

The *Restatement*, however, adopts at least three positions which have been interpreted as supporting the “dual” approach. Although each is somewhat ambiguous and subject to a number of meanings, at least in the form in which they lend support to the “dual” approach, they are, I believe, plainly wrong under both the existing foreign relations law of the United States and what that law ought to be. These are, first the proposition that: “[t]he Senate may also give its consent on conditions that do not require change in the treaty but relate to its domestic application...”¹¹⁷ Second, the proposition that:

Although the Senate’s resolution of consent may contain no statement of understanding, there may be such statements in the report of the Senate Foreign Relations Committee or in the Senate debates. In that event, the President must decide whether they represent a general understanding by the Senate and, if he finds that they do, must respect them in good faith.¹¹⁸

And the third is the proposition:

A court or agency of the United States is *required to take into account* United States materials relating to the formation of an international agreement that might not be considered by an international body such as the International Court of Justice. These may include:

... Committee reports, debates, and other indications of meaning that the legislative branch has attached to an agreement...¹¹⁹

With the possible exception, as previously noted, of the *sui generis* issue of statements concerning whether a treaty is regarded as self-executing, I believe the first proposition is flatly wrong under the Constitution of the United States, as will be examined in greater detail in the next section. The second proposition is quite broad and ambiguous, and

117. See, e.g., cmt. d to § 303, at 160.

118. See, e.g., cmt. d to § 314 at 188.

119. Reporters’ Note 5 to § 325, at 201 (emphasis added).

in some settings or interpretations could be quite innocuous, and even helpful; for example, if the President determines a clear Senate intent on a particular issue and insists on attaching it as an understanding to be conveyed to the other party. But if this proposition is intended to support the "dual" approach, with all of its hidden meaning, then I think it, too, is wrong. And the third proposition also is quite broad and ambiguous. In many settings, of course, it would be quite appropriate. Thus, the official Department of State article-by-article legal analysis frequently submitted with a treaty at the time it is transmitted by the President for advice and consent is a classic example of such "United States materials" appropriate for consideration. Indications of negotiated understandings, as reflected in State Department cable traffic and embodied in a Committee report might be a further example. Moreover, the phrase "required to take into account" is quite general and vague and itself conveys many possibilities of legal effect. As has already been seen, courts sometimes do consult Senate materials in the interpretative process. If they do so simply as a source of information, as they would a law review or treatise, or for evidence of the Executive view of the correct international meaning of the treaty, a view itself entitled to "great weight," as seems to be the principal reason such materials are examined by the courts, then fine. If the statement seeks to convey no more than this, perhaps along with the proposition that the American approach to treaty interpretation is more contextual, and thus will take into account a broader range of materials in the search for the intent of the parties, then fine. But if this proposition is taken as requiring the "dual" approach, that is, as mandating a referent for decision other than the intent of the parties, then, again, I believe that it is flatly wrong.

All three of these propositions share a dubious distinction. None is supported in the *Restatement* by a single case or other authority, other than a citation to Professor Henkin's article on the *Niagara Reservation* case, which, we have seen, did not accept the Henkin thesis in that article on domestic conditions. And the *Restatement* effort to explain away the *Niagara Reservation* case simply sets out the Henkin thesis and makes no reference to the lengthy opinion by Professors Philip C. Jessup and Oliver C. Lissitzyn, which seemed to be accepted by the majority of the Court of Appeals in that case. Perhaps if the Henkin view had been clearly supported by copious authority, or if one of the authors of the contradictory opinion had not been Philip C. Jessup, one of the top international lawyers this Nation has ever produced, it might have been understandable to omit this opinion. As it is, however, I find this *Restatement* note less than candid or persuasive. Thus, Reporters' Note 4 to Section 303 says:

Senate conditions of domestic import. A condition imposed by the Senate that does not seek to modify the treaty and is solely of domestic import, is not part of the treaty and hence does not partake of its character as “supreme Law of the Land.” See Sec 111(1) and Comment *d*. It was once assumed, therefore, that a Senate proviso that a treaty shall not take effect for the United States until Congress adopts implementing legislation could not have the force of law necessary to prevent the agreement from automatically taking effect as law in the United States. See *Power Authority of New York v. Federal Power Commission*, 247 F.2d 538 (D.C.Cir. 1957), *vacated and remanded with instructions to dismiss as moot*, 355 U.S. 64 . . . (1957). The effectiveness of such a Senate proviso, however, does not depend on its becoming law of the land as part of the treaty. Such a proviso is an expression of the Senate’s constitutional authority to grant or withhold consent to a treaty, which includes authority to grant consent subject to a condition. The authority to impose the condition implies that it must be given effect in the constitutional system. See Henkin, “The Treaty Makers and the Law Makers: The Niagara Power Reservation,” 56 *Colum. L. Rev.* 1151 (1956)...¹²⁰

The *Restatement* concedes that such “domestic conditions” are “not part of the treaty” and are thus not “supreme Law of the Land.” These statements, coupled with the hedged additional caveats set out in the footnote quotation of the remainder of Reporters’ Note 4, suggest some uneasiness about both the legal basis for such “domestic conditions,” and their potential breadth as a general domestic lawmaking power binding at least on the federal courts and the President. As required to be “given effect” but not “supreme Law of the Land” they would be a rather cabined form of law of the United States.

120. Reporters’ Note 4 to § 303 at 164. This note concludes:

The Senate has not made a practice of attaching conditions unrelated to the treaty before it. If the Senate were to do so, or were to attach a condition invading the President’s constitutional powers—for example, his power of appointment—the condition would be ineffective. The President would then have to decide whether he could assume that the Senate would have given its consent without the condition

Id. The cross reference to § 111(1) and cmt. *d* in Reporters’ Note 4 adds nothing but a cross reference to the proposition that international law and international agreements are law of the United States and supreme over the law of the States. See § 111(1) and cmt. *d* to § 111 at 42 and 44–45 respectively. This is yet further evidence that the *Restatement* does not regard “domestic conditions” as treaties, or even the broader phrase, international agreements.

F. *Further Inconsistencies with the Foreign Relations Law and Practice of the United States*

In the *Chinese Exclusion Case*¹²¹ of 1899, the Supreme Court established the principle that a later act of Congress, passed within the constitutional legislative authority of the Congress, and clearly inconsistent with a prior treaty, will take precedence over the treaty obligation as a matter of United States domestic law as opposed to our international obligation, which would remain unmodified. The Court understood the difficult choice that it was making when confronted with a later inconsistent act of Congress, and it emphasized that this principle of United States domestic law could not have the effect of removing the Nation's international obligation. The Court also noted that it made this decision in the face of a "constitutional exercise of legislative power."¹²² Since, without more, a Senate "view" as to an issue of treaty interpretation, whatever it is, is not a "constitutional exercise of legislative power" (nor, for that matter, a constitutional exercise of Executive power), it would not seem consistent with the underpinnings of this case for the "dual" approach to override a binding international treaty obligation as a matter of domestic law, which is precisely what the "dual" approach purports to do. Consider also that the "dual" approach, as it was originated, and presumably will be sought to be applied in the future, can be triggered simply by a statement of an Executive Branch witness during hearings, or the views of a few Senators, or perhaps a committee report. While it can, of course, be argued that the Senate treaty interpretation condition has a different standard, it is itself uncertain and ambiguous. Should the principle of the *Chinese Exclusion Case*, which has been criticized by many in our profession, including Professor Henkin, be extended to override our binding international treaty obligations even by informal actions within the advice and consent process? This would seem neither consistent with, nor desirable under, the foreign relations law of the United States.¹²³

121. 130 U.S. 581 (1899).

122. 130 U.S. 581, 581 (1899).

123. In this connection, it should be recalled that John Jay and Thomas Jefferson, perhaps the most experienced foreign affairs experts among the Framers, both had the view that a treaty of the United States could not be overridden even by full legislative acts. Thus, John Jay said in *Federalist* 64: "The proposed Constitution . . . has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government." THE FEDERALIST NO. 64, *supra* note 61, at 437 (John Jay) (Jacob E. Cooke ed., 1961). And Thomas Jefferson, as our first Secretary of State, wrote in 1790, in a memorandum to President Washington: "A treaty made by the President, with the concurrence of two-thirds of the Senate, is a law of the land, and a law of superior order, because it not only repeals past laws, but cannot itself be repealed by future ones."

The “dual” approach is even more clearly in violation of the important principle of United States foreign relations law embodied in the classic *Charming Betsy*¹²⁴ case. This principle, announced by Chief Justice Marshall in the early days of the Republic, is intended to minimize areas in which legislative actions would be found to be in conflict with the international legal obligations of the United States. Indeed, in a post *Chinese Exclusion Case* world, it is one of the most critical provisions of United States foreign relations law designed to promote our compliance with international law. As Chief Justice Marshall stated: “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹²⁵ This principle generally has been applied rigorously by United States domestic courts. They want to be certain that the legislature knew of, and intended to override for domestic purposes, the particular international legal obligation of the United States in question, before they will do so. This principle is embodied in Section 114 of the *Restatement*, which provides: “Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”¹²⁶ The “dual” approach, however, would domestically

THE JEFFERSONIAN CYCLOPEDIA 880 (New York: Funk & Wagnalls Company, John P. Foley ed., 1900). It does not seem likely that these influential Framers would have conceived of unilaterally imposed Senate “domestic conditions” as overriding the Nation’s treaty obligations.

124. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). As an example of the contemporary power of this principle, see *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D. N.Y. 1988).

Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence...

The long standing and well-established position of the Mission at the United Nations, sustained by international agreement, when considered along with the text of the ATA and its legislative history, fails to disclose any clear legislative intent that Congress was directing the Attorney General, the State Department or this Court to act in contravention of the Headquarters Agreement. This court acknowledges the validity of the government’s position that Congress *has the power* to enact statutes abrogating prior treaties or international obligations entered into by the United States... However, unless this power is clearly and unequivocally exercised, this court is under a duty to interpret statutes in a manner consonant with existing treaty obligations. This is a rule of statutory construction sustained by an unbroken line of authority for over a century and a half. Recently, the Supreme Court articulated it in *Weinberger v. Rossi*, *supra*, 456 U.S. at 32, 102 S.Ct. at 1516:

It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 [2 L.Ed. 208] (1804), that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains...”

695 F. Supp. at 1464-65.

125. 6 U.S. (2 Cranch) 64, at 118.

126. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

override our most solemn international treaty obligations without any legislation (or Executive Branch constitutional action), and would seek to do so even on vague and ambiguous “advice and consent process history,” which might simply take the form of testimony by an Executive Branch official or expressed views of members of the Senate. Note that it does not even require recognition and inclusion of the interpretive issue in the Senate resolution of advice and consent or a vote by the Senate. Most seriously, however, in relation to this important principle of our foreign relations law, the “dual” approach would apply even in complete absence of any evidence that the members of the Senate were intent, not just on a particular interpretation, but to have that interpretation override the treaty obligations of the Nation if the interpretation proved to be inconsistent with the internationally correct meaning between the parties. That is, the Senate intent in giving advice and consent to a treaty is always a double intent, relating both to *meaning* and *bargain*. They believe that the meaning is X *and* that the meaning X is the internationally correct meaning bargained for and binding on all treaty parties alike. Later, in a mistake setting, just to focus on the Senate’s intent that the meaning was X tells you nothing about what the Senate would have wanted to do if the internationally correct meaning turned out to be Y. In most cases, the “dual” approach to the contrary, I believe, more often than not, the Senate would not want a result either requiring the United States to shoulder higher unilateral obligations or to violate our treaty obligations, one or the other of which is the result always required by the “dual” approach. The “dual” approach, then, would seem particularly inconsistent with the modern *Charming Betsy* principle, both on the nature of the domestic acts necessary to override our treaty obligations, and on the lack of evidence that the members of the Senate really would have wanted to do so, despite the interpretation being different than they had thought.

Finally, the “dual” approach would seem inconsistent with a general effort in United States foreign policy practice to promote effective third party international adjudication of our treaty disputes¹²⁷ and to partici-

127. Even Professor David Koplow, a principal proponent of the “dual” approach, and one broadly sympathetic to the Biden Treaty Interpretation condition, has his doubts about the effects of these doctrines on the ability of the United States to effectively participate in international adjudication. Thus, he writes:

[The Biden Condition] . . . provides that “the United States shall not agree to or adopt an interpretation different from [the current executive-legislative understanding of the treaty] except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute.” Under this language, could the United States reliably submit disputes to binding international adjudication? Does the language require that, whenever the United States’s interpretation is rejected, this country will resist the

pate effectively in multilateral treaty regimes. Despite current non-acceptance of the optional clause general compulsory jurisdiction of the International Court of Justice, the United States is a party to many international treaties and agreements which contain dispute resolution clauses. Indeed, seeking such clauses in our international agreements has been, and remains, a mainstay of United States foreign policy. The "dual" approach, however, by adding another domestic legal rule that would potentially require the President to violate United States treaty obligations, would certainly not seem consistent with this thrust toward a more effective rule of law in international life. Any lawyer, domestic or international, understands that the correct meaning of language, whether embodied in a statute, a treaty or even a valentine, is not always evident. It is commonplace for contentious cases to present reasonable arguments on all sides, for mistakes to be made, and for courts to sometimes surprise in interpretation. Further, any reasonably sophisticated jurisprudence understands that complex framework agreements such as constitutions or basic multilateral treaties, such as the UN Charter, the European Convention on Human Rights, or the General Agreement on Tariff and Trade, evolve through time and are not simply frozen at the moment of conception.¹²⁸ Losing unilateral control is a price we pay for third party adjudication and the rule of law. Sadly, the "dual" approach would seem the worst kind of "old thinking" in not understanding the national interest shared by the United States and all nations in a more effective rule of law.

authoritative international interpretation, unless the other party agrees to renegotiate the treaty (and give up in diplomacy a victory it just won in litigation) or new domestic United States law is created to effectuate the new ruling?

This type of unilateralism in foreign affairs is not a sound device for aiding the establishment of a viable network of international law and order.

D. Koplow, *supra* note 12, at 1433-34 (footnote omitted).

128. See, e.g., Rudolf Bernhardt, *Evolutionary Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GERMAN YEARBOOK INT'L L. 11, 16 (1999):

In general, it cannot be denied that there is a certain dynamism that is relevant in treaty interpretation because later statements and practices of the parties to a treaty and of the organs of an international organization are relevant elements of interpretation. Even if one can hardly find express statements that every treaty is a living instrument and has to be interpreted accordingly, it is also obvious that in substance this is and must be accepted. Not the existence, but the extent of the evolutive or dynamic element in any treaty interpretation is the real problem.

See also Detlev Vagts, *supra* note 49, at 42 (with reference to the Free Trade Agreement with Canada, the North American Free Trade Agreement with Canada and Mexico, and the GATT/WTO arrangement).

G. Policy Concerns

*"Great nations, like great men, should keep their word."*¹²⁹

Justice Black, dissenting in *Tuscarora Indian Nation*, 1960.

The most serious policy concern with respect to the proposed "dual" approach to treaty interpretation is that in a variety of ways it harms the rule of law and United States efforts to promote the rule of law internationally. Were other nations to adopt such an approach, following the example of the Senate condition in the United States, there would be a truck hole through efforts at treaty compliance.¹³⁰ Other nations would now feel justified in saying they would adhere to the interpretation of their Duma or other constitutional body, rather than the meaning as agreed with the United States. And even if they did not, *we* would be short changing our own treaty partners, with all the associated costs through time in doing so. The provision set out in Article 46 of the Vienna Convention on the Law of Treaties is about as far as one would want to go in recognizing internal rules consistent with a rule of law internationally. That, of course, permits a state to invoke a provision of its internal law regarding competence to conclude treaties when a "violation was manifest and concerned a rule of its internal law of fundamental importance." It seems likely that the Framers, who were so concerned that we adhere to our treaty obligations that they built into the Supremacy Clause language to ensure that past treaties "made . . . under the Authority of the United States..."¹³¹ would be "the supreme Law of the Land," even though none of these past treaties could be presented to the Senate, would have not looked favorably on the proposed "dual" approach.

A second serious policy concern of a proposal that would shift the referent in treaty interpretation from the meaning as agreed between the parties to the meaning as agreed with the Senate, is a staggering cost in United States foreign relations that has largely remained hidden in the debate. Thus, whenever it is applicable, the "dual" approach would inevitably mean either that the United States is required to violate its treaty obligations or to unilaterally comply with obligations not bargained for or binding on the other treaty party or parties. Now the first

129. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting with the concurrence of the Chief Justice and Justice Douglas).

130. Concerning efforts to enhance compliance with treaties generally, see John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881 (1999).

131. U.S. CONST. art. VI.

of these really undermines our long term milieu interests in the rule of law, as well as our reputation as a dependable treaty partner with all of its associated costs, as discussed above. The second setting, however, could also be of great concern in our treaty relationships. While there are exceptions, treaty relationships are generally rooted in mutuality and shared benefit. It could be of the most serious nature in arms control, trade or other matters to be held domestically to a standard not binding on the other treaty party, and thus to set aside mutuality of obligation in a setting where we had assumed it was applicable and had bargained for it. Professor David Koplow, in his defense of the "dual" approach, argues that "[s]trict mutuality of treaty obligations is unlikely and legally unnecessary."¹³² While, in making this argument against the importance of mutuality of obligation, he shows that treaties may intentionally impose *different* obligations on the treaty parties and that their domestic processes may pose *different routes or challenges to implementation*,¹³³ this argument shockingly misses the point. For mutuality of obligation no more requires *identical* obligations on the parties than does a contract for sale. Rather, the point is for the United States and other nations to be able to rely upon the *bargain* struck. *That* is the core meaning of *mutuality* and the core mechanism of *shared benefit through agreement*. The "dual" approach would impose a severe cost to the United States precisely where it held the nation to a higher cost than bargained for. And this would *inevitably* be one of the logical consequences of the "dual" approach whenever it made a legal difference.

A third concern is that, although ostensibly designed to protect the intent of a consenting Senate, the "dual" approach could *never* fully effectuate that intent. Moreover, it is open to question whether more often than not this approach would undermine the Senate intent in settings in which the issue would actually arise. This paradox occurs because, as seen above, the Senate intent in approving a treaty is always a *double* intent; that is, an intent as to treaty *meaning* and an intent as to the treaty *bargain*. The Senate believes that the meaning is X *and it believes* that the meaning X is the internationally correct meaning bargained for or binding on both parties. The "dual" approach makes a difference *only* where these two differ and, thus, inevitably only one of these "intents" can be implemented. The important other "bargain" intent concerning legal obligation and mutuality of obligation will simply always be violated as the approach focuses on the intent concerning the meaning X. Basically, the "dual" approach occurs in settings of mistake, or settings

132. D. Koplow, *supra* note 12, at 1408.

133. See generally section II (B) (5) of the article by Professor D. Koplow, *supra* note 12, at 1408-12.

comparable in their effect to that of mistake. In these settings, the "dual" approach, by always favoring the meaning X over the issues of legal obligation and mutuality of obligation, may actually insist on a "remedy," which is, more often than not, less congruent with the choices members of the Senate would actually have made if faced with the dilemma which triggered the approach. Although speculative, I suspect that few Senators would choose to follow a particular meaning if they knew it would, in a specific case, impose a higher burden on the United States than on the other treaty party. And I hope a considerable number would choose the good faith and credit of the United States in following its legal obligations over insistence on a particular meaning. Adding these important "intents" together, it is quite possible, if not probable, that the "dual" approach as a way of handling mistakes in treaty interpretation would actually less satisfactorily carry out the intent of most Senates through time. It certainly would in some settings.¹³⁴

Yet another concern is that the "dual" approach would add a substantial burden in day-to-day conduct of United States foreign policy as the record of Senate advice and consent were now routinely consulted, as opposed to the usual sources for treaty interpretation. As my fellow former Counselor on International Law to the Department of State, Malvina Halberstam, notes, the "dual approach would mean:

the President would have to review the whole pre-ratification record—testimony, correspondence, reports, statements made in the Senate—every time a question of treaty interpretation arose, to see whether he could decipher any Senate understanding—explicit or implicit—that would require him to take a particular position on the question.¹³⁵

Translating this burdensome task into its precise human and economic costs may be difficult, but as another former Counselor on Inter-

134. In jurisprudential terms, a problem in thinking clearly about this issue is that the concept of "Senate meaning" has multiple referents. That is, it not only means "Senate intent" as to the scope of the treaty right, privilege, power or immunity in question, but also "Senate intent" as to that jural relation being reciprocally binding on, or bargained with, the other treaty party. And, most centrally, whenever the "dual" approach presents itself, and there is a conflict between these "Senate intents," it presents the dual question of meaning concerning "Senate intent" as to which of these "intents" the Senate would prefer to have prevail if only one could be realized, and "Senate intent" as to whether this preference was intended to create a legally binding "domestic condition" apart from the treaty. See generally the classic discussion of ambiguity in legal terms in WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (Walter Wheeler Cook ed., Foreword by Arthur L. Corbin, 1964) And for a classic representative sample of the rich philosophical literature concerning ambiguity in language, see *ORDINARY LANGUAGE* (V. C. Chappell ed., 1965).

135. Malvina Halberstam, *A Treaty Is a Treaty Is a Treaty*, 33 VA. J. INT'L L. 63 (1992).

national Law to the Department, my sense is that these costs would be quite real for the Executive Branch. Indeed, these costs may be difficult to fully appreciate unless one has spent time in the Legal Adviser's Office at State or has sought to decipher "Senate intent" from a complex record such as that in the ABM "broad-narrow" debate.¹³⁶ Eugene Rostow, a former Under Secretary of State, provides a flavor of the pervasiveness and inevitability of the process of interpretation in the day-to-day conduct of United States foreign policy when he writes:

The phenomenon of presidential interpretation and reinterpretation of treaties is not "previously unknown," ... It occurs daily in every nook and cranny of the law. When the President sends instructions to representatives of the United States at the United Nations Security Council and at international conferences on dozens if not hundreds of subjects ranging from telecommunication and aviation to fisheries and the law of war, he is interpreting and reinterpreting treaties as he "faithfully executes" the law... This process of change and development is inherent in the growth of the law. Sometimes the changes are incremental and interstitial. Sometimes they are considerable. They are in fact inevitable as law confronts life every day of the week. Laws evolve around the broad policy purposes sought by their progenitors. But the progenitors can never freeze the law into a static pattern, nor anticipate exactly how it should be applied in all future circumstances.¹³⁷

Must the Executive Branch now review the informal pre-ratification record for each interpretation in this multiplicity of interpretations? And how deeply must they dig into the record?

Of related jurisprudential concern is the *tilt* of the "dual" approach toward a wishful belief in a treaty so clear as to cabin all subsequent interpretation. Is such an objective for a treaty, or any other form of legal prescription, anything but fantasy? Professor W. Michael Reisman, Hohfeld Professor of Jurisprudence at Yale, points out in this connection:

[O]ne reads with... disbelief, in the 1987 Senate Foreign Relations Report that

136. My own experience in carefully examining the full treaty advice and consent process in the ABM "broad-narrow" debate provides an appreciation of the monumental task this review may entail in a contentious treaty interpretation case.

137. E. Rostow, *supra* note 12, at 1457. Professor Rostow also writes: "Since the President necessarily interprets and reinterprets every statute and treaty each time he applies them to new fact situations, the constitutional authority ... [to do so] is an essential part of the executive power entrusted to the President under Article II of the Constitution." *Id.* at 1455.

[t]he committee is aware of *no* instance in which a treaty was reasonably supposed by the Senate, when it consented to ratification, to mean one thing, and it was argued later by the Executive to mean something altogether different.

Can one find any enduring treaties, or laws for that matter, that have not undergone interpretive transformations? Is there any lawmaker with the omniscience or prescience to anticipate every eventuality and to provide explicitly for it and then prohibit all applicative initiative? And if there were such an entity with such objectives, is language capable of this task?¹³⁸

Surely the legal realists and every other modern approach to jurisprudence and communication have alerted us to the inherent interpretive difficulties in law and language.¹³⁹ Nor is this even to consider the desirability of complete rigidity in legal prescription.

Further, and again paradoxically, the "dual" approach may actually reduce rather than enhance the Senate's role in advice and consent to treaties. For that role relates not solely to the *domestically* binding meaning of a treaty but rather to its real meaning as binding the United States *internationally*. It is the job of the Senate to carefully consider and assess the meaning of the treaty in *both* dimensions. Simply to rely on the "dual" approach to protect the Senate, as has been seen, cannot protect the Senate's intent or its role in relation to the international meaning. Most importantly, it cannot protect the *United States*, which one assumes is the principal purpose of the Senate check. The "dual" approach may encourage some to take false comfort in believing they are now "protected," but there is really no substitute for careful Senate consideration of all the issues it believes important. And those issues viewed as of particular importance should be treated in amendments, understandings or reservations fully attached to the resolution of advice and consent and conveyed to the other treaty party. Only in this way, in effectuating a correct international legal meaning on important points, can the interests of the country be truly protected. Sadly, this concern that the "dual" approach may even discourage an active Senate role is

138. See W. Michael Reisman, *supra* note 31, at 327.

139. See, e.g., such classics as Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960); LUDWIG WITTMENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (1953); G. E. MOORE, *PHILOSOPHICAL PAPERS* (1959).

This jurisprudential concern, however, should not be taken to the point of nihilism. Language does convey meaning in context. And it is certainly understandable that the Senate would wish to pin down important issues. Even so, the "dual" approach is not the best way to achieve this objective and even its tilt seems to underestimate the fluidity of legal prescription and the interpretive process.

not an imaginary concern. When I was conducting interviews on the Hill for the Arms Control and Disarmament Agency, in relation to the “broad-narrow” issue, I was presented with an argument that the President had better accept the approach that Executive Branch statements are “authoritative” or the Senate will really have to closely examine future treaties sent up. That, however, *is* the job of the Senate and there is no magic bullet to avoid doing that job in a way which will be effective internationally as well as domestically. Professor Malvina Halberstam nails this point precisely when she says:

the purpose of the constitutional requirement that the Senate give its advice and consent to treaties was not to ensure that domestic law comports with the Senate’s understanding but, rather, to ensure that the United States does not bind itself *internationally* to that which the Senate considers objectionable. The justification for the dual treaty approach relieves the Senate of that responsibility. Thus, under the dual treaty approach, the Senate would abdicate the very function that the advice and consent requirement was designed to serve.¹⁴⁰

Finally, one of the important policy points to note in relation to the choice between the proposed new “dual” approach to treaty interpretation and the traditional “unitary” approach is that there seems to be no problem in need of a remedy. The “dual” approach is promoted, it is said, to keep the Executive Branch honest in presenting treaties to the Senate. Yet despite the contentious public debate in the “broad-narrow” setting about a contemporary interpretation of the ABM Treaty, apparently no one has been able to find a single example in American constitutional history where a President has sought to mislead a Senate in presenting a treaty for advice and consent. It is, at least to the present,

140. Malvina Halberstam, *The Use of Legislative History in Treaty Interpretation: The Dual Treaty Approach*, 12 CARDOZO L. REV. 1649 (1991) (footnotes omitted). Professor Halberstam cites Michael J. Glennon, *Interpreting “Interpretation”: The President, The Senate, and When Treaty Interpretation Becomes Treaty Meaning*, 20 U.C. DAVIS L. REV. 913, 919-20 (1987) for the proposition she is refuting in this passage. Not surprisingly, this article by Professor Glennon was reprinted in the hearings on the ABM Treaty “broad-narrow” debate. See Malvina Halberstam, *supra*, at 1649 n.19.

Of relevance to efficient performance of the Senate’s role in advice and consent, as well as the interpretive roles of the Executive Branch and the courts, practice under the “dual” approach would add an additional layer of concern for all three branches as to whether Administration witnesses had spoken “authoritatively” on a treaty or were merely expressing their personal views or had exceeded their authorized scope of testimony. For a discussion of these issues as they arose in the process of Senate advice and consent to the INF Treaty, see Gary Michael Buechler, *Constitutional Limits on the President’s Power to Interpret Treaties: The Sofaer Doctrine, the Biden Condition, and the Doctrine of Binding Authoritative Representations*, 78 GEO. L.J. 1983, 1992-94 (1990).

simply a non-problem. Moreover, were the President to intentionally mislead the Senate, there is a host of available remedies. These range from enacting legislation, holding hearings, withholding cooperation, criminal sanctions, and, in the most extreme cases, even impeachment.

H. The Right Stuff

"There is no error so monstrous that it fails to find defenders among the ablest men."

Lord Acton, 1881

It is common sense and fair play. It is "do unto others as you would have them do unto you." It is international law. And it is the foreign relations law of the United States as repeatedly declared by the Supreme Court. Treaties should be interpreted by reference to the shared intentions of the parties, not by reference to the shared intent of the President and the Senate. A treaty is not an agreement between the President and the Senate, it is an agreement between nations.

Equally obviously, the President and the Senate should work together in good faith to ensure that shared intentions of the President and the Senate are conveyed to the other party for agreement or renegotiation. That is a difficult job, but it will not be helped by the false comfort, and enormous costs, of the "dual" approach.

IV. "DOMESTIC CONDITIONS": THE INVISIBLE ISSUE AND THE TRAIL OF INVISIBLE AUTHORITY

If the complexities and costs of the "dual" approach have been a hidden virus in the debate about treaty interpretation, the role of "domestic conditions" has been all but invisible. Thus, it is unlikely that the Senate even understood that it was at least implicitly dealing with the scope of its own authority under the Constitution to attach "domestic conditions" to treaties during the advice and consent process, when it embarked on a campaign for what became the "dual" approach and the Biden Senate Treaty Condition now routinely attached to treaties.

"Domestic conditions" are those which take effect, if at all, solely under national law, and not as part of the international agreement or even a broader international bargain. Since the effect of the "dual" approach is solely to alter domestic law, as opposed to the internationally correct legal meaning of the treaty, all such interpretations are inevitably a form of "domestic condition." If "domestic conditions," then, are not within Senate authority, the "dual" approach should fall on that ground alone. If, however, "domestic conditions" are within Senate

authority, the “dual” approach and/or the generic Biden Condition may still be unconstitutional.

This section will examine these issues.

A. *Does the Senate Have Authority to Attach “Domestic Conditions” to Treaty Advice and Consent?*

The issue to be considered here is whether the Senate has general lawmaking authority over domestic law which it can exercise by attaching “domestic conditions” to its treaty advice and consent, and, if it does have any such authority, what are its limitations? There are three theoretical possibilities on which to assess any such Senate “domestic conditions” lawmaking authority.

The first possibility is that such an exercise might be within the legislative powers of the Senate. That possibility is quickly and definitively eliminated, however, by art. I, § 1 of the United States Constitution. It provides: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹⁴¹ The Senate, acting alone, is plainly not the “Congress” under this definition and thus, quite simply, possesses no unilateral legislative power.

The second possibility is that “domestic conditions” attached to a treaty are part of the treaty and take their legal effect from the treaty. If a treaty is a contract or compact between nations, as the Supreme Court has repeatedly held, then “domestic conditions,” whether or not attached to the treaty, are plainly not part of the treaty. This is sufficiently clear that even the *Restatement*, which supports at least limited authority for such “domestic conditions,” says: “A condition imposed by the Senate that does not seek to modify the treaty and is solely of domestic import, is not part of the treaty...”¹⁴² As has been seen, this seems also to be the import of the only case in the United States which has squarely addressed this issue after full briefing and argumentation, that is, the 1957 decision of the Court of Appeals for the District of Columbia Circuit in the *Niagara Reservation* case.

The final possibility is simply to assert that the Senate’s ability to grant or withhold consent carries with it the ability to impose conditions on that consent. That is the apparent view of Professor Henkin, expressed in an article he wrote as a lecturer in law, and subsequently embodied in the *Restatement* under his tenure as Chief Reporter, which we

141. U.S. CONST. art. I, § 1.

142. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 Reporters’ Note 4, at 164 (1987).

will further examine in the next section. But there are powerful arguments against this general proposition, as well as the other rejected possibilities above.

First, as has been seen, there is a long line of Supreme Court decisions that a treaty is a contract or compact among nations. There is also considerable evidence, including Jefferson's *Manual of Parliamentary Practice for the Use of the Senate*, that the role of the Senate concerning treaties is that of a "negative" or veto. There seems to be no evidence that the Senate was to be given general lawmaking power to make domestic law apart from the treaty it was considering. Given the care with which the legislative power was considered and structured in the Constitution, it is really quite an extraordinary leap to believe that the Framers intended for the advice and consent power with respect to treaties to also include a domestic lawmaking power. Moreover, the treaty advice and consent power is not the only such in the Constitution. The language of the Senate "veto" set out in art. II, § 2, cl. 2, of "by and with the Advice and Consent of the Senate" is also the identical language used in that clause for the Senate "veto" in appointment of Ambassadors, Judges of the Supreme Court, and all other officers of the United States.¹⁴³ If, then, the Senate has the ability to attach "domestic conditions" to treaties under this theory, one would assume the Senate also would have the ability to attach "conditions" to the approval of appointments, including Supreme Court Justices.¹⁴⁴ Indeed, this same theory of granting or withholding consent as a basis for domestic lawmaking might also be asserted by the President under the presentment clauses of art. I, § 7 of the Constitution.¹⁴⁵ Further, in its broadest rami-

143. With respect to potential interference of the "dual" approach with the Courts, as well as with the Executive, there is also a parallel in constitutional language between the art. II, § 1 general grant: "The executive Power shall be vested in a President..." and the art. III, § 1 general grant: "The judicial Power of the United States, shall be vested in one supreme Court . . . [and in inferior Courts]."

144. An early opinion of the Attorney General rejects the ability of the Senate to attach conditions to vary a Presidential appointment as submitted. It says: "It's [the Senate's] constitutional action is confined to a simple affirmation or rejection of the President's nominations..." 3 OPS. ATTY. GEN. 188 (1837). In this case the Attorney General gave an opinion that a particular Navy commission failed when the Senate sought to attach to it a designation of rank which would have placed the new lieutenant on the register above one hundred sixty-two other lieutenants.

145. Professor Kenneth S. Gallant writes in his article on the "Biden Condition":

The idea that the President's understanding of legislation is relevant to statutory interpretation has been highly controversial. No one, however, is claiming that the President's understanding of legislation, even as received from members of Congress, is controlling. Yet the Senate, through the Biden Condition, is asserting that its understanding of treaties controls their interpretation.

See Kenneth S. Gallant, *American Treaties, International Law: Treaty Interpretation after the Biden Condition*, 21 ARIZ. ST. L.J. 1101 (1989).

fications, this theory could even be asserted to support a power to make binding domestic law as a condition attached to the exercise of *any* one House or branch power, such as the “sole Power of Impeachment” of the House of Representatives. Such a theory would seem of great consequence, and quite far reaching under the Constitution.

Again, the only treaty law case in the United States which seems to have squarely addressed this issue after full briefing and argumentation, the *Niagara Reservation* case, did not accept the validity of a Senate imposed “domestic condition” and, thus, would also seem to have rejected this “condition argument” as well. Indeed, the *Niagara Reservation* court refused to accept a “domestic condition” as a reservation to a treaty despite the fact that the case presented the strongest category of domestic conditions, that of whether the treaty would have direct effect as domestic law or whether it would only have an effect in the United States subsequent to a later act of Congress as per the Senate reservation. Indeed, the dissenting Court of Appeals Judge, Circuit Judge Bastian, specifically pointed this out, saying:

the Senate has not by its reservation sought to extort as its price for ratifying the treaty that it be allowed, independently of the Congress at large, to determine the nature and status of domestic legislation or policy. It has not provided that its conditional ratification is to be regarded as withdrawn if the Federal Power Act *is ever applied* to the water in question. It has merely left the question as to whether that Act or some other should be applied open to determination of both houses of Congress and the President.¹⁴⁶

Second, to imply a general domestic lawmaking power in the Senate alone, pursuant to its advice and consent power, presumably not just in relation to treaty approval, but also all such matters, including the appointment of Supreme Court Justices, as this power appears in art. II, § 2, cl. 2, would seem profoundly at odds with the decisions of the Supreme Court in the *Chadha* and *Clinton* cases and the underlying principles of separation of powers and checks and balances policed by the Court in those cases. If the one house legislative veto, with its substantial basis in legislative practice, and the line item veto, as authorized formally by the full art. I, § 7 process of both Houses of Congress and the President acting together, are not valid, it would seem quite a stretch to argue that the Senate alone should have a domestic lawmaking power of undefined scope to be exercised at its discretion on the occasion of

146. *Power Authority of New York v. Federal Power Comm'n*, 247 F.2d 538, 547 (D.C. Cir. 1957), *vacated and remanded with instructions to dismiss as moot*, 355 U.S. 64 (1957).

consideration of a treaty or an appointment. Certainly this would be fundamentally at odds with the very purpose of including both houses of Congress and the President in the general federal domestic lawmaking process. Such a limited process would be expected to make it much easier for special interests to obtain their goals and thus, to subvert the real protections for the people of the United States, which underlie the separation of powers and checks and balances principles. These were, indeed, among the most fundamental principles of the United States Constitution, as expounded by Madison and other Framers. Such an undefined Senate lawmaking power would also seem to run counter to the expectations of the House of Representatives, which has assumed based on general constitutional practice that to the extent legislation is required to implement treaties domestically it will play a role in that process. Yet if the Senate power is based on a general authority to condition consent on acceptance of domestic conditions, why could it not attach full implementing legislation to its resolution of advice and consent and bypass the House?

Third, at least if the *Restatement* view is accepted, that the Senate does have a power to condition consent on acceptance of domestic conditions but that such conditions are not "the supreme Law of the Land" under the Article VI Supremacy Clause, then this doctrine could create further confusion in undermining uniformity in United States federal law, by creating one class of law binding only on federal officials and judges, presumably with state officials and judges potentially governed by different rules with respect to the same case. On policy grounds at least this would seem an undesirable result in matters even relating to United States treaties. And it would seem counter to the very purpose of the Supremacy Clause, which is to make the laws and treaties of the United States also binding on the States. That the *Restatement* is driven to this remarkable distinction between the domestic condition as binding and yet not "the supreme Law of the Land" suggests that the origins of this doctrine lie in logic chopping rather than a full analysis of its implications.

Fourth, just as the constitutional structural issue concerning separation of powers would seem inconsistent with the doctrine that the art. II, § 2, cl. 2 "advice and consent" powers of the Senate include an incidental one House domestic lawmaking power, so too, the constitutional structural underpinnings with respect to the respective powers of the federal and state governments would seem to at least cast some additional doubt on this "domestic condition" doctrine. That is, yet another important underlying principle of our federal constitutional system is that the powers of the federal government are limited. While genera-

tions of law students reared on an expansive commerce clause may have largely forgotten this structural underpinning, it is unquestionably significant, and is now undergoing some degree of rediscovery by the courts.¹⁴⁷ The structure of this principle, at least as a general principle, is explicit with respect to the federal legislative power. That is, the Constitution uses the language in art. I, § 1 of “[a]ll legislative Powers herein granted...” Further, the Ninth and Tenth Amendments to the Constitution respectively speak of rights retained by the people, and reserve “to the States respectively, or to the people” “powers not delegated to the United States by the Constitution, nor prohibited by it to the States...” Although not free from doubt, it seems likely that the treaty power entrusted to the federal government also has restrictions rooted in this same structural underpinning of the Constitution. In the case of the treaty power, however, these are implicit in the nature of that power, rather than explicit. Thus, the official position of the Department of State today, as embodied in its *Foreign Affairs Manual, Handbook on Treaties and Other International Agreements* provides that, “The President, with the advice and consent of two-thirds of the Senators present, may enter into an international agreement on any subject *genuinely of concern in foreign relations*.”¹⁴⁸ This language makes it clear that for the Department a prerequisite for a constitutional international agreement is that it must be on a subject “genuinely of concern in foreign relations.” This requirement is assumed to be implicit in the nature of the federal treaty power and, of course, parallels the many Supreme Court decisions indicating that a treaty is a contract or compact between nations. But by definition, domestic conditions are those not part of an agreement or bargain with the other treaty partner. And as a matter of underlying constitutional structure, to read into the advice and consent power the power to make separate domestic law apart from the underlying treaty can increase the risk of an end run around this treaty law limit on federal power. At the least it would raise the question of how such limits would be defined in the treaty advice and consent context given that, definitionally, such purely domestic lawmaking was not

147. See, e.g., *United States v. Lopez*, 517 U.S. 549 (1995).

148. UNITED STATES DEPARTMENT OF STATE, HANDBOOK ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS, FOREIGN AFFAIRS MANUAL 11 FAM 710, 721.2 (emphasis added). While serving as the Counselor on International Law to the Department of State, the author participated in an early draft of this State Department treaty procedure sub-chapter of the Foreign Affairs Manual called internally the “Circular 175 Procedure,” including the quoted material.

Circular 175 is reprinted in the latest treaty study of the Senate Committee on Foreign Relations. See TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 301, 303, 103d Cong., 1st Sess., (Comm. Print 1993).

deemed part of the international bargain. Now, in the real world, the foreign affairs concerns of the United States are so vast it would be hard to imagine a treaty invalid under this Circular 175 requirement. Nevertheless, I believe that the principle is valid, and if, for example, the Supreme Court were to strike down an act of Congress as beyond its art. I, § 8 powers, and the Senate and the President were immediately to collude to undo the Court decision by entering into a treaty without any genuine foreign affairs concern and solely for the purpose of overturning the Court decision, I believe that the Court would and should strike down the treaty. While this principle seems unlikely to be tested in real world treaty settings, it does present at least another concern with respect to an undefined Senate authority to attach purely domestic conditions to its advice and consent as exercised pursuant to art. II, § 2, cl. 2.¹⁴⁹

This further constitutional requirement, of relevance to the permissibility of a general Senate "domestic conditions" power in relation to treaty approval, that treaties must be on a subject "genuinely of concern in foreign relations," is rooted in repeated statements of the Supreme

149. The present *Restatement* drops the "international concern" requirement reflected in the previous *Restatement* and the current Circular 175 of the Department of State. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 Reporters' Note 6, and § 303 Reporters' Note 13 (1987). Reporters' Note 6 to § 302 says: "This section is in accord with section 117 of the previous Restatement, except that this Restatement [*Restatement (Third)*] rejects the requirement that the subject of an agreement be of international concern..." *Id.* Reporters' Note 2 to § 302, however, does say: "A treaty or other international agreement must be a bona fide international act with one or more other nations, not a unilateral act dressed as an agreement; no agreement of the United States appears to have been challenged in the courts as not being a bona fide agreement." *Id.*

This issue, of course, is not that of *Missouri v. Holland*, in which the Court made it clear that the treaty power is broader in scope, and not limited by, the art. I, § 8 legislative powers of the federal government. See *Missouri v. Holland*, 252 U.S. 416 (1920). The issue, rather, is whether there is any limit on the scope of the treaty power by virtue of its nature as a power to make international agreements; that is, whether there is any limit at all on the treaty power other than violation of specific prohibitions in the Constitution. In this connection, it should be noted that the very reason the treaty power transcends the art. I, § 8 enumerated legislative powers is that it is an exercise of the federal foreign relations power, either conceived as inherent in the federal government, or in the international treaty (or more broadly agreement) power of the Nation, or as an attribute of a broader implied power in foreign affairs. An exercise *not* pursuant to that power, then could, of course, not take its authority from that power *and* would still be subject to the structural limitations both of federalism and the Article I legislative process. Thus, the "genuinely of concern in foreign relations" standard in the State Department Circular 175 would seem to be on sound theoretical ground in so limiting international agreements. And since "domestic conditions" are, by their nature, neither part of the treaty nor other than a condition solely of domestic import, it would seem that they would both be subject to the structural limits of the federal system rooted in the nature of federalism and the Article I legislative power, and unconstitutional non-exercises of the federal international agreement power. That is, in *Missouri v. Holland* terms, a "domestic condition," unlike a treaty, is simply not "made... under the Authority of the United States" as set out in the Supremacy Clause.

Court. In the 1890 case of *Geofroy v. Riggs*, the Court described the scope of the treaty power as “touching any matter which is properly the subject of negotiation with a foreign country.”¹⁵⁰ And in the 1924 decision of *Asakura v. City of Seattle*, the Court said that the treaty power extends “to all proper subjects of negotiation between our government and other nations.”¹⁵¹ Are “domestic conditions” contemplated within the thrust of these statements? At least three United States Secretaries of State have taken the position that the treaty power is or should be limited to matters of international concern.¹⁵²

Fifth, it should also be noted against any one house Senate power to

150. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). Earlier in its opinion the Court described as “clear” the proposition that “the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations.” *Id.* at 266.

151. *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924). The Court also said: “[t]he treaty-making power of the United States . . . does not extend ‘so far as to authorize what the Constitution forbids’ . . .” *Id.* at 341.

152. *See Power Authority of the State of New York v. Federal Power Commission*, 247 F.2d 538, 543 (1957):

Our present Secretary of State has said that the treaty power may be exercised with respect to a matter which “reasonably and directly affects other nations in such a way that it is properly a subject for treaties which become contracts between nations as to how they should act”; and not with respect to matters “which do not essentially affect the actions of nations in relation to international affairs, but are purely internal.” . . .

Charles Evans Hughes, just before he became Chief Justice and after he had been Secretary of State, addressing himself to the question whether there is any constitutional limitation of the treaty power, said: “The [treaty] power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns.” The Hughes quote above, also referred to in Reporters’ Note 2 to § 302 of the *Restatement (Third)* on the issue of “international concern” in treaty scope, can be found directly at Charles Evans Hughes, as President of the American Society of International Law, 23 PROC. AM. SOC’Y INT’L L. 194 & 196 (1929).

Given the modern understanding as to the sweep of issues of international concern, certainly including human rights treaties in an effort to promote human dignity, democracy and the rule of law worldwide, this limitation on the treaty power is unlikely to have any detrimental effect on the real-world exercise of the treaty power. But the underlying principle continues to speak directly and cogently to any Senate asserted general unilateral domestic lawmaking power in the exercise of its advice and consent power.

Similarly, Attorney General Herbert Brownell, Jr., in Administration testimony in opposition to the Bricker Amendment, stated: “[o]ur federal system did not contemplate having treaties deal with matters exclusively domestic in their nature.” Statement by Honorable Herbert Brownell, Jr., *supra* note 29, at 5. And he further pointed out that, “The view of the Supreme Court has always been that, ‘the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations.’” *Id.* at 35.

In footnote 80, appended to this proposition, Attorney General Brownell cited a variety of Supreme Court decisions before and after the 1920 decision in *Missouri v. Holland*, and including that case. Thus, his footnote in full provided: “*Geofroy v. Riggs*, 133 U.S. 258, 266 (1890). See also *Holmes v. Jennison*, 14 Pet. 540, 569 (Opinion of Taney, C.J.) (1840); *Holden v. Joy*, 17 Wall. 211, 243 (1872); *In re Ross*, 140 U.S. 453, 463 (1891); *Missouri v. Holland*, 252 U.S. 416, 433-434 (1920); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931).”

attach “domestic conditions” incidental to its Article II, advice and consent powers, that the Framers certainly understood how to specify such related incidental powers if they had intended to do so. For art. I, § 8 of the Constitution concludes the enumeration of *legislative* powers with the famous “necessary and proper” clause, providing: “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁵³

There is no such comparable clause accompanying the Senate “negative” in the exercise of its advice and consent power in art. II, § 2. And, in a structural parallel in the Constitution, the President is also not given a power to make domestic law incidental to the exercise of the Presidency’s power to “negative” legislative initiatives under the presentment clause of art. I, § 7. Moreover, when this power incidental to other powers *is* specified, it is a *legislative* power, not a power incidental to other Departments in the exercise of their powers.

Sixth, at least with respect to “domestic conditions” said *to arise from informal Senate pre-ratification history*, the “legislative history” analogy seems fundamentally misplaced. Whatever one’s approach to the permissible scope of reliance on “legislative history” in statutory interpretation, all agree that its use is for the purpose of *interpreting a formal lawmaking prescription* adopted through normal legislative procedure and a vote. No one suggests that legislative history alone, absent an enactment to be interpreted, can make binding law. But that is exactly the posture of informal Senate pre-ratification history in the absence of inclusion of a relevant provision to be interpreted in a resolution of advice and consent. Such “history” cannot be an interpretation of the resolution of advice and consent which contains no relevant provision. And it cannot be an interpretation of the treaty in many cases, as in its purported assertion in *Rainbow Navigation*, simply because it is not an interpretation of the treaty at all, but rather a side agreement of domestic relevance, and in all cases simply because interpretation of the treaty refers to ascertaining the intent of the parties, not simply the intent of the domestic processes for treaty approval of one of the parties. Indeed, the “legislative history” analogy is an inapt role reversal. In legislation, where one looks to legislative history, it is the legislation, and the legislative act, from which the authority of the law arises. And the role of the President is that of a veto. In a treaty, however, the authority arises from the agreement or compact between nations and it is from the

153. U.S. CONST. art. I, § 8, cl. 18.

agreement that the authority arises. And the role of the Senate, absent formal reservations, understandings, amendments or international conditions, is that of a veto. The legislative history of the Senate's veto, absent a relevant provision in the resolution of advice and consent, should be no more authoritative than the legislative history of the President's veto. In both cases, history may be relevant to interpretation, but it is not of itself "authoritative" or legally binding.¹⁵⁴

Finally, it can at least be questioned whether it is desirable to have the Senate engage in separate domestic lawmaking as it is tasked with giving advice and consent concerning a treaty. Quite apart from the easier one house mark for special interests, there is a concern as to whether the Senate will effectively perform its role in considering the international agreements of the United States on their merits as internationally binding the nation if it is simultaneously engaged in domestic lawmaking. The experience, at least in the constitutional debate incident to the "broad-narrow" debate, would give pause in this, with at least one highly placed congressional staff member explaining to the author that the Senate needs the "dual" approach precisely so that it will *not* be required to review treaties as carefully as it would otherwise.

B. Even If "Domestic Conditions" are within Senate Authority, Are the "Dual" Approach and the "Senate Treaty Condition" Constitutional?

1. Constitutionality of the "Dual" Approach

Since, by definition, the "dual" approach is a form of "domestic condition" with a meaning separate from the underlying treaty, if for the above or other reasons domestic conditions generally are in violation of the Constitution, then, of necessity, the "dual" approach to treaty interpretation is also unconstitutional. But there are powerful additional reasons for believing that the "dual" approach is unconstitutional even if

154. This point is made in an interesting manner in the note by Gary Michael Buechler: Those who would approach treaty interpretation according to the rules of statutory interpretation fail to consider this role reversal [between the President and Senate]. These commentators place undue significance on Senate-generated interpretations of the treaty that are not expressed as explicit conditions. The distinction between congressional drafting of statutes (with presidential review) and presidential drafting of treaties (with Senate review) is highlighted by the placement of the statute-making rules in article I—describing the legislative powers—and the treaty-making rules in article II—describing the executive powers. By placing great weight on Senate-generated interpretations of a proposed treaty these commentators allow the Senate (or even, perhaps, a few Senators) to impose its interpretation on a treaty without either formal Senate or Executive action.

Buechler, *supra* note 140, at 2016-17 (footnotes omitted).

domestic conditions generally, or even certain domestic conditions, are permissible.

First, since the "dual" approach, whenever it has an effect of its own, seeks to compel the President to ignore the legally binding meaning of a treaty between the parties, it would seem simultaneously in violation of the Supremacy Clause and of the President's obligation in art. II, § 3 to "take Care that the Laws be faithfully executed..." For Article VI, the "Supremacy Clause" is quite clear. The Constitution, the laws of the United States, and "Treaties made" are "the supreme Law of the Land..." It has already been established that a long line of Supreme Court cases establishes that a treaty is a contract or compact among nations. As such, it is the correct meaning of the treaty as an international bargain that is the "Law of the Land," unless overridden by subsequent legislation. Surely core purposes of the Supremacy Clause were to ensure uniformity of federal law throughout the United States and to ensure faithful adherence to the treaty obligations of the United States within every jurisdiction in the United States. Neither of these goals would be met if we adopted the *Restatement* view that domestic conditions must be given effect, yet are not the Supreme Law of the Land for purposes of the Supremacy Clause, and this doctrine were to be applied to the "dual" approach to treaty interpretation.¹⁵⁵ It is important to note in this connection that quite apart from the constitutionality of "domestic conditions" generally, the "dual" approach always directly offends the Supremacy Clause and its direction that treaties made are "the supreme Law of the Land," for unlike certain other variants of such conditions, "dual" approach domestic conditions, if of binding legal effect, would *always* contradict *the treaty itself*.

Second, the "dual" approach would seem also to interfere with the President's general foreign affairs power in a number of serious ways.¹⁵⁶ Thus, it would complicate United States foreign relations by compelling the President, whenever it was applicable, either to violate the solemn international legal obligations of the United States or to be held to higher requirements than had been bargained for in the international

155. Professor Halberstam notes on this latter point: "[w]here the legislative history results in an interpretation that is narrower, i.e., more permissive, than the interpretation internationally, the United States would be in breach of its international obligations. Thus, the dual treaty approach would also undermine the very purpose of the supremacy clause, which was to make the obligations that the United States undertakes internationally binding domestically." Malvina Halberstam, *supra* note 140, at 1649-50.

156. I agree with Thomas Jefferson that the grant of "[t]he executive Power" in Article II carries with it the general foreign affairs power and that "[e]xceptions are to be construed strictly..." See 16 THE PAPERS OF THOMAS JEFFERSON 378-79 (Julian P. Boyd ed., 1961). For a fuller exposition of this point, see JOHN NORTON MOORE, *supra* note *.

agreement. It would have important consequences for the ability of the United States to participate in international courts and tribunals and adhere to the decisions of those courts. For whenever the “dual” approach mandated that the Senate had a different intent, then the President would be obligated not to follow another interpretation, even if proclaimed after careful review by an international Court in which the United States had been fully participating. The “dual” approach would also greatly complicate the job of the Executive Branch in its day-to-day interpretation of a multiplicity of treaty issues. For if such an approach were to be adopted, it would require the Executive Branch to routinely examine the record of Senate advice and consent in addition to the usual sources under the Vienna Convention and those typically heavily relied on, such as the submission statement of the President with any accompanying legal analysis of the Treaty. In important cases, examination of the record of Senate consideration may already be done, but the “dual” approach would more broadly extend this burden to routine treaty issues as well. It would also seem to diminish the important role of the Executive in commenting, where appropriate, for domestic courts and other domestic fora, on the interpretation of international agreements, a role said by the *Restatement* generally to be accorded “great weight.” In view of these, and no doubt other, ways in which the “dual” approach, sought to be established by implication from the advice and consent power, would interfere with the President’s responsibility in the conduct of foreign relations, the conclusion of Chief Justice Taft writing for the Supreme Court in the first critical separation of powers case, *Myers v. United States*,¹⁵⁷ would seem most appropriate. He wrote:

Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, [and] ... that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication...¹⁵⁸

Third, the “dual” approach, by making it easy to violate the international legal obligations of the United States, would seem to violate the structural balance, with constitutional underpinnings, reflected in the foreign relations law of the United States with respect to the uneasy relationship between the international obligations of the United States and the adoption of subsequent inconsistent legislation. The uneasy truce in

157. *Myers v. United States*, 272 U.S. 52 (1926).

158. *Id.* at 163-64.

existing law is that the subsequent inconsistent legislation will prevail for purposes of domestic law, but we require an extraordinarily high standard as to congressional intent to violate our international legal obligations before we will construe the later act as inconsistent with our international obligations. As has been seen, this is the principle of the *Schooner Charming Betsy* case in which Chief Justice Marshall stated that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains..."¹⁵⁹ And, as has been seen, the *Restatement* adopts this as black letter foreign relations law when it says in § 114: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."¹⁶⁰ The "dual" approach, however, would not simply set aside under domestic law the international legal obligations of the United States pursuant to a very clear mandate from both Houses of Congress, signed into law by the President, but it would purport to trump our international legal obligations simply by the actions of one house, by definition in a setting in which it is unlikely to have adverted to a consequence of its action as violating our international legal obligations, simply because it believed that the intent it had was the correct international meaning. Is it structurally sound under the Constitution of the United States to make it this easy to violate our treaty obligations? Would such a result be consistent with the Framers' concern that we adhere to our treaty obligations, something done quite poorly under the Articles of Confederation? Moreover, as the final point in this part will discuss, some of the incarnations of the "dual" approach would trigger this approach and, thus, where applicable override our international legal obligations on quite thin "evidence" as to Senate intent, even on the primary interpretive issue.

Fourth, since the United States is bound by important principles of customary international law with respect to observance of its treaty obligations, including *pacta sunt servanda*, and that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty," subject to the rule we have earlier seen concerning internal law regarding competence to conclude treaties where a violation was "manifest" and of "fundamental importance," the constitutional underpinnings of the foreign relations law of the United States should simply override any effect of the "dual" approach by the direct application in United States courts of these fundamental international legal ob-

159. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

160. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

ligations of the United States.¹⁶¹ The classic case in this regard is *The Paquete Habana*, in which Justice Gray declared for the Court, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."¹⁶² Most importantly for our consideration here, however, Justice Gray qualified this obligation by adding that customary law would apply "where there is no treaty, and no controlling executive or legislative act or judicial decision."¹⁶³ Note that Senate-imposed "domestic conditions" attached to treaties are *not* on his list. Note also that, as we have seen, the "dual" approach, as a form of "domestic condition," is neither a treaty nor a legislative act and, as such, there is no basis in the foreign relations law of the United States for it to trump fundamental customary international legal obligations of the United States. And finally, note that the obligation sought to be trumped by the "dual" approach is precisely the "treaty" obligation referred to by Justice Gray. If "domestic conditions" cannot trump the customary law obligations of the United States how can they trump the treaty law obligations of the United States?

Fifth, the "dual" approach is not just a purported exercise in prospective lawmaking, rather it is an effort to direct, prospectively and retrospectively, the mode of decision, and weight to be given evidence to be used, in interpreting the treaty obligations of the United States, a role which belongs to the courts in justiciable cases and controversies. Further, the Senate action which triggered the "dual" approach was motivated by, and also directed at, an effort to compel a *particular* interpretation of a *particular* treaty, *after* the adoption of that treaty. Even if the full legislative process could adopt such rules, and the permissible parameters of any such action are unclear, could any such potential interference with the role of the courts as a principal interpreter of treaties be unilaterally imposed by the Senate, indeed, even by informal Senate "legislative history?" This Senate imposed "dual" approach has a sour flavor of the problem presented in the classic 1871 case of *United States v. Klein*, in which the Court struck down an effort by Congress to limit the effect of a pardon as "evidence of the rights conferred by it," saying, "We must think that Congress has inadvertently passed the limit which

161. See arts. 26, 27 & 46 of the Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27. Although the United States is not yet a party to this Convention, it regards the substantive provisions of the treaty as customary international law.

162. 175 U.S. 677, 700 (1900).

163. *Id.*

separates the legislative from the judicial power."¹⁶⁴

Finally, various incarnations of the "dual" approach would seem to violate another structural component of the Constitution related to the necessity of the Senate to act with the concurrence of "two thirds of the Senators present." Thus, the insistence that the statement of any Executive Branch official to the Senate would automatically create a domestically binding legal obligation as to the meaning of the treaty, by itself bypasses the requirement of adequate evidence within the advice and consent process of an intent of "two thirds of the Senators present." Specific statements by Executive Branch officials may or may not have that effect, but the issue is the intent of "two thirds of the Senators present," and there is certainly no constitutional principle of automatic lawmaking simply by Executive Branch *statement* during the advice and consent process (any more than during the legislative process). This same point is also relevant with respect to other variants of the "dual" approach, which seem not to clearly focus on the need for an intent shared by "two thirds of the Senators present" as the legal standard for *any effect* of Senate action during the advice and consent process.¹⁶⁵ The importance of the "two thirds" standard would seem consistent with the decision of the Supreme Court in the important treaty law case, *Fourteen Diamond Rings v. United States*, which regarded an effort at Senate interpretation of a treaty which fell short of "two thirds of a quorum" as "absolutely without legal significance..."¹⁶⁶

2. *Constitutionality of the "Senate Treaty Condition"*

The "Biden Senate Treaty Condition," attached initially to the INF Treaty and subsequently to many other treaties, is a special form of "domestic condition" and "dual" approach. Thus, if domestic conditions are, as a general proposition, unconstitutional, then the Senate Treaty Condition is also unconstitutional. Similarly, if the "dual" approach is

164. *United States v. Klein*, 80 U.S. 128, 144, 147 (1871); see also *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("[C]ourts interpret treaties for themselves.").

165. Some variants of the "dual" approach, such as the principles set forth in the Byrd-Nunn letter to Secretary of State Shultz of February 5, 1988, seem not even to focus meaningfully on the *Restatement* test that the President must decide whether Senate statements "represent a general understanding by the Senate..." in order to be binding on the President. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 cmt. d (1987). And even this *Restatement* test does not clearly focus on the real requirement of concurrence by "two thirds of the Senators present," as set out in art. II, § 2, cl. 2 of the Constitution and the *Fourteen Diamond Rings* case. See the Letter from Senators Robert C. Byrd and Sam Nunn to Secretary of State George P. Shultz (Feb. 5, 1988). This letter is set out and discussed in detail in JOHN NORTON MOORE, *supra* note *.

166. *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 180 (1901).

unconstitutional, then the Senate Treaty Condition is unconstitutional. For the reasons discussed above, I believe that the Treaty Condition is unconstitutional as within both of these unconstitutional categories without more. But there is more, and for these additional reasons also, I believe that this condition is unconstitutional and without legal effect.

The "Senate Treaty Condition" seeks to affirm, not simply a particular interpretation for one treaty under consideration by the Senate, but rather a modality of interpretation adopting the "dual" approach as applicable to the interpretation of all treaties. As such, it is a form of "domestic condition" purporting to go beyond relevance even to the treaty to which it is attached and purporting to legally mandate a modality of treaty interpretation generally, in an area which, as has been seen, certainly reflects important constitutional underpinnings. It is as though the War Powers Resolution, adopting a congressional view of the war powers at the expense of the presidency, were sought to be enacted into law, not by both Houses over the veto of the President, but by the Senate alone, seeking to mandate its own view of treaty interpretation and an expansive "domestic conditions" power, of potential concern both to the House of Representatives and the President. And, of course, the Constitution and its principles cannot be changed, even by the modality adopted in the now widely regarded as suspect War Powers Resolution.¹⁶⁷

Constitutionally, this "Biden Treaty Condition" presents special concerns in many respects, including assertion of a Senate "domestic conditions" power going beyond relevance to the particular treaty before the Senate, and seeking to mandate a particular general modality for the President to carry out his duty to "take Care that the Laws be faithfully executed" in the treaty interpretation area. Both would seem unconsti-

167. On both policy and legal grounds, the War Powers Resolution has come under strong criticism in recent years. Particularly interesting in this regard was a Senate colloquy on May 19, 1988, accompanying the introduction of legislation to amend the Resolution, in which Senate Majority Leader George Mitchell, former Majority Leader Robert Byrd, Armed Services Committee Chairman Sam Nunn, Ranking Republican John Warner, and several other Senate leaders took turns attacking the Resolution. Senator Warner, for example, said: "[T]here are provisions which are clearly unconstitutional." 134 CONG. REC. 6177 (daily ed. May 19, 1988). And Senator Mitchell asserted:

Although portrayed as an effort "to fulfill... the intent of the framers of the U.S. Constitution," the War Powers Resolution actually expands Congress' authority beyond the power to declare war to the power to limit troop deployment in situations short of war...

The War Powers Resolution therefore threatens... the delicate balance of power established by the Constitution...

134 CONG. REC. 6177-78 (daily ed. May 19, 1988). For a detailed discussion of the constitutional shortcomings of the War Powers Resolution, see ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY* (1991) (Foreword by Gerald R. Ford).

tutional encroachments. The Senate, of course, also seeks by this condition to impose, and write large, a blanket modality of treaty (and constitutional) interpretation on the courts as well, since it is asserting a general lawmaking power affirming what it declares to be "the constitutionally based principles of treaty interpretation." This too would seem to raise constitutional issues in relation to the independence of the judiciary and, of course, cannot remove their authority to declare such actions unconstitutional.

The especially suspect nature of the Biden Condition is evident in that even the *Restatement*, which in a variety of ways has tilted toward "domestic conditions" and the "dual" approach, would not seem to countenance the condition. Thus it says, "The Senate has not made a practice of attaching conditions unrelated to the treaty before it. If the Senate were to do so, or were to attach a condition invading the President's constitutional powers—for example, his power of appointment—the condition would be ineffective."¹⁶⁸

Similarly, Professor Louis Henkin, the Chief Reporter of the *Restatement*, and one, arguably, whose work provides the principal intellectual underpinning of at least "domestic conditions," if not the "dual" approach itself, seems to suggest that the INF Treaty Condition is not a legally binding "condition of consent but only an expression of the Senate's view of the Constitution." Thus, he writes:

In my view the constitutional principle declared by the Senate [attached to the INF Treaty] is sound and its implications for treaty interpretation unexceptionable. But its title as a condition is dubious. The President, eager to make the treaty, accepted the Senate's consent subject to the Senate's "condition," but issued a statement declaring the condition to be "improper." Proper or not, such conditions are not very significant except as a salvo in President-Senate warfare in the conduct of their shared treaty power. Attaching a constitutional principle as a "condition" of consent to a treaty does not bind future Presidents to that principle. A future President might not agree that there is such a con-

168. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 Reporters' Note 4 (1987). The theory of the *Restatement* as to its own limitation here, other than of course the specific invasion of constitutional powers part of it, is never explained. That is, it asserts in this same Reporters' Note that the basis for the Senate "domestic condition" power is the Senate's ability "to grant or withhold consent to a treaty, which includes authority to grant consent subject to a condition." Why under that theory is the power limited to conditions related to the treaty? In any event, the *Restatement* test is sufficiently broad as apparently to include implementing legislation for domestic implementation of the treaty, a subject which certainly has plausible relation to implementation of the treaty, and a power which would likely come as a surprise to the House of Representatives.

stitutional principle. The principle may not bind even the President who ratified that particular treaty. The principle is not really a condition of consent but only an expression of the Senate's view of the Constitution. The Senate's view may be disputed by the President and must stand or fall on its merits.¹⁶⁹

C. *The Restatement Position and the Trail of Invisible Authority*¹⁷⁰

The *Restatement* does not address the core issue in the "unitary-dual" debate as to the governing law under the foreign relations law of the United States in a setting in which a meaning of a treaty understood by the Senate at the time of advice and consent turns out not to be the internationally correct meaning of the treaty. This issue is apparently for the *Restatement* what it has been for other authorities, simply a hidden virus whose presence and implications have not been fully understood. One can only hope that the distinguished Reporters of the *Restatement*, whose commitment to the rule of law is unquestioned, would reject the "dual" approach as the issue and its implications become more fully understood. Nor has the *Restatement* adopted the most extreme views in the debate, that, for example, the normative basis for treaty interpretation is the meaning shared between the President and the Senate, as opposed to the meaning shared between the treaty parties, or that no materials can be taken into account in treaty interpretation other than those before the Senate at the time of Senate consideration for advice and consent.

Sadly, however, the *Restatement's* views on a number of issues have given aid and comfort to the "dual" approach and to a variety of other

169. Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 417 (1989). This statement by Professor Henkin that the Senate Treaty Condition is not really a binding "condition of consent" seems not to be shared by at least one of the major author's of the Condition, who argues that it even applies retroactively to govern the interpretation of the 1972 ABM Treaty. See Biden & Ritch, *The End of the Sofaer Doctrine: A Victory for Arms Control and the Constitution*, 18 ARMS CONTROL TODAY 3, 8 (Sept. 1988). "In my judgment, the facts of the case are such that the Senate, by enacting the Biden Condition [the INF Treaty Interpretation Condition], has effectively declared the 'reinterpretation' of the ABM Treaty to be invalid and unconstitutional." *Id.* at 8. Professor Henkin's distancing himself from the "Biden Condition" while declaring its constitutional principles "unexceptionable," would itself seem an admission of the tenuous nature of the "dual" approach, as well as of this condition, under the caveats set forth in the *Restatement* itself.

170. While the author is critical of the *Restatement of the Foreign Relations Law of the United States* with respect to the core issues discussed in this article, it should not be assumed that he is in general a critic of the *Restatement*. On most issues, I believe that the *Restatement* does its job well, and that it is a highly professional and useful source. It has also had substantial impact in the Courts, perhaps even more than any other *Restatement*. Its success in no small measure is due to its outstanding Chief Reporter, Associate Reporters and Advisers, as well as the high professionalism of the American Law Institute.

even more extreme views about treaty interpretation under the Constitution. The first of these is the *Restatement* position in support of a broad Senate authority to attach "domestic conditions" to its approval of treaties. This position is a prerequisite for the "dual" approach and, as this article has urged, is constitutionally incorrect. As has been seen, it is reflected in the *Restatement* in a number of places, including cmt. *d* to § 303, and Reporters' Note 4 to § 303. The *Restatement* expresses the view in comment *d* that the condition must have "plausible relation to the treaty, or to its adoption or implementation," which is rather a broad standard. And in Reporters' Note 4 it uses a core test of impermissibility as to whether the Senate has "made a practice of attaching conditions unrelated to the treaty before it." Remarkably, in Reporters' Note 4 it concedes that such "domestic conditions" do "not partake of [the treaties] . . . character as 'supreme Law of the Land.'" It is important to note that the *Restatement* cites absolutely no authority for its position that the Senate has a "domestic condition" authority, even if not part of the law of the land. More remarkably, it does cite the *Power Authority* case in Reporters' Note 4, but does not clearly reveal to the reader that the case was counter to the just expressed *Restatement* view. Indeed, the reader is invited to read Reporters' Note 4 to marvel at the finesse with which the Reporters sought to deal with *the* critical precedent on the issue which basically went against them. One can only speculate that the concession made that such "domestic conditions" are not the "supreme Law of the Land" may have been a concession driven by the obvious existence of this case. Nor does the *Restatement* explain to the reader precisely how "domestic conditions" "must be given effect in the constitutional system" when they are not part of the "supreme Law of the Land."

The *Restatement* also takes the position, in broad general terms that could imply agreement with the "dual" approach, that Senate consent given on the basis of a particular understanding as to the meaning of a treaty must be respected if the President makes the treaty. This is reflected in § 314 (2) and in cmt. *d* to this section. Comment *d* further adopts the view that such Senate understandings must be respected, even if not part of the resolution of advice and consent but simply reflected in the informal "legislative history" in the event the President determines that such history reflects "a general understanding by the Senate..."¹⁷¹ As has been seen, one problem with this position is its fail-

171. For an indication of non-agreement with the position of the *Restatement (Third)* on these issues, and its even more extreme variant embodied in the "dual" approach, see E. Rostow, *supra* note 12, at 1459. Professor Rostow, former Dean of the Yale Law School and Under Secretary of State, says: "I do not agree with the language on this subject put forward in the A.L.I.'s new Re-

ure to precisely identify the constitutional requirement for effective Senate action on any issue associated with treaty advice and consent, that is, the concurrence of "two thirds of the Senators present" as set out in art. II, § 2, cl. 2. Another problem is the failure to meaningfully consider on the intent issue itself the effect of failing to adopt an understanding as a condition in the Senate resolution of advice and consent and thus generally the absence even of a Senate vote on the condition. That is, might such a failure usually, or even always, carry implications for the intent of the Senate concerning whether it just held a particular meaning, or whether it intended to impose that meaning as a condition of treaty advice and consent? And if the reference were to the "dual" approach, to what language would the "legislative history" attach in the absence of a specific condition set out as part of the resolution of advice and consent? It could not attach to the treaty itself because the treaty itself has a different meaning in any case in which the "dual" approach would make a difference. Perhaps the Reporters really have in mind for this section that the President should seek to convey to the other treaty parties the Senate interpretation in some fashion to make it part of the international bargain of the treaty itself. Indeed, that seems to be the thrust of cmt. *b* to § 314 (2) as to the meaning of this *Restatement* position. If so, there is, of course, no real issue here, although this intent could have been facilitated by requiring such conditions and understandings intended by the Senate to be conveyed, to actually be identified in the resolution of advice and consent rather than simply admonishing the President to be responsible also for views expressed in floor debates and committee reports. Indeed, under the *Restatement* view, as a practical matter, how does the President decide which views in floor debates and Committee reports must be conveyed to the other treaty parties? These issues aside, perhaps the greatest shortcoming of this *Restatement* position concerning a Senate understood meaning is that it fails to address the "unitary-dual" issue and, without doing so, lends itself to an interpretation supporting the "dual" approach. As with its position on "domestic conditions" generally, once again, this section of the *Restatement*, with its elaborate Comments and Reporters' Notes, fails to cite a single authority for its position on Senate understood meanings.

Finally, the *Restatement* espouses a view, which, although not a real issue or problem of itself, can without adequate understanding of the "unitary-dual" issues lend itself to the "dual" interpretation or other extreme views about treaty interpretation. Thus, Reporters' Note 5 to Sec-

tion 325 on "Interpretation of International Agreement" provides:

Use of domestic sources. A court or agency of the United States is required to take into account United States materials relating to the formation of an international agreement that might not be considered by an international body such as the International Court of Justice. These may include:

- (i) Committee reports, debates, and other indications of meaning that the legislative branch has attached to an agreement which, as a matter of internal law, requires the assent of the Senate or of Congress...¹⁷²

There is, I believe, nothing wrong with reviewing such materials for the purpose of determining the meaning between the parties or for the view of the Executive entitled to "great weight" in the courts on matters of treaty interpretation, and the courts have reviewed such materials for these purposes. But supporters of the "dual" approach can, without further explanation as to the purpose of reviewing such materials, mistake this Note as suggesting that the purpose of treaty interpretation in United States courts is a search for the shared intent of the President and the Senate, or the President and the Congress, as opposed to the shared intent of the parties. Or this Note could be interpreted to suggest a preference in the interpretive process for such domestic "legislative history" materials as opposed to the standard international treaty interpretive sources including the negotiating record between the parties. In this case, however, I believe that in the full context of § 325 of the *Restatement*, such interpretations would be unfair to the *Restatement*, as they would be distortions of the core meaning of that Section, which quite generally adopts a view of treaty interpretation close to the international standard set out in the Vienna Convention. Moreover, § 325 is clearly inconsistent with the extreme view that only materials before the Senate can be taken into account in treaty interpretation, since it expressly includes in the interpretive process subsequent agreements between the parties unlikely to be present during Senate advice and consent. And, although the introductory language in Reporters' Note 5 uses mandatory language of a court or agency, "is *required* to take into account United States materials," the voluntary language "[t]hese *may* include" precedes the further description of "[c]ommittee reports, debates, and other indications of meaning . . . [from] the legislative branch."¹⁷³

172. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 Reporters' Note 5 (1987).

173. In this connection it might be noted that footnote 7 in *United States v. Stuart*, in quoting Reporters' Note 5 to § 325 of the *Restatement*, moves directly from the "is required to take into

It may be instructive to examine previous *Restatements* and their drafts in relation to these issues generally. Thus, a draft of the *Restatement (Second)*, which becomes Reporters' Note 5 to § 325 in the *Restatement (Third)*, candidly noted the lack of decisional authority, concerning "Domestic criteria that are not material internationally":

There is virtually no precise decisional authority on this matter, probably because of the domestic interpretative rule, stated in § 155, that executive interpretations of international agreements are given great weight by courts in the United States or because, as explained in Comment *a* to this Section, the courts wish to avoid if possible creating disharmony between the international and the domestic meanings of international agreements.¹⁷⁴

Similarly, this 1962 *Restatement Draft* also says in comment *b* to § 138:

If the Senate does not insert its understanding in its resolution of advice and consent. . . it should never have more than an interpretative significance. Where Senate action in giving its consent is thus ambiguous, the courts should be left free to interpret the Senate's intent with respect to the internal effect of the "understanding." Even as so restricted, the situation is one that creates possibilities for serious variance between domestic effect and international effect. Hence, considerations of policy support a limited, interpretative effect to this manifestation of Senate intent.¹⁷⁵

One wonders why the present *Restatement* has not used the candid acknowledgment as to the lack of decisional authority for its position (much less candidly admitting that its view on "domestic conditions" is

account" language of the introduction to that Note to the language concerning "[c]ommittee reports, debates, and other indications of meaning . . . [from] the legislative branch . . .," and omits the voluntary language of "[t]hese may include," which directly precedes the reference to these "legislative history" materials. See *United States v. Stuart*, 489 U.S. 353, 367 n.7 (1989). The fact that this material from Reporters' Note 5 appeared in footnote 7 of the *Stuart* case suggests that it may have been misinterpreted as suggesting, as that footnote later does, that such "legislative history" materials would be a better interpretive guide than a treaty's negotiating history. That certainly would not seem the thrust of § 325.

174. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 154 cmt. b, at 555 (Prop. Off. Draft 1962). Further, the first paragraph to cmt. b to § 154, which becomes Reporters' Note 5 to § 325, uses the qualifying language "to some extent" to modify the "are required to take into account" of Reporters' Note 5, as well as the word "interpretative" before the word account. *Id.* at 554. Reporters' Note 2 on "History of Negotiations" in this draft also includes a long line of Supreme Court decisions which used *travaux* and diplomatic correspondence in interpretation. *Id.* at 557.

175. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 138 cmt. b, at 505 (Prop. Off. Draft 1962).

counter to the only decision to have addressed the issue after full argumentation before the court). Similarly, one wonders why the Reporters no longer seem sufficiently concerned about "creating disharmony between the international and the domestic meanings of international agreements" or "serious variance between domestic effect and international effect."¹⁷⁶ This, after all, is the core of the policy problem underlying the "dual" approach. Yet it is as though in moving from earlier positions to the present *Restatement*, the Reporters are encouraging the virus of the "dual" approach to stay hidden.

The immediate predecessor *Restatement*, the *Restatement (Second) of the Foreign Relations Law of the United States*, as revised and published in 1965, clearly adopts the position that informal indicators from Senate treaty consideration are not *ipso facto* effective under national law but are simply to be taken into account "as that of the record of legislative history on the interpretation of a statute." Section 135 of the *Restatement (Second)* provides:

Effect of Statement of Understanding as Domestic Law

(1) If a statement of understanding as to the meaning of a treaty is either attached at signature by the United States or is included in the instrument of ratification by the United States either because required by the Senate resolution of advice and consent or to reflect a particular meaning that the Senate ascribed to the treaty in giving its advice and consent, the treaty and the understanding become effective as domestic law under the rule stated in Sec. 141.

(2) In the absence of a statement of understanding as described in Subsection (1), an indication from the record of the Senate's consideration of the treaty that the Senate ascribed a particular meaning to the treaty has the same bearing on the interpretation of the treaty as domestic law as that of the record of legislative history on the interpretation of a statute.¹⁷⁷

176. For a provision in the *Restatement (Second)* which seems sensitive to the need to only have a single meaning for a treaty obligation of the United States, see § 133(3) which is apparently designed to bring informal indications of Senate intent as to the meaning of a treaty into line with the internationally binding meaning. Even this effort, however, fails to understand that many, if not most, of these settings of informal Senate intent as to meaning may arise subsequent to ratification, as in the ABM "broad-narrow" debate. It also fails to meaningfully address the problem as to the standard for ascertaining *any legally binding* Senate intent absent Senate inclusion of the item in the resolution of ratification adopted by the constitutionally required two-thirds vote. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 133(3) (1965).

177. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §

And comment *b* to this section says:

Interpretative effect of meaning attributed by Senate. If the Senate does not insert an understanding in its resolution of advice and consent and the President does not feel that it is necessary to do so in the instrument of ratification, conclusions based upon the deliberations of the Senate are not controlling in the interpretation of the treaty as the domestic law of the United States. Under Supreme Court precedents discussed in Sec. 151, Reporters' Note 1, courts in the United States, in interpreting an international agreement, take into account manifestations of intention made during the course of its formation. In the case of a treaty, the deliberations and action of the Senate are a necessary phase of such formation. Moreover, it is clear from Senate practice that the Senate gives its advice and consent in the expectation that its understanding, whether or not included in the resolution of advice and consent, will be taken into account in determining the effect of the treaty as domestic law.¹⁷⁸

Thus, the immediate predecessor *Restatement* clearly adopted the position that informal indications from the record of Senate intent, as opposed to formal statements of understanding either attached at signature or included in the instrument of ratification, would not *ipso facto* become "effective as domestic law" but rather would only be "taken into account." Moreover, the comment to this section makes it clear that informal "conclusions based upon the deliberations of the Senate are not controlling in the interpretation of the treaty as the domestic law of the United States." The current *Restatement (Third)* cites no authority, and gives no constitutional or policy justification, for departing from this view.

Similarly, the *Restatement (Second)*, in comment *b* to § 151 entitled "*Domestic criteria that are not material internationally*," uses the language "is to some extent required to take into account domestic sources"¹⁷⁹ as opposed to the unqualified language of its successor statement in Reporters' Note 5 to § 325 of the *Restatement (Third)*, entitled "*Use of domestic sources*" of "is required to take into account United States materials." Further, Reporters' Note 1 to § 151 in the *Restatement (Second)*, if retained in the *Restatement (Third)*, would have made it far more difficult for the Court in *Stuart*, as expressed in its last

135, at 422 (1965).

178. *Id.* cmt. b, at 422-23 (emphasis added).

179. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 151 cmt. b (1965) (emphasis added).

sentence in footnote 7, to have mistaken the *Restatement* position as giving priority to preratification Senate materials over a treaty's negotiating history. For Reporters' Note 1 in the *Restatement (Second)*, under a heading entitled: "*United States decisions showing general agreement with the international law standard*" provides in relevant part:

"The general rule obtains that the court is to be guided by the intention of the parties..." *Dobrin v. Mallory S. S. Co.*, 298 Fed. 349, 351 (E.D.N.Y. 1924). "Undoubtedly the intention of the two governments, as gathered from the words of the treaty must control." *United States v. Texas*, 162 U.S. 1, 36 (1896). See also *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890). *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929).

"Treaties must receive a fair interpretation according to the intention of the parties, and so as to carry out their manifest purpose." *Wright v. Henkel*, 190 U.S. 40, 57 (1903). See *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924).

"As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning as 'understood in the public law of nations.'" *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931).

...

"In ascertaining the meaning of the treaty we may look beyond its written words to . . . their [the parties'] own practical construction of it." *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933). For a collection of cases indicating the attitude to these problems of the Supreme Court, see 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1478-1485 (1945).¹⁸⁰

Even Philip C. Jessup and Oliver J. Lissitzyn did not state it any better in their opinion prepared for the *Niagara Reservation* case. Indeed, perhaps the clarity of the *Restatement (Second)* on this point benefitted from the service of Philip Jessup on the Advisory Committee.¹⁸¹

180. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 151 Reporters' Note 1 (1965).

181. According to the *Restatement (Second)*, Philip C. Jessup served on the Advisory Committee "to 1961." This, of course, included the period during which Professors Jessup and Lissitzyn prepared and submitted their ninety-six page analysis as an opinion in the 1957 *Niagara Reservation* case. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES at iv (1965). The Chief Reporter of the *Restatement (Second)* was Adrian S. Fisher. Associate Reporters were Covey T. Oliver, Cecil J. Olmstead, I. N. P. Stokes (Reporter for Part IV on "Responsibility of States for Injuries to Aliens"), and Joseph M. Sweeney. RESTATEMENT

It may be further useful to compare the treatment of the *Niagara Reservation* case in the *Restatement (Second)* with its treatment in Reporters' Note 4 to § 303 of the *Restatement (Third)*, as already examined. Thus, the *Restatement (Second)* does not adopt the Henkin-argued Senate power of "conditioning" acceptance on a "domestic condition." It treats the issue of Senate "legislation by reservation" as arising in the setting of agreement by both the President and the other treaty party, and as unsettled even in that setting. And the *Restatement (Third)* also drops the cross-reference to an article by Professor Covey T. Oliver, an Associate Reporter of the *Restatement (Second)*, which includes a discussion of the *Niagara Reservation* case, in favor of a citation *solely* to the Henkin article. The Oliver piece, which was omitted from this Reporters' Note in the *Restatement (Third)*, was more neutral on the issues in the *Niagara Reservation* case, and asks in an implied negative on the concept of "domestic conditions": "[h]ow much actual legislative power is it wise to lodge in one House at the expense of the other, either by Constitutional change or by toleration?"¹⁸² This Reporters' Note to § 134 of the *Restatement (Second)* provides in principally relevant part:

A special problem arises when a Senate reservation, rather than the treaty as signed, raises the question whether its subject matter (i) is appropriate for settlement by international negotiation or (ii) possibly conflicts with specific limitations on the powers of the government of the United States, and is therefore, as indicated in Sec. 117, outside the scope of an international agreement under the Constitution. Related to the second of these questions is that of the extent to which the Senate (if the President and the other state agree to its reservation) may "legislate by reservation" without the concurrence of the House of Representatives. Litigation involving the Senate's "reservation" in 1950 to the United States-Canadian Treaty Concerning Uses of the Waters of the Niagara River was the first, and, apparently, the only case to raise this question directly. See Sec. 133, Reporters' Note 1.

...

Before any action was taken by the Supreme Court, the Congress enacted legislation dealing with the disposition of the Niagara water flow made available to the United States under the treaty. The Supreme Court thereafter granted *certiorari*, vacated and remanded the judgment of the Court of Appeals, with directions

(SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES at iii (1965).

182. Covey T. Oliver, *Treaties, The Senate, and the Constitution: Some Current Questions*, 51 AM. J. INT'L L. 606, 610 (1957) (Editorial Comment).

to dismiss it as moot, *sub nom.* American Public Power Assn. v. Power Authority of the State of New York, 355 U.S. 64 (1957). See Henkin, *The Treaty Makers and the Law Makers: the Niagara Reservation*, 56 Colum. L. Rev. 1151 (1956); Oliver, *Treaties, the Senate and the Constitution: Some Current Questions*, 51 Am. J. Int'l L. 606 (1957).¹⁸³

As has been previously noted,¹⁸⁴ the *Restatement (Third)* also rejected the requirement present in the *Restatement (Second)* that the subject of an agreement be "of international concern." Reporters' Note 2 to § 302 of the *Restatement (Third)* which discussed this issue cited the *Power Authority* case, thus suggesting that the issue raised in this case was in the sights of the Reporters as they made this change. The Reporters cited no new authority between the *Restatement (Second)* and the *Restatement (Third)* supporting this change. Nor did they note the position to the contrary in State Department Circular 175, or the many statements in Supreme Court decisions to the contrary. And further, the argument that under international law a subject automatically ceases to be a matter solely of "domestic concern" once an international agreement is concluded about it is, of course, correct but hardly conclusive. For since the issue is one of United States constitutional law, rooted in the structure of our federal system, it is simply a *non sequitur* to argue that the international law rule answers the domestic constitutional law issue. Most importantly, the core reasoning given for this change, that no subjects are intrinsically "impermissible subjects for an international agreement," hardly applies to "domestic conditions," which, by definition, are not part of an international agreement.¹⁸⁵

183. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 134 Reporters' Note (1965). Omitted portions of the full note, covering approximately two full pages in the *Restatement*, related to the history of the *Niagara Reservation* case, including the majority and dissenting opinions in the Case, and a focus on whether, when a "real" reservation is constitutionally invalid, the treaty as a whole would fail as the law of the land, or the Supreme Court might apply a doctrine of "severability."

184. See *supra* note 149.

185. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 Reporters' Note 2 (1987). The full Reporters' Note 2, offering justification for rejecting the *Restatement (Second)* requirement that the subject of an agreement be "of international concern," provides:

International agreements and "matters of international concern." It had sometimes been suggested that a treaty or other international agreement must deal with "a matter of international concern." That suggestion derived from a statement by Charles Evans Hughes. See 23 Proc. Am. Soc'y Int'l L. 194-96 (1929). See previous *Restatement* § 117; also *Power Authority of New York v. Federal Power Commission*, 247 F.2d 538 (D.C.Cir.1957), vacated and remanded with directions to dismiss as moot, 355 U.S. 64, 78 S.Ct. 141, 2 L.Ed.2d 107 (1957). Hughes also used other phrases, referring to treaties as "relating to foreign affairs" and not applying to matters "which did not pertain to our

In assessing the position of the *Restatement (Third)* in relation to the “dual” approach, apparently a virus it never spots, Reporters’ Note 4 to § 325 also includes language which could be interpreted as inconsistent with the *Restatement’s* other language lending aid and comfort to that approach. Thus, Reporters’ Note 4 says, in discussing “*United States and international interpretive approaches*”:

The courts seek to avoid giving to an international agreement a meaning in domestic law different from its international meaning.

...

[I]n United States tradition the primary object of interpretation is to “ascertain the meaning intended by the parties.”

...

[B]oth the Vienna Convention and the United States approach seek to determine the intention of the parties...

...

The United States and its courts and agencies... are bound by an interpretation of an agreement of the United States by an international body authorized by the agreement to interpret it...

The international law on the interpretation of international agreements is binding on the United States, and is part of the law

external relations.” Hughes’s statement may have implied only that an international agreement of the United States must be a bona fide agreement with another state, serving a foreign policy interest or purpose of the United States. That requirement may well be implied in the word “treaty” or “agreement” as used in international law and the United States Constitution. See Comment c.

There is no principle either in international law or in United States constitutional law that some subjects are intrinsically “domestic” and hence impermissible subjects for an international agreement. As to international law, it has been authoritatively stated that even a subject that is strictly of domestic concern “ceases to be one solely within the domestic jurisdiction of the State, [and] enters the domain governed by international law,” if states conclude an international agreement about it. *Nationality Decrees in Tunis and Morocco* (Great Britain v. France), P.C.I.J. ser.B. No. 4, p. 26 (1923). Under United States law, the Supreme Court has upheld agreements on matters that, apart from the agreement, were strictly domestic and indeed assumed to be within State rather than federal authority. E.g., *De Geofroy v. Riggs*, Reporters’ Note 1 (rights of inheritance in land); *Missouri v. Holland*, Reporters’ Note 1 (protection of migratory birds). Early arguments that the United States may not adhere to international human rights agreements because they deal with matters of strictly domestic concern were later abandoned. (Introductory Note to Part VII). A treaty or other international agreement must be a bona fide international act with one or more other nations, not a unilateral act dressed as an agreement; no agreement of the United States appears to have been challenged in the courts as not being a bona fide agreement.

of the United States. Insofar as this section [the interpretive articles 31-33, Part III, Section 3 of the Vienna Convention on the Law of Treaties] reflects customary law [as it does, at least in general terms], or if the United States adheres to the Vienna Convention, courts in the United States are required to apply those rules of interpretation even if the United States jurisprudence of interpretation might have led to a different result.¹⁸⁶

The reader should note that this language in Reporters' Note 4, focused on the intent of the parties and the importance of international rules of interpretation, appears *immediately* before the language in Reporters' Note 5, cited in footnote 7 by the majority in the *Stuart* case as support for their conclusion that: "[a] treaty's negotiating history . . . would . . . be a worse indicator of a treaty's meaning . . . [than preratification Senate materials]." The reader will also be forgiven if at this point he or she has no idea as to the real position of the *Restatement (Third)* on the "unitary-dual" issue.¹⁸⁷

D. *The Source: Professor Henkin's Niagara Reservation Article*

The only authority cited by the current *Restatement* for its position in support of a Senate authority for "domestic conditions" is an article by Professor Louis Henkin, now the Chief Reporter for the *Restatement*, written in 1956 when he was a lecturer in law at Columbia. This article, "The Treaty Makers and the Law Makers: the Niagara Reservation,"¹⁸⁸

186. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Excerpts from Reporters' Note 4, § 325 (1987) (bracketed material added).

187. To further confuse the issue, cmt. b to § 111 of the *Restatement (Third)* provides: "A rule of international law or a provision of an international agreement derives its status as law in the United States from its character as an international legal obligation of the United States. A rule of international law or an international agreement has no status as law of the United States if the United States is not in fact bound by it..." *Id.*

188. Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COL. L. REV. 1151 (1956). For a subsequent discussion of his "domestic conditions" position, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 134-36, 160-61 (1972). In apparent contradiction even to the limitations expressed in the *Restatement (Third)*, Professor Henkin writes in this 1972 pre-current *Restatement* consideration of the issues:

A different question is whether the Senate can impose conditions unrelated to the treaty itself. While the Senate has never attempted to do so, one may ask hypothetically whether, say, it can tell the President that it will consent to a treaty only if he dismisses his Secretary of State. Perhaps such conditions were not contemplated, perhaps the Senate that made them would be abusing its power, and indeed it seems incredible that a Senate would put such a condition, at least formally and publicly. But since the Senate can withhold its consent for no reason, perhaps it can withhold it for any reason, and a President may have to buy that consent at whatever price and in whatever form the Senate asked. It would be particularly difficult to conclude that when the Senate imposes a condition which is not "proper," the President can disregard the condition, treat the Sen-

was written following the decision of the Federal Power Authority that a reservation attached to the Treaty with Canada Concerning Uses of the Waters of the Niagara River, admittedly a "domestic condition," was "invalid as an attempt to amend or repeal in part the Federal Power Act."¹⁸⁹ As has further been noted, Professor Henkin's view, and the inclusion of this view in the *Restatement*, have been the principal intellectual support for the Senate's "dual" approach to treaty interpretation, and perhaps also for the "Biden Treaty Interpretation Condition" now routinely being applied by the Senate to treaties despite Professor Henkin's expressed reservations concerning the latter practice. As such, it may be useful to at least briefly review Professor Henkin's 1956 arguments in relation to contemporary assertions of the "dual" approach, the "Biden Treaty Interpretation Condition," "domestic conditions" generally, and even, by far the strongest case of a "domestic condition," a Senate "non-self-executing condition" as was presented in the *Niagara Reservation* case itself.

In fairness to Professor Henkin, it should be noted that his article was written *before* the decision of the Court of Appeals in the *Niagara Reservation* case in which the majority of the Court rejected his approach in favor of that taken by his then fellow Columbia senior faculty colleagues, Philip C. Jessup and Oliver J. Lissitzyn.¹⁹⁰ And it should be noted that his article was written *before* the important *I.N.S. v. Chadha*¹⁹¹ decision in which the Supreme Court set aside a formidable pattern of practice by the House and the Senate in the use of one-House vetoes as inconsistent with the constitutional requirements for legislative action. And it was written *before* the more recent *Clinton, President of the United States v. City of New York*¹⁹² in which the Court showed

ate's consent as unconditional and proceed to ratify the treaty.

Id. at 135-36.

189. Louis Henkin, *supra* note 188, at 1151.

190. We know that Professor Henkin's approach was available to the Court of Appeals and rejected by the majority, since the dissenting Judge cites it in footnote 24 of his dissent as, "an excellent and cogently reasoned discussion." See *Power Authority v. Federal Power Commission*, 247 F.2d 538 (1957), dissenting opinion of Judge Bastian at 544, n.24 at 553. Philip C. Jessup was on the brief for the petitioner in this case. See 247 F.2d at 539. Jessup's distinguished career as an international lawyer was, of course, capped by his tenure as a Judge of the International Court of Justice.

Professor Henkin cites the substantial Jessup & Lissitzyn opinion written for the case in the first footnote to his article. Louis Henkin, *supra* note 188, at 1151 n.1.

191. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

192. 524 U.S. 417 (1998). Professor Henkin's article was also written before the decision in *Bowsher v. Synar*, 478 U.S. 714 (1986), which also illustrates the vitality of separation of powers for the contemporary Court. In *Bowsher* the Court said:

Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that

even heightened sensitivity to the constitutional lawmaking process. Further, it was written before the "dual" approach or the "Biden Condition" had even been imagined, and when available evidence was to the contrary, as is suggested by Judge Sofaer's unfortunate testimony to the Senate which set off the firestorm. Sadly, however, all the same cannot be said for the *Restatement*, which was published after both the *Niagara Reservation* case and *Chadha*.

In understanding Professor Henkin's arguments in his 1956 article, it is also important to note the strength of the case for the *Niagara Reservation* which Professor Henkin was defending and its differences, as day to night, to the "dual" approach and the Biden Condition. For unlike the "dual" approach and the Biden Condition, and even the asserted "domestic condition" in the *Rainbow Navigation* case, the *Niagara Reservation* case presents a setting of the strongest possible case, indeed I believe the *only* even arguable case, for the lawfulness of "domestic conditions." Thus, the "domestic condition" in question was solely one to prevent domestic implementation of the 1950 Niagara Waters Treaty with Canada until domestic implementing legislation could be passed by the full Congress in the normal legislative process. That is, it essentially related to whether the treaty with Canada was to be self-executing in the United States. And it had been clearly adopted by the Senate, appended to the Treaty as a "reservation," conveyed to Canada by the President with a request that he be "notified whether that reservation is acceptable to the Canadian Government," and the Government of Canada had then explicitly accepted the "reservation." In addition, there had been no effort by the Senate to assert that this condition was simply an interpreta-

would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent with "[t]he judicial Power . . . extend[ing] to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States."

478 U.S. 722. And:

The dangers of congressional usurpation of Executive Branch functions have long been recognized. "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley v. Valeo*, 424 U.S. 1, 129 (1976). Indeed, we also have observed only recently that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."

478 U.S. at 727. And further the Court noted, quoting *Chadha*:

"the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government..."

478 U.S. at 736.

tion of the treaty or an international condition, but rather it had been clearly recognized in the report of the Senate Foreign Relations Committee, in the President's diplomatic note to Canada, and in the Canadian statement in the protocol of exchange of ratifications, that it related solely to internal United States applications of the Treaty.¹⁹³ That there had been no effort to shoehorn a "domestic condition" into a purported interpretation of the international obligations under the Treaty is clearly reflected in the Canadian statement in the protocol of exchange of ratifications, providing that, "Canada accepts the above-mentioned reservation because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada's rights or obligations under the Treaty."¹⁹⁴ Moreover, the President's transmittal message of the 1950 Treaty to the Senate adverted to the question of domestic implementation of the treaty, and indicated that it would not be appropriate for the international agreement itself to contain a solution to this internal issue.¹⁹⁵

We should remind ourselves that it was even in this strongest possible setting for a "domestic condition," one relating solely to whether the treaty was self-executing in the United States *and* which had been accepted by the other treaty party, that Circuit Judge Bazelon and a two-to-one majority of the United States Court of Appeals, District of Columbia Circuit, set aside the reservation as an impermissible "domestic condition." And, it should be noted, Circuit Judge Bastian in dissent seemed to limit his support for domestic conditions to the strong case before the Court relating solely to a non-self-executing condition as opposed to a setting where the Senate sought to engage in lawmaking on its own apart from the normal legislative process. That is, even his dissenting opinion in *Niagara Reservation* was sensitive to the separation of powers concerns subsequently focused by the Supreme Court in the *Chadha* and *Clinton v. City of New York* cases.¹⁹⁶

193. See Louis Henkin, *supra* note 188, at 1154-58.

194. *Id.* at 1158.

195. S. EXEC. N., 81st Cong., 2d Sess. (1950) (cited in Louis Henkin, *supra* note 188, at 1155 n.10):

When the Niagara Treaty has been ratified, the question will naturally arise as to how additional facilities shall be developed to achieve the best use of water to be diverted for power purposes. . . . This is a question, however, which is not determined by the treaty itself. It is a question which we in the United States must settle under our own procedures and laws. It would not be appropriate either for this country or for Canada to require that an international agreement between them contain the solution of what is entirely a domestic problem. All this treaty does is to make additional water legally available for power purposes in each of the two countries.

196. *Power Authority of the State of New York v. Federal Power Commission*, 247 F.2d 538, 547 (1957) (Bastian, J., dissenting).

It was in this context that Professor Henkin sought to support the validity of the Niagara "reservation" as a valid "domestic condition." And one can agree with the dissent that, as with most Henkin products, his 1956 article provided "an excellent and cogently reasoned discussion." At least in its broadest implications for consideration of the constitutionality of the "dual" approach, the Biden Condition, and "domestic conditions" generally, however, and, quite possibly, even on its core facts of a "non-self-executing" Senate condition, the Henkin approach is wrong as a modern statement of the law.

With some oversimplification on my part, Professor Henkin made three principal arguments for the constitutionality of the "domestic condition" in the *Niagara Reservation* case. First, he suggests that, based on certain past treaty precedents, this reservation relating to the non-self-executing nature of the Treaty, which was formally incorporated as a reservation to the Treaty and accepted by Canada, was "a proper treaty provision." That is, he says: "[i]t is of bona fide contractual character appropriate to an agreement between States."¹⁹⁷ Second, he argues, in obvious reference to the character of the "domestic condition" in question as of a non-self-executing nature, that: "it is a proper exercise of the constitutional powers of the President and the Senate to give the Congress a role in the treaty process."¹⁹⁸ And finally, reflective of the theory subsequently adopted by the *Restatement*, he broadly poses a Senate power to condition its consent in providing advice and consent to a treaty. Thus, he says, before somewhat limiting his own broad statement, "[i]f the Senate can withhold consent for no reason, or for any bad reason, perhaps it can give its consent on any condition whatever."¹⁹⁹ Immediately, however, perhaps concerned by the audacious breadth of his own surmise, he cautions:

For present purposes it is not necessary to decide what would be the effect if an irresponsible Senate sought to extract from the President, or from the Congress, as the price of its consent, conditions unrelated to its role in the treaty process, unrelated to the subject matter of the treaty, or unrelated to its legitimate concern for the consequences of its consent to this treaty. That is not this case. Neither is it suggested that by such a "condition" the Senate could automatically repeal a law of the United States. That, again, is not this case.²⁰⁰

197. Louis Henkin, *supra* note 188, at 1176.

198. *Id.* at 1176.

199. *Id.* at 1176.

200. *Id.* at 1177.

One wonders where Professor Henkin gets these limitations if the underlying power he posits is simply the power to approve with conditions. But reflecting the powerful influence of its Chief Reporter, at least some of the cautionary points in the first sentence here end up in the *Restatement*, along with Professor Henkin's underlying "condition to consent" argument.²⁰¹ The thrust of Professor Henkin's subsequent discussion in his 1956 article relates to why conditions related generally to a non-self-executing nature are valid.

The "dual" approach to treaty interpretation is light years from the stronger case presented in the *Niagara Reservation* case. By definition, the Senate condition sought to be imposed under this doctrine is not only not part of the treaty, but inconsistent with the treaty. It will have been neither presented to the other treaty party nor accepted by the other treaty party. At least in its specific effect, it will not usually be part of any resolution of advice and consent, nor will it appear as a reservation. Indeed, it will in almost every setting not even be voted on by the Senate to ascertain whether it reflects two-thirds Senate support. Since, by definition, it posits a "domestic condition" that is not *ever* a part of the treaty, Professor Henkin's first argument in his 1956 article is simply irrelevant. Further, by definition, the "dual" approach would not support the role of the President and the Congress in the normal legislative process. For, by definition, the "dual" approach seeks to produce a binding domestic effect solely from the action in the Senate, and always even in opposition to the treaty itself. Thus, it hardly meets Professor Henkin's second argument that it is intended to give the President and the Congress their normal legislative roles in the process. Certainly the President, who objected to the concept in the "broad-narrow" context, would be startled to learn that the doctrine is really intended to protect his role. Rather, in origin and intent, it is, however mistaken in its objective, spun to protect the Senate role. And as to Professor Henkin's third argument, based on a broad Senate power to condition consent, the "dual" approach neither fits the thrust of his cases, which are in the non-self-executing context, nor is it consistent with his own limiting principle. For, the "dual" approach, whenever it would make a legal difference, *always* seeks to alter domestically the treaty law itself. As such, it does seek the equivalent of repeal of not just "a law of the United States," as Professor Henkin says in his article could not be done, but, indeed, departure from a treaty obligation, which is by art. VI, cl. 2 of the United States Constitution, "the supreme Law of the Land." And

201. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 Reporters' Note 4 (1987).

this, by some form of legal effect which the *Restatement* concedes is not itself "the supreme Law of the Land." And none of this is even to consider the destructive effects for United States foreign policy and the international rule of law from the "dual" approach.

The "Biden Treaty Interpretation Condition" incorporates the "dual" approach so it shares, at minimum, all of its characteristics and shortcomings. As such, it too is clearly not supported by the arguments made by Professor Henkin for "domestic conditions" in his 1956 article. It would seem further suspect by its effort to force the President and the courts to a blanket acceptance of this mode of treaty interpretation espoused by the Senate, in contradiction to their own constitutional roles in treaty interpretation.

"Domestic conditions" generally, that is, for the moment, those other than conditions relating to a non-self-executing effect, are at least to some extent supported by Professor Henkin's condition to consent argument, and may further be supported in some cases by Professor Henkin's first argument if incorporated into the treaty itself and accepted by the other treaty party. They are, however, by definition, never supported by Professor Henkin's second argument concerning protecting the role of the normal legislative process, as in every case they *do* seek to create domestic law solely by Senate action. And in cases such as *Rainbow Navigation* where the "domestic condition" thought to be discovered by Judge Harold Greene was never incorporated in a resolution of advice and consent or even voted on, much less conveyed to the other treaty party and accepted by them, these general conditions would also not be supported by Professor Henkin's first argument. Further, just as even the dissent in the *Niagara Reservation* case would seem to have rejected such general "domestic conditions" as encroaching on the normal legislative process even when conveyed to the other treaty party, so too, I believe that the modern law after the *Chadha* and *Clinton v. City of New York* cases would not accept such conditions, whether or not incorporated into the treaty itself. For such general "domestic conditions" assert an undefined unilateral Senate lawmaking power in its consideration of a treaty. Such a lawmaking power does not seem inherent in the advice and consent process and, instead, seems flatly contradictory to the general legislative lawmaking power in accord with "a single, finely wrought and exhaustively considered, procedure" as noted by the Supreme Court in both these cases.

In the conclusion of his article, Professor Henkin does ask an important question with respect to this general "domestic conditions" power. That is:

To circumscribe a constitutional power should require some ba-

sis, some purpose. What in our case is the purpose? What is the basis? What in particular is the purpose in denying the right of those who enjoy a constitutional power to limit the exercise of their power? At whose expense is this power of self-restraint being asserted, in favor of whom in the constitutional configuration is this power now being denied?²⁰²

Quite apart from this passage's question begging assertion of an alleged Senate "constitutional power," both the Framers and, more recently, the United States Supreme Court in the *Chadha* and *Clinton v. City of New York* cases, have given persuasive answers to these questions. It was not by accident that the Framers created a lawmaking process of two Houses and presentment to the President. This more complex process was intended, at its core, as an essential part of the Constitutional framework of checks and balances. In turn, this was intended to lessen the power of "factions," as Madison called them,²⁰³ or special interests, as we would know them today, and to better protect the interests of the citizens of the several states and, indeed, of all the people of the United States. Modern economic theory, with its understanding of "government failure," powerfully endorses this brilliant insight of the Framers.²⁰⁴ Moreover, it should be noted that while the treaty power, at least in general requires agreement with one or more other nations, a doctrine of "domestic conditions" apart from the underlying treaty does not even have this check. It would be action purely and simply by one house of the legislature. And further, even if the "domestic condition" is embodied formally as a reservation and conveyed to the other party, that party has no incentive other than to accept it while pointing out that it does not affect *their* rights. Indeed, this is precisely what we saw with Canada in the *Niagara Reservation* case. While conveying such "domestic conditions" to the other treaty parties has the considerable ad-

202. Louis Henkin, *supra* note 188, at 1182.

203. See generally the contributions of James Madison to *The Federalist Papers*. As one example, Madison, brilliantly intuiting insights, which with further development would later win the Nobel Prize in Economics, wrote in *Federalist* 10: "The inference to which we are brought is that the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*." THE FEDERALIST NO. 10, at 48 (Clinton Rossiter ed., 1961, with Charles R. Kesler Introduction & Notes 1999).

204. The writings of Professor James M. Buchanan, who was the first to win the Nobel Prize in Economics for this insight, which he called "Public Choice Theory," are a good place to begin on this fundament of good government. See, e.g., JAMES M. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962); JAMES M. BUCHANAN, THE ECONOMICS AND THE ETHICS OF CONSTITUTIONAL ORDER (1991); THE THEORY OF PUBLIC CHOICE—II (James M. Buchanan & Robert D. Tollison eds., 1984). See particularly the overview chapter by James M. Buchanan in this work on *The Theory of Public Choice—II* entitled: "Politics without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications." *Id.* at 11-22.

vantage of at least being honorable and not violating our Nation's international treaty obligations, it provides no check whatsoever on the asserted domestic lawmaking by a single house. There is at least a touch of these "factions" in the air with respect to the *Rainbow Navigation* case, where the "domestic condition" asserted, and not even voted on or conveyed to the other treaty party, was alleged to be a condition to give certain U.S. Navy carriage contracts to a particular merchant marine company. It is presumably considerably easier to get such special interest provisions in unilateral Senate informal treaty process history than enacted pursuant to the normal legislative process.

In an editorial comment in the *American Journal of International Law* published in 1957, almost contemporaneously with Professor Henkin's article on the *Niagara Reservation* case, Professor Covey T. Oliver, a distinguished international lawyer and Associate Reporter of the *Restatement (Second)*, makes clear that *he* understands the policy question in the *Niagara Reservation* case.²⁰⁵ He concludes his discussion of that case with the paragraph:

Despite the lack of any concrete evidence that the House of Representatives does concern itself about the steady increase of Senate power *de facto* throughout the field of lawmaking—an increase sometimes almost as much at the expense of executive power as of the legislative power of the "popular" branch of the national legislature—the policy question, and it is a big one, remains for decision: How much actual legislative power is it wise to lodge in one House at the expense of the other, either by Constitutional change or by toleration?²⁰⁶

There is also an additional answer to Professor Henkin's question as to why there is not a unilateral general Senate domestic lawmaking power attached to its advice and consent power. And ironically, this seems to be the converse of Professor Henkin's apparent background concern in his article to ward off the political effort behind the misguided Bricker Amendment to restrict the treaty power in the name of state's rights. For the core check on the legislative power in part to protect state's rights is set out in the limited powers given to the Congress of the United States in Article I of the Constitution. And presumably the limit with respect to the treaty power is that a treaty is an agreement or contract among nations, adopted pursuant to a genuine concern in the Nation's foreign relations. But to permit the Senate unilaterally to make domestic law apart from the obligations of the underlying agreement,

205. Covey T. Oliver, *supra* note 182.

206. *Id.* at 610.

and without any limitations on its power, could more easily encroach upon the legitimate interests of the states, though unlikely to do so in the real world of treaty practice. Certainly there seems a stronger argument against a general unilateral Senate “domestic conditions” power in relation to the protection of state’s rights than in Professor Henkin’s implications to the contrary in support of “domestic conditions” in his article.²⁰⁷

This article has not been written to inject myself into the ongoing debate about the constitutionality of the peculiar *sui generis* form of “domestic condition,” as reflected in the *Niagara Reservation* case, which relates solely to whether the treaty, or part thereof, is non-self-executing within the United States. This is certainly the strongest, indeed, I believe the only even arguable, case for the validity of such “domestic conditions.” And, as Professor Henkin’s article demonstrates with its examples, this is really the only area with any significant treaty practice reflective of such conditions. Nevertheless, I believe even this category of “domestic condition” is suspect under modern constitutional law. For if the Senate has no “domestic conditions” power in general, that is, a legislative power to alter the law apart from the international meaning of the treaty, then it may not even have this power. Indeed, as has been seen, this was the conclusion of the majority of the Court of Appeals in the *Niagara Reservation* case. Moreover, to the extent that the Senate begins to exercise such a power by unilateral statement, as opposed to conveying it to the other treaty party as a reservation or amendment to be accepted if treaty relations are to be concluded, then it has the potential to put the United States in violation of its treaty obligations, at least if domestic implementing legislation is unreasonably delayed or never enacted. Of course, there is no problem if the Senate statement that a treaty is not self-executing accurately reflects the international meaning of the treaty, or if the reason for subsequent United States domestic legislation is a constitutional requirement which is “manifest and . . . [concerns] a rule . . . of fundamental importance” as reflected in Article 46 of the Vienna Convention, in which case the United States would not be in violation of its international legal obligations while awaiting domestic implementing legislation. These two settings, I believe, reflect-

207. Professor Henkin’s statement on page 1182 about “aid and comfort . . . to those who seek to impose serious limitations on the treaty power” would seem to be written with the damaging Bricker Amendment proposals in mind. See Louis Henkin, *supra*, note 188, at 1182. That the Bricker Amendment proposals, and the issue “of international concern,” were on the minds of contemporary commentators on the *Niagara Reservation* case is most evident in Covey T. Oliver, *supra* note 182, at 609 (“Thus, once again the substantive contents of ‘of international concern’ comes into issue, as does the rôle of the courts *versus* other institutions of government with respect to the making of the determination as to a particular treaty or reservation.”).

ing our treaty obligations, are not properly "domestic conditions." Further, since the Senate could, if feasible internationally, *require* that a particular treaty be made not self-executing by the terms of the treaty itself, there would also seem an additional option for the Senate in the event that it had no power to declare treaties not self-executing. The majority of the Court in the *Niagara Reservation* case noted this option available to the Senate. Circuit Judge Bazelon, writing for the Court, said:

The Senate could, of course, have attached to its consent a reservation to the effect that the rights and obligations of the signatory parties should not arise until the passage of an act of Congress. Such a reservation, if accepted by Canada, would have made the treaty executory. But the Senate did not seek to make the treaty executory. By the terms of its consent, the rights and obligations of both countries arose at once on the effective date of the treaty. All that the Senate sought to make executory was the purely municipal matter of how the American share of the water was to be exploited.²⁰⁸

There is a further nagging doubt about even this strongest form of "domestic condition"; that is, a "non-self-executing" condition specifically adopted as a reservation solely concerning a "domestic condition" in the Senate resolution of advice and consent and then conveyed to and accepted by the other treaty party, as in the *Niagara Reservation* case. For, in a sophisticated post public choice era, should we accept that the motivation of the Senate in *Niagara Reservation* was purely "neutral" to give the House an opportunity to participate with them in the fashioning of implementing legislation? Or might the Senate not have liked, or wanted to delay for some reason, the legal consequences which would have occurred with the waters of the Niagara River in the absence of its condition? Should we believe that if a majority of the Senate strongly supported the legal effect absent the condition that it would still have pushed for the condition to give the House a participatory role? It is clear that hearings on the Treaty had included hearings on the domestic issue of how additional power should be developed at the Falls and that "[c]onflicting views" had been presented to the Senate Foreign Relations Committee on this issue.²⁰⁹ It is also clear that the Senate condition altered a legal effect under United States law which otherwise would have governed. Perhaps in this case, the motivation was exactly as ex-

208. *Power Authority of the State of New York v. Federal Power Commission*, 247 F.2d 538, 542 (1957).

209. See Louis Henkin, *supra* note 188, at 1156.

pressed in the report of the Senate Foreign Relations Committee, which said:

Conflicting views as to how the additional power should be developed at the Falls and who should be responsible for that development were presented to the committee. A number of questions raised remain unresolved. This resource is unique and of national interest. The distribution of the Falls is a subject on which opinions differ. It will require careful study. And it is not at all unlikely that additional studies will be sought concerning the relationship of the Niagara power project to the St. Lawrence seaway and power project and to the whole question of power shortage is [sic] northeastern United States.²¹⁰

As the consideration by the Senate of these domestic issues illustrates, however, at least in the short run, even a Senate “non-self-executing” power is a unilateral power to pick and choose concerning the domestic legal effect of a treaty. Should the Senate, acting alone and apart from the normal constitutional legislative process, have such a power to decide even the short run legal effects of a treaty apart from the treaty itself?

On balance, I believe that the best test for whether a treaty is self-executing is the nature of the agreement stemming from the intent of the parties, as seems to be the basis applied by Chief Justice John Marshall in the classic case of *Foster and Elam v. Neilson*.²¹¹ Senate non-self-executing concerns could be dealt with under this approach by either requiring that the treaty itself be non-self-executing, that is, an agreement of the parties that the treaty looks to the political branches for implementation as was the test used by Chief Justice Marshall in *Foster and Elam v. Neilson*, or requiring agreement between the parties that the treaty will only enter into legal effect when subsequently executed by both parties in their domestic law. Further options might include requiring that implementing legislation be simultaneously presented to the Congress with the treaty, rapidly proceeding with implementing legisla-

210. S. EXEC. REP. NO. 11, 81st Cong., 2d Sess. 6-7 (1950). See Louis Henkin, *supra* note 188, at 1156.

211. *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). Chief Justice Marshall wrote in this case:

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

27 U.S. (2 Pet.) at 314.

tion on Senate or Congressional initiative, or specifying in the resolution of advice and consent that the President should delay ratification until domestic implementing legislation is enacted.²¹²

It should further be noted that there is nothing in Professor Henkin's article which supports the wrong-headed and destructive notion that a treaty should be interpreted by the intent of the Senate, as opposed to the intent of the treaty parties, or that only materials before a Senate in its consideration of a treaty could be considered in the interpretive process. Despite the breadth of his argument for a Senate power to impose "domestic conditions" as part of the advice and consent process, which I believe is not part of modern law, I cannot believe that Professor Henkin, as a strong adherent to the international rule of law, would have intended any such positions, as he made the "domestic conditions" argument in what was, as should be fairly recognized, the much stronger context of the *Niagara Reservation* case.

E. *More Right Stuff*

"The least initial deviation from the truth is multiplied later a thousandfold."

Aristotle, On the Heavens, bk. I, ch. 5

The structure of the Constitution, authority and policy suggest that the *Restatement* is wrong in its view that the Senate power of advice and consent includes a power to attach "domestic conditions" to treaties. Such "domestic conditions" are not part of the advice and consent power. The *Restatement* is further wrong in its view that such "domestic conditions" can be implied simply from deliberations of the Senate absent any provision in the resolution of advice and consent or even a

212. Whether or not a treaty is self-executing is not the only issue in its direct application in domestic courts. Other important issues, well understood by domestic courts, include the issue of whether the treaty, while creating an obligation between nations, is intended to create "standing" for private litigants to either invoke the treaty against a Government or other private litigants, the "political question" doctrine, particularly if the treaty is invoked against Presidential conduct of foreign policy, and the usual panoply of what Professor Bickel called "the passive virtues," including the classic meaning of "standing" as to the Article III requirement of adequately presenting a case or controversy, and associated doctrines of ripeness and adversariness. For a discussion of these latter concepts, see *The Justiciability of Challenges to the Use of Military Forces Abroad*, Chapter XIII in JOHN NORTON MOORE, *LAW & THE INDO-CHINA WAR* 570 (1972). And for the classic positions on the "political question" and related doctrines, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517 (1966); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959); and, of course, *Baker v. Carr*, 369 U.S. 186 (1962), reflecting the judicial resolution of this debate as to the legitimacy of judicial consideration of prudential and systemic considerations.

Senate vote. Even more clearly, the “dual” approach to treaty interpretation, and the effort to write it large in the Biden Condition, are unconstitutional even if the Senate did have a “domestic conditions” power.

V. CONCLUSION: RECLAIMING THE RULE OF LAW IN UNITED STATES TREATY PRACTICE

*If a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name...*²¹³

United States Secretary of State Bayard, 1887

The integrity of agreement is a cornerstone of the rule of law nationally and internationally. In the international system, with its more diffuse lawmaking, a robust protection of agreement is particularly central. The United States should not lead the world toward the disgraceful “dual” approach to treaty interpretation. That approach, which, whenever it made a difference, would either require the United States to breach its treaty obligations or hold the Nation to higher requirements than internationally agreed, should be consigned to the ash can of a history which never should have been. And if followed by other nations, so that they would place interpretations in their own internal approval process above the agreement between the parties, it would degrade the critical modality of agreement and the rule of law for all nations.

Paradoxically, the “dual” approach arose in an effort by good people devoted to the rule of law to ensure that their own Nation adhered to its international obligations. Their reasonable slogans in this effort, such as the President can only make the agreement understood by the Senate, concealed, in the mistake settings where the approach would arise, a hidden virus which turned their solution of the “dual” approach both against the rule of law and potentially even against the intent of the approving Senate. As with Plato’s exile of the poets from his Republic, the purpose was high, the arguments logical, yet the result was both wrong and counter to the high purpose itself.²¹⁴

The setting that produced the “dual” approach also stimulated the

213. [1887] U.S. FOREIGN REL. 751, 753.

214. See PLATO, THE REPUBLIC 84-85, for the banishment of the poets from the commonwealth, and Part V, at 321-40 (translated with introduction and notes by Francis MacDonald Cornford 1945; The Legal Classics Library, Special Edition 1991), for the logical arguments in support of this decision. See also PAUL FRIEDLÄNDER, PLATO: 3 THE DIALOGUES, SECOND AND THIRD PERIODS 75-79, 86-87 (translated from the German by Hans Meyerhoff, Bollingen Series LIX 1969). Critical theory in literature has had a field day with this Platonic recommendation and reasons given for it.

continuing struggle between the branches in the conduct of foreign policy. That struggle, periodically erupting throughout American history, had encompassed a wide variety of issues, from the scope of the treaty power, executive agreements, war powers, information flow and executive privilege, the control of secrecy and intelligence, and the treaty termination power, before embracing the struggle over treaty interpretation triggered by the "broad-narrow" debate in interpretation of the ABM Treaty.²¹⁵ In that setting, and riding a crest of conviction that it was serving the rule of law, the Senate began a practice of appending the "Biden Treaty Interpretation Condition" to its resolution of advice and consent, thus seeking to eternalize the "dual" approach throughout United States treaty practice. This condition, like many of the other measures unilaterally advanced by Congress in its struggles with the Executive for the control of foreign relations, is almost certainly unconstitutional, as well as perversely upside down in harming rather than serving the rule of law. Certainly, if allowed to stand, it would damage the United States in its international relations and would interfere with the legitimate constitutional roles of the President as the Chief Executive of the Nation in the conduct of foreign relations, and of the courts as the chief interpreters of the Nation's treaties in cases and controversies of judicial cognizance.

As sometimes happens in "great" cases, the effects of actions may be different than initially understood or anticipated. This seems likely also to be the case for the Senate, as the issue of its asserted power of domestic lawmaking through "domestic conditions" attached to treaties in the advice and consent process, becomes more visible as a result of this debate and its actions in espousing the "dual" approach and attaching it as a "domestic condition" to numerous treaties. It seems likely that when this issue is again squarely addressed by the courts that they will rule against any such Senate power, as has already been the case in the only Court of Appeals decision to have the issue fully identified and argued by counsel before the court. In recent years, the Supreme Court has begun importantly to focus on structural issues under the Constitution, including the integrity of the lawmaking process and the separation of powers. In the *Chadha* and *Clinton* cases in particular, the Court has firmly stressed the "single, finely wrought" requirements of art. I, § 7 of the Constitution as critical structural requirements for domestic lawmaking. Since it is conceded even by supporters of this asserted Senate "domestic conditions" power that such conditions are neither part of the

215. See, e.g., on this continuing struggle, *Executive Agreements and Congressional Executive Relations, Treaty Termination: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 400, 414 (1979) (Appendix to Statement of John Norton Moore).

treaty being considered nor the “supreme Law of the Land,” this strange asserted power seems highly likely to fail judicial scrutiny as did the one House and line-item vetoes before it.

The “broad-narrow” dispute about the proper interpretation of the ABM Treaty is not the first heated struggle about the proper interpretation of a treaty in United States history. Nor will it be the last. Sometimes in these struggles the Executive will be right, and sometimes he or she may be wrong. But throughout American history, no President has argued that he has the power as a matter of interpretation simply to ignore the correct international interpretation of a treaty to create a parallel domestic interpretation binding within the United States. Ironically, however, the Senate, perhaps only dimly aware of the consequences of its position, has asserted precisely that and in the name of the rule of law.

During the 1950s, a heated dispute arose over the scope of the federal treaty power. A proposal by Senator Bricker during the 83d Congress to amend the Constitution to restrict the treaty power was narrowly defeated.²¹⁶ Today it is generally accepted that the Bricker Amendment would have been a malignancy for the Nation in its conduct of foreign policy. And its core motivation, fear of human rights treaties expressed by some during the civil rights struggle, seems quaintly dated. So too, the “dual” approach, whatever the merits of its original motivation, would severely harm the ability of the Nation in its foreign policy. This latest “impulse of sudden passion,” as with the earlier Bricker Amendment, should not be permitted to do permanent harm to our international constitutive processes in an even more global world.

The United States and the international community are powerfully served by the rule of law.²¹⁷ Protecting and strengthening it should be a primary concern as we continue to examine issues of treaty law under the Constitution. The “dual” approach to treaty interpretation, however, is a deep disservice to the rule of law and an abomination whose time should never come.

216. See, e.g., for the nature of the Bricker Amendment controversy and Administration arguments in opposition, Statement by the Honorable Herbert Brownell, Jr., *supra* note 29. See also COMM. ON THE JUDICIARY, 83D CONG. 1ST SESS., PROPOSALS TO AMEND THE TREATY-MAKING PROVISIONS OF THE CONSTITUTION: VIEWS OF DEANS AND PROFESSORS OF LAW (Comm. Print 1953).

217. For development of this theme, and the great importance of democracy and the rule of law, see John Norton Moore, *Toward a New Paradigm*, 37 VA. J. INT'L L. 811 (1997).

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