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## The Case for Writing International Law into the U.S. Code

John F. Coyle

*University of North Carolina Law School, [jfcoyle@email.unc.edu](mailto:jfcoyle@email.unc.edu)*

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# THE CASE FOR WRITING INTERNATIONAL LAW INTO THE U.S. CODE

JOHN F. COYLE\*

**Abstract:** In recent years, the U.S. judiciary has taken steps to limit the role played by international law in the U.S. legal system. This Article seeks to explain this retreat and to identify ways by which it may be reversed. It argues first that the present judicial retreat from international law is attributable to two causes: judicial attitudes and judicial inexperience. Many judges have expressed some degree of ambivalence—occasionally rising to the level of hostility—about relying upon international law to provide a rule of decision. At the same time, many judges are largely unfamiliar with an ever-expanding array of international legal sources and methods. This Article contends that the end result of this combination of attitudes and inexperience is a pronounced reluctance among U.S. judges to give direct effect to certain types of international law. To date, many international legal scholars have responded to these developments by attempting to persuade the judiciary to rethink its basic approach to international law. This Article argues that a more promising approach would be to seek to persuade the other two branches of the federal government to enact domestic statutes that incorporate various international law rules. These statutory enactments would, among other things, enable the courts to ignore many of the doctrinal impediments that currently make it difficult for individuals to rely directly on international law as a source of rights. They would have a positive impact on the attitudes of skeptical judges. And they would help to alleviate the problem of judicial inexperience. With these goals in mind, the Article offers a number of practical suggestions as to how to draft statutes that incorporate international law so as to maximize the likelihood that such statutes—and the international law rules incorporated therein—will be given their full effect by U.S. courts.

## INTRODUCTION

The overwhelming majority of international law is today—and has long been—enforced in national courts.<sup>1</sup> In the United States, courts are

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regularly called upon to give effect to treaties relating to the liability of air carriers, the enforceability of international sales contracts, and the protection of intellectual property, among other areas.<sup>2</sup> These courts also occasionally hear cases involving the application of customary international law.<sup>3</sup> Over the past few decades, however, the judiciary has taken steps to limit the direct role played by international law in the U.S. legal system.<sup>4</sup> In a number of recent decisions, the U.S. Supreme Court has evinced what one commentator describes as a “visceral resistance to treating modern international law in both treaty and customary form as law of the United States.”<sup>5</sup> Similarly, the federal courts of appeal have exhibited a marked reluctance to give direct effect to customary international law or treaties to which the United States has long been a party.<sup>6</sup>

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<sup>1</sup> JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* 5 (1999) (“[I]nternational law is most commonly applied by judges in their own national courts . . . .”); ANDRÉ NOLLKAEMPER, *NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW* 8 (2011) (“The volume of national case-law on . . . matters of international law easily outnumbers the decisions of international courts and tribunals.”).

<sup>2</sup> See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644, 646 (2004) (international air carrier liability); *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.*, 635 F.3d 1106, 1109 (8th Cir. 2011) (international sales contracts); *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 156 (2d Cir. 2007) (international trademarks).

<sup>3</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735–38 (2004); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884–85 (2d Cir. 1980); see also *Alien Tort Statute*, 28 U.S.C. § 1350 (2014). Customary international law is that law resulting from “a general and consistent practice of states followed by them from a sense of legal obligation.” *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102(2) (1987).

<sup>4</sup> See Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 *YALE J. INT’L L.* 51, 90 (2012) (“The courts of the United States are today less willing than at any previous time in history to directly enforce the Article II treaty obligations of the United States through a private right of action.”).

<sup>5</sup> Ralph G. Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 *AM. J. INT’L L.* 841, 845 (2013) (stating further that “[b]oth the Rehnquist and Roberts Courts have opted to minimize the authority of much of international law by deploying existing doctrine in an aggressive and unprecedented way”); see *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1669 (2013) (invoking presumption against extraterritoriality to bar certain international law claims under the Alien Tort Statute); *Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) (announcing a new presumption against reading treaties to provide a right of action in domestic litigation); *Sosa*, 542 U.S. at 712–24 (narrowing scope of customary international law norms actionable under the Alien Tort Statute).

<sup>6</sup> *Yuen Jin v. Mukasey*, 538 F.3d 143, 159 (2d Cir. 2008) (observing that “there is a strong presumption against inferring individual rights from international treaties” (internal citations omitted)); *Gandara v. Bennett*, 528 F.3d 823, 825 (11th Cir. 2008) (concluding that Article 36 of the Vienna Convention on Consular Relations does not create private rights that may be enforced by individuals in U.S. courts); *Empresa Cubana Del Tabaco v. Culbro Corp.*, 399 F.3d 462, 485 (2d Cir. 2005) (concluding that “the Paris Convention creates [no] substantive rights beyond those independently provided in the Lanham Act”); *Kane v. Winn*, 319 F. Supp. 2d 162, 201 (D. Mass. 2004) (“The United States has at times demonstrated a certain unwillingness to permit international law to decide domestic disputes. In particular, American courts have often been reluctant to apply customary international law . . . .” (internal citations omitted)).

This persistent judicial reluctance to directly enforce international law rules is normatively undesirable for two reasons. First, if U.S. courts consistently decline to give effect to international law, litigants will often lack *any* forum in which to bring claims sounding in international law because individuals rarely have standing to appear before international tribunals.<sup>7</sup> Viewed from a litigant's perspective, therefore, the recent judicial retreat from international law raises the possibility that that law will confer a right for which there exists no remedy.<sup>8</sup> Second, if U.S. courts consistently decline to give effect to international law, they will lose their ability to influence the development of that law. Viewed from the perspective of the United States, therefore, the recent judicial retreat from international law raises the possibility that that law will increasingly be shaped by foreign courts and tribunals whose long-term interests may not be consistent with those of the United States.<sup>9</sup>

This Article aims to explain this judicial retreat from international law and to identify ways by which it may be reversed. To this end, it first seeks to understand precisely *why* U.S. courts are often reluctant to give effect to that law. It argues that this reluctance stems from two primary causes.<sup>10</sup> First, a not-insignificant number of U.S. judges have expressed some degree of ambivalence—occasionally rising to the level of hostility—towards the very concept of international law.<sup>11</sup> The Article refers to this cause as “judi-

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<sup>7</sup> Outside of a few regional human rights courts and various ad hoc tribunals convened pursuant to bilateral investment treaties, individuals typically have no standing to initiate a claim before international tribunals. The International Court of Justice and the Dispute Settlement Body of the World Trade Organization, for example, will only hear cases brought by sovereign states, and individuals cannot compel the various international criminal tribunals to initiate prosecutions against individuals accused of violating international law. *See, e.g.*, Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on "the Activities of National Courts and the International Relations of Their State,"* 5 EUR. J. INT'L L. 423, 423–24 (1994) (suggesting that national courts currently provide the best, and sometimes the only, chance for individuals to invoke international law).

<sup>8</sup> As the Supreme Court observed almost a century ago: “Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.” The W. Maid, 257 U.S. 419, 433 (1922); *see* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 40 (2014) (“A right without a remedy of any kind is not a right at all.”).

<sup>9</sup> *See* Joshua Wallenstein, Note, *Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide*, 54 STAN. L. REV. 351, 367–68 (2001) (identifying the United States as a state that has historically exerted “great influence in international law”); *see also* Michael Kirby, *International Law—the Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327, 362 (2006) (“[I]nternational law would be grievously injured if national courts, out of a sense of their own superiority or proclaimed ignorance, were to reject the rules and influence of the international legal order.”); Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 30–34 (1995) (arguing that the current preference for domestic law exhibited by U.S. courts “corrodes the very system of international law”).

<sup>10</sup> *See infra* notes 72–150 and accompanying text.

<sup>11</sup> *See infra* 72–103 and accompanying text.

cial attitudes.” Second, a significant portion of the U.S. judiciary has had little exposure to or training in international law and international legal methods.<sup>12</sup> The Article refers to this cause as “judicial inexperience.” The combined effect of these two causes, the Article suggests, is a judiciary that is extremely reluctant to rely directly on international law to provide a rule of decision in all but the least controversial cases.

In the past, those who favor a more expansive role for international law in U.S. courts have sought to address these attitudinal and experiential obstacles via direct appeals to the U.S. judiciary.<sup>13</sup> They have urged U.S. courts to scale back—or cast aside altogether—the various doctrinal rules that limit the ability of individuals to invoke international law directly in domestic litigation.<sup>14</sup> They have encouraged U.S. judges to familiarize themselves with international law norms in the hope that greater familiarity will lead to the more frequent application of these norms.<sup>15</sup> And they have called for better education and training of U.S. judges with respect to international law.<sup>16</sup> As yet, however, few of these arguments have had a significant impact on judicial practice. Indeed, the available evidence suggests that the U.S. judiciary has actually become *less* receptive to claims sounding directly in international law in recent years.<sup>17</sup> The ironic culmination of decades of legal scholarship urging U.S. judges to adopt a more monist approach to international law is a judiciary that is more profoundly dualist than at any previous point in the nation’s history.<sup>18</sup>

This Article suggests a different approach. It argues that, instead of addressing U.S. judges directly, international law advocates should seek to persuade the political branches to enact domestic statutes that incorporate various rules of international law.<sup>19</sup> Once this act has been done, history

<sup>12</sup> See *infra* 104–150 and accompanying text.

<sup>13</sup> See *infra* notes 151–179 and accompanying text.

<sup>14</sup> See *infra* 155–166 and accompanying text.

<sup>15</sup> See *infra* 167–177 and accompanying text.

<sup>16</sup> See *infra* 175–179 and accompanying text.

<sup>17</sup> See *supra* notes 3–5 and accompanying text; *infra* notes 48–71 and accompanying text.

<sup>18</sup> Ingrid Wuerth, *International Law, Domestic Law, and the United States*, 108 AM. J. INT’L L. 116, 117 (2014) (book review) (observing that U.S. law has “unquestionably” shifted to a more dualist system over the past decade, though questioning whether this development is a positive one). There are two basic theories regarding the relationship between international and domestic law. The first theory, monism, posits that there is no distinction between the two. JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 48–50 (8th ed. 2012). The monist view is simply that international law and domestic law are part of the same legal system and that domestic courts may draw upon international law as a rule of decision whenever necessary. *Id.* The second theory, dualism, posits that international law and domestic law exist in two separate spheres and that the relationship between the two spheres is mediated by domestic actors. *Id.*

<sup>19</sup> See *infra* notes 180–221 and accompanying text. This Article is not the first to argue that legislative action represents a particularly promising means by which international law may be given a more expansive role in the U.S. legal system. See, e.g., David H. Moore, *An Emerging*

suggests that judges will give effect to these statutory rules without complaint.<sup>20</sup> To the extent that international law advocates would like international law to play a more prominent role in the U.S. legal system, therefore, this Article contends that they are more likely to achieve this goal by focusing their attention on the executive and the legislative branches rather than the courts.<sup>21</sup>

The Article advances this argument in full awareness that many members of Congress have in recent years evidenced a not-insignificant degree

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*Uniformity for International Law*, 75 GEO. WASH. L. REV. 1, 52–53 (2006) (“In addition to pressing claims appropriate for judicial incorporation, international law advocates need to turn to Congress and treaty negotiators in the executive branch to translate treaties and custom into domestic law.”). Other scholars have urged the political branches to enact such statutes in order to give effect to particular treaties—or classes of treaties—to which the United States is a party. *See, e.g.*, Hathaway et al., *supra* note 4, at 91–95 (urging Congress to pass “legislation declaring certain classes or categories of treaty obligations self-executing and enforceable through private rights of action”); Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025, 1065 (2010) (discussing the need for federal legislation to give effect to international human rights treaties); David Sloss, *Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 FORDHAM INT’L L.J. 445, 482 (2012) (stating that “the United States should enact federal legislation to facilitate domestic judicial application of international human rights treaties”); Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 99 (2011) (arguing that “for human rights treaties to have maximum impact in the United States . . . it is critical to have universal implementing legislation that would apply to all treaties”); *see also* Edward W. Duffy, Note, *The Avena Act: An Option to Induce State Implementation of Consular Notification Rights After Medellín*, 98 GEO. L.J. 795, 796 (2010) (proposing federal legislation “that would induce states to implement the [Vienna Convention on Consular Relations] through conditional grants”); Nicole M. Howell, Comment, *A Proposal for U.S. Implementation of the Vienna Convention’s Consular Notification Requirement*, 60 UCLA L. REV. 1324, 1354–60 (2013) (discussing the need for federal legislation to implement the Vienna Convention on Consular Relations). This Article is, however, the first to argue that incorporative statutes represent a *structural* solution to the various obstacles—doctrinal, attitudinal, and experiential—that currently make it difficult for litigants to invoke international law in domestic litigation. Rather than focusing on how to give domestic effect to one particular treaty or treaty type, in other words, the Article focuses on the trans-substantive question of how all types of international law may achieve a more prominent role domestically.

<sup>20</sup> *See, e.g.*, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 536–38 (1995) (Hague Rules); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (United Nations Protocol Relating to the Status of Refugees); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 (1985) (United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (law of foreign sovereign immunity); *Al Bahlul v. United States*, 767 F.3d 1, 22 (D.C. Cir. 2014) (law of war); *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 100 (2d Cir. 2014) (Berne Convention); *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 746 F.3d 42, 54–55 (2d Cir. 2014) (Torture Convention); *United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013) (law of piracy); *Skaftouros v. United States*, 667 F.3d 144, 149 (2d Cir. 2011) (extradition treaties); *Brzak v. United Nations*, 597 F.3d 107, 113 (2d Cir. 2010) (law of diplomatic immunity); *Filartiga v. Penabaz-Cordero*, 630 F.2d 876, 878, 883–84 (2d Cir. 1980) (human rights law).

<sup>21</sup> *See infra* 222–291 and accompanying text.

of hostility towards international law.<sup>22</sup> To be clear, the Article does not contend that the political branches are *likely* to enact legislation that incorporates various elements of international law into the U.S. legal system in the near future.<sup>23</sup> It argues merely that the political branches are currently *more likely* than are the courts to take meaningful steps to bring international law home.<sup>24</sup> Over the past two decades, Congress has enacted hundreds of statutes that incorporate a wide range of international law rules into the U.S. legal system.<sup>25</sup> Over this same time period, U.S. courts have made it increasingly difficult for litigants to rely directly on international law as a source of rights.<sup>26</sup> In light of this history, it would appear that the challenges of motivating the political branches to act are less intractable than the task of persuading the judiciary to take aggressive steps on its own initiative to enhance the domestic prominence of international law. This is not to minimize the challenges inherent in persuading the political branches to act. Given the allocation of lawmaking power within the federal government, this task will never be easy. It is merely to point out that the political branches are today more likely than the judiciary to expand the role played by international law in the U.S. legal system.

With this insight in mind, the Article considers whether certain *types* of incorporative statutes are more effective than others.<sup>27</sup> After answering this question in the affirmative, it offers general advice to legislators and executive branch officials tasked with deciding how best to incorporate rules of international law into the U.S. Code.<sup>28</sup> It also makes a number of specific suggestions as to how Congress should draft incorporative statutes going forward in order to maximize the likelihood that they will be given effect if and when they are litigated before U.S. courts.<sup>29</sup>

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<sup>22</sup> See *infra* notes 206–207 and accompanying text (discussing this phenomenon).

<sup>23</sup> See *infra* notes 151–179 and accompanying text.

<sup>24</sup> Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 668–69 (1998).

<sup>25</sup> During this time period, Congress has enacted legislation to give effect to the Chemical Weapons Convention, to the Convention on Cybercrime, and to a variety of intellectual property treaties. Cf. Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1239 (2008) (“Each year, hundreds of congressional-executive agreements on a wide range of international legal topics are enacted by simple majorities in the House and Senate and signed into law by the President, outside the traditional Treaty Clause process.”); Ashley Deeks, *International Law in Congress: Contact, Resistance, and Embrace* 1 (unpublished manuscript) (on file with author) (“Congress, it turns out, employs international law in a wide variety of ways, some of which predictably express Congress’s disdain for international law, but many of which embrace that law.”).

<sup>26</sup> See *infra* notes 48–71 and accompanying text.

<sup>27</sup> See *infra* notes 225–235 and accompanying text.

<sup>28</sup> See *infra* notes 236–291 and accompanying text.

<sup>29</sup> See *infra* notes 236–291 and accompanying text.

Part I of this Article surveys the contrasting scholarly views with respect to the relationship between international law and the law of the United States and chronicles the judicial retreat from international law in recent years.<sup>30</sup> Part II explores the reasons why U.S. judges are often reluctant to give effect to international law rules.<sup>31</sup> Part III argues that direct appeals to the judiciary have failed to bring about any significant change in judicial behavior.<sup>32</sup> Part IV contends that legislative action—via the enactment of incorporative statutes—represents the most promising means of reversing the recent judicial retreat from international law.<sup>33</sup> Part V develops a typology of incorporative statutes and argues that certain types of such statutes are likely to be more effective than others at expanding the role played by international law in the U.S. legal system.<sup>34</sup>

## I. THE DEBATE OVER THE ROLE OF INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM

It has long been recognized that international law, under appropriate circumstances, may be incorporated into the domestic law of the United States.<sup>35</sup> The principal actors who determine when and how such incorporation takes place are the three branches of the federal government.<sup>36</sup> The president, acting with the consent of two-thirds of the Senate, may ratify treaties that become the law of the land.<sup>37</sup> A majority of Congress, acting with the consent of the president, may enact legislation that incorporates provisions of international law.<sup>38</sup> And the federal courts may, under certain circumstances, use their common-law-making powers to recognize customary international law as a form of federal common law.<sup>39</sup>

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<sup>30</sup> See *infra* notes 35–71 and accompanying text.

<sup>31</sup> See *infra* notes 72–150 and accompanying text.

<sup>32</sup> See *infra* notes 151–179 and accompanying text.

<sup>33</sup> See *infra* notes 180–221 and accompanying text.

<sup>34</sup> See *infra* notes 222–291 and accompanying text.

<sup>35</sup> See *infra* notes 180–199 and accompanying text.

<sup>36</sup> This is not to suggest that state and local actors do not play any role in incorporating rules of international law into domestic law—they do. See Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 461 (2004) (arguing that “in many circumstances, the states already control how and whether the United States will comply with certain obligations under international law”); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1626 (2006) (“[T]ransnational precepts are often incorporated locally, through actions of a diverse group of state actors.”). The primary actors mediating between the domestic and the international, however, operate at the federal level.

<sup>37</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>38</sup> See *id.* art. I, § 8, cls. 10, 18; see also *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

<sup>39</sup> A number of scholars have argued that customary international law is, in fact, federal common law. See, e.g., Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L.



The task of determining the legitimacy and the precise contours of each of these methods of incorporation has attracted a great deal of attention from legal scholars in recent years.<sup>40</sup> It has also generated sharp debates among U.S. academics as to when international law incorporated via one of the above methods may provide a binding rule of decision in domestic litigation.<sup>41</sup> This debate has given rise to two distinctly different scholarly viewpoints as to the role international law should play in the U.S. legal system. This Article refers to these two differing perspectives as the internationalist and the nationalist viewpoints.

### A. *The Internationalist/Nationalist Divide*

Some legal scholars—the internationalists—generally approach the question of whether U.S. courts should give effect to international law from the (external) perspective of the international legal system. Indeed, a number of internationalists have expressed the view that national courts should operate as *de facto* outposts of the international legal order.<sup>42</sup> The internationalists tend to favor the expansive application of international law by U.S. courts.<sup>43</sup> When the United States ratifies a treaty, the internationalists

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REV. 2241, 2259 (2004) (arguing that international law is an “enclave of federal common law” that “authorizes the federal courts to hear cases and frame remedies . . . as they would any other common law cause of action”); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 *FORDHAM L. REV.* 393, 393 (1997) (noting that, for decades, federal courts have held that “customary international law is part of federal common law”). Others have voiced a contrary view. See Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 *HARV. L. REV.* 869, 915–19 (2007); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *HARV. L. REV.* 815, 817 (1997).

<sup>40</sup> See *infra* notes 42–47 and accompanying text.

<sup>41</sup> *Id.*

<sup>42</sup> See RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER*, at xii (1964) (arguing that “it is sensible and necessary for states, regardless of their history or orientation, to allow national courts increasingly to serve the cause of world order without regard to national affiliation”); PHILIP QUINCY WRIGHT, *THE ENFORCEMENT OF INTERNATIONAL LAW THROUGH MUNICIPAL LAW IN THE UNITED STATES* 16–17 (1916) (“It is for states to supply the lack of a world administration for the execution of international law. As state courts of the United States enforce the federal constitution, laws and treaties, so it is the duty of independent governments to see that their courts enforce international law . . .”); Hersch Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 *BRIT. Y.B. INT’L L.* 65, 67, 93 (1929) (describing national judges as “the organs and trustees of the international legal community” and encouraging them to perform their duties with that “special care and devotion which flows from the consciousness that states, on whose behalf they administer international law, are the guardians of the international legal order which is as yet in a stage of minority”); see also *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 775 (1972) (Powell, J., concurring) (“Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law.”).

<sup>43</sup> See SHARON WEILL, *THE ROLE OF NATIONAL COURTS IN APPLYING INTERNATIONAL HUMANITARIAN LAW* 158–61 (2014) (noting instances in which “activist” national courts applied

believe that U.S. judges should give effect to that treaty in domestic litigation to the extent that it is relevant. Where a rule of customary international law is on point, the internationalists argue that U.S. judges should enforce that rule. Although legislative action may occasionally serve to facilitate the domestic application of international law, the internationalists maintain that it is not strictly necessary.<sup>44</sup>

Other scholars—the nationalists—generally approach this same question from the (internal) perspective of a particular national legal system. In recent years, this approach has tended to favor a more limited application of international law by courts in the United States.<sup>45</sup> When the United States ratifies a treaty, for example, the nationalists would discourage U.S. courts from giving direct effect to that treaty absent some clear signal from the political branches that they intended the treaty to be judicially enforceable. Similarly, where a rule of customary international law is on point, the nationalists would discourage U.S. judges from giving effect to that rule un-

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international law expansively in order to realize “utopian” goals); Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT’L L. 159, 160 (1993) (“It is common among international lawyers to refer to national courts as a reliable if diffuse system for ensuring compliance with international norms, and therefore to urge judges to apply these norms rigorously.”).

<sup>44</sup> See NOLLKAEMPER, *supra* note 1, at 82 (observing that it is “the ambition of international law to control the exercise of public power of the state and strengthen the position of the individual” and arguing that this ambition is “best achieved in states that allow for . . . automatic incorporation”); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310, 323 (1992) (“Since, it is argued, direct applicability [of treaties and customary international law] will enhance the effectiveness of international norms, it will also generally enhance the respect for and general prestige of international law, to the benefit of world order.”); see also Louis Henkin, *Lexical Priority or “Political Question”: A Response*, 101 HARV. L. REV. 524, 533 (1987) (expressing a preference for self-executing treaties to the exclusion of non-self-executing treaties that would require implementing legislation). But see Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT’L L. & POL. 501, 504 (2000) (discussing the act of translation inherent in any attempt by a domestic court to apply international law).

<sup>45</sup> Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT’L L. 805, 809 (1989) (“Some suggest that courts inevitably reflect the biases of their culture and their nation’s foreign policy when cases touch on foreign affairs. Especially in such cases, the courts cannot be expected to render neutral decisions; their function, rather, should be to maintain and protect the United States, its policies and its constitutional structure against alien pressures.”). It should be emphasized that the nationalist view that international law should play a more limited role in domestic litigation is a fairly modern development. See David Sloss, *Schizophrenic Treaty Law*, 43 TEX. INT’L L.J. 15, 26 (2007) (observing that “the nationalist presumption that treaties do not create individually enforceable rights is a fairly new doctrinal innovation”); see also Michael P. Van Alstine, *Treaties in the Supreme Court, 1901–1945*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 191, 194 (David L. Sloss et al. eds., 2011) (“In contrast with the era to follow [post-1945], separation of powers concerns about trenching on the prerogatives of the political branches did not feature prominently in the Supreme Court’s treaty jurisprudence of the time [1901–1945], even in public law disputes with the federal government.” (footnote omitted)).

less the political branches have specifically authorized its use in some way.<sup>46</sup> Although the nationalists are not opposed to giving international law a more expansive role in the U.S. legal system per se, they would prefer that the political branches (rather than the judiciary) take the lead on this issue. The nationalists acknowledge that these various limitations may mean that certain international law rules go unenforced. They contend, however, that this outcome is compelled by questions of institutional competence and the constitutional structure of the United States.

In practice, of course, there is some overlap in the views of the internationalists and the nationalists. Even the most fervent internationalist is likely to concede, for example, that there are some situations in which a national court may decline to enforce a particular rule of international law. And even the most dedicated nationalist will also concede that it is generally desirable that national courts interpret and apply international law in such a way so as to avoid putting a state in breach of its international obligations. Nevertheless, it is useful to conceptualize these two viewpoints as existing at opposite ends of a spectrum.<sup>47</sup> At the nationalist end, there is a distinct reluctance to allow U.S. courts to give effect to international law in domestic litigation absent clear evidence—such as a domestic statute authorizing its use—that the political branches intended this result. At the internationalist end, there is a strong presumption that international law can and should be directly applied by U.S. courts whenever it is invoked by a litigant.

### *B. The Judicial Retreat from International Law*

In recent years, U.S. courts have adopted the nationalist viewpoint in a series of high-profile cases.<sup>48</sup> In 2008, for example, the U.S. Supreme Court

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<sup>46</sup> U.S. courts may also decline to apply international law on the grounds that doing so would flood the courts with litigation or that its application would be contrary to principles of federalism. See Michael A. McKenzie, *Treaty Enforcement in U.S. Courts*, 34 HARV. INT'L L.J. 596, 609 (1993) (stating that “[t]he private enforcement of major international agreements like Geneva III might flood courts”); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 370, 462 (2002) (suggesting that treating customary international law as federal common law “offends constitutional norms of federalism”).

<sup>47</sup> Sharon Weill has developed a useful typology of national courts roles with respect to the application of international humanitarian law that loosely tracks the nationalist/internationalist divide. See WEILL, *supra* note 43, at 196. At the nationalist extreme, Weill argues that national courts distort international law in order to legitimate state actions that are clearly impermissible. *Id.* At the internationalist extreme, she argues that national courts apply international law even where it contradicts their own national law in order to provide greater legal protections to individuals. *Id.*

<sup>48</sup> See David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135, 137 (2012) (“In *Medellin*, the Supreme Court threw its substantial weight behind the nationalist camp.”); Peter J. Spiro, *Sovereignism’s Twilight*, 31 BERKELEY J. INT’L L. 307, 307 (2013) (“On key issues, sovereignism is also carrying the day in the federal courts, with further major victories likely just over the horizon.”). See, e.g., CURTIS A.

in *Medellin v. Texas* was called upon to determine whether a decision rendered by the International Court of Justice was “self-executing,” that is, whether it constituted a binding source of judicially-enforceable federal law without further action by Congress.<sup>49</sup> In answering this question in the negative, the Court articulated a test for determining whether a treaty was self-executing that was arguably stricter than the existing standard.<sup>50</sup> At the same time, the Court stated that “the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”<sup>51</sup> Commentators have argued that this decision “effectively flip[s] the presumption in favor of self-execution and a private right of action that prevailed for a century and a half to a presumption against.”<sup>52</sup> The upshot, in the view of these same commentators, is that “[t]he courts of the United States are today less willing than at any previous time in history to directly enforce the Article II treaty obligations of the United States through a private right of action.”<sup>53</sup>

The U.S. Supreme Court has also taken steps to roll back the (already quite limited) role played by customary international law in domestic litiga-

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BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 330 (2013) (“[A]lthough they sometimes apply international law directly, courts tend not to do so if they perceive that such application is contrary to the wishes of the political branches.”).

<sup>49</sup> 552 U.S. at 505; see *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (stating that a treaty is “to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision” but that “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”), *overruled on other grounds*, *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833); see also Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 299 (2005) (explaining the distinction between “self-executing” and “non-self-executing” treaties). In some cases, the political branches have declared certain treaties non-self-executing. In other cases, the courts have done so. In either case, the effect is the same—to make it difficult (if not impossible) for individuals to directly invoke the rights guaranteed in a particular treaty in domestic litigation.

<sup>50</sup> See *Medellin*, 552 U.S. at 505 n.2; Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1618–19 (2008) (noting that the majority in *Medellin* “appears to presume that a treaty is not self-executing unless there is affirmative evidence that the parties intended that the treaty have domestic legal force” and concluding that “[i]f this is the test, then very few, if any, treaties will pass it”).

<sup>51</sup> *Medellin*, 552 U.S. at 506 n.3 (citations and internal punctuation omitted).

<sup>52</sup> Hathaway et al., *supra* note 4, at 57; see John T. Parry, *A Primer on Treaties and § 1983 After Medellin v. Texas*, 13 LEWIS & CLARK L. REV. 35, 37 (2009) (“[A]lthough *Medellin* first and foremost hampers the domestic enforcement of public international law, it is also part of an ongoing jurisprudence that seeks to control and limit the ability of individuals to enforce federal rights in a variety of circumstances.”).

<sup>53</sup> Hathaway et al., *supra* note 4, at 90.

tion.<sup>54</sup> In 2004, the Court in *Sosa v. Alvarez-Machain* imposed limits on the number and type of customary international law norms that give rise to a cause of action under the Alien Tort Statute (“ATS”).<sup>55</sup> Although this decision did not qualify as a complete victory for the nationalists—the Court declined to end the practice of litigation under the ATS altogether, which some nationalists had urged it to do—its effect was to make it more difficult to enforce certain rules of customary international law in domestic litigation. Nine years later, the Court in *Kiobel v. Royal Dutch Petroleum Co.* further restricted the ability of plaintiffs to enforce these rules via the ATS when it held that that statute did not apply extraterritorially.<sup>56</sup> This decision effectively barred foreign plaintiffs from bringing claims against foreign defendants for violations of international law that occurred on foreign soil.<sup>57</sup>

This same pattern of judicial retreat from international law is also discernible in several recent decisions rendered by the federal courts of appeal. Virtually all of these courts have held, for example, that the Vienna Convention on Consular Relations does not create judicially-enforceable private rights.<sup>58</sup> These same courts also frequently demand in treaty cases “a threshold showing of ‘judicial enforceability’ beyond what is required for statutory and constitutional provisions.”<sup>59</sup> In 2010, for example, the Second Circuit concluded in *Katel LLC v. AT&T Corp.* that an international telecommunications treaty did not give rise to a private right of action in part

<sup>54</sup> Although the Court has long recognized that customary international law is a part of the law of the United States, it has also held that such law may provide a rule of decision only where there is “no controlling executive or legislative act . . . .” *The Paquete Habana*, 175 U.S. 677, 700 (1900). Congress has chosen to incorporate customary international law into U.S. statutes on a number of occasions. *See, e.g.*, 10 U.S.C. § 821 (2012) (law of war); 18 U.S.C. § 1651 (2012) (law of nations); Alien Tort Statute, 28 U.S.C. § 1350 (2012) (law of nations). U.S. courts have also recognized that certain customary international law rules are a part of the common law. *See, e.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (holding that the FSIA does not govern claims relating to foreign official immunity and that the courts should look to the common law to resolve questions under this doctrine).

<sup>55</sup> 542 U.S. at 732 (stating that “federal courts should not recognize private claims . . . for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted”).

<sup>56</sup> 133 S. Ct. 1659, 1669 (2013).

<sup>57</sup> *Id.* at 1676 (Breyer, J., concurring).

<sup>58</sup> *Gandara v. Bennett*, 528 F.3d 823, 829 (11th Cir. 2008); *see Mora v. New York*, 524 F.3d 183, 188–89 (2d Cir. 2008); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (en banc) (describing, though not explicitly endorsing, the government’s contention that Article 36 creates no judicially enforceable individual rights); *United States v. Li*, 206 F.3d 56, 60, 62 (1st Cir. 2000) (en banc) (declining to hold that Article 36 does not confer individual rights, though stating that “the Vienna Convention’s preamble explicitly disclaims any attempt to create individual rights”). *But see Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) (holding that “Article 36 confers individual rights on detained nationals”).

<sup>59</sup> Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 604–05 (2008) (citations omitted).

because that treaty did not specifically address the question of whether it was intended to create private rights.<sup>60</sup> This approach to determining whether treaties create private rights in U.S. courts has been fairly criticized as “hyper-exacting” in that it “incorrectly focuses on the absence of specific enforcement language as clear evidence that the signatory states did not intend to create [private] rights.”<sup>61</sup> In any event, the end result is that it is increasingly difficult for litigants to invoke treaties as a source of rights before the federal courts of appeal.

These same courts have also expressed reservations about giving effect to various rules of customary international law.<sup>62</sup> In 2011, for example, the Ninth Circuit held in *Sarei v. Rio Tinto, PLC* that a plaintiff seeking to bring a cause of action under the ATS must first exhaust local remedies, a requirement that seems calculated to reduce the likelihood that a U.S. court will ultimately be required to give effect to international law in cases brought under the ATS.<sup>63</sup> In a number of other cases, the lower federal courts have been asked to apply customary international law outside the context of a statutory enactment.<sup>64</sup> In the overwhelming majority of cases, these courts have refused to do so, holding that the customary international law rule in question had been displaced by a (wholly domestic) act of the executive or legislative branch.<sup>65</sup>

Finally, there also appears to be an increasing willingness on the part of U.S. courts to make aggressive use of other doctrinal rules—including standing,<sup>66</sup> personal jurisdiction,<sup>67</sup> and the doctrine of forum non conven-

<sup>60</sup> 607 F.3d 60, 67 (2d Cir. 2010) (“No wording in the [treaties] creates a private right of action . . .”).

<sup>61</sup> *Gandara*, 528 F.3d at 834 (Rodgers, J., concurring).

<sup>62</sup> M. Shah Alam, *Enforcement of International Human Rights by Domestic Courts in the United States*, 10 ANN. SURV. INT’L & COMP. L. 27, 42 (2004) (arguing that “U.S. courts are generally hesitant and reluctant to apply the customary law of human rights directly”).

<sup>63</sup> 671 F.3d 736, 761 (9th Cir. 2011) (en banc), *vacated on other grounds*, 133 S. Ct. 1995 (2013).

<sup>64</sup> *See, e.g.*, *Oliva v. U.S. Dep’t of Justice*, 433 F.3d 229, 236 (2d Cir. 2005).

<sup>65</sup> *See id.*; *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302–03 (D.C. Cir. 2005); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995) (en banc); *Gisbert v. U.S. Att’y Gen.*, 988 F.2d 1437, 1447–48 (5th Cir. 1993); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453–55 (11th Cir. 1986). The U.S. Supreme Court will look to customary international law when dealing with certain issues (such as border disputes) that arise between U.S. States. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106–07, 110 (1938); *see also* Edwin Dewitt Dickinson, *The Law of Nations as a Part of the National Law of the United States*, II, 101 U. PA. L. REV. 792, 821 (1953) (“[T]he Supreme Court from the beginning has resolved interstate boundary disputes in recourse to the Law of Nations.”).

<sup>66</sup> *See* *United States v. Bout*, 731 F.3d 233, 240 n.6 (2d Cir. 2013) (“[A]bsent protest or objection by the offended sovereign, [a defendant] has no standing to raise the violation of international law as an issue.” (citations omitted)); *Doe VIII v. Exxon Mobil Corp.*, 658 F. Supp. 2d 131, 134–35 (D.D.C. 2009) (stating that the “general rule is that non-resident aliens have no standing to sue in United States courts” (citations omitted)), *aff’d in part, rev’d in part*, 654 F.3d 11, 65 (D.C. Cir.

iens<sup>68</sup>—to decline to hear cases with some connection to a foreign jurisdiction.<sup>69</sup> It is precisely these cases, of course, that are most likely to raise interesting and novel issues of international law. In addition, U.S. courts have long invoked the “last-in-time rule” as a justification for declining to give effect to treaties to which the United States is a party.<sup>70</sup> Although this rule is ostensibly neutral in that it directs courts to give effect to the more *recent* statute or treaty in the event of a conflict between them, in practice the rule more frequently results in statutes displacing treaties than the other way around.<sup>71</sup> Again, the result is to limit the role played by international law in the U.S. legal system.

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This judicial retreat from international law is normatively undesirable for two reasons. First, in many cases there will be no other forum with jurisdiction to hear particular disputes sounding in international law. Viewed from a litigant’s perspective, therefore, this trend presents the very real pos-

2011), *vacated sub nom. Doe v. Exxon Mobil Corp.* 527 F. Appx. 7 (D.C. Cir. 2013), *aff’d in part, rev’d in part*, 527 F. App’x 7 (D.C. Cir. 2013); *see also* Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1088–89 (2010) (discussing increased use of standing doctrine to limit transnational litigation).

<sup>67</sup> Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. (forthcoming 2015) (manuscript at 10–11), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2546351##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546351##), *archived at* <https://perma.cc/U84X-H4WP?type=pdf> (describing recent judicial “retreat” from transnational litigation via revisions to personal jurisdiction rules).

<sup>68</sup> *See Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1289–90 (11th Cir. 2009) (dismissing suit alleging torture in violation of international law on forum non conveniens grounds).

<sup>69</sup> *See* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 724 (2012) (“Federal courts have begun to constrain the ability of plaintiffs to file [Alien Tort Statute] cases. . . . [C]ourts have done this not only by interpreting international law narrowly, but also by employing domestic procedural devices that limit the application of international law in domestic courts.”); *see also* Bookman, *supra* note 67, at 8–19 (discussing the growth of judicial avoidance tactics by U.S. courts); Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT’L L. 663, 672–73 (2012) (describing several “recent developments . . . that make [international civil] litigation harder to maintain in United States courts”); Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT’L L. 259, 259–60 (2012) (discussing U.S. courts’ recent unwillingness “to exercise extraterritorial jurisdiction over multinational[]” corporations in human rights cases).

<sup>70</sup> The U.S. Supreme Court has long interpreted the Supremacy Clause to accord equal status to statutes and treaties. When a conflict arises between a statute and a treaty, the “last-in-time” rule holds that the more recent enactment shall prevail. *See* *Breard v. Greene*, 523 U.S. 371, 376 (1998); *see also* Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 342–44 (2005).

<sup>71</sup> *See* Andrea Bianchi, *International Law and US Courts: The Myth of Lohengrin Revisited*, 15 EUR. J. INT’L L. 751, 761–62 (2004); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 160; Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 595–96 (2007).

sibility that that law will confer a right for which there exists no remedy. Second, U.S. courts that consistently find ways to avoid applying international law will eventually lose the ability to shape that law, an outcome that is arguably contrary to the long-term best interests of the United States. In light of these costs, the question that naturally arises is precisely *why* U.S. courts are today so reluctant to give effect to international law.

## II. EXPLAINING THE JUDICIAL RELUCTANCE TO GIVE EFFECT TO INTERNATIONAL LAW

The contemporary judicial reluctance to give direct effect to international law is attributable to two primary causes. The first is *judicial attitudes*. Many U.S. judges are, for lack of a better word, unenthusiastic about relying upon international law to provide a rule of decision. The second is *judicial inexperience*. Many U.S. judges are unfamiliar with international methods and sources and are, consequently, wary of relying on these same methods and sources in deciding cases that come before them.

### A. Judicial Attitudes

U.S. judges have long had an ambivalent relationship with international law.<sup>72</sup> Although the precise reasons for this ambivalence are complex, it is likely attributable in part to the unique legal culture that exists within the United States. Almost twenty years ago, Rosalyn Higgins noted the important role that legal culture could play in shaping the ways that national judges interact with international law:

In some jurisdictions international law will be treated as a familiar topic, one that both the judge and the counsel before him will expect to deal with on a routine basis . . . . But there is another culture that exists, in which it is possible to become a practising lawyer without having studied international law, and indeed to become a judge knowing no international law. Psychologically that disposes both counsel and judge to treat international law as

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<sup>72</sup> Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2291 (1991). Professor Brilmayer notes:

The familiar “passive virtues” rhetoric reveals a general philosophy of judicial modesty that goes beyond specific doctrinal limitations to what sometimes seems almost an allergic reaction to anything international. As Judge Aubrey Robinson was reported to have put it: “I’m nothing but a trial judge in one federal court. I don’t run the universe, and I have nothing to do with international affairs.”

*Id.* (quoting Tracy Thompson, *Hijacker Gets Thirty-Year Prison Term*, WASH. POST, Oct. 5, 1989, at A39).



some exotic branch of the law, to be avoided if at all possible, and to be looked upon as if it is unreal, of no practical application in the real world.<sup>73</sup>

In recent years, a number of commentators have argued that U.S. judges do, in fact, tend to view international law as something that is both exotic and unwelcome. One scholar has observed, for example, that “United States courts have historically shown an ambivalent commitment to the application of international law.”<sup>74</sup> Another has argued that this ambivalence in many cases crosses the line into outright “hostility.”<sup>75</sup> Still other scholars have argued that U.S. judges are “wary” of international law<sup>76</sup> or that this law makes U.S. courts “uncomfortable”<sup>77</sup> or that U.S. courts exhibit a “continuing, seemingly visceral resistance to treating modern international law in both treaty and customary form as law of the United States.”<sup>78</sup>

The existence of these attitudes is not altogether surprising. National courts are institutions created and maintained by a particular state. In cases when they are called upon to apply international law, it is possible (indeed, it is likely) that national judges will feel a greater affiliation with the national legal culture in which they are trained and resist attempts to apply inter-

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<sup>73</sup> ROSALYN HIGGINS, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 206 (1996); see Bianchi, *supra* note 71, at 781 (“Regardless of the formal instruments of incorporation . . . the extent to which international law is actually used by the courts within the formal constraints of constitutional arrangements largely depends on the legal culture prevailing at any particular time.”).

<sup>74</sup> Martin A. Rogoff, *Application of Treaties and the Decisions of International Tribunals in the United States and France: Reflections on Recent Practice*, 58 ME. L. REV. 405, 428 (2006); see also Paul R. Dubinsky, *United States*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS* 631, 631 (Diana Shelton ed., 2011) (“Ambivalence about international law . . . can be found in . . . federal and state courts . . .”).

<sup>75</sup> Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195, 200 (2004) (claiming that “[u]nlike most other developed countries, the United States has assumed a skeptical, sometimes openly hostile posture to international law”); see Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 259 (2001) (“The reluctance and open hostility some federal courts express toward international law claims reflect ambivalence toward the legitimacy of international law as a source of law.”).

<sup>76</sup> Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT’L L. 273, 322 (2004) (observing that Justices on the U.S. Supreme Court “are very wary . . . of adopting any rule that may make them or the United States beholden to laws beyond their control”).

<sup>77</sup> John K. Setear, *A Forest with No Trees: The Supreme Court and International Law in the 2003 Term*, 91 VA. L. REV. 579, 664 (2005); see Jonathan I. Charney, *International Law Decisions in National Courts*, 91 AM. J. INT’L L. 394, 395 (1997) (book review) (remarking on the “the negative attitude of U.S. lawyers, especially the judiciary, toward the relevance and usefulness of international law” and suggesting that these attitudes “may be explained in part by the failure of U.S. law schools, unlike those of some other states, to train all students in the international legal system”).

<sup>78</sup> Steinhardt, *supra* note 5, at 845.

national or foreign law whose origins lie outside of that culture. As Brainerd Currie once observed:

Lawyers and judges are ordinarily schooled in their own domestic law. Day in and day out they think, advise, and argue and dispose of cases in terms of that law. . . . The intrusion of foreign law is an unsettling departure from routine, involving even under ideal conditions some encounter with the unfamiliar, some departure from usual procedures, some additional burden; and there are situations in which the degree of unfamiliarity and the burden of understanding can become oppressive.<sup>79</sup>

Even though national judges may be uniquely well-positioned to enforce a disparate and decentralized body of international law, they are still national courts at their core.<sup>80</sup> As such, they will often reflect the values of their national legal culture.

Whatever the precise label that one applies to these U.S. judicial attitudes towards international law—ambivalence, hostility, discomfort, wariness, or visceral dislike—scholars agree that these attitudes can and do lead U.S. judges to refuse to give effect to that law.<sup>81</sup> Theories abound as to these attitudes' precise origins. Some scholars have speculated these attitudes are attributable to the unique reverence that the U.S. Constitution occupies in the U.S. legal system.<sup>82</sup> Others have suggested that they stem from

<sup>79</sup> BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 9 (1963); see *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 306 (3d Cir. 2004) (Roth, J., concurring) (“Many times, rather than wade through the mire of a complex set of foreign statutes and case law, judges marginalize the [Hague Evidence] Convention as an unnecessary ‘option.’”).

<sup>80</sup> See Benvenisti, *supra* note 43, at 161 (“Judges firmly refuse to live up to the vision of international lawyers.”); see also Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT’L L. 507, 546 (2011) (“Judges have no particular incentive to defy their own national governments for the sake of ambiguous international ideals. And, if they did, it is not clear how they could constrain their governments, most of which demand, and receive, freedom of action in foreign affairs.”); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT’L & COMP. L.Q. 57, 75–76 (2011).

<sup>81</sup> Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 52 (2004) (discussing Justices Scalia and Thomas as espousing a “nationalist” jurisprudence that “is characterized by . . . resistance to comity or international law as meaningful constraints on national prerogatives”); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1117–18 (2000) (noting that the U.S. Supreme Court is “regarded by many foreign judges and lawyers as resolutely parochial in its refusal to look either to international or foreign law”).

<sup>82</sup> See, e.g., Bianchi, *supra* note 71, at 754 (suggesting that the U.S. legal system is hostile to international law because of a “perception that the fundamental tenets of the domestic legal order, as enshrined in the Constitution, cannot be altered by a body of law which does not exclusively emanate from the national societal body”); Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT’L L. 1, 3–4 (2000) (claiming that reverence for the Constitution makes it “almost unimaginable that we would yield political or legal authority to institutions and actors outside of this web popular sovereignty”); Michael

a lack of familiarity with foreign cultures.<sup>83</sup> Others have argued that they can be traced to concerns that international human rights law might supplant the rights accorded by the U.S. Constitution and national civil rights law.<sup>84</sup> Others have argued that these attitudes “stem from concerns about institutional competence and deference to the political branches.”<sup>85</sup> Still others contend that this reluctance to apply international law stems in part from “an ideological commitment to a democratic process, wherein Congress takes the lead in determining the content of the rights to enforced by the judiciary.”<sup>86</sup>

Whatever the precise explanation for these attitudes, it is interesting that the intensity of judicial skepticism towards international law appears to fluctuate depending on the *type* of international law at issue.<sup>87</sup> Although the term “international law” formally encompasses any and all treaties negotiated between and among sovereign states, the range of topics covered by these treaties is vast. As a form of shorthand, legal scholars often distinguish “public law” treaties from “private law” treaties.<sup>88</sup> Public law treaties are those international agreements whose primary purpose is to regulate or otherwise constrain the behavior of states and state actors.<sup>89</sup> Private law treaties, by contrast, are those international agreements whose primary purpose is to allocate rights and responsibilities between and among private individuals.<sup>90</sup> The distinction is significant because U.S. courts are often

Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1765 (2009). *But see* Daniel Bodansky & Jutta Brunnee, *The Role of National Courts in the Field of International Environmental Law*, 7 REV. EUR. COMP. INT’L ENVTL. L. 11, 14 (1998) (“[T]he extent to which international environmental law enters the domestic sphere seems more dependent upon judicial attitudes towards international law than upon the formal features of the constitutional system . . .”).

<sup>83</sup> See Lori A. Fields, Note, *Société Nationale Industrielle Aérospatiale v. United States District Court: The Supreme Court Undermines the Hague Evidence Convention and Confounds the International Discovery Process*, 22 LOY. L.A. L. REV. 217, 308–09 (1988).

<sup>84</sup> Hathaway et al., *supra* note 4, at 68–70. *But see* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1817 (2009) (noting parallels between international law and constitutional law in that both are forms of public law that “suffer from deep uncertainty about what counts as authoritative legal norms”).

<sup>85</sup> Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT’L L. 1, 28 (1992).

<sup>86</sup> Sloss, *supra* note 19, at 482.

<sup>87</sup> See generally Andrew Moravcsik, *Why Is Human Rights Policy So Unilateralist?*, in THE COST OF ACTING ALONE: MULTILATERALISM AND U.S. FOREIGN POLICY 345 (Shepard Forman & Patrick Stewart eds., 2001) (seeking to explain why the United States is generally reluctant to ratify human rights treaties).

<sup>88</sup> See John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343, 347 & n.11 (2011).

<sup>89</sup> See *id.* Treaties relating to human rights, immigration, humanitarian law, consular relations, and the law of armed conflict are well-known examples of public law treaties.

<sup>90</sup> See *id.* Treaties relating to intellectual property, the international sale of goods, and arbitration are well-known examples of private law treaties.

reluctant to enforce public law treaties against U.S. executive branch agencies and officials.<sup>91</sup> These same courts are, however, generally willing to give effect to private law treaties in resolving disputes between private individuals.<sup>92</sup>

Consider, by way of an example, judicial practice with respect to public law treaties that limit or otherwise constrain the discretion of federal executive branch actors.<sup>93</sup> A number of commentators have argued that U.S. courts frequently interpret these treaties “so as to allow maximum freedom for the actions of domestic officials.”<sup>94</sup> One scholar, for example, has argued that the restrictive treaty interpretations adopted by judges in a number of cases “do not call into question U.S. courts’ *competency* to apply international treaty law so much as . . . cast doubt on courts’ *commitment* to international treaty law.”<sup>95</sup> Other scholars contend that the “judiciary generally

<sup>91</sup> See generally David Sloss, *United States*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* 504, 505 (David Sloss, ed.) (2009) (“[I]n litigation between private parties, courts are more likely to apply a transnationalist approach than a nationalist approach. However, in cases where private parties are adverse to government actors, courts are more likely to apply a nationalist approach than a transnationalist approach.”).

<sup>92</sup> *Id.*; see Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1474 (2006) (book review) (noting that “modern courts seem increasingly reluctant to adjudicate rights under public law treaties,” but that “private law treaties . . . are a different matter”).

<sup>93</sup> This ambivalence about giving effect to public law treaties typically manifests itself exclusively in cases in which the treaty purports to constrain the discretion of *federal* officials. U.S. courts have long enforced public law treaties against state officials. See, e.g., *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924).

<sup>94</sup> Martin A. Rogoff, *Interpretations of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U. J. INT’L L. & POL’Y 559, 566 (1996); see David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1469–70 (1999) (arguing that courts in treaty interpretation cases “profess independence and maintain judicial review of treaty claims, but actually extend unnecessary and untoward deference to executive branch positions that tend to frustrate the litigation of those claims”); Thomas Franck, *The Courts, the State Department, and National Policy: A Criterion for Judicial Abdication*, 44 MINN. L. REV. 1101, 1123 (1960) (suggesting on the one hand that “it is right that the legal notions of the political branches of government should be respected by the courts” but claiming on the other hand that “there is no reason for the courts to abdicate their function in deference to this principle in those cases in which there is at stake no matter of international law substantially affecting the national interest”); see also Rogoff, *supra*, at 613 (“In *Sale*, *Alvarez-Machain*, *Schlunk*, *Aéropostale*, and *Sumitomo* . . . [t]he Court in effect preserved the freedom of action of domestic decision-makers, rather than limiting their freedom of action in the interests of the other party or parties to the international agreement.”).

<sup>95</sup> Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 463 (2004); see Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241, 242 (2008) (“[T]hrough an assortment of avoidance doctrines . . . the identification or misidentification of customary international law, and expansive or restrictive interpretation of treaties, national courts managed to align their findings and judgments with the preferences of their governments and thus to guarantee them complete latitude in external affairs.”).

follows the executive's lead instead of pushing the executive toward greater international engagement."<sup>96</sup> And one exhaustive survey of reported cases found that U.S. courts are far more likely to adopt a restrictive interpretation of a treaty in cases in which the U.S. government (or an executive official) was the named defendant than in cases brought against purely private actors.<sup>97</sup> When litigants seek to rely on international treaties to constrain the discretion of the executive branch, in short, the courts are generally reluctant to give effect to those treaties.

This reluctance is greatly reduced—though not eliminated altogether—in cases where the treaty in question is a private law treaty. It is almost unheard of, for instance, for a U.S. court to refuse to give effect to perhaps the quintessential private law treaty—the United Nations Convention on Contracts for the International Sale of Goods (“CISG”).<sup>98</sup> There are, to be sure, some exceptions to this general rule.<sup>99</sup> Some courts have declined to give effect to treaty provisions granting foreign companies special rights with respect to the hiring and firing of their own nationals.<sup>100</sup> Others have sought to narrow the scope of the Hague Evidence Convention.<sup>101</sup> Still others have refused to give effect to certain provisions in treaties relating to the protec-

<sup>96</sup> Abebe & Posner, *supra* note 80, at 529.

<sup>97</sup> See Sloss, *supra* note 91, at 534 (“[C]ourts are more likely to apply nationalist tools [of interpretation] in government litigation than in private litigation.”); see also *id.* at 545 (“Remarkably, the government won all thirty-one cases in which a private party was adverse to a government actor, one or both parties invoked a treaty, and the court applied a nationalist approach.”).

<sup>98</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3. Occasionally, a U.S. judge will express some degree of disaffection with this treaty. See, e.g., *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1238 (S.D.N.Y. 1992) (“[T]he Uniform Commercial Code, as previously noted does not apply to this case, because the State Department *undertook to fix something that was not broken* by helping to create the Sale of Goods Convention which varies from the Uniform Commercial Code in many significant ways.” (emphasis added)). As a general rule, however, U.S. courts give effect to the CISG without complaint. See, e.g., *Allied Dynamics Corp. v. Kennametal, Inc.*, 965 F. Supp. 2d 276, 298–99 (E.D.N.Y. 2013); *CSS Antenna, Inc. v. Amphenol-Tuchel Electronics, GmbH*, 764 F. Supp. 2d 745, 752–53 (D. Md. 2011).

<sup>99</sup> See Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369, 379 (2001) (arguing that the U.S. Supreme Court has construed certain private law treaties “overwhelmingly from an American perspective” and that the Court has made “no visible attempt to maintain decisional harmony with other contracting nations”).

<sup>100</sup> See Gerald D. Silver, Note, *Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives “of Their Choice,”* 57 FORDHAM L. REV. 765, 775–76 (1989) (arguing that the employer choice provision in some FCN treaties does, in fact, confer rights on foreign companies that are denied to domestic companies); John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT’L L. 302, 343–44 (2013).

<sup>101</sup> See Patrick J. Borchers, *The Incredible Shrinking Hague Evidence Convention*, 38 TEX. INT’L L.J. 73, 73 (2003) (criticizing the U.S. Supreme Court for adopting “hypertechnical” readings of the Hague Evidence Convention and other private law treaties that operate in practice to “minimize their scope”).

tion of intellectual property.<sup>102</sup> These exceptions notwithstanding, U.S. courts are today much more likely to enforce private law treaties (as against private parties) than to enforce public law treaties (as against public officials). This pattern of practice suggests that current judicial ambivalence with respect to international law is rooted less in a commitment to a democratic process—properly ratified private law treaties, after all, are every bit as democratically legitimate as properly ratified public law treaties—than in a belief that individuals ought to rely on the rights afforded by wholly domestic law when seeking to constrain the actions of the executive branch.<sup>103</sup>

### B. Judicial Inexperience

Most U.S. judges have had little—if any—training in international law.<sup>104</sup> As a consequence, they are often unfamiliar with the content of that law, the sources of that law, and the unique methods that international lawyers use to determine the precise meaning of that law.<sup>105</sup> Curtis Bradley and Jack Goldsmith, for example, have argued that “[i]nternational law is a mystery to most U.S. judges” and that “most judges are not familiar with

<sup>102</sup> See *infra* notes 244–251 and accompanying text (discussing the Paris Convention).

<sup>103</sup> See Bederman, *supra* note 94, at 1487–88 (“[T]he farther removed treaties appear to judges as part of the national legal order, the more likely courts will defer or abstain in their application and interpretation.”).

<sup>104</sup> See Frederic L. Kirgis, Jr., *Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts*, 82 AM. J. INT’L L. 323, 326–27 (1988) (“Federal judges in the United States typically are not experts in international law. Nor are their law clerks. When they deal with international law questions, they are dealing with an unfamiliar system shaped by unfamiliar sources and mechanisms.”); Janet Koven Levit, *Sanchez-Llamas v. Oregon: The Glass Is Half Full*, 11 LEWIS & CLARK L. REV. 29, 33 (2007) (“One real consequence of the academy’s failure to recognize state courts as transnational actors is that state courts, state judges, and state bars remain ill-equipped to grapple with questions of international law, especially questions as complicated as those posed by the Vienna Convention.”); Douglas J. Sylvester, Comment, *Customary International Law, Forcible Abductions, and America’s Return to the “Savage State,”* 42 BUFF. L. REV. 555, 620 (1994) (“Arguably, the greatest barrier to applying international law is the ignorance of the United States judiciary about the sources and effect of that law.”). *But see* Charney, *supra* note 45, at 809 (expressing confidence in ability of U.S. judges to resolve international law questions); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 383–84 (2006) (“[T]he question of judicial competence in the transnational law arena is increasingly a relic of an earlier time. In law schools today, international law, including human rights law, is one of the fastest growing areas of the curriculum.”); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2389 (1991) (“When difficult questions of international law do arise, American courts have traditionally been deemed competent to decide them.”).

<sup>105</sup> Bradley & Goldsmith, *supra* note 39, at 875 (“[I]nternational law issues have arisen much less frequently in U.S. courts during this century than have ‘domestic’ issues such as interpretation of the U.S. Constitution and federal and state statutes.”); Mary Ellen O’Connell, *Beyond Wealth: Stories of Art, War, and Greed*, 59 ALA. L. REV. 1075, 1103–04 (2008) (“Turning to international law requires knowledge of the law and recognition of its applicability. Both qualities seem to have declined in the United States in recent decades.”).

the materials relevant to the resolution of international law questions . . . .”<sup>106</sup> Another well-known scholar has commented that “most American law graduates are in a state of abysmal ignorance when it comes to international law” and that “[o]ur judges, for the most part, know it only as an exotic export of political science departments and their clerks have neither the interest nor ability to look it up.”<sup>107</sup> Still another scholar once stated that “most judges in the United States . . . have, at the most, a superficial familiarity with the theory of law creation in the international legal system and only the vaguest notion of how the system functions.”<sup>108</sup> Other commentators have pointed out that most federal judges are “unlikely to have great facility with international legal, political, or economic theories or materials” and are “more likely to be chosen because of their prominence as litigators or as public officials.”<sup>109</sup>

It is tempting to dismiss these views as academic brickbats hurled from the ivory tower. The suggestion that many U.S. judges are not well-versed in international law has, however, been echoed by a number of prominent U.S. jurists. Justice Blackmun once observed in a speech to the American Society of International Law that U.S. judges “are relatively unfamiliar with interpreting instruments of international law.”<sup>110</sup> Justice O’Connor once observed that U.S. judges have “no special competence” to “resolve disputes that involve questions of foreign and international law.”<sup>111</sup> These frank statements—along with a number of similar observations made by lower federal court judges—suggest that a significant proportion of the U.S. judiciary is, in fact, largely unfamiliar with international law and the

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<sup>106</sup> Bradley & Goldsmith, *supra* note 39, at 874–75; see Friedrich Kratochwil, *The Role of Domestic Courts as Agencies of the International Legal Order*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 236, 252 (Falk et al., eds., 1985) (observing that “courts are often quite oblivious to their proper duties and role within the international legal order”).

<sup>107</sup> Thomas M. Franck, *Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh’s Optimism*, 35 HOUS. L. REV. 683, 694–95 (1998).

<sup>108</sup> Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 GA. J. INT’L & COMP. L. 205, 205 (1996); see McFadden, *supra* note 9, at 37 (“Few judges and lawyers approach their work with a solid grounding in the substance and methods of international law . . . . Both lawyers and judges lack experience in handling international issues and are ill-disposed to explore unfamiliar territory.”).

<sup>109</sup> Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 187 (further explaining that “[i]t is difficult to recall more than a handful of judges who had significant foreign affairs experience before their appointment to the federal bench”).

<sup>110</sup> Justice Harry A. Blackmun, *The Supreme Court and the Law of Nations: Owning a Decent Respect to the Opinions of Mankind*, Address Before The American Society of International Law (Apr. 8, 1994), in 88 AM. SOC’Y INT’L L. PROC. 383, 388 (1994).

<sup>111</sup> Sandra Day O’Connor, *Federalism of Free Nations*, 28 N.Y.U J. INT’L L. & POL. 35, 41 (1997); see Slaughter, *supra* note 81, at 1109 (“At the 41st Congress of the Union Internationale des Advocates[.] . . . Justice O’Connor lamented the fact that lawyers and judges in America and elsewhere tend to forget that other legal systems exist.”).

sources that comprise it.<sup>112</sup> This is not to suggest, of course, that all U.S. judges are unfamiliar with international law. It is merely to point out that the number of sitting U.S. judges who are well-versed in the intricacies of international law is quite small. Because the vast majority of claims sounding in international law are resolved in the lower federal courts, this lack of expertise will inevitably impact the quality of the international law decisions rendered by these courts, particularly when those cases present novel or challenging issues.<sup>113</sup>

This Section first considers the problem of judicial inexperience specifically as it relates to the enforcement of treaties.<sup>114</sup> It then considers this problem in the context of judicial attempts to determine the content of customary international law.<sup>115</sup>

## 1. Treaties

When it comes to treaties, judicial inexperience manifests itself in three primary ways. First, U.S. courts sometimes *overlook* treaties that are relevant in a particular case. Second, these courts are sometimes *reluctant to apply* the treaty because they are unfamiliar with international legal methods. Third, inexperience with international legal sources sometimes leads these same courts to *misinterpret* these treaties.

The CISG provides an excellent example of the tendency among some U.S. judges to overlook international treaties. U.S. litigants and jurists routinely fail to recognize that the CISG displaces Article 2 of the Uniform Commercial Code with respect to contracts involving the international sale

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<sup>112</sup> *In re Auto. Refinishing Paint*, 358 F.3d 288, 306 (3d Cir. 2004) (Roth, J., concurring) (stating that few judges have any experience in the field of international law); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247–48 (2d Cir. 2003) (“[T]he relevant evidence of customary international law is . . . generally unfamiliar to lawyers and judges.”); *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 860 (2d Cir. 1962), *rev’d*, 376 U.S. 398 (1964) (“Judges of municipal courts, the bulk of whose decisions involve questions under a domestic law derived from a long-established and increasingly elaborate national legal system, will often find themselves unfamiliar with the ratiocination necessary for decision in this area [of international law], where recognized precedent and accepted authority are scant.”).

<sup>113</sup> See Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L.J. 941, 950 (2012) (observing that the federal courts of appeal “create the vast bulk of precedents on international law”); Janet Chiancone et al., *Issues in Resolving Cases of International Child Abduction by Parents*, JUVENILE JUSTICE BULLETIN, Dec. 2001, at 7, available at <https://www.ncjrs.gov/pdf/files1/ojjdp/190105.pdf>, archived at <https://perma.cc/KTN3-3CLF> (reporting that “[n]early two-thirds of responding parents reported that a judge’s inexperience in dealing with international abduction cases was a major obstacle in the search for and recovery of their child” and that “three-fifths of U.S. judges had handled either no international parental abduction cases or just one case”).

<sup>114</sup> See *infra* notes 116–130 and accompanying text.

<sup>115</sup> See *infra* notes 131–150 and accompanying text.



of goods.<sup>116</sup> The CISG is referenced in every modern contracts casebook, its text is easily accessible via the Internet, and commentaries on it may be found in many courthouse libraries.<sup>117</sup> Litigants and judges nevertheless frequently overlook it.<sup>118</sup> When this occurs, U.S. courts apply state contract law—not the treaty—to resolve these disputes.<sup>119</sup>

U.S. judges also sometimes shy away from applying treaties because they are unfamiliar with them. A federal district court judge based in Galveston, Texas, for example, once transferred a complex international law case to another federal district because he felt that he lacked experience with international law.<sup>120</sup> This judge observed that “the capacity of this Court to address the complex and sophisticated issues of international law and foreign relations presented by this case is dwarfed by that of its esteemed colleagues in the District of Columbia” and that he could not “think of a Bench better versed and more capable of handling precisely this type of case, which requires a high level of expertise in international matters.”<sup>121</sup> Although this decision is perhaps somewhat anomalous in its frankness, there are other cases in which U.S. judges with limited experience in the field of international law have sought out reasons to avoid having to adjudicate such cases on the merits.<sup>122</sup> Indeed, a number of scholars have argued

<sup>116</sup> See, e.g., *Simar Shipping Ltd. v. Global Fishing, Inc.*, 540 Fed. Appx. 565, 567 (9th Cir. 2013) (rejecting argument that the lower court “committed reversible legal error in not applying or even mentioning the [CISG]” where it should have been applied); *Att’ys Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593, 600 (9th Cir. 1996) (failing completely to address the CISG’s application); *GPL Treatment, Ltd. v. Louisiana-Pacific Corp.*, 894 P.2d 470, 477 n.4 (Or. Ct. App. 1996) (Lesson, J., dissenting) (noting that the trial court erred in applying the Uniform Commercial Code rather than the CISG).

<sup>117</sup> See William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72, 76 (2000). Although most contracts casebooks discuss the CISG, few devote any substantial time to it. *Id.*

<sup>118</sup> See *id.* at 74 (“American law schools appear to be graduating students who have no familiarity with the CISG and who, as a result, are not properly equipped to serve their clients.”); cf. M. Margaret McKeown, *Celebrating Women on the High Seas—in Admiralty Law and Otherwise*, 45 J. MAR. L. & COM. 119, 119 (2014) (“I admit to never having heard of COGSA before this appeal.”).

<sup>119</sup> See James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT’L L.J. 273, 284 (1999) (“Since no provision in the treaty identifies the treaty as self-executing and since the treaty is not easily located within the U.S. Code, this uniform law which preempts the UCC in the area of international sales remains both hidden and unknown to courts and practitioners.” (footnote omitted)); Kina Grbic, Comment, *Putting the CISG Where It Belongs: In the Uniform Commercial Code*, 29 TOURO L. REV. 173, 175 (2012) (“[M]any United States courts erroneously fail to apply the CISG in situations in which its application is appropriate, even mandated by law.”).

<sup>120</sup> *Republic of Bolivia v. Philip Morris Cos.*, 39 F. Supp. 2d 1008, 1009–10 (S.D. Tex. 1999).

<sup>121</sup> *Id.* at 1009.

<sup>122</sup> See Peter L. Fitzgerald, *The International Contracting Practices Survey Project*, 27 J.L. & COM. 1, 17–19 (2008) (noting view among foreign practitioners that U.S. judges were “reluctant” to apply the CISG in some cases); McFadden, *supra* note 9, at 38 (“It should not surprise us that

in recent years that U.S. courts are making aggressive use of existing doctrinal rules to avoid reaching the merits in cases exhibiting some connection to a foreign jurisdiction.<sup>123</sup>

Even in cases where treaties are given effect by U.S. courts, judicial inexperience sometimes leads them to misinterpret particular provisions.<sup>124</sup> The Third and Eleventh Circuits, for example, have repeatedly (and incorrectly) held that certain bilateral treaties require U.S. courts to accord full faith and credit to foreign judgments.<sup>125</sup> The Second Circuit has evidenced an “abysmal” understanding of the principle of national treatment in international copyright conventions.<sup>126</sup> And the Eleventh Circuit has read the text of the Paris Convention specifically to address the issue of self-execution when, in fact, that treaty does not address that issue.<sup>127</sup> In each case, a lack of familiarity with international sources led the court to interpret a particular treaty provision in a way that was not just debatable but objectively incorrect.

The U.S. Supreme Court has a similarly checkered record when it comes to treaty interpretation. The Court’s characterization of the Hague Evidence Convention in its 1987 *Aerospatiale* opinion, for example, has been described as a “caricature.”<sup>128</sup> Other scholars have suggested that the

men and women of practical affairs are reluctant to pursue a line of analysis about which they know little, which is seldom brought to their attention, whose mastery requires a substantial investment of time, and whose ultimate usefulness is open to question.”)

<sup>123</sup> See *supra* notes 66–71 and accompanying text.

<sup>124</sup> See, e.g., William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFF. L. REV. 213, 215 (2011) (“[T]here is a widespread and growing body of U.S. jurisprudence propagating imprecise and incorrect analysis of the CISG and its effective exclusion.”).

<sup>125</sup> See *Otos Tech Co. v. OGK Am., Inc.*, 653 F.3d 310, 312–13 (3d Cir. 2011); *Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 459 F.3d 1249, 1259 (11th Cir. 2006); *Sik Choi v. Hyung Soo Kim*, 50 F.3d 244, 248 (3d Cir. 1995); *Vagenas v. Cont’l Gin Co.*, 988 F.2d 104, 107 (11th Cir. 1993); John F. Coyle, *Friendship Treaties ≠ Judgments Treaties*, 112 MICH. L. REV. FIRST IMPRESSIONS 49, 49 (2013), [http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1004&context=mlr\\_fi](http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1004&context=mlr_fi), archived at <https://perma.cc/M2QY-RQXS?type=pdf>.

<sup>126</sup> William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 396 (2000); see *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 89 (2d Cir. 1998); *Murray v. British Broad. Corp.*, 81 F.3d 287, 290–91 (2d Cir. 1996).

<sup>127</sup> *Int’l Cafe, S.A.L., v. Hard Rock Cafe Int’l (U.S.A.), Inc.*, 252 F.3d 1274, 1277 n.5 (11th Cir. 2001); Sloss, *supra* note 91, at 529.

<sup>128</sup> George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision*, 63 TUL. L. REV. 525, 539, 542 (1989); see James G. Dwyer & Lois A. Yurov, *Taking Evidence and Breaking Treaties: Aérospatiale and the Need for Common Sense*, 21 GEO. WASH. J. INT’L L. & ECON. 439, 460–72 (1988) (criticizing the majority opinion as “both analytically and practically unsound”); Russell J. Weintraub, *The Need for Awareness of International Standards When Construing Multilateral Conventions: The Arbitration, Evidence, and Service Conventions*, 28 TEX. INT’L L.J. 441, 456–61 (1993). See generally *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522 (1987) (discussing the Hague Evidence Convention’s history and application).

Court is “deeply reluctant to rely on humanitarian law treaties and does so rarely, haphazardly, and minimally, eschewing comprehensive analysis of the text, structure, and history of the relevant provisions.”<sup>129</sup> The Court’s interpretation of the Warsaw Convention in six cases decided between 1984 and 1999 also exhibited a multitude of problems. As one scholar has observed:

The Warsaw Convention cases are hardly a model of coherent development of international rules under a multilateral treaty. The Court, for example, invoked prior foreign judicial interpretations of the treaty when convenient and disregarded them when it did not like the result. It, along with the parties and the amicus United States, failed to note the apparent inapplicability of the Convention altogether in two of the six cases it considered. These cases do not, in short, provide much support for the argument that the Supreme Court brings special competence and insight to the resolution of treaty disputes.<sup>130</sup>

In summary, a lack of experience with international law sometimes leads judges to (1) overlook treaties that are on point, (2) search for ways to avoid rendering decisions on the merits in treaty cases, and (3) misinterpret treaty provisions in cases in which they are applied.

## 2. Customary International Law

When the source of international law invoked in a particular dispute is international custom, the lack of judicial expertise with respect to international legal materials becomes even more problematic.<sup>131</sup> In the classic formulation, customary international law is created by (1) state practice that is (2) undertaken out of a sense of legal obligation.<sup>132</sup> In order to establish that a rule of customary international law exists under this test, a court must first survey the practice of states in order to ascertain whether these states consistently act in accordance with certain rules.<sup>133</sup> If the court determines that

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<sup>129</sup> David Weissbrodt & Nathaniel H. Nesbitt, *The Role of the Supreme Court in Interpreting and Developing Humanitarian Law*, 95 MINN. L. REV. 1339, 1423 (2011).

<sup>130</sup> Paul B. Stephan, *Treaties in the Supreme Court, 1946–2000*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 45, at 317, 347 (footnotes omitted); see *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 312–14 (2d Cir. 2000).

<sup>131</sup> Setear, *supra* note 77, at 671 (“The difficulties of interpreting customary law make even the challenges of interpreting treaty law seem relatively unproblematic.”).

<sup>132</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); CRAWFORD, *supra* note 18, at 24–27.

<sup>133</sup> See CRAWFORD, *supra* note 18, at 26; A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT’L L. 1475, 1485–88 (2003) (discussing the traditional ap-

there is substantial evidence of consistent state practice, it must then seek to determine whether these states act in this way out of a sense of legal obligation.<sup>134</sup> If there is no evidence of consistent state practice, or if there is evidence of such practice but no proof that the practice is undertaken out of a sense of legal obligation, then there exists no binding rule of customary international law under the classic test.<sup>135</sup>

The process by which customary international law is created has no obvious analog in the U.S. legal system. In addition, U.S. courts generally lack expertise in determining the precise nature of state practice because the judges possess only limited capacity to engage in fact-finding as to the actual behavior of states. In 2003, the Second Circuit acknowledged these limitations in *Flores v. Southern Peru Copper Corp.* when it observed that “the relevant evidence of customary international law is . . . generally unfamiliar to lawyers and judges” and that “[t]hese difficulties are compounded by the fact that customary international law . . . does not stem from any single, definitive, readily-identifiable source.”<sup>136</sup> In light of these challenges, U.S. courts often seek to avoid applying customary international law. One study found, for example, that approximately eighty percent of cases brought under the ATS and the Torture Victim Protection Act (TVPA) between 1980 and 2004 were decided without reaching the issue of whether the conduct in question violated international law.<sup>137</sup> U.S. courts have also consistently refused to apply customary international law as a rule of decision in cases outside the ATS context.<sup>138</sup> Whenever possible, in short, U.S. courts seek to avoid reaching the merits of claims sounding in customary international law.

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proach applied by U.S. courts for determining customary law); *see also* The Paquete Habana, 175 U.S. 677, 711–25 (1900) (devoting 14 pages of opinion to survey of existing state practice).

<sup>134</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 23–26 (2005) (criticizing modern scholars and commentators for paying too little regard to this requirement).

<sup>135</sup> Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984) (“The process by which customary law is created is hardly certain and remains somewhat mysterious. Courts are often reluctant to conclude that a principle has become customary law, and they may be even more reluctant to do so when the principle would be contrary to earlier congressional legislation.”).

<sup>136</sup> 414 F.3d 233, 247–48 (2d Cir. 2003); *see* Van Alstine, *supra* note 113, at 996–97 (“The absence of an authoritative text; the complicated and unfamiliar lawmaking processes; and the linguistic, cultural, and legal differences among the participants combine to increase substantially the ‘open texture’ of this form of judicially enforceable law.” (footnote omitted)).

<sup>137</sup> *See* K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT’L L.J. 1, 2 (2004) (“Based on a review of over ninety human rights cases brought [under the ATS and the TVPA] since 1980, approximately eighty percent have been dismissed based on [various affirmative defenses and procedural requirements].”).

<sup>138</sup> *See supra* note 65 (collecting cases).

There are, however, cases in which U.S. courts must apply customary international law. Judicial practice in this area has, perhaps unsurprisingly, been subjected to withering academic criticism. One common complaint is that U.S. courts will often look to secondary sources that purport to describe state practice accurately rather than looking to state practice itself.<sup>139</sup> One scholar has argued, for example, that “the approach U.S. courts have taken in determining the content of international law is fundamentally flawed” in that these courts “base[] their legal conclusions on sources that cannot generate legal rules, and which . . . misstate[] the content of state practice.”<sup>140</sup> In a similar vein, another commenter noted that “courts rarely attempt any direct or systematic inquiry into the attitude of states about a customary practice.”<sup>141</sup> Whatever weaknesses that U.S. courts may exhibit in interpreting international treaties, in other words, these weaknesses are even more manifest when it comes to determining the content of customary international law. This issue arises because, in the latter case, there is often, quite literally, no text from which it is possible to derive the existence of any legal rule.<sup>142</sup>

In light of these challenges, some commentators have urged courts to jettison the traditional approach for determining customary international law in favor of a “modern” approach. Whereas traditional custom is “identified through an *inductive* process in which a general custom is derived from specific instances of state practice,” modern custom is “derived by a *deductive* process that begins with general statements of rules rather than particular instances of practice.”<sup>143</sup> A court seeking to determine modern custom, for example, would look not to the actual practice of states but rather to

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<sup>139</sup> This behavior is akin to looking for one’s lost keys beneath a streetlight because that is the only place where one can see well enough to look.

<sup>140</sup> Weisburd, *supra* note 133, at 1478, 1503; *see id.* at 1529 (urging U.S. courts called upon to determine the content of customary international law to consult “extensive collections of the actual practice of states regarding human rights, published frequently by trustworthy organizations”); *see also* Michael D. Ramsey, *The Empirical Dilemma of International Law*, 41 SAN DIEGO L. REV. 1243, 1259 (2004) (arguing for U.S. courts to be more rigorous in determining existence and content of customary international law); Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT’L L. 1, 32 (1988) (same).

<sup>141</sup> J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 469 (2000); *see* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 709 (1986) (arguing that U.S. courts “cannot readily make judgments about changed international circumstances” and therefore “lack an institutional capacity to participate fully in the development of customary international law”).

<sup>142</sup> *See* Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT’L L. 1, 45 (2007) (“[T]he federal judiciary is not best suited to determine amorphous, indeterminate new CIL norms on a case-by-case basis.”).

<sup>143</sup> Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 757 (2001).

“multilateral treaties and declarations by international fora such as the General Assembly . . . .”<sup>144</sup>

Although modern custom is clearly easier for judges to administer than traditional custom in that it requires them to canvas legal texts rather than determine the nature of (often unwritten) state practice, it is “descriptively inaccurate because it reflects ideal, rather than actual, standards of conduct.”<sup>145</sup> In the U.S. Supreme Court’s most recent pronouncement on the question, it made clear that the traditional test for determining the existence of such law should remain the touchstone of the analysis for courts in the United States.<sup>146</sup> Nevertheless, advocates who wish to expand the scope of customary international law rules often (strategically) blur the differences between the two approaches. The upshot is that U.S. judges with little to no background knowledge of international law are often asked to determine the content of an amorphous and contested body of law whose content may vary depending upon one’s methodological approach.<sup>147</sup>

Given these challenges, it is unsurprising that the customary international law rules recognized by U.S. courts do not always correspond to the customary international law rules recognized by international tribunals. Customary international law is “plagued by debates and uncertainties about its proper sources, its content, its usefulness, and its normative attractiveness.”<sup>148</sup> Moreover, the context in which this inquiry often occurs—litigation under the ATS—is so idiosyncratic as to defy attempts to extrapolate rules derived in connection with it to other contexts. As one scholar has observed:

[T]he jurisprudence of the US courts applying the ATS is not merely internationally agreed substantive international law plus

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 769.

<sup>146</sup> See John O. McGinnis, *Sosa and the Derivation of Customary International Law*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 45, at 481, 487 (observing that the *Sosa* Court “endorse[d] . . . a relatively strict positivist approach toward customary international law rather than the looser approaches sometimes advocated in the modern era”).

<sup>147</sup> See Kedar S. Bhatia, Comment, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 EMORY INT’L L. REV. 447, 504 (2013) (“Whether the fault lies with the statute itself, the subject-matter, or with the actors interpreting it, courts are struggling with the sophisticated analysis required to discern the intricacies of customary international law.” (footnote omitted)); see also Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 255 (observing that where a rule of customary international law is unsettled, there arise “difficult issues concerning the institutional competence of U.S. courts to interpret and apply [customary international law]”).

<sup>148</sup> Curtis A. Bradley & Mitu Gulati, *Mandatory Versus Default Rules: How Can Customary International Law Be Improved?*, 120 YALE L.J. ONLINE 421, 421 (2011), <http://www.yalelawjournal.org/forum/mandatory-versus-default-rules-how-can-customary-international-law-be-improved>, archived at <http://perma.cc/4Y6E-JDRF>.

some US civil litigation concepts . . . . It is, instead, an interpretation of ‘international law’ filtered through an ancient US statute, with US canons of constitutional interpretation applied to the meaning of the statute and only by extension to the ‘international’ law underlying it. . . . [M]any international law experts are, on the one hand, reassured to see American courts involve themselves with substantive international law, gradually drawing it into American jurisprudence and adjudication. On the other hand, I suspect many of them are also privately unhappy with the actual content of that law, thinking that it is evolving within its closed community in ways which are not consistent with the ‘authoritative’ interpretation of international law in the international community and which are, in a word, *weird*.<sup>149</sup>

In summary, given the unique interpretive challenges posed by customary international law, and the fact that most U.S. judges lack experience with this law, it is not at all clear that its direct application by U.S. judges will consistently result in the faithful domestic application of customary international rules.<sup>150</sup>

### III. THE IMPRACTICABILITY OF DIRECT APPEALS TO THE JUDICIARY

In response to the attitudinal and experiential obstacles that have led U.S. judges to retreat from international law, internationalist legal scholars have advanced a number of proposals that seek to give international law a more prominent role in the U.S. legal system.<sup>151</sup> First, they have argued that U.S. judges should relax—or even cast aside altogether—the doctrinal rules that often serve to impede the direct application of international law in U.S. courts.<sup>152</sup> Second, they have encouraged U.S. judges to familiarize themselves with international norms in the hopes that acculturation will lead to a softening of judicial attitudes toward those norms.<sup>153</sup> Third, they have sug-

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<sup>149</sup> Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT’L L. 331, 350–51 (2009).

<sup>150</sup> See Celé Hancock, *The Incompatibility of the Juvenile Death Penalty and the United Nations Convention on the Rights of the Child: Domestic and International Concerns*, 12 ARIZ. J. INT’L & COMP. LAW 699, 721 (1995) (“American courts may be reluctant to utilize customary international law because they are traditionally and structurally ill-equipped to effectively deal with the subject. In the framework of customary international law, they have little experience from which to draw.” (footnote omitted)).

<sup>151</sup> As discussed above, this outcome is normatively desirable because it would (1) make it possible for certain disputes sounding in international law to be adjudicated where no forum would otherwise exist, and (2) give U.S. courts the ability to exercise a greater degree of control over the development of international law rules. See *supra* notes 7–9 and accompanying text.

<sup>152</sup> See *infra* notes 155–166 and accompanying text.

<sup>153</sup> See *infra* notes 167–174 and accompanying text.

gested that U.S. judges should receive more extensive training into the methods and content of international law in order to counterbalance their inexperience in dealing with international law and its sources.<sup>154</sup>

Each of these proposals, it should be emphasized, is couched as an appeal to the U.S. judiciary. The internationalists have, in short, generally sought to give international law a greater role in domestic litigation by persuading U.S. judges to reform their doctrine, rethink their attitudes, and reacquaint themselves with the basics of international law. To date, however, these appeals do not appear to have had much of an impact on judicial practice.

### A. Doctrinal Liberalization

The internationalists have long sought to persuade U.S. courts to liberalize those doctrines that currently make it difficult to give direct effect to international law in the U.S. legal system. Louis Henkin once suggested, for example, that the last-in-time rule should be abandoned and that treaties should always trump inconsistent statutes.<sup>155</sup> Carlos Vazquez has argued that all treaties should be presumptively self-executing.<sup>156</sup> David Sloss has argued that declarations of non-self-execution by the political branches are unconstitutional.<sup>157</sup> Sital Kalantry has urged courts to adopt a more liberal approach to determining whether a particular treaty gives rise to a private right of action.<sup>158</sup> David Bederman encouraged judges to refrain from invoking the political question doctrine when adjudicating claims involving treaty rights.<sup>159</sup> Derek Jenks and Neal Katyal have argued that judges should be less deferential to executive interpretations of international law.<sup>160</sup> And a number of internationalist scholars—including Harold Koh, Beth Stephens, and Ryan Goodman—have asserted that customary international

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<sup>154</sup> See *infra* notes 175–179 and accompanying text.

<sup>155</sup> LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 210–11 (1996); cf. Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 50 (1970) (advancing a similar argument).

<sup>156</sup> See Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2157–58 (1999). But see David H. Moore, *Law(makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. F. 32, 32–33 (2009), <http://www.harvardlawreview.org/wp-content/uploads/pdfs/moore.pdf>, archived at <http://perma.cc/QA94-KY3D> (challenging this argument).

<sup>157</sup> See David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 45–70 (2002).

<sup>158</sup> See Sital Kalantry, *The Intent-to-Benefit: Individually Enforceable Rights Under International Treaties*, 44 STAN. J. INT'L L. 63, 99 (2008) (stating that the “test suggested by this article is more likely than the statutory approach to lead courts to find that certain treaties create rights in favor of certain individuals that are enforceable by those individuals in a U.S. court”).

<sup>159</sup> See Bederman, *supra* note 94, at 1488.

<sup>160</sup> Derek Jenks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1235 (2007).



law is a form of federal common law that the federal courts can (and should) look to on a more regular basis.<sup>161</sup>

The internationalist assault on these limiting doctrinal rules has, in short, been fierce and unrelenting. This assault, moreover, began decades ago. Almost forty years ago, Louis Henkin argued that the political question doctrine should rarely (if ever) be applied by courts considering cases touching on international law or foreign affairs.<sup>162</sup> More than fifty years ago, Thomas Franck argued that the courts were overly deferential to the executive branch when it came to cases involving the correct interpretation of international law.<sup>163</sup> These scholarly efforts to bring about doctrinal change have not, however, had much of an effect. Instead, U.S. courts continue to apply regularly all of these limiting doctrines.<sup>164</sup> Indeed, to the extent that a trend is discernible, it appears that these doctrines are even more vigorously enforced today than in years past.<sup>165</sup> The ironic culmination of decades of scholarship urging U.S. judges to give direct effect to international law in its various manifestations, in short, is a judiciary that is increasingly reluctant even to *cite* to international sources.<sup>166</sup>

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<sup>161</sup> See Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 497–513 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 *HARV. L. REV.* 1824, 1857 (1998); Stephens, *supra* note 39, at 460–61.

<sup>162</sup> Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 *YALE L.J.* 597, 622 (1976) (arguing that “the ‘political question’ doctrine . . . is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there”).

<sup>163</sup> Franck, *supra* note 94, at 1123 (arguing that “there is no reason for the courts to abdicate their function . . . in those cases in which there is at stake no matter of international law substantially affecting the national interest”).

<sup>164</sup> See Wuerth, *supra* note 18, at 119 (“Many would like the courts to use treaty self-execution and customary international law in a sense as the better angels of ourselves to judicially enforce normatively desirable international law, even when not clearly authorized to do so by the political branches. The Court has shied away from this approach . . .”).

<sup>165</sup> In *Medellin v. Texas*, for example, the U.S. Supreme Court articulated a test for determining whether a treaty was self-executing that was arguably stricter than the one most U.S. courts had previously applied. See Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 *AM. J. INT'L L.* 540, 540 (2008) (“[T]he [Medellin] Court implicitly rejected the argument . . . that there should be a strong presumption in favor of treaty self-execution.”); David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 *COLUM. L. REV.* 2228, 2229 (2010) (suggesting that “Medellin arguably . . . endorsed a broad notion of non-self-execution”); John Quigley, *A Tragi-Comedy of Errors Erodes Self-Execution of Treaties: Medellin v. Texas and Beyond*, 45 *CASE W. RES. J. INT'L L.* 403, 415–17 (2012).

<sup>166</sup> See *infra* note 220 and accompanying text. (citing anecdotal evidence that some judges now seek to avoid citing to international law).

### B. Socialization and Acculturation

The internationalists have also long sought to persuade U.S. courts to familiarize themselves with international law so that it will seem less exotic and unwelcome when courts are called upon to apply it. Peter Spiro has argued, for example, that as U.S. courts “become increasingly socialized to international norms . . . [they] are also likely to be increasingly receptive to the incorporation of international law.”<sup>167</sup> Ryan Goodman and Derek Jenks have argued that the process of socializing state actors to international law norms has the potential to improve state compliance with human rights treaties.<sup>168</sup> And Anne-Marie Slaughter has famously suggested that judges from around the world are increasingly engaged in transnational judicial dialogue through which they learn about foreign and international law from their counterparts in other nations.<sup>169</sup> Once these judges are exposed to international norms and have conversed with their international counterparts, so these arguments go, their resistance to international law will soften.<sup>170</sup>

To date, however, these calls to socialize U.S. judges to international law norms do not appear to have significantly altered judicial attitudes. There are several possible reasons why. First, these acculturation efforts have historically been conducted on a relatively small scale. Although some international law organizations have intermittently sought to familiarize U.S. judges with international law norms, there has been no comprehensive attempt to persuade judges who are skeptical of international law that they should rethink their position.<sup>171</sup> Second, many of the projects that have the

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<sup>167</sup> Peter J. Spiro, *Wishing International Law Away*, 119 YALE L.J. ONLINE 23, 24–25 (2009), <http://www.yalelawjournal.org/forum/wishing-international-law-away>, archived at <http://perma.cc/P9NB-4MCA>; see Spiro, *supra* note 48, at 321 (2013) (“As American judges more closely identify as members of the international community of courts, they too have been socialized in international norms.” (footnote omitted)).

<sup>168</sup> RYAN GOODMAN & DEREK JENKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 1–17 (2013); see David Sloss, Book Review, 108 AM. J. INT’L L. 576, 581 (2014) (arguing that “the acculturative force of the [UN] Charter’s anti-discrimination norm . . . exert[ed] an indirect influence over legal and constitutional developments in the United States [in the 1950s and 1960s]”).

<sup>169</sup> See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65–103 (2004); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 193 (2003).

<sup>170</sup> See *infra* notes 167–169 and accompanying text. But see Abebe & Posner, *supra* note 80, at 546 (critiquing this argument).

<sup>171</sup> One organization that seeks to encourage dialogue between U.S. judges and their foreign and international counterparts is the Committee on International Judicial Relations, whose official mandate is to “coordinate the federal judiciary’s relationship with foreign judiciaries and with official and unofficial agencies and organizations interested in international judicial relations.” See *Committee on International Judicial Relations*, FED. JUDICIAL CTR. (Oct 2002), [http://www.fjc.gov/public/pdf.nsf/lookup/IJR00012.pdf/\\$file/IJR00012.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/IJR00012.pdf/$file/IJR00012.pdf), archived at <http://perma.cc/EA74-CS9S>. This organization regularly arranges for U.S. judges to travel to foreign nations and helps to bring foreign jurists to the United States. *Id.* At least one scholar has suggested that by bringing U.S.

potential to bring about these changes are entirely voluntary. The judges who are most likely to volunteer to be socialized to international norms by participating in workshops sponsored by the American Society of International Law, for example, are precisely the judges who are least likely to require acculturation to these same norms.

The third and final possible reason why calls for socialization do not appear to have had a meaningful effect is that those elected officials who strongly oppose the use of international law by U.S. courts tend to care far more deeply about this issue than the elected officials who favor it. Conservative legislators at both the state and federal levels have in recent years proposed legislation formally barring U.S. judges from citing to international or foreign legal sources in their opinions.<sup>172</sup> Certain members of the U.S. Senate have successfully opposed the confirmation of judicial nominees on the grounds that they are too open to using international law expansively in judicial decision-making.<sup>173</sup> To the extent that a federal district court judge aspires to be promoted to serve on the courts of appeal, therefore, that judge is unlikely to make extensive use of international law in her judicial opinions for fear that such use may engender opposition. For the same reasons, a federal appeals court judge who dreams of someday serving on the U.S. Supreme Court is also likely to shy away from invitations to

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judges into contact foreign and international law, the work of the Committee indirectly encourages these judges to incorporate these sources into their opinions. Janet K. Levit, *U.S. Judicial Conference International Judicial Relations Committee Prepares for Semi-Annual Meeting*, OPINIOJURIS.ORG (Nov. 20, 2006, 6:03 PM), <http://opiniojuris.org/2006/11/20/us-judicial-conference-international-judicial-relations-committee-prepares-for-semi-annual-meeting>, archived at <http://perma.cc/JMA3-NVMY> (“And while the Committee’s work at first appears unidirectional—exporting U.S. knowledge on how to structure an effective, independent judiciary, my [sense] . . . is that this transnational judicial intercourse shapes, perhaps in immeasurably subtle and subconscious ways, these judges’ relationship with foreign law, international law, and international institutions.”).

<sup>172</sup> See generally Aaron X. Fellmeth, *International Law and Foreign Laws in the U.S. State Legislatures*, 15 ASIL INSIGHTS 1 (2011), available at <http://www.asil.org/insights/volume/15/issue/13/international-law-and-foreign-laws-us-state-legislatures>, archived at <http://perma.cc/BH68-FYWD> (discussing state legislation); Mark Tushnet, *The “Constitution Restoration Act” and Judicial Independence: Some Observations*, 56 CASE W. RES. L. REV. 1071 (2006) (discussing federal legislation).

<sup>173</sup> See Chris Casteel, *Sen. Tom Coburn Blocked Attempt to Fill Federal Appeals Court Vacancy, Oklahoma Attorneys Say*, NEWSOK.COM (Sept. 12, 2011), [http://newsok.com/sen.-tom-coburn-blocked-attempt-to-fill-federal-appeals-court-vacancy-oklahoma-attorneys-say/article/3603420?custom\\_click=headlines\\_widget](http://newsok.com/sen.-tom-coburn-blocked-attempt-to-fill-federal-appeals-court-vacancy-oklahoma-attorneys-say/article/3603420?custom_click=headlines_widget), archived at <http://perma.cc/6SAQ-LQ8W> (“Sen. Tom Coburn shot down the impending nomination of the dean of the University of Tulsa law school for the vacant seat on the 10th U.S. Circuit Court of Appeals, according to Oklahoma attorneys who said Coburn was concerned about Janet Levit’s background in international law.”); Nathan Koppel, *Goodwin Liu and Other Judicial Nominees Fail to Win Confirmation*, WALL ST. J., Dec. 23, 2010, <http://blogs.wsj.com/law/2010/12/23/goodwin-liu-and-other-judicial-nominees-fail-to-win-confirmation/>, archived at <https://perma.cc/8RF7-D33X?type=pdf> (“Liu faced particular scrutiny from Republicans due to his supposed liberal leanings, including his writings supporting the use of international law in judicial rulings . . .”).

make creative arguments grounded in international law. Any attempt to socialize judges to international legal norms must, in other words, account for the existence of countervailing forces that discourage the open expression of sympathy for those same norms.<sup>174</sup> To date, these countervailing forces appear to have been stronger than the push for greater acculturation.

### C. Education

Internationalist legal scholars have also urged all U.S. lawyers to become better acquainted with international law as a means of redressing the problem of judicial inexperience.<sup>175</sup> One commentator, for example, has proposed that (1) all U.S. law students be required to take a course in international law, (2) international law questions be added to the bar examination, (3) bar associations and other similar groups be persuaded to offer more continuing legal education courses in international law, and (4) annual conferences be convened at which U.S. judges and others may learn more about international law.<sup>176</sup> The goal of this and other similar proposals is not so much to encourage U.S. judges to apply international law in the first instance—though it may incidentally help to achieve this goal—but instead to ensure that U.S. judges called upon to interpret international law do so expertly, impartially, and in a manner that takes into account the law’s international origins.

It is difficult to take issue with any proposal that calls for the better education of judges and lawyers. Nor is it easy to quarrel with the efforts that various organizations have made in order to advance this project specifically with respect to international law. At the end of the day, however, it is not clear that these efforts have had a meaningful impact on judicial practice. International law cases are today—and have long been—relatively rare. In many jurisdictions, it is unlikely that a judge will see more than a handful of such cases over the course of his or her career. Accordingly, most judges have little reason to develop expertise in this particular area of law. In addi-

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<sup>174</sup> It is probably not a coincidence that those judges who are most willing to adopt expansive readings of international law are senior judges who do not aspire to promotion within the federal judiciary. *See, e.g.*, *Delgado v. Holder*, 648 F.3d 1095, 1110 n.2 (9th Cir. 2011) (Reinhardt, J., concurring); *Beharry v. Reno*, 183 F. Supp. 2d 584, 596–603 (E.D.N.Y. 2002) (Weinstein, J.), *rev’d sub nom.* *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

<sup>175</sup> *See* Davis, *supra* note 104, at 383–84 (“While these uses of transnational law are traditional and widely accepted, it may be the case that some judges avoid using transnational law because they are not sufficiently familiar with its sources—a problem that is already being remedied through judicial education.”); *McFadden, supra* note 9, at 39–40 (“Lack of knowledge and lack of seasoning have straightforward antidotes: education and practice.”); *Sylvester, supra* note 104, at 620 (“If the United States judiciary is ignorant of international law, then education is the answer, not abandonment of the judicial function.”).

<sup>176</sup> *McFadden, supra* note 9, at 63–64.

tion, most U.S. law schools still do not require that their students learn the basics of international law; only nine percent of law schools ranked in the top one hundred by U.S. News and World Report currently require their students to take an international law class prior to graduation.<sup>177</sup> After law school, moreover, there is no requirement that practicing attorneys in the United States familiarize themselves with international law rules; no U.S. state currently tests the subject on its bar exam. Finally, although all newly-appointed federal judges are encouraged to attend training programs sponsored by the Federal Judicial Center, the substantive areas of law covered in these programs do not include international law.<sup>178</sup> At the beginning of their judicial careers, in other words, federal judges receive no mandatory formal training in the basics of international law.

To be sure, opportunities exist for judges to acquaint themselves with international law rules that they were never exposed to as students, bar applicants, or newly-appointed judges.<sup>179</sup> It is unclear, however, whether a substantial number of judges will seek out these opportunities. As a result, many judges will likely continue to be wary of applying international law and will continue to struggle to interpret international law rules correctly in those cases in which they do arise.

#### IV. THE CASE FOR STATUTES THAT INCORPORATE INTERNATIONAL LAW

Although it is possible that the U.S. Supreme Court will choose to revisit many of its seminal decisions concerning the relationship between international law and U.S. domestic law, that judicial ambivalence with respect to international law will give way to widespread enthusiasm for it, and that U.S. judges will decide that the time has finally come to educate them-

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<sup>177</sup> In June 2014, a research assistant under the author's supervision telephoned the registrar's office at *U.S. News & World Report's* top one hundred law schools to ask if the school required its students to take an international law class in order to receive a J.D. Only nine schools reported that they imposed such a requirement. Telephone Survey with Registrar's Offices of U.S. News & World Reports Top One Hundred Law Schools (June 2014). These schools are Harvard Law School, the University of Michigan Law School, Georgetown University Law Center, the University of Washington School of Law, Washington & Lee School of Law, the University of Nebraska College of Law, the University of Pittsburgh School of Law, the Maurice A. Deane School of Law at Hofstra University, and the University of Tulsa. *Id.* Although some other schools have "perspectives" requirements that students may fulfill by taking international law courses, they do not formally mandate that their students take a course in international law prior to graduation. *Id.*

<sup>178</sup> E-mail from a U.S. District Court Judge to author (June 17, 2014) (on file with author).

<sup>179</sup> For an example of a recent publication on international law whose goal was to educate U.S. judges as to the workings of international law, see generally AM. SOC'Y OF INT'L LAW, BENCHMARK ON INTERNATIONAL LAW (2014). The American Bar Association has, in the past, called for better education of U.S. judges with respect to international law. *Judicial Education on International Law Committee of the Section of International Law of the American Bar Association: Final Report*, 24 INT'L LAW. 903, 914–15 (1990).

selves as to international law, none of these changes would appear to be imminent. If the goal is to ensure that international law is given a more prominent role in the U.S. legal system, recent history suggests that direct appeals to the judiciary are likely to prove largely unavailing.

This Part argues that a more promising means of achieving this goal is to focus on the political branches. Specifically, it contends that the simplest and most straightforward means of giving existing international law rules a greater role in the U.S. legal system is for the political branches to incorporate these rules into statutes.<sup>180</sup> Such statutes, this Part argues, offer a number of practical advantages over the direct application of international law by the courts.<sup>181</sup> Consequently, they represent a particularly promising means of expanding the role played by international law in the U.S. legal system.

### A. *The Virtues of Incorporative Statutes*

Statutes that incorporate international law into the domestic law of the United States have a long and distinguished history. In 1789, the ATS gave the federal district courts jurisdiction over certain torts committed “in violation of the law of nations.”<sup>182</sup> In 1918, the Migratory Bird Treaty Act codified the substantive provisions of a particular conservation treaty into the U.S. Code.<sup>183</sup> In 1936, the Carriage of Goods by Sea Act gave domestic effect to the Hague Rules, an international treaty governing the liability of oceanic shippers.<sup>184</sup> In 1976, the Foreign Sovereign Immunities Act sought to codify, at least in part, the customary international law of sovereign immunity.<sup>185</sup> In 1987, the Genocide Convention Implementation Act wrote the substance of that convention into U.S. law.<sup>186</sup> And in 2006, the Military Commissions Act conferred jurisdiction on military commissions to try any offense made punishable by the “law of war.”<sup>187</sup> Congress is, in short, perfectly capable of writing international law into the U.S. Code when it wishes to do so, and has done precisely that on a number of occasions.

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<sup>180</sup> See *infra* notes 182–199 and accompanying text.

<sup>181</sup> See *infra* notes 200–221 and accompanying text.

<sup>182</sup> Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

<sup>183</sup> Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–712 (2012)).

<sup>184</sup> Carriage of Goods by Sea Act, Pub. L. No. 74-521, 49 Stat. 1207 (1936) (codified as amended at 46 U.S.C. § 30701 note (2012)).

<sup>185</sup> The Foreign Sovereign Immunities Act is “a statutory regime which incorporates standards recognized under international law.” H.R. REP. NO. 94-1487, at 14 (1976), *reprinted in* 1976 U.S.C.A.N. 6604, 6613; see *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199–200 (2007).

<sup>186</sup> Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. No. 100-606, 102 Stat. 3045 (codified as amended at 18 U.S.C. § 1091 (2012)).

<sup>187</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 48 U.S.C.).

This long history notwithstanding, a number of internationalist scholars have maintained that although incorporative statutes may be useful in facilitating the use of international law by U.S. courts, they are not strictly necessary because courts can and should give direct effect to treaties and customary international law.<sup>188</sup> U.S. judges are, however, often reluctant to give effect to international law directly.<sup>189</sup> These same judges are, by contrast, more than willing to give effect to international law rules once those rules are incorporated into statutes.<sup>190</sup> Indeed, statutory incorporation seems to function as a sort of magic elixir when it comes to the willingness of U.S. judges to apply international law in domestic litigation.<sup>191</sup> Although the enactment of an incorporative statute will not absolutely guarantee that a particular international law rule will be given domestic effect, it will go a long way towards achieving this end.

If various international law rules were to be written comprehensively into the U.S. Code, for example, this legislative act would eliminate many of the doctrinal impediments that currently complicate the ability of U.S. judges to enforce international law directly. It would, for example, make it less likely that the last-in-time rule would result in a treaty being displaced by a statute.<sup>192</sup> It would render the question of whether a treaty is or is not self-executing irrelevant.<sup>193</sup> It would give the political branches an opportunity to specify whether a particular treaty does or does not provide for a private right of action and also to specify whether certain other judicial doctrines (such as the act of state doctrine) should apply.<sup>194</sup> Writing customary international law rules into statutes would, moreover, elevate these rules to the status of legislation within the domestic legal hierarchy and, in so doing, would make it more difficult for them to be displaced by a subsequent executive or legislative act. Although systemic statutory incorporation would not eliminate every doctrinal barrier to applying international law, it would

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<sup>188</sup> See *supra* note 44 (collecting sources).

<sup>189</sup> See *supra* notes 72–150 and accompanying text.

<sup>190</sup> See *supra* note 20 (collecting cases).

<sup>191</sup> Weissbrodt & Nesbitt, *supra* note 129, at 1422–23 (arguing that the U.S. Supreme Court “is profoundly reluctant to root its holdings in humanitarian law treaties” and that “it is the incorporation of the law of war into domestic statute that occasions the Court’s most extensive analysis of [international humanitarian law]”).

<sup>192</sup> See *supra* note 70–71 and accompanying text (discussing the last-in-time rule).

<sup>193</sup> See *supra* notes 48–53 and accompanying text (describing the debate regarding self-executing and non-self-executing treaties).

<sup>194</sup> See, e.g., 22 U.S.C. § 2370(e)(2) (2012) (“[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted . . . based upon . . . a confiscation or other taking . . . by an act of that state in violation of the principles of international law . . .”).

make it far more likely that U.S. judges would reach the merits when international law issues arise in domestic litigation.

The incorporation of international law rules into U.S. statutes would also have a positive impact on judicial attitudes. To a significant extent, U.S. judges today are wary of enforcing international law in the absence of clear authorization to do so from the political branches.<sup>195</sup> Indeed, on a number of occasions U.S. courts have specifically requested guidance from the political branches as to whether a particular rule of international law should be applied.<sup>196</sup> Writing international law rules into domestic statutes constitutes a clear and unambiguous signal from the political branches that judges should enforce those rules. To the extent that U.S. judges have historically evidenced a preference for domestic sources over international ones, moreover, incorporating international law into statutes would address that concern by formally transforming particular international rules into domestic law.

Finally, statutory incorporation would also help to remedy the problem of judicial inexperience. This process would transfer legal rules from a body of law with which U.S. judges are often unfamiliar (treaties and international custom) to a body of law with which they are quite familiar (statutes). To the extent that judges seek to avoid reaching the merits in international law cases because they lack any experience with such law, writing these rules into statutes may help to alleviate these anxieties. To the extent that customary international law is “plagued by debates and uncertainties about its proper sources, its content, its usefulness, and its normative attractiveness,”<sup>197</sup> then the move by the political branches to clearly identify *which* customary international law rules should be given legal effect in the United States by writing the *substance* of these rules into domestic statutes would greatly facilitate the ability of U.S. judges to give them effect. Although statutory incorporation would not solve the problem of judicial inexperience entirely—it would, for example, have only a negligible impact on the process of treaty interpretation because judges would be interpreting the same

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<sup>195</sup> See Weissbrodt & Nesbitt, *supra* note 129, at 1422–23.

<sup>196</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004) (“[A]lthough we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine, the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.” (citation omitted)); *id.* at 731 (“[W]e would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations [via the Alien Tort Statute] . . . .”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 453 n.14 (1964) (“The most certain guide, no doubt, for the decision of such questions [implicating international law] is a treaty or a statute of this country.”).

<sup>197</sup> Bradley & Gulati, *supra* note 148, at 421.



text as before—it would address a number of issues that currently arise from the lack of judicial familiarity with international law.<sup>198</sup>

This near-magical ability of incorporative statutes to change the hearts and minds of U.S. judges is not merely hypothetical. In case after case—rendered consistently in decade after decade—U.S. courts have enforced such statutes and, in so doing, given domestic effect to the international law rule incorporated into the statute.<sup>199</sup> This is not to argue that U.S. courts have not also given direct effect to self-executing treaties and (on rare occasions) to rules of customary international law during that same time period. They have. It is merely to point out that incorporating more international law rules into statutes would make it easier for litigants to invoke those rules when appearing before U.S. courts.

### *B. The Pragmatic Case for Focusing on the Political Branches*

In order for incorporative statutes to come into being, of course, they must first be enacted by Congress and signed by the President. This is no easy task.<sup>200</sup> Indeed, in light of the many challenges inherent in the project of enacting these statutes, one might be tempted to conclude that—the arguments above notwithstanding—international law advocates should focus their attention upon the judiciary.<sup>201</sup> At the end of the day, however, a number of considerations—including recent history, relative institutional capacity to change course, and the tendency of U.S. courts to tack to the winds of public opinion—suggest that appeals to the political branches are more likely to lead to success in the long term.

Turning first to history, it is significant that the political branches have over the past several decades chosen to write international law rules into the U.S. Code on hundreds of occasions.<sup>202</sup> In a few instances, they enacted

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<sup>198</sup> The statutory codification of U.S. treaty obligations also has the potential to create new sets of problems, such as the possibility that courts will interpret domestic statutes in ways that conflict with the international treaties that inspired their creation. These potential problems—and some ways around them—are discussed in Part V.B.1. See *infra* notes 238–258 and accompanying text.

<sup>199</sup> See *supra* note 20 (collecting cases).

<sup>200</sup> See *supra* notes 206–207 and accompanying text.

<sup>201</sup> See, e.g., Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 347 (2005) (“Political activists within the United States, who have failed to achieve these [reformist political] goals through political campaigns at home, have turned their hopes to a newly autonomous globalized judiciary, through which they hope to secure their goals by alternative means.”).

<sup>202</sup> Hathaway, *supra* note 25, at 1239 (“Each year, hundreds of congressional-executive agreements on a wide range of international legal topics are enacted by simple majorities in the House and Senate and signed into law by the President, outside the traditional Treaty Clause process.”).

laws that incorporated rules of customary international law.<sup>203</sup> In other cases, they approved congressional-executive agreements.<sup>204</sup> In still other cases, they enacted statutes intended to implement treaties that had been approved by the Senate.<sup>205</sup> There is, in short, ample historical precedent to support the conclusion that the political branches can and will enact incorporative statutes when it suits their purposes. This conclusion runs contrary to the argument that the political branches generally—and Congress in particular—are implacably hostile to international law in all its manifestations.

One could argue, however, that legislative hostility to international law has increased substantially just in the past few years. The 112th and 113th Congresses were famously unproductive; the number of federal laws enacted between 2010 and 2014 was among the lowest in U.S. history.<sup>206</sup> In this political environment, one might argue, it is highly unlikely that the political branches will agree to enact any statute whose avowed purpose is to incorporate international law into the U.S. legal system.<sup>207</sup>

The problem with this argument is that it paints with too broad a brush. Much of the legislation opposition to “international law” in the abstract is at its core opposition to a particular type of that law—international human rights law. The same legislators who consistently speak out against the ratification of human rights treaties are perfectly willing to support free trade agreements,<sup>208</sup> treaties relating to the protection of intellectual property,<sup>209</sup>

<sup>203</sup> See *supra* note 187 and accompanying text (discussing the enactment of the Military Commissions Act of 2006).

<sup>204</sup> For examples of these kinds of congressional-executive agreements, see generally Free Trade Agreement Between the United States of America and the Republic of Korea, U.S.-S. Kor., June 30, 2007, available at <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>, available at <https://perma.cc/5WT6-UGSX>; Australia-United States Free Trade Agreement, U.S.-Austl., May 18, 2004, available at <https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>, archived at <https://perma.cc/6ZSH-A95W>.

<sup>205</sup> Patent Law Treaties Implementation Act of 2012, Pub. L. No. 112-211, 126 Stat. 1527 (codified as amended in scattered sections of 35 U.S.C.).

<sup>206</sup> Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2085 (2013) (observing that although “it is true that, at least by some measures, the 112th Congress was historically unproductive . . . the 111th Congress was historically productive”); Morgan Little, *Congress Set to Pass Historically Few Laws in 2013*, L.A. TIMES, Dec. 11, 2013, <http://articles.latimes.com/2013/dec/11/news/la-pn-congress-few-laws-2013-20131211>, archived at <https://perma.cc/J9UD-BZAV?type=image>.

<sup>207</sup> See Abebe & Posner, *supra* note 80, at 535–38 (arguing that Congress is a less active proponent of international law than is the executive branch); Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1218 (2008) (stating that “the reality [is] that Congress is either at times unaware of international law or even actively hostile to it”).

<sup>208</sup> See, e.g., *Senate Vote 161—Passes U.S.-Korean Trade Agreement*, N.Y. TIMES, <http://politics.nytimes.com/congress/votes/112/senate/1/161>, archived at <https://perma.cc/SR97-XQKL?type=pdf> (last visited Feb. 9, 2015) (noting that the U.S.-South Korea Free Trade Agreement was approved by the Senate on a vote of eighty-three to fifteen, with all but one Republican senator in

and international investment treaties.<sup>210</sup> Even with respect to human rights, moreover, the opposition is not so implacable as one might think. The most recent human rights treaty considered by the Senate—the Convention on the Rights of Persons with Disabilities—received sixty-one votes in 2012.<sup>211</sup> One recent study found that members of Congress speak out in favor of international law compliance far more frequently than is generally appreciated.<sup>212</sup> Another study found that domestic debates about international law are often shaped as much by partisan politics as by the merits of the international law rules in question.<sup>213</sup> One must be careful, in short, not to assume that the relatively small number of legislators who speak out loudly and often in opposition to international law speak for the institution as a whole.

The second consideration identified above—relative institutional capacity to change course—also cuts in favor of looking to the political branches rather than the judiciary. Even if there were enough members of Congress today to block the enactment of any and all incorporative statutes, this state of affairs is subject to change. Control of Congress can and does shift over time. If a new legislative majority wishes to pursue a policy that is different from that of the previous one, it is perfectly free to do so.<sup>214</sup> The federal judiciary, by contrast, is far more constrained in its capacity to change course. Because federal judges have life tenure, the composition of the judiciary will ordinarily change only slowly over a period of many

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support, and by the House on a vote of 278 to 151, with all but twenty-one Republican congresspersons in support).

<sup>209</sup> See, e.g., *S. 3486 (112th): Patent Law Treaties Implementation Act of 2012*, GOVTRACK, <https://www.govtrack.us/congress/bills/112/s3486>, archived at <https://perma.cc/QYF2-LSKV?type=live> (last visited Feb. 9, 2015) (noting that legislation to implement Patent Law Treaties was unanimously approved by the Senate).

<sup>210</sup> See, e.g., Dep't of State, Media Note, Office of the Spokesperson, United States Senate Approves U.S.-Rwanda Bilateral Investment Treaty (Sept. 27, 2011), available at <http://m.state.gov/md174101.htm>, archived at <http://perma.cc/LC6Q-NU85> (noting that the U.S.-Rwanda Bilateral Investment Treaty was unanimously approved by the Senate).

<sup>211</sup> See Ramsey Cox & Julian Pecquet, *Senate Rejects United Nations Treaty for Disabled Rights in a 61–38 Vote*, HILL (Dec. 4, 2012), <http://thehill.com/policy/international/270831-senate-rejects-un-treaty-for-disabled-rights-in-vote>, archived at <http://perma.cc/UF22-RVPN>; Dennis Jett, *Republications Are Blocking Ratification of Even the Most Reasonable International Treaties*, NEW REPUBLIC (Dec. 26, 2014), <http://www.newrepublic.com/article/120646/ratification-arms-trade-treaty-others-blocked-republicans>, archived at <http://perma.cc/P8YN-L3JG> (focusing primarily on international human rights treaties but also mentioning the United Nations Convention on the Law of the Sea).

<sup>212</sup> See Kevin Cope, *Congress's International Legal Discourse*, 115 MICH. L. REV. (forthcoming 2015).

<sup>213</sup> Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 NW. U. L. REV. 635, 640 (2011) (observing that “instrumental partisan motivations” may motivate political parties to support or oppose international legal commitments).

<sup>214</sup> See *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (citing Blackstone for the proposition that “one legislature may not bind the legislative authority of its successors”).

years. In addition, the principle of *stare decisis* means that future judges are generally bound to follow decisions rendered by their predecessors.<sup>215</sup> The recent decisions rendered by the U.S. Supreme Court and the lower federal courts on topics such as treaty self-execution, private rights of action, and extraterritoriality will make it more difficult for litigants to invoke international law directly in future years.<sup>216</sup> *Even if* the federal judiciary were to become more favorably disposed to international law in the years to come, therefore, it is not at all clear that it would be able to easily cast aside earlier decisions delineating the role of international law in the U.S. legal system.<sup>217</sup>

Third, and finally, it is important to consider the role played by public opinion in shaping judicial behavior. A number of studies have shown that federal judges generally—and Supreme Court justices, in particular—are closely attuned to public opinion.<sup>218</sup> If this is so, then it seems unlikely that the courts will take up the internationalist mantle so long as they perceive there to be substantial opposition to international law among the political branches. As one scholar has observed:

[G]iven the extent to which the Supreme Court appears to work generally in step with public opinion, it is hard to see why the courts would (or successfully could) be on the leading edge with respect to international law when the political winds blow hard in the opposite direction. . . . The[] actions by the political branches

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<sup>215</sup> *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (“[A]ny departure from the doctrine of *stare decisis* demands special justification.”); *Morrow v. Balaski*, 719 F.3d 160, 181 (3d Cir. 2013) (Smith, J., concurring) (“[T]he very point of *stare decisis* is to forbid us from revisiting a debate every time there are reasonable arguments to be made on both sides.”).

<sup>216</sup> *See, e.g.*, *Medellín v. Texas*, 552 U.S. 491, 506 n.3 (2008) (announcing a presumption that international agreements generally do not create private rights of action in domestic courts); *Chowdhury v. WorldTel Bangl. Holding Ltd.*, 746 F.3d 42, 54–55 (2d Cir. 2014) (looking into extraterritorial implications of statutes inspired by the Torture Convention); Bradley, *supra* note 165, at 540.

<sup>217</sup> *See In re Woerner*, 758 F.3d 693, 702 (5th Cir. 2014) (“[A]s a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explanations of the governing rules of law.” (citation and internal punctuation omitted)).

<sup>218</sup> *See, e.g.*, Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (but We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 280 (2010) (concluding that “our results indicate that an association exists between the public’s mood and the Court’s decisions”); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 117–20; *cf.* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516 (2010) (“Supreme Court Justices care more about the views of academics, journalists, and other elites than they do about public opinion.”). For additional information regarding the relationship between the Court and public opinion, see generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006).

may not be a perfect proxy for public opinion, but the extent to which the (directly) politically accountable actors in the United States are willing to violate, denounce, and fail to commit to widely accepted international norms cannot, in some sense, be lost on the Court.<sup>219</sup>

The claim that the courts are more likely to follow—rather than to lead—public opinion on this issue derives support from anecdotal evidence relayed to the author in which several federal judges were said to have consciously omitted references to international law from their published decisions after concluding that it wasn't worth the blowback that these citations would engender.<sup>220</sup> To the extent that federal judges are sensitive to public opinion, therefore, and to the extent that the views of elected officials may serve as a rough proxy for public opinion, it seems likely that judges will continue to shy away from relying directly on international law to provide a rule of decision until they perceive the risk of backlash to be low. A successful campaign to persuade the political branches to enact statutes that give effect to a broader range of international law rules domestically, therefore, may be the best way to ensure that judges feel empowered to make greater use of that law in their decisions.

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The foregoing argument that international law advocates should look to the political branches—rather than the courts—is at its core a *pragmatic* one.<sup>221</sup> It begins with the premise that it is normatively desirable for international law to play a more prominent role in domestic litigation. It then works backward to identify the most promising means of achieving this goal. The essential argument is that the internationalists are right that international law should play a more prominent role in domestic litigation but

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<sup>219</sup> Wuerth, *supra* note 18, at 120.

<sup>220</sup> The individuals who relayed these anecdotes to the author requested that their names not be used. For general support for this point of view, however, see Wuerth, *supra* note, at 121 (“Had the U.S. Supreme Court given full imprimatur to *Filártiga v. Feña-Irala* and subsequent ATS cases (especially against corporations) or had it held in *Medellin* that ICJ decisions are directly enforceable in U.S. courts, political backlash seems like a nontrivial possibility, perhaps reverberating well beyond those cases themselves.”).

<sup>221</sup> The argument is agnostic as to the “proper” constitutional role to be played by the respective branches of the federal government in the conduct of U.S. foreign relations and is only obliquely interested in the issue of relative institutional competence. On the latter point, however, it seems fairly clear that the relevant actors in the political branches are experts in international law. The Office of the Legal Advisor at the State Department is staffed by attorneys with a deep and abiding knowledge of international law in all its many forms. The respective staffs of the House Foreign Affairs Committee and the Senate Foreign Relations Committee are similarly well-versed in international affairs. These individuals, working in tandem, are well-positioned to draft detailed legislation that incorporates international law rules into the U.S. legal system.

that continued appeals to the judiciary are not the best way of achieving this goal. The enactment of incorporative statutes represents a means of achieving the ends desired by the internationalists—more international law in U.S. courts—through a mechanism that addresses the concerns of a judiciary that has proven itself to be quite sympathetic to the structural arguments advanced by the nationalists. As such, these statutes represent a promising way forward when it comes to better integrating international law into the U.S. legal system.

## V. CONSTRUCTING THE IDEAL INCORPORATIVE STATUTE

If incorporative statutes represent a particularly promising means of giving international law an expanded role in the U.S. legal system, then the question that naturally arises is what form these statutes should take. Should they transcribe international law rules into the U.S. Code? Or should they incorporate them by reference? Should they incorporate international law in a general way? Or should they incorporate specific rules of international law?

This Part offers answers to each of these questions.<sup>222</sup> In so doing, it seeks to provide guidance to future legislators tasked with drafting incorporative statutes. It first sets forth a typology of incorporative statutes.<sup>223</sup> In constructing this typology, it draws extensively upon past congressional practice and on the ways in which the courts have dealt with different types of incorporative statutes. It then analyzes the strengths and weaknesses of these various approaches.<sup>224</sup>

### A. A Typology of Incorporative Statutes

When it comes to drafting incorporative statutes, Congress has three distinct choices to make.<sup>225</sup> First, it must decide whether to codify international law or incorporate it by reference. Second, it must decide whether to incorporate international law generally or to incorporate specific parts of that law. Third, it must decide to what extent the incorporative statute

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<sup>222</sup> See *infra* notes 223–291 and accompanying text.

<sup>223</sup> See *infra* notes 225–235 and accompanying text.

<sup>224</sup> See *infra* notes 236–291 and accompanying text.

<sup>225</sup> See, e.g., SHAHEED FATIMA, USING INTERNATIONAL LAW IN DOMESTIC COURTS 55–77 (2005) (providing useful overview of role played by incorporative statutes in other legal systems); John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 664–69 (2010) (discussing different types of incorporative statutes). For simplicity, the analysis in this Part refers to legislation drafted by Congress rather than by the political branches acting in concert. In most cases, of course, the executive will also play an important role in shaping the legislation and the consent of the executive will be required for the legislation to become law.

should be accompanied by other legal rules that make clear precisely when an individual litigant may rely on international law in domestic litigation.

With respect to the first choice, it is necessary first to explain the difference between codifying an international law rule and incorporating the rule by reference. Congress *codifies* a rule of international law when it writes the substance of that rule into a statute. Codification occurs, in other words, when Congress acts as a transcription service that cuts language from a particular treaty and pastes that language into the U.S. Code. (Congress codifies customary international law by writing the substance of that law into a statute.) Once a particular rule has been codified, it will appear—word for word—in the text of the U.S. Code. By way of example, consider the Carriage of Goods by Sea Act (“COGSA”), which reads:

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . Act of God.<sup>226</sup>

This language is identical to the language set forth in Article IV(2)(d) of the Hague Rules, an international treaty ratified by the United States in 1936:

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . Act of God.<sup>227</sup>

As a statute whose language tracks the language in a particular international treaty, COGSA *codifies* the Hague Rules in the U.S. Code.<sup>228</sup>

Alternatively, Congress may choose to draft a statute that incorporates international law by *reference*. Under this approach, the international law rule is not formally transcribed into the U.S. Code. Instead, the statute will declare that certain treaties or certain rules of customary international law constitute a binding source of legal authority under the statute. The task of locating and interpreting the text of the referenced treaties—or of determining the content of the relevant rules of customary international law—is left to the litigants and, ultimately, to the judge. The ATS is an example of a statute that incorporates U.S. treaties as well as customary international law by reference. It provides that:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.<sup>229</sup>

<sup>226</sup> Carriage of Goods by the Sea Act, 46 U.S.C. § 30701 note (2012).

<sup>227</sup> International Convention for the Unification of Certain Rules of Law Relating to the Bills of Lading (The Hague Rules), art. IV, § 2(d), Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155.

<sup>228</sup> The Foreign Sovereign Immunities Act is an example of a statute that codifies a rule of customary international law. *See* Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 199–200 (2007) (observing that one purpose of the Foreign Sovereign Immunities Act was the “codification of international law”).

In this case, Congress has not copied the language of any particular international rule into the U.S. Code. It has merely *referred* a judge tasked with enforcing the statutory rule to the relevant international law sources and directed that judge to give effect to those sources in domestic litigation.

The second choice that Congress must make in drafting incorporative statutes is whether to incorporate international law on a general basis or a specific basis. Congress incorporates international law on a *general* basis when it refers to “treaties” or to “customary international law” without specifying any particular treaty or any particular rule of customary international law.<sup>230</sup> By contrast, Congress incorporates international law on a *specific* basis when it refers to one particular treaty or one particular rule of customary international law. In the former case, the statute directs the courts to enforce a wide range of (unspecified) international law rules in U.S. courts. In the latter case, the statute directs the courts to enforce a specific treaty or a specific rule of customary international law. The ATS is an example of a statute that incorporates treaties and customary international law on a general basis; it does not refer to any specific treaties or any specific rules of customary international law. The federal piracy statute, by contrast, is an example of a statute that incorporates a specific rule of customary international law by reference. The statute states:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.<sup>231</sup>

The legislation that implements the New York Convention is an example of a statute that incorporates a specific treaty by reference. It provides:

The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention.<sup>232</sup>

The primary difference between a statute that incorporates international law rules on a general basis and a statute that does so on a specific basis, there-

<sup>229</sup> 28 U.S.C. § 1350 (2012). The federal extradition statute is an example of a statute that incorporates treaties by reference. 18 U.S.C. § 3181(a) (2012) (“The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.”); see 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the . . . treaties of the United States.”).

<sup>230</sup> See *supra* note 229 and accompanying text.

<sup>231</sup> 18 U.S.C. § 1651; see H.R. REP. NO. 94-1487, at 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613 (describing the Foreign Sovereign Immunities Act as “a statutory regime that incorporates standards recognized under international law”).

<sup>232</sup> See 9 U.S.C. § 207 (2012).



fore, is whereas the former refers to *all* treaties or *all* customary international law without limitation, the latter purports to limit the act of incorporation to a particular *subset* of these same rules.

When these two sets of binary choices are viewed in tandem, it becomes clear that there are four general “types” of incorporative statutes: (1) general codification statutes, (2) general reference statutes, (3) specific codification statutes, and (4) specific reference statutes. Table 1 illustrates how several existing incorporative statutes fit into each of these four categories. Since Congress has never attempted to codify vast swathes of international law in a single statute, there are no general codifications statutes in the U.S. Code at this time.

<b>TABLE 1: INCORPORATIVE STATUTES, BY TYPE</b>	
<u>General Codification</u> None	<u>Specific Codification</u> Carriage of Goods by Sea Act (treaty) Foreign Sovereign Immunities Act (custom)
<u>General Reference</u> Alien Tort Statute (treaty & custom)	<u>Specific Reference</u> New York Convention Implementation Act (treaty) Federal Piracy Statute (custom)

Once it chooses among these various types of incorporative statutes, Congress then faces a third and final decision. It must decide whether to enact additional provisions that explain when and how individuals may invoke the newly-incorporated rules in domestic litigation.<sup>233</sup> These additional provisions may address such issues as whether a private right of action exists, whether the statute applies extraterritorially, or whether state and federal courts have concurrent jurisdiction to hear disputes arising under the

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<sup>233</sup> See, e.g., 22 U.S.C. § 9003 (2012). Section 9003 states:

Any person seeking to initiate judicial proceedings under the [Hague Convention on the Civil Aspects of International Child Abduction] for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

statute.<sup>234</sup> They may also limit (or expand) the defenses available to a defendant alleged to have violated the international law rule in question.<sup>235</sup>

### B. Choosing the “Right” Type of Statute

Having reviewed the different types of incorporative statutes that Congress may choose to enact, it is useful to consider the advantages and disadvantages inherent in these various options. This Section first considers which type of incorporative statute should be used when the international law rule in question is set forth in a treaty.<sup>236</sup> It then examines which type of statute should be used when the rule is derived from customary international law.<sup>237</sup>

#### 1. Treaties

In theory, it should make no difference which drafting technique Congress uses when it comes to the incorporation of international treaties because there is widespread agreement that incorporation by reference is the functional equivalent of statutory codification. As one author has written: “Incorporation by reference is at heart nothing more than a drafting technique to avoid the time and expense of setting forth all of the referenced language verbatim in the referencing statute, and its proper legal interpretation is just the same as if that more tedious task had in fact been done.”<sup>238</sup> In practice, however, a decision to codify or incorporate by reference may impact the way in which a particular treaty provision is applied and interpreted by U.S. courts.

Let us first consider the virtues and vices of specific codification statutes such as COGSA. The primary virtue of these statutes is that the text of a particular treaty is written directly into the U.S. Code. When this act is done, there can be no debating whether international law has been well and truly incorporated into the law of the United States. It clearly has. The primary danger in adopting this particular approach is that a court called upon

<sup>234</sup> See, e.g., 9 U.S.C. § 203 (addressing jurisdiction); *id.* § 207 (addressing right of action).

<sup>235</sup> See, e.g., 22 U.S.C. § 2370(e)(2) (“[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted . . . based upon . . . a confiscation or other taking . . . by an act of that state in violation of the principles of international law . . . .”); 28 U.S.C. § 1605A (2012) (discussing claims brought arising out of acts of torture, extrajudicial killings, aircraft sabotage, or hostage and specifying the application (or non-application) of such issues as sovereign immunity, the statutes of limitations, private rights of action, and property disposition).

<sup>236</sup> See *infra* notes 238–255 and accompanying text.

<sup>237</sup> See *infra* notes 256–291 and accompanying text.

<sup>238</sup> F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 LA. L. REV. 1201, 1280 (2008).

to interpret the statute will fail to appreciate its international origins.<sup>239</sup> In its *INS v. Stevic*,<sup>240</sup> for example, the U.S. Supreme Court interpreted a specific codification statute in a manner that was wildly inconsistent with the international understanding of the original treaty text.<sup>241</sup> In *Couthino, Caro & Co. v. M/V Sava*, the Fifth Circuit chose to interpret a different specific codification statute in light of “common law principles” rather than by looking to the international understanding of the treaty language upon which the statute was based.<sup>242</sup> When Congress chooses to codify specific treaty obligations in domestic statutes, in other words, there is the danger that a U.S. court will ignore the fact that the statute is derived from a treaty and render an interpretation of the statute that is inconsistent with the original *international* understanding of the text in question.<sup>243</sup>

Where a statute incorporates a treaty by reference, this danger vanishes; the specific words contained in the treaty are never written into the statute. Instead, the statute merely incorporates the treaty by reference and directs the reader to consult the treaty text. Since the text is set forth in only

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<sup>239</sup> See Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 740 (1987) (“A court is more likely to follow the international understanding when it has the actual convention before it . . . and is more likely to diverge if the substance of the convention is embedded in a national code in which judges lose sight of its international nature.”); see also R v. Sec. of State for the Home Dep't, *ex parte Adan*, [2001] 1 All E.R. 593, 617 (H.L.) (Steyn, L.J.) (U.K.) (observing that national courts must find the true interpretation of international law “untrammelled by notions of their national legal culture”).

<sup>240</sup> 467 U.S. 407, 407 (1984).

<sup>241</sup> *Id.* at 412–13. The Court concluded that the “clear probability” standard rather than the “well-founded fear” standard should be applied in determining whether an alien was eligible for mandatory relief from deportation. *Id.* Scholars have generally been quite critical of that decision. See James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 523 (2000) (“There is . . . not an iota of historical support for the Supreme Court’s insistence that the drafters wanted to limit Article 33 protection to the minority of refugees able to show a probability of persecution (rather than a well-founded fear of persecution).”); *id.* (“To the contrary, the drafting record supports the view that the [‘life or freedom would be threatened’] language . . . was selected simply as a shorthand means of incorporating the refugee definition in Article 1.”); Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 87, 123–24 (Erika Feller et al. eds., 2003) (“As a matter of the internal coherence of the Convention, the words ‘where his life or freedom would be threatened’ in Article 33(1) must . . . be read to encompass territories in respect of which a refugee or asylum seeker has a ‘well-founded fear of being persecuted.’ . . .”); *Id.* (“[T]here is little doubt that the words ‘where his life or freedom would be threatened’ must be construed to encompass the well-founded fear of persecution that is cardinal to the definition of ‘refugee’ in Article 1A(2) of the Convention.”); Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 746 (1998) (suggesting that “the Court never even attempted to discern whether its holding was a plausible construction of Article 33.1”);

<sup>242</sup> 849 F.2d 166, 168–71 (5th Cir. 1988).

<sup>243</sup> In other cases, U.S. judges have stated (incorrectly) that treaties should be interpreted as though they are statutes. See, e.g., *Cannon v. U.S. Dep't of Justice*, 973 F.2d 1190, 1192 (5th Cir. 1992).

one place, there need be no concern that a court will misinterpret that text. Reference statutes, as it happens, pose an altogether different danger. In some cases, they make it easier for a court to ignore the treaty and to apply domestic law instead.

The case law touching on Section 44(b) of the Lanham Act illustrates the potential for such an outcome. Section 44(b) is a general reference statute that incorporates an unspecified number of international treaties relating to the protection of trademarks and the repression of unfair competition. The statute provides that:

Any person whose country of origin is a party to any convention or treaty relating to trademarks, trade or commercial names, or the repression of unfair competition, to which the United States is also a party . . . shall be entitled to the benefits of this section under the conditions expressed herein to the extent necessary to give effect to any provision of such convention [or] treaty . . . *in addition to* the rights to which any owner of a mark is otherwise entitled by this Act.<sup>244</sup>

As it so happens, the United States—along with virtually every other developed nation—is a party to the Paris Convention, a treaty that contains language addressing the topic of unfair competition.<sup>245</sup> In the views of many commentators, the protections afforded by the Paris Convention with respect to unfair competition are more expansive than those otherwise available under U.S. law.<sup>246</sup> A straightforward reading of Section 44(b), therefore, would suggest that foreign individuals would be able to rely upon these expansive treaty rights—in addition to the rights otherwise available exclusively under U.S. law—when involved in litigation in the United States.<sup>247</sup>

In practice, however, U.S. courts have routinely declined to permit foreign litigants to invoke the treaty as an independent source of rights under

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<sup>244</sup> 15 U.S.C. § 1126(b) (2012) (emphasis added).

<sup>245</sup> See Gerald J. Mossinghoff & Vivian S. Kuo, *World Patent System Circa 20XX, A.D.*, 38 IDEA 529, 530 (1998).

<sup>246</sup> See, e.g., 4A RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 2610 (4th ed. 1994) (“Article 10bis [of the Paris Convention] is not premised upon the narrow meaning of ‘unfair competition’ as it was understood in American common law, but adopts the more liberal construction of the European countries such as France, Germany and Switzerland . . .”).

<sup>247</sup> See, e.g., *Gen. Motors Corp. v. Lopez de Arriortua*, 948 F. Supp. 684, 687–90 (E.D. Mich. 1996); *Maison Lazard et Compagnie v. Manfra, Tordella & Brooks, Inc.*, 585 F. Supp. 1286, 1288 (S.D.N.Y. 1984); see also Patricia V. Norton, Note, *The Effect of Article 10bis of the Paris Convention on American Unfair Competition Law*, 68 FORDHAM L. REV. 225, 254 (1999) (urging the United States to “adopt Article 10 bis’s definition of unfair competition as the definition for all suits in the United States”).

Section 44(b).<sup>248</sup> They have held instead that the Paris Convention guarantees only that foreign nationals shall be entitled to national treatment—that is, precisely the same rights available to U.S. nationals under U.S. law (and no more). In justifying this conclusion, these courts have held that the Paris Convention does not set forth any “substantive rights” as they relate to unfair competition. This holding is difficult to square with Article 10 *bis* of the Paris Convention, which by its terms prohibits “all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.”<sup>249</sup> Nevertheless, the overwhelming majority of federal courts to have considered the issue have concluded that the substantive protections against unfair competition set forth in the Paris Convention have no independent domestic effect, notwithstanding the “in addition to” language set forth in Article 44(b) of the Lanham Act.<sup>250</sup>

In this case, the congressional decision to utilize a general reference statute arguably made it easier for U.S. courts to give effect to their underlying (and often unstated) preference for applying domestic law rather than international law. The statute achieved this result by distancing the substantive rules set forth in the treaty from the otherwise applicable substantive rules set forth in the wholly domestic Lanham Act. The primary danger in incorporating a treaty by reference, in short, is the risk that the treaty will be marginalized or disregarded by the court in favor of wholly-domestic rules because the text of the treaty was never formally been transcribed into domestic legislation.<sup>251</sup>

This problem of marginalization may be alleviated—through not entirely eliminated—by utilizing a specific reference statute that refers to a single treaty. Rather than incorporating all U.S. treaties—or even a particular class of treaties, such as unfair competition treaties—this specific reference statute would direct the reader’s attention to the text of just one single treaty. Although there is still the risk that a court will disregard the treaty

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<sup>248</sup> See, e.g., *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 644 (2d Cir. 1956).

<sup>249</sup> Paris Convention for the Protection of Industrial Property, art. 10bis(3)(i), Mar. 20, 1883, 13 U.S.T. 2, 828 U.N.T.S. 107, as last revised at Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 303.

<sup>250</sup> See, e.g., *Grupo Gigante SA de CV v. Dallo & Co.*, 391 F.3d 1088, 1099–1100 (9th Cir. 2004); *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona*, 330 F.3d 617, 628–29 (4th Cir. 2003); *International Cafe, S.A.L. v. Hard Rock Cafe Int’l (U.S.A.), Inc.* 252 F.3d 1274, 1277–78 (11th Cir. 2001).

<sup>251</sup> At least one court has urged Congress to adopt legislation that spells out more precisely what provisions from the Paris Convention should be given effect by U.S. courts. See *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 164 (2d Cir. 2007) (noting “the absence of any statutory provision expressly incorporating . . . Articles 6bis [of the Paris Convention]” into U.S. law and urging Congress to enact legislation to express its intent with respect to this provision more clearly).

and apply domestic law instead, the very specificity of the legislative instructions—look at *this* treaty—makes this outcome less likely to occur.

There are, however, at least two downsides to using specific reference statutes that refer to individual international agreements. First, their very specificity means that they can only be used to refer to treaties already in existence. In areas of the law where the United States enters into new treaties with some frequency—tax, for example, or extradition—this particular drafting technique creates issues because it cannot easily account for treaties entered into after the statute's enactment. Second, where a treaty overlaps to a significant extent with an existing body of statutory law, even a statutory provision that specifically invokes one particular treaty may not be enough to overcome the broad judicial preference for giving effect to domestic law rules.<sup>252</sup>

Each type of incorporative statute, in short, has its drawbacks. The danger presented by reference statutes is that the incorporated treaty will be ignored or otherwise marginalized. The danger presented by codification statutes is that the statute (and by extension the treaty) will be interpreted incorrectly. Since the issue of interpretation is a second-order problem—it will never arise if the court declines to apply international law in the first instance—then it follows that specific codification statutes should generally be preferred to general reference statutes. The choice between specific codification statutes and specific reference statutes is a closer call. If a treaty deals with an issue that is relatively self-contained, and if the legislation that incorporates the treaty into the U.S. Code is set forth in its own stand-alone chapter, then the choice between the two drafting techniques likely will not matter overmuch.<sup>253</sup> In these cases, the specific reference statute should generally be used to encourage interpretations consistent with those adopted by our treaty partners. In cases in which a treaty is incorporated by reference against the backdrop of an existing statutory framework, by contrast, then the risk that the treaty will go unenforced counsels in favor of writing the text of that treaty into the statute itself via a specific codification statute.

In closing, it is useful to note that there are at least two means by which the problem of inconsistent interpretation posed by codification statutes may be addressed. First, U.S. courts can (and sometimes do) seek to verify that their interpretation of these statutes is consistent with their read-

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<sup>252</sup> Bederman, *supra* note 94, at 1487–88 (“[T]he farther removed treaties appear to judges as part of the national legal order, the more likely courts will defer or abstain in their application and interpretation.”).

<sup>253</sup> The legislation that facilitates the implementation of the Hague Convention on International Child Abduction in the United States is a good example of this type of statute. *See* 22 U.S.C. §§ 9001–9011 (2012 & Supp. 2014).

ing of the treaty text upon which the statute is based.<sup>254</sup> Second, it is possible to address the problem of inconsistent interpretation via language contained in the statute itself. Chapter 15 of the Bankruptcy Code, for example, which governs cross-border insolvencies, contains the following provision: “In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”<sup>255</sup> In a similar vein, the legislation that facilitates the implementation of the Hague Convention on the Civil Aspects of International Child Abduction provides that: “In enacting this chapter the Congress recognizes . . . the international character of the Convention; and . . . the need for uniform international interpretation of the Convention.”<sup>256</sup> If Congress were to include a similar reminder in other statutes that codify rules derived from international treaties, then the likelihood that U.S. courts would adopt inconsistent interpretations of these statutes would be significantly reduced.

## 2. Customary International Law

In the context of customary international law, the question of what type of incorporative statute should be preferred presents a different set of questions. On the one hand, the meaning of statutes that refer to the “law of nations” generally can evolve alongside the meaning of that law. Indeed, it was precisely this adaptability that enabled the venerable ATS—first enacted in 1789 to address eighteenth-century problems—to be reimagined as a tool for promoting compliance with modern human rights law in the late 1970s. On the other hand, codification statutes provide judges with clearer guidance as to the precise content of customary international law. In light of widespread judicial inexperience with customary international law, the importance of such guidance should not be underestimated.

As was the case in the treaty context, there are sound arguments in support of both types of statutes. On balance, however, the advantages that accrue to codification statutes in this context are arguably greater than the advantages that accrue to reference statutes. In order to understand the reasons why this is so, let us compare the ATS, a general reference statute, to the Foreign Sovereign Immunities Act (FSIA), a specific codification statute.

The ATS, by its terms, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed

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<sup>254</sup> See Coyle, *supra* note 225, at 664–69.

<sup>255</sup> 11 U.S.C. § 1508 (2012).

<sup>256</sup> 22 U.S.C. § 9001(b)(3) (2012).

in violation of the law of nations or a treaty of the United States.”<sup>257</sup> At the time of its enactment, the ATS was apparently intended to provide redress for three specific torts—violation of safe conducts, infringements of the rights of ambassadors, and piracy.<sup>258</sup> In 1980, however, the Second Circuit held in *Filartiga v. Pena-Irala* that the ATS could be used by victims of human rights abuses committed “in violation of the law of nations” to seek damages from the perpetrators of these abuses.<sup>259</sup> This decision ushered in an era in which U.S. courts were routinely called upon to determine whether certain acts did or did not violate the law of nations.<sup>260</sup> Although this flexibility served to expand dramatically the role of customary international law in U.S. courts, the decision to incorporate customary international law only by reference posed a great many questions for which there were not always easy answers.<sup>261</sup> Does murder qualify as a violation of the law of nations? Torture?<sup>263</sup> Assisting in the production of chemical weapons?<sup>264</sup> War crimes?<sup>265</sup> Forced labor?<sup>266</sup> Child rape?<sup>267</sup> Drug trafficking?<sup>268</sup> Medical experimentation without the consent of the subject?<sup>269</sup> Extensive damage to the environment?<sup>270</sup> The answers to these (and other) questions concerning the scope and application of customary international law were not always clear.

When the First Congress enacted the ATS, moreover, it declined to enact any supplementary provisions that would facilitate its domestic application by courts. In the absence of such provisions, the task of determining whether the ATS created a private right of action, whether it contained an exhaustion of local remedies requirement, or whether it applied extraterrito-

<sup>257</sup> 28 U.S.C. § 1350 (2012).

<sup>258</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713–15 (2004). Scholars disagree over the precise historical meaning of the term “tort” as used in the ATS. Compare Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 837, 870 (2006) (explaining that “[a] tort, as the word was understood in 1789, was simply a noncontract injury to person or property”), with Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMP. L. REV. 445, 451 (1995) (arguing that “tort” refers to the law of prize).

<sup>259</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, 883–84 (2d Cir. 1980).

<sup>260</sup> Russell J. Weintraub, *Establishing Incredible Events by Credible Evidence: Civil Suits for Atrocities That Violate International Law*, 62 BROOK. L. REV. 753, 762–63 (1996).

<sup>261</sup> Ingrid Wuerth, *Kiobel v. Royal Dutch Shell Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601, 620 (2013) (describing the ATS as “a 200-year-old textual cipher”).

<sup>262</sup> *Estate of Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1353 (11th Cir. 2010).

<sup>263</sup> *Filartiga v. Pena-Irala*, 630 F.2d 878, 883–84 (2d Cir. 1980).

<sup>264</sup> *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 390 (4th Cir. 2011).

<sup>265</sup> *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1996).

<sup>266</sup> *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1077–78 (C.D. Cal. 2010).

<sup>267</sup> *M.C. v. Bianchi*, 782 F. Supp. 2d 127, 132 (E.D. Pa. 2011).

<sup>268</sup> *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1247 (11th Cir. 2012).

<sup>269</sup> *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 168–69 (2d Cir. 2009).

<sup>270</sup> *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 266 (2d Cir. 2003).



rially fell to judges.<sup>271</sup> On the one hand, the fact that the text was so sparse gave judges a great deal of freedom to shape the contours of ATS litigation without interference from the other branches of government.<sup>272</sup> On the other hand, the lack of textual guidance means that U.S. courts have long possessed—and continued to possess—the ability to scale back or end altogether the practice of litigation under the ATS. The tradeoff struck between judicial flexibility and legal certainty, in other words, favored judicial flexibility.

A very different tradeoff was struck with the enactment of the FSIA in 1976.<sup>273</sup> The FSIA—which sought to codify the existing body of customary international law rules relating to sovereign immunity—prioritized legal certainty over judicial flexibility.<sup>274</sup> The Act contains a detailed definition of what constitutes a “foreign state,” a clear statement that such states are immune from the jurisdiction of U.S. courts, and a list of exceptions to this general rule.<sup>275</sup> The fact that these rules are all set forth in a statute means that FSIA is easier for judges to administer than is the ATS. It also means that it is unlikely that the courts will take it upon themselves to dramatically expand (or contract) the scope of the customary international law of foreign sovereign immunity.

The downside, of course, is that this codification of customary rules “freezes” them in a particular moment in time. Scholars have criticized the law of sovereign immunity in the United States on the grounds that the FSIA no longer reflects the prevailing customary law of sovereign immunity as it has evolved over the past 40 years.<sup>276</sup> Scholars have levied similar complaints at the Death on the High Seas Act, which provides that “[w]hen

<sup>271</sup> In *Sosa*, the Supreme Court held that the statute did create a private right of action for a limited number of torts. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699–712 (2004). In *Sarei v. Rio Tinto, PLC*, the Ninth Circuit held that a plaintiff seeking to bring a cause of action under the ATS must exhaust local remedies under certain circumstances. 487 F.3d 1193, 1224 (9th Cir. 2007), *vacated en banc*, 550 F.3d 822 (9th Cir. 2008) (plurality opinion). In *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court ruled that the ATS did not apply extraterritorially. 133 S. Ct. 1659, 1669 (2013).

<sup>272</sup> See Wuerth, *supra* note 261, at 610 (“If there is a statutory analog to the ATS, perhaps it is the Sherman Act, which delegates broad discretion to the federal courts to develop the substantive rules of antitrust.”).

<sup>273</sup> Foreign Sovereign Immunities Act in 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at scattered sections of 28 U.S.C.).

<sup>274</sup> The Foreign Sovereign Immunities Act is “a statutory regime which incorporates standards recognized under international law.” H.R. REP. NO. 94-1487, at 14 (1976), *reprinted in* 1976 U.S.C.A.N. 6604, 6613.

<sup>275</sup> 28 U.S.C. §§ 1603–1605 (2012).

<sup>276</sup> John W. Borchert, Comment, *Tribal Immunity Through the Lens of the Foreign Sovereign Immunities Act: A Warrant for Codification?*, 13 EMORY INT’L L. REV. 247, 276 (1999) (“One criticism of the FSIA is that it inappropriately codifies and freezes in place the progressive development of customary international law.”).

the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas *beyond 3 nautical miles* from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible.”<sup>277</sup> When this statute was enacted in 1920, customary international law stipulated that a state’s sovereignty over its territorial waters extended three miles from its shores. Accordingly, Congress wrote that rule into the statute. Over the past century, however, the customary rule changed. Today, the rule is that a state’s territorial waters extend twelve miles from its shores.<sup>278</sup> The statute, however, has not been updated to reflect these developments and some U.S. courts have applied the older rule (three miles) even as they acknowledged that the existence of modern rule (twelve miles) because the older rule is the one that was originally codified in the statute.<sup>279</sup>

The danger of “freezing” customary rules in time notwithstanding, a strong case can be made that the specific codification statute exemplified by the FSIA represents a more sustainable model than the general reference statute exemplified by the ATS. Although both statutes have undeniably expanded the role played by international law in the U.S. legal system, the success of the ATS in achieving this goal was attributable in large part to serendipity. In the late 1970s, a unique constellation of interests—including human rights advocates, federal judges, and sympathetic officials in the executive branch—decided to use the then-moribund ATS as a tool of promoting human rights law amid the diplomatic pressures of the Cold War.<sup>280</sup> In the early years, the primary defendants named in suits under the ATS were individuals who were often incapable of paying the judgments entered against them.<sup>281</sup> This allowed the modern incarnation of the ATS to gain

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<sup>277</sup> 46 U.S.C. § 30302 (2012) (emphasis added).

<sup>278</sup> See United Nations Convention on the Law of the Sea, pt. II, art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397. Although the United States has not ratified the U.N. Convention on the Law of the Sea, the State Department regards it as an authoritative statement of customary international law. See Andrew S. Levy, Note, *A Territorial Sea Change: The Death on the High Seas Act and the Extension of the Territorial Sea*, 80 FORDHAM L. REV. 1721, 1734 n.127 (2012).

<sup>279</sup> Compare Helman v. Alcoa Global Fasteners, Inc., 637 F.3d 986, 992–93 (9th Cir. 2011) (applying the three mile boundary described in the statute), with *In re Air Crash Off Long Island*, 209 F.3d 200, 201 (2d Cir. 2000) (applying the twelve mile boundary).

<sup>280</sup> Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 378 (1997) (“[I]n *Filartiga v. Pena-Irala* . . . the Second Circuit adopted its view of the customary international law ban on torture as federal law at the explicit urging of the Carter administration.”).

<sup>281</sup> Beth Stephens, Comment, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 537 (2004) (“Despite an outpouring of law review commentary, the *Filartiga* line of cases triggered little controversy through most of the 1990s. Most of the defendants were foreign individuals and most cases resulted in default judgments that could not be enforced against those defendants.”).

significant traction in the U.S. legal system.<sup>282</sup> When the focus of the litigation later turned to corporations, the ATS was too well established to be easily cast aside. Had the original set of defendants in ATS suits been corporations accused of aiding and abetting human rights abuses rather than individuals who actually committed those abuses, it is far from clear that ATS doctrine would have proceeded along the same doctrinal path.<sup>283</sup>

None of which is to minimize the impact of the ATS in enhancing the prominence of international law in domestic litigation; its impact in this area has been dramatic and undeniable.<sup>284</sup> Rather, it is to convey how easily things could have turned out differently given the open-ended nature of the statutory text. Notwithstanding its many successes, therefore, it is difficult to argue that the ATS represents a prototype upon which other incorporative statutes should be modeled. Instead, a specific codification statute modeled after the FSIA—replete with clear definitions, a careful distillation of the substantive rules of customary international law, and additional provisions explaining its intended scope of domestic application—seems better calculated to ensure that judges consistently give effect to customary international law rules.

As it so happens, there has been at least one attempt to “codify” the ATS.<sup>285</sup> In 2005, Senator Diane Feinstein proposed a bill—the Alien Tort Statute Reform Act—that would have amended the ATS so as to make it more closely resemble the FSIA. The proposed legislation would have removed the language referring to torts “committed in violation of the law of nations” and replaced it with language specifically authorizing “claim[s] of

<sup>282</sup> See Childress, *supra* note 69, at 724.

<sup>283</sup> To illustrate this point, consider the fact that the U.S. Supreme Court recent held in *Kiobel*—a case in which the defendant was a Dutch corporation—that the ATS does not supply a cause of action in so-called foreign-cubed cases, i.e. those cases involving foreign plaintiffs, foreign defendants, and tortious acts alleged to have been committed on foreign soil. 133 S. Ct. at 1669. Had this been the law of the land in 1980, it is at least arguable that the seminal ATS case of *Filartiga*—a case involving an individual defendant of Paraguayan nationality who had committed acts of torture against another Paraguayan national in Paraguay—might have dismissed for lack of substantial nexus with the United States. See Eugene Kontorovich, *Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671, 1674 (2014) (“Modern ATS litigation began with a foreign-cubed case, *Filartiga v. Pena-Irala*.”). But see Ralph G. Steinhardt, *Determining Which Human Rights Claims “Touch and Concern” the United States: Justice Kennedy’s Filartiga*, 89 NOTRE DAME L. REV. 1695, 1705–07 (2014) (arguing that Justice Kennedy believes *Filartiga* to have been rightly decided).

<sup>284</sup> See Anne-Marie Slaughter & David Bosco, *Plaintiff’s Diplomacy*, 79 FOREIGN AFF. 102, 106 (2000) (“From the perspective of American jurisprudence, however, the Alien Tort Statute cases have . . . forced U.S. courts to grapple with developments in international law that might otherwise have received little attention—a much-needed tonic for a judicial system often lamentably out of touch with international law.”).

<sup>285</sup> See Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1666 (2014) (describing Senator Dianne Feinstein’s proposed Alien Tort Statute Reform Act).

torture, extrajudicial killing, genocide, piracy, slavery, or slave trading.”<sup>286</sup> The precise meaning of each of these terms was exhaustively defined in the proposed legislation.<sup>287</sup> This legislation would have directly addressed such issues as the exhaustion of local remedies and the statute of limitations.<sup>288</sup> It also would have made clear that a defendant could not be held liable under the statute unless he or she was a “direct participant acting with specific intent to commit the alleged tort.”<sup>289</sup> This latter provision would likely have made it difficult—if not impossible—to sue corporations for violating the ATS because such claims are typically based on a theory that corporations have “aided and abetted” others in their actions.<sup>290</sup>

This legislative proposal was opposed by many human rights groups that chose to forego the certainty that would have come with the proposed legislation in order to retain the flexibility afforded by the current ATS. The legislation was never voted on by the Senate and never became law.<sup>291</sup> In concept, however, it seems clear that the enactment of *something* resembling this reform legislation—as modified to strike a different balance between the various stakeholders in the debate—would put the ATS on a sounder legislative footing. Such legislation would also arguably make it easier for judges to administer the statute and would remove altogether the possibility that the Supreme Court might someday choose to bring the era of ATS litigation to a close.

## CONCLUSION

At the end of the day, recent history and practice suggest that U.S. courts are most likely to give effect to international law in situations in which that law has been written into a statute. To the extent that some scholars have argued that it is preferable for U.S. judges to give effect to self-executing treaties and customary international law directly, these arguments have foundered on the rocks of attitudes and inexperience. If the goal is to enhance the role played by international law in the U.S. legal system, that law should be written into the U.S. Code to the greatest extent possible.

In closing, it should be emphasized that this Article does *not* argue that international law should never be given direct effect in the United States in

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<sup>286</sup> Alien Tort Statute Reform Act, S. 1874, 109th Cong. § 1350(a) (2005); see Brittany J. Shugart, Note, *Relieving the Vigilant Doorkeeper: Legislative Revision of the Alien Tort Statute in the Wake of Judicial Lawmaking*, 22 S. CAL. REV. L. & SOC. JUST. 91, 97 (2012) (arguing that Congress should amend the ATS).

<sup>287</sup> S. 1874, § 1350(b).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* § 1350(a).

<sup>290</sup> See *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 262 (2d Cir. 2007).

<sup>291</sup> Kirshner, *supra* note 69, at 275.

the absence of a statute. Such law has long been—and should continue to be—directly enforced by U.S. courts in appropriate cases. Nor does this Article suggest that U.S. courts should treat all treaties as non-self-executing or that they should never directly enforce customary international law. This Article simply argues that that if the goal is to reverse the present judicial retreat from international law—and to give international law a more prominent role in the U.S. legal system—there are a number of compelling reasons to believe that appeals to the political branches to enact legislation that writes this law into the U.S. Code are more likely to achieve this goal than continued attempts to persuade U.S. judges to reform their doctrine, rethink their attitudes, and reacquaint themselves with the basics of international law.