Breard, Our Dualist Constitution, and the Internationalist Conception

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In its decision last Term in Breard v. Greene, the Supreme Court refused to stay the execution of Angel Breard, an inmate in Virginia, even though Virginia had violated a treaty on consular relations and the International Court of Justice had ordered the United States to "take all measures at its disposal" to stay the execution. The international law academy has been heavily critical of the Supreme Court's decision and other aspects of the United States' handling of the Breard case. In this article, Professor Curtis Bradley argues that the criticisms by the academy reflect an "internationalist conception" of the relationship between international law and U.S. domestic law. This conception presumes that international law must be incorporated into domestic law, that international law should supersede domestic law when the two conflict, and that "foreign affairs exceptionalism" should provide the federal government with expansive ability to enter into and implement international obligations. Using Breard as a case study, Professor Bradley argues that the internationalist conception is inconsistent with this country's traditionally "dualist" approach to international law and that it is unlikely to be accepted by U.S. government actors.

The Supreme Court's decision last Term in *Breard v. Greene*,¹ although a mere *per curiam* opinion issued without oral argument, may turn out to be one of the most significant and controversial foreign affairs decisions in recent history. In its decision, the Court declined to stay the execution of Angel Breard, a Paraguayan national, who earlier had been convicted in Virginia of murder and attempted rape. The Court did so notwithstanding its acknowledgement that Virginia had violated the Vienna Convention on Consular Relations² by failing to advise Breard at the time of his arrest of his right to confer with the Paraguayan consulate. More dramatically, it did so notwithstanding a provisional order by the International Court of Justice

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1. 118 S. Ct. 1352 (1998).

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

(ICJ) stating that the United States was to "take all measures at its disposal" to stay *Breard's* execution.³ Shortly after the Court's decision, Virginia carried out the execution.

The *Breard* case is interesting on several levels. At the doctrinal level, the case raises important questions concerning the status in U.S. courts of ICJ orders, the applicability of the Eleventh Amendment to treaty violations, and the powers of the federal government to compel state compliance with international obligations. At the policy level, *Breard* illustrates some of the difficulties associated with balancing the U.S. commitment to federalism against its interest in international law compliance.⁴ At the conceptual level, which will be the focus of this article, *Breard* provides a useful case study for examining the relationship between international law and U.S. domestic law.

There are two basic viewpoints concerning the relationship between international and domestic law—"monism" and "dualism."⁵ Although there is much uncertainty surrounding these terms, a survey of the literature suggests the following general definitions. The monist view is that international and domestic law are part of the same legal order, international law is automatically incorporated into each nation's legal system, and international law is supreme over domestic law. Monism thus requires, among other things, that domestic courts "give effect to international law, notwithstanding inconsistent domestic law, even domestic law of constitutional character."⁶ By contrast, the dualist view is that international and domestic law are distinct, each nation determines for itself when and to what extent international law is incorporated into its legal system, and the status of international law in the domestic system is determined by domestic law. Under this view, "[w]hen municipal law provides that international law applies in whole or in part within the jurisdiction, this is merely an exercise of the authority of municipal law, an adoption or transformation of the rules of international law."⁷ As these definitions suggest, the debate between monism and dualism is in part a debate about where one should look to determine international law's domestic status: Monism looks outward to the structure and content of international law; dualism looks inward to domestic standards and processes.

3. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), I.C.J. (Apr. 9, 1998), reprinted at 37 I.L.M. 810, 819 (1998).

4. For a brief discussion of this issue, see Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675 (1998).

5. For background on the "monist" and "dualist" perspectives, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32-35 (4th ed. 1990); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 64-67 (1995); and I OPPENHEIM'S INTERNATIONAL LAW 53-56 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992).

6. HENKIN, *supra* note 5, at 64.

7. BROWNLIE, *supra* note 5, at 33. "Municipal law" is another term for domestic law.

Most commentators agree that, at least during the latter half of this century, dualism has been the prevailing view.⁸ In recent years, however, there has been a definite revival of monist thought in the American international law academy. This revival does not perfectly mirror the traditional monist model, since few commentators today contend that all of international law is automatically incorporated into every domestic legal system and always trumps domestic law whenever the two conflict.⁹ To distinguish it from pure monism, I will refer to it in this article as the "internationalist conception" of the relationship between international and domestic law.¹⁰ The internationalist conception is not a school or even a unitary phenomenon but rather signifies a family of academic beliefs concerning international law's role in the U.S. legal system. A central theme underlying these beliefs is that the incorporation and status of international law in the U.S. legal system should be determined, at least to some extent, by international law itself.¹¹

In this article, I argue that the internationalist conception is inconsistent with pervasive and long-standing principles of U.S. jurisprudence, and I use the *Breard* case to illustrate this point. Notwithstanding academic claims to the contrary, the U.S. approach to international law has been and continues to be fundamentally dualist. The article proceeds in three parts. Part I provides an overview of the proceedings and arguments in the *Breard* case. Part II

8. See, e.g., HENKIN, *supra* note 5, at 66 ("The international system today . . . is essentially dualist in principle . . ."); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 83 (2d ed. 1993) ("The prevalent theoretical approach . . . is . . . dualist."); Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 41 (1995) ("[T]he dualists soundly thrashed the monists."); see also James A.R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 422-23 (1998) ("The dualist theory . . . is a constitutional axiom in contemporary United States jurisprudence.").

9. The scholar who today comes closest to embracing the traditional conception of monism is Professor Jordan Paust. See generally JORDAN J. PAUST, INTERNATIONAL LAW AS THE LAW OF THE UNITED STATES (1996).

10. I have used this and similar terms before in more specific contexts. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 497-504 (1998) (discussing "internationalist conception" of the *Charming Betsy* canon of construction); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2274-75 (1998) (discussing "internationalist assumption" concerning the incorporation of customary international law into U.S. law).

11. At least some proponents of the internationalist conception expressly understand it to be a challenge to dualism. Professor Louis Henkin, for example, has in recent years compared dualism to a cancer and has urged fellow international lawyers to fight against it. See, e.g., Louis Henkin, *Implementation and Compliance: Is Dualism Metastasizing?*, 91 AM. SOC'Y INT'L L. PROC. 515 (1997) (comments at the Wrap-up Plenary of the 91st Annual Meeting of the American Society of International Law). Professor Harold Koh has urged U.S. courts to engage in "transnational public law litigation" (which encompasses many elements of what I am calling the internationalist conception) because such litigation "moves us closer to a unitary, 'monist' legal system, in which domestic and international law are integrated." Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2397 (1991).

describes the principal strands of the internationalist conception and how they are inconsistent with settled law. Part III revisits the *Breard* case and argues that it reaffirms the U.S. commitment to dualism.

I should make clear at the outset the nature of my argument. My principal goal here is to describe and criticize the framework from which many international law scholars operate in discussing the relationship between international law and U.S. domestic law. My argument is not intended as a disparagement of the importance of international law or international institutions. Thus, for example, I do not defend here Virginia's failure to give Breard the notice required under the Vienna Convention. Nor is my argument intended as a complete defense of the way in which the federal government and Virginia handled Breard's execution. It is quite possible that, as a policy matter, the federal government should have tried harder to delay the execution and that Virginia's Governor should in any event have used his own authority to do so. My analysis does suggest, however, that the Supreme Court correctly denied a stay of execution.

I. OVERVIEW OF THE *BREARD* CASE

There is a certain amount of drama in almost any death penalty case, given the often gruesome nature of the crime, the seriousness and irrevocability of the punishment, and the usual last-minute stay requests. This is true of the *Breard* case. But what makes this case especially dramatic is the unusual—indeed, unprecedented—nature of its proceedings. Among other things, this case featured a suit by a foreign government against a U.S. state, a showdown with the ICJ, and intense (and, according to some observers, contradictory) involvement of two components of the Executive Branch.

A. *Trial and Conviction*¹²

Angel Francisco Breard, a citizen of Paraguay born in Argentina, came to the United States in 1986 on a student visa. In 1992, he was arrested by Virginia authorities and charged with the murder and attempted rape of a 39-year-old woman in Arlington County. As Virginia officials would later admit, Breard was not advised of his right under the Vienna Convention to have the Paraguayan consulate notified of his arrest.¹³ Virginia officials did,

12. The facts described in this subsection are drawn primarily from the various judicial opinions in the *Breard* litigation, especially *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1997), and *Breard v. Commonwealth*, 445 S.E.2d 670 (Va. 1994).

13. The Convention provides that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." Vienna Convention, *supra* note 2, art. 36(1)(a). It further provides that, "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in

however, appoint two attorneys to represent Breard, and those attorneys represented him throughout his trial and on direct appeal. He also was able to communicate with and receive assistance from his family in Paraguay.

Breard pleaded not guilty and, apparently against the advice of his lawyers, decided to testify at his trial. In his testimony, he admitted to having committed the murder, for which he blamed a Satanic curse placed on him by his former father-in-law. Breard was subsequently convicted of capital murder and attempted rape and was sentenced to death. The conviction and sentence were affirmed by the Virginia Supreme Court,¹⁴ and the U.S. Supreme Court denied certiorari.¹⁵ After having new counsel appointed, Breard pursued collateral review of his conviction and sentence in the Virginia state courts, which denied relief.¹⁶

At no time in his trial, direct appeal, or state collateral proceedings did Breard raise the claim that state authorities had violated the Vienna Convention. At some point during 1996, Paraguayan officials became aware of Breard's conviction and sentence and sought to confer with him. Virginia consented, and from that point on Paraguayan officials were given free access to Breard.

B. *Federal Habeas Corpus*

In August 1996, Breard filed a petition for a writ of habeas corpus in federal district court, arguing, among other things, that his conviction and sentence were invalid because of Virginia's violation of the Vienna Convention. The court denied relief.¹⁷ While noting that it was "trouble[d]" by "Virginia's persistent refusal to abide by the Vienna Convention," the court held that Breard had procedurally defaulted his claim by not presenting it to the state courts and that he had not shown "cause" for this default.¹⁸

any other manner." *Id.*, art. 36(1)(b). Finally, it provides that "[t]he said authorities shall inform the person concerned without delay" of this right. *Id.* The United States ratified the Convention in 1969. See 21 U.S.T. 77, T.I.A.S. No. 6820 (effective Dec. 24, 1969).

14. See *Breard v. Commonwealth*, 445 S.E.2d 670, 682 (Va. 1994).

15. See *Breard v. Virginia*, 513 U.S. 971, 971 (1994).

16. See *Breard v. Netherland*, 949 F. Supp 1255, 1260, 1269 (E.D. Va. 1996) (noting this fact).

17. See *id.* at 1258.

18. *Id.* at 1263-65. Federal habeas relief is available to a state prisoner only after the prisoner has exhausted state judicial remedies. See 28 U.S.C. § 2254(b), (c) (1994). If the prisoner has not exhausted such remedies but would now be procedurally barred under state law from pursuing them, the prisoner's claim is procedurally defaulted and ordinarily can be pursued in federal court only upon a showing of "cause" and "prejudice." See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). Under Virginia law, Breard was barred from returning to state courts to present his Vienna Convention claim. See VA. CODE ANN. § 8.01-654.1 (1995) (limiting time period for the filing of petitions for writs of habeas corpus by prisoners sentenced to death). Until recently, this procedural default doctrine was largely the product of Su-

The court of appeals affirmed, holding that neither the novelty of Breard's Vienna Convention claim nor Virginia's failure to advise Breard of his rights under the Convention constituted cause for Breard's failure to raise the claim in state courts.¹⁹ Consistent with its prior decision in a similar case,²⁰ the court reasoned that "a reasonably diligent attorney would have discovered the applicability of the Vienna Convention to a foreign national defendant."²¹ One appeals court judge wrote a concurrence emphasizing the importance of the Vienna Convention to U.S. citizens living and traveling abroad whose "freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example."²²

C. *Suit by Paraguay*

Meanwhile, in September 1996, the Republic of Paraguay, its Ambassador to the United States, and its Consul General to the United States together brought suit in federal district court against the Commonwealth of Virginia. They argued that Virginia's failure to advise the Paraguayan consulate of Breard's arrest had violated both the Vienna Convention and an 1859 Treaty of Friendship, Commerce, and Navigation between the United States and Paraguay.²³ The Consul General asserted a parallel claim under 42 U.S.C. §

preme Court decisions rather than the express language of the habeas statute. The Antiterrorism and Effective Death Penalty Act of 1996, however, specifically provides that federal courts should not hold evidentiary hearings on habeas claims, including claims based on alleged treaty violations, "[i]f the applicant has failed to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. § 2254(a), (e)(2) (1994 & Supp. 1996). The Act became effective on April 24, 1996, prior to the time Breard filed his first federal habeas petition. The Act has additional provisions governing capital cases coming from states that have established certain mechanisms for the appointment and payment of counsel in state post-conviction proceedings. See 28 U.S.C. § 2261(b), (c). The district court held that these provisions did not apply to Breard because Virginia had not established the requisite mechanisms. See 949 F. Supp. at 1262. When applicable, these provisions generally bar federal habeas relief for claims that have not been "raised and decided on the merits in the State courts." 28 U.S.C. § 2264(a) (Supp. 1996).

19. See *Breard v. Pruett*, 134 F.3d 615, 619-20 (4th Cir. 1998).

20. See *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997). For discussion of this decision, see William J. Aceves, *Murphy v. Netherland*, 92 AM. J. INT'L L. 87 (1998).

21. 134 F.3d at 619-20.

22. *Id.* at 622 (Butzner, J., concurring).

23. Feb. 4, 1859, U.S.-Para., 12 Stat. 1091. The Friendship, Commerce, and Navigation treaty gives the diplomatic agents of Paraguay in the United States the same privileges, exemptions, and immunities granted by the United States to agents of other nations. *Id.*, art. XII. In bilateral consular conventions with several other nations, the United States has agreed that appropriate authorities will inform consular officials of those nations of the detention of their nationals. See, e.g., Consular Convention, June 6, 1951, U.S.-U.K., art. 16, 3 U.S.T. 3426 ("A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district.").

1983 for violation of these treaties. The plaintiffs argued that, because of these treaty violations, the court should vacate Breard's conviction.

Although stating that it was "disenchanted by Virginia's failure to embrace and abide by the principles embodied in the Vienna Convention," the district court dismissed the case for lack of subject-matter jurisdiction, principally on the ground that the plaintiffs' claims were barred by the Eleventh Amendment to the U.S. Constitution.²⁴ The court noted that the Eleventh Amendment is applicable to suits by foreign governments against states in federal court, and it held that this particular suit did not fall within the exception to Eleventh Amendment immunity established in *Ex Parte Young*²⁵ for ongoing violations of federal law.²⁶ The court of appeals affirmed, agreeing with the district court that the violations alleged were not ongoing, and also holding that the *Ex Parte Young* exception did not apply because the relief sought was not prospective in nature.²⁷ The appeals court did note, however, that it shared the district court's "disenchantment" with Virginia's violation of the treaty, and the court observed that "[t]here are disturbing implications in that conduct for larger interests of the United States and its citizens."²⁸

In late-February and early-March, 1998, the Paraguayan officials and Breard filed petitions for writs of certiorari in the Supreme Court, seeking review of their respective cases.²⁹ The Commonwealth of Virginia announced that it planned to execute Breard on April 14, 1998.

D. *Proceedings in the International Court of Justice*

The controversy then shifted venue to The Hague, where, on April 3, eleven days before Breard's scheduled execution, Paraguay filed a suit

24. *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1273 (E.D. Va. 1996). The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. This language refers only to suits by citizens and subjects, but the Amendment has been held to apply as well to suits by foreign nations against U.S. states. See *Monaco v. Mississippi*, 292 U.S. 313, 330 (1934); see also *Blatchford v. Native Village*, 501 U.S. 775, 780-82 (1991) (relying on *Monaco* to support the existence of Eleventh Amendment immunity in suits brought against states by Indian tribes).

25. 209 U.S. 123 (1908).

26. *Republic of Paraguay*, 949 F. Supp. at 1272-73.

27. See *Republic of Paraguay v. Allen*, 134 F.3d 622, 627-28 (4th Cir. 1998). For an earlier holding to this effect by another circuit court, see *United Mexican States v. Woods*, 126 F.3d 1220, 1223 (9th Cir. 1997).

28. 134 F.3d at 629 (footnote omitted).

29. The Paraguayan officials' petition was supported by amicus curiae human rights organizations and by four amicus curiae nations—Argentina, Brazil, Ecuador, and Mexico.

against the United States in the ICJ.³⁰ Paraguay invoked jurisdiction under Article 36(1) of the ICJ Statute³¹ and Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention.³² Paraguay asked the ICJ to declare that the United States had violated Article 36 of the Vienna Convention and to order the United States to vacate Breard's conviction. It also requested that the ICJ indicate provisional measures directing the United States to ensure that Breard not be executed pending the outcome of the case.

Just two days following oral arguments, on April 9, the ICJ issued a unanimous order stating that Paraguay had established *prima facie* jurisdiction, a threat of irreparable prejudice, and the urgency necessary for an indication of provisional relief.³³ The ICJ concluded by "[i]ndicat[ing] the following provisional measures: The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision of these proceedings, and should inform the [ICJ] of all the measures which it has taken in the implementation of this Order."³⁴

E. *Proceedings in the U.S. Supreme Court*

Breard and the Paraguayan officials brought the ICJ decision to the U.S. Supreme Court's attention in two separate new motions for relief, filed on

30. Paraguay had officially notified the United States on March 30 that it would pursue the action in the ICJ unless the United States stayed Breard's execution. *See* Brief for the United States as Amicus Curiae at 11, *Breard v. Greene*, 118 S. Ct. 1352 (1998) (No. 97-1390) [hereinafter U.S. Amicus Brief]. In the days prior to the filing of the ICJ action, the State Department made a request to Virginia's Governor that he stay the execution, but the Governor refused. *See id.*

31. *See* Statute of the International Court of Justice, art. 36(1), 59 Stat. 1055 (1945) ("The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.").

32. Article I of the Protocol provides: "Disputes arising out of the interpretation of the [Consular] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any Party to the dispute being a Party to the Protocol." Optional Protocol to the Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

33. *See* Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), I.C.J. (Apr. 9, 1998), reprinted at 37 I.L.M. 810 (1998). While concluding that such relief was warranted in this case, the ICJ also noted that its function "is to resolve international legal disputes between States . . . not to act as a court of criminal appeal." 37 I.L.M. at 819. Judges Schwebel (the American Judge), Oda, and Koroma each filed separate declarations explaining why they voted for the order.

34. 37 I.L.M. at 819. The ICJ's governing statute provides that the ICJ "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." Statute of the International Court of Justice, art. 41(1), 59 Stat. 1055 (1945).

April 10 and 13, which invoked the Court's original jurisdiction.³⁵ These motions essentially argued that the Vienna Convention was the "supreme law of the land" that trumped the procedural default doctrine, and that the ICJ decision was binding domestic law that the Court was obliged to enforce.³⁶

On April 13, one day before Breard's scheduled execution, at the invitation of the Supreme Court, the Justice Department filed a brief expressing the views of the United States.³⁷ The Department conceded that Virginia had violated the Vienna Convention but nonetheless urged the Court to deny the certiorari petitions and related motions.³⁸ It further explained that the United States had accorded Paraguay the traditional remedy for a failure of consular notification—a formal apology and a pledge to improve future compliance.³⁹ The Department then argued that the Vienna Convention provided no basis for vacating Breard's conviction, and that the ICJ order was not binding on the United States.⁴⁰ It added that even were the ICJ order binding on the United States, the federal government, including the Supreme Court, lacked the power to order Virginia to stay Breard's execution.⁴¹ The only measure at the federal government's disposal, according to the Justice Department, was to request that Virginia's Governor voluntarily stay Breard's execution.⁴²

Earlier the same day, Secretary of State Madeleine Albright had made such a request in a letter to the Governor of Virginia.⁴³ Albright noted how vigorously the United States had defended Virginia's right to execute Breard before the ICJ. Nonetheless, she requested the stay "with great reluctance" because of her "responsibility to bear in mind the safety of Americans over-

35. Breard filed an original petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 on April 10, 1998. The Paraguayan officials filed a motion for leave to file a bill of complaint in support of an original action pursuant to 28 U.S.C. § 1251(b)(1) on April 13, 1998.

36. See Petition for a Writ of Habeas Corpus, *In re* Angel Francisco Breard, No. 97-8660 (filed Apr. 10, 1998), in *Breard v. Greene*, 118 S. Ct. 1352 (1998); Motion for Leave to File a Bill of Complaint, Complaint, and Memorandum in Support, *Republic of Paraguay v. Gilmore*, No. 97-125 (filed Apr. 13, 1998), in *Breard v. Greene*, 118 S. Ct. 1352 (1998).

37. See U.S. Amicus Brief, *supra* note 30.

38. See *id.* at 13-13.

39. See *id.* at 12.

40. See *id.* at 15-16. Scholars are divided over whether provisional orders by the ICJ are binding. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 903, reporters' note 6 (1987) [hereinafter RESTATEMENT (THIRD)]. Although the United Nations Charter obligates the United States to "comply with the decision of the International Court of Justice in any case in which it is a party," U.N. CHARTER art. 94(1), it is not clear that a provisional order qualifies as a "decision" under this provision.

41. See U.S. Amicus Brief, *supra* note 30, at 17.

42. See *id.* at 50.

43. Letter from Madeleine Albright, Secretary of State, to James Gilmore III, Governor of Virginia, Apr. 13, 1998 (on file with author).

seas,” and her particular concern about “the possible negative consequences for the many U.S. citizens who live and travel abroad.”⁴⁴

The Supreme Court denied the certiorari petitions and related motions in a *per curiam* opinion issued on April 14.⁴⁵ The precise details of the Court’s reasoning will be described below. In brief, the Court held that Breard’s claim under the Vienna Convention had been procedurally defaulted and that Paraguay’s claims lacked merit and, in any event, were barred by the Eleventh Amendment.⁴⁶

F. *Virginia’s Response*

Virginia’s Governor rejected the Secretary of State’s request to stay Breard’s execution. The Governor stated that “Mr. Breard received all of the procedural safeguards that any American citizen would receive,” and added that delaying the execution “would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court.”⁴⁷ The Governor further stated that the foreign relations impact of executing Breard “is but one of the various concerns that I must take into consideration in reaching my decision.”⁴⁸ The Governor concluded: “Mr. Breard having committed a heinous and depraved murder, his guilt being unquestioned, and the legal issues resolved against him, and the U.S. Supreme Court having denied the petitions of Breard and Paraguay, I find no reason to interfere with his sentence. Accordingly, I decline to do so.”⁴⁹ Breard was executed at 10:39 p.m. on April 14, 1998.⁵⁰

44. *Id.*

45. *See* Breard v. Greene, 118 S. Ct. 1352, 1356 (1998).

46. Justice Souter filed a separate statement noting that he voted to deny the petitions and applications because any treaty violations were not causally related to Breard’s conviction, and because Paraguay’s Section 1983 claim was almost certainly meritless. *See id.* at 1356 (Statement of Souter, J.). Justices Stevens, Breyer, and Ginsburg filed short separate dissents, each arguing that they would vote to stay the case to give the Court more time to consider the issues presented. *See id.* at 1356-57 (Stevens, J., dissenting); *id.* at 1357 (Breyer, J., dissenting); *id.* (Ginsburg, J., dissenting).

47. Commonwealth of Virginia, Office of Governor, Press Office, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (Apr. 14, 1998) (on file with author).

48. *Id.*

49. *Id.*

50. After the execution, Paraguay continued to pursue claims against the United States in the ICJ. In November 1998, Paraguay voluntarily dismissed these claims. *See* Order of 10 November 1998—Discontinuance by the Republic of Paraguay of the Proceedings Instituted by the Application filed on 3 April 1998—Case Removed from List <<http://www.icj-cij.org/docket/ipaus/ipausframe.htm>>.

II. THE INTERNATIONALIST CONCEPTION

The international law academy has been heavily critical of the United States' handling of the *Breard* case. This criticism is best understood against the backdrop of recent monistic thinking in the academy, which, as noted above, I am calling the "internationalist conception" of the relationship between international and domestic law. This conception has three principal strands. The first is a strong presumption that international law must be incorporated into domestic law. The second is the view that international law should generally trump domestic law when the two conflict. The third is an opportunistic use of what could be called "foreign affairs exceptionalism" to expand the federal government's capacity to enter into international obligations.⁵¹ As I explain, a central theme underlying these strands is that the incorporation and status of international law in the U.S. legal system should be determined, at least to some extent, by the structure and content of international law itself.

A. *Presumptive Incorporation of International Law*

The two principal forms of international law are treaties and customary international law. Treaties are express agreements among nations.⁵² Customary international law, by contrast, is the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation."⁵³ Many commentators in recent years have expressed the view that both of these forms of law are presumptively incorporated into the U.S. legal system.

1. *Presumption in favor of self-executing treaties.*

Article VI of the Constitution states that "all Treaties made, or which shall be made, under the Authority of the United States" shall be part of the supreme law of the land.⁵⁴ In light of this language, it might be argued that all treaties ratified by the United States should be enforceable in U.S. courts to the same extent as federal statutes, another form of supreme federal law. Since early in the nation's history, however, the Supreme Court has distinguished between "self-executing" and "non-self-executing" treaties. The latter category of treaties, the Court has held, can be enforced in domestic

51. By "foreign affairs exceptionalism," I am referring to the view that the usual constitutional restraints on the federal government's exercise of power do not apply in the area of foreign affairs. See generally Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (using and explaining this term).

52. See RESTATEMENT (THIRD), *supra* note 40, pt. I, ch. 1 introductory note, at 18.

53. *Id.* § 102(2).

54. U.S. CONST. art. VI, cl. 2.

courts only after and to the extent that Congress has implemented the treaties by federal statute.⁵⁵ The Court has explained that, unlike federal statutes, treaties are by their nature *contracts*.⁵⁶ As such, their domestic enforceability, like other questions concerning their scope and effect, is determined by the intent of the parties. If the parties do not intend for a treaty to be self-executing, then it does not have this status, notwithstanding the Supremacy Clause.⁵⁷ In other words, the Court has construed the Supremacy Clause as *permissive* in nature—it permits the creation of self-executing federal law by treaty, but it does not mandate this result.⁵⁸

Consistent with this permissive approach to self-execution, U.S. courts ordinarily will give effect to express conditions attached by a party to its ratification of a treaty. One condition frequently attached by U.S. treaty-makers is that the treaty in question not be self-executing. This condition is designed to ensure that certain changes in U.S. law occur only through domestic democratic processes. Thus, for example, U.S. treaty-makers have attached “non-self-execution” declarations to their ratification of several human rights treaties,⁵⁹ and the courts have given effect to these declarations.⁶⁰

55. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); see also Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 695 (1995) (“At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative ‘implementation.’”).

56. For statements by the Court to this effect, see *TWA v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) (“A treaty is in the nature of a contract between nations.”); *Chinese Exclusion Case*, 130 U.S. 581, 600 (1889) (“A treaty, it is true, is in its nature a contract between nations and is often merely promissory in its character, requiring legislation to carry its stipulations into effect.”); *The Head Money Cases*, 112 U.S. 580, 598 (1884) (“A treaty is primarily a compact between independent nations.”); *Foster*, 27 U.S. (2 Pet.) at 314 (“A treaty is in its nature a contract between two nations, not a legislative act.”).

57. The *Restatement (Third)* contends that it is the intent of the United States, not of all the parties, that determines whether a treaty is self-executing in this country. See RESTATEMENT (THIRD), *supra* note 40, § 111, cmt. h. Most courts, however, have described this as an issue of the parties’ intent. In many cases, there may be little practical difference between these two positions, since the only relevant evidence of intent may come from the U.S. treaty-makers.

58. This permissive reading of the Supremacy Clause still gives it significant effect: The treaty-makers in the United States, unlike those in many other countries, have the power to make treaties immediately enforceable in domestic courts. This reading also appears to be consistent with the principal goal of the Framers in including treaties within the Supremacy Clause—to give the federal government the power to deter and remedy treaty violations by the states. See generally FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (1986). See also THE FEDERALIST NO. 22, at 151 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that, under the Articles of Confederation, “[t]he treaties of the United States . . . are liable to the infractions of thirteen different legislatures”); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (M. Farrand ed., 1911) (noting concern by James Madison regarding “[t]he tendency of the States to these violations” of the law of nations and treaties).

59. The U.S. treaty-makers attached such declarations to their ratification of the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Convention on the Elimination of All Forms of Racial Discrimination. See Bradley, *supra* note 10, at 521 n.243.

60. See, e.g., *Iguarta de la Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994); *Jama v. INS*, 22 F.Supp. 2d 353, 362 (D.N.J. 1998); *In re Cheung*, 968 F. Supp. 791, 803 n.17 (D. Conn.

Absent such an express statement, courts typically look to various indicia of intent in determining whether treaties are self-executing, including the way in which the treaty obligations are phrased, the purposes and subject matter of the treaty, and the treaty's drafting history.⁶¹ Importantly, many courts in recent years have held that they will not find a treaty to be self-executing unless there is affirmative evidence of such intent.⁶² In other words, these courts presume to some extent that treaties are *not* self-executing. In explaining this presumption, courts have noted that treaties are often less precise than federal statutes, their interaction with existing domestic law tends to be less certain, and their enforcement is more likely to raise foreign relations difficulties.⁶³ Courts have followed this approach to self-execution not only with respect to treaties, but also with respect to the directives of international institutions, which typically derive their authority from some underlying treaty.⁶⁴

A number of commentators, however, have sought to assign a more mandatory—and thus monistic—character to the Supremacy Clause. First, several commentators, as well as the *Restatement (Third) of the Foreign Relations Law of the United States*, insist that there should be a strong pre-

1997); see also *White v. Paulsen*, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (observing that, while a non-self-execution declaration “may not carry controlling weight on this issue, the view of the Senate is entitled to substantial deference”); RESTATEMENT (THIRD), *supra* note 40, § 111(4)(b) (stating that “[a]n international agreement of the United States is ‘non-self-executing’ . . . if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation.”); Vazquez, *supra* note 55, at 707 (noting that courts have given effect to even more ambiguous evidence of the U.S. treaty-makers’ intent).

61. See, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) (listing factors relevant to determining whether a treaty is self-executing); *People of Saipan v. United States Dep’t of Interior*, 502 F.2d 90, 97 (9th Cir. 1974) (same).

62. See *Goldstar, S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *More v. Intelcom Support Servs., Inc.*, 960 F.2d 466, 469 (5th Cir. 1992); *Frolova*, 761 F.2d at 373; *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *United States v. Postal*, 589 F.2d 862, 875 (5th Cir. 1979); *Diggs v. Richardson*, 555 F.2d 848, 850-51 (D.C. Cir. 1976); *Dreyfus v. Von Finck*, 534 F.2d 24, 29 (2d Cir. 1976); *Sei Fuji v. State*, 242 P.2d 617, 620 (Cal. 1952); see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (“Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in courts.”); *United States v. Noriega*, 808 F. Supp. 791, 798 (S.D. Fla. 1992) (noting that “the courts have generally presumed treaties to be non-self-executing in the absence of express language to the contrary”).

63. For these reasons, courts have, for example, uniformly found provisions of the United Nations Charter to be non-self-executing. See *Frolova*, 761 F.2d at 374 (Articles 55 and 56); *Spieß v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353, 363 (5th Cir. Unit A Apr. 1981) (Article 55); *Hitai v. INS*, 343 F.2d 466, 468 (2d Cir. 1965) (Article 55); *Camacho v. Rogers*, 199 F. Supp. 155, 158 (S.D.N.Y. 1961) (Article 55); *Sei Fujii*, 242 P.2d at 620 (Articles 1, 55, and 56); see also *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring) (Articles 1 and 2).

64. See, e.g., *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-38 (D.C. Cir. 1988) (holding decision of the International Court of Justice to be non-self-executing); *Diggs*, 555 F.2d at 851 (holding UN Security Council resolution to be non-self-executing).

sumption in favor of self-execution.⁶⁵ They point out that, on the international plane, a treaty is binding on the United States as soon as the United States has ratified the treaty. As a result, they argue that a presumption in favor of self-execution is necessary in order to reduce treaty violations. There is modest case law support for this sort of a presumption, mainly from federal district courts that have relied on the *Restatement (Third)*.⁶⁶ As discussed above, however, most of the recent case law is to the contrary.

Second, a number of commentators have challenged the general ability of the treaty-makers to render treaties non-self-executing.⁶⁷ Their challenge has been especially directed at conditions imposed with respect to U.S. ratification of human rights treaties. Here, again, they argue that the Supremacy Clause mandates that most treaties be automatically enforceable in domestic courts. These commentators acknowledge that the U.S. treaty-makers have the power to refuse to ratify a treaty, but they deny that this power implies any "lesser" power to limit the domestic enforceability of a ratified treaty that would otherwise be self-executing.⁶⁸ Among other things, they have

65. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 201 (2d ed. 1996); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 775 (1988); Vazquez, *supra* note 55; see also RESTATEMENT (THIRD), *supra* note 40, § 111, reporters' note 5 ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts.").

66. See, e.g., *McKesson Corp. v. The Islamic Republic of Iran*, 1997 U.S. Dist. LEXIS 8903, *44-45 (D.D.C. 1993); *Rainbow Navigation, Inc. v. Dep't of the Navy*, 686 F. Supp. 354, 357 (D.D.C. 1988).

67. See, e.g., Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 518, 527 (1991); Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 64-70 (1997); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1829 n.24 (1998); see also Vazquez, *supra* note 55, at 708 ("[T]he practice is in some tension with the text and apparent purposes of the Supremacy Clause."). But see RESTATEMENT (THIRD), *supra* note 40, § 303, reporters' note 4 (arguing that a non-self-execution declaration "is an expression of the Senate's constitutional authority to grant or withhold consent to a treaty" and "must be given effect in the constitutional system").

68. Some commentators also have argued that, even if the U.S. treaty-makers do have the constitutional power to condition their ratification of treaties on non-self-execution, a mere "declaration" does not have this effect because, unlike a reservation, a declaration is simply a unilateral statement of opinion. See, e.g., John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1303 (1993); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 608-09 (1991). Conditions on ratification, however, do not depend on particular labels. "Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation." RESTATEMENT (THIRD), *supra* note 40, § 313 cmt. g; see also Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 2(1)(d), 1155 U.N.T.S. 331, reprinted at 8 I.L.M. 679 (stating that a reservation is "a unilateral statement, however phrased or named"). It seems clear that, in attaching non-self-execution declarations, the U.S. treaty-makers have intended to limit domestic enforceability, not merely to express their opinion on this subject. See, e.g., David P. Stewart, *United States Ratifica-*

expressed concern that the "U.S. ratification practice threatens to undermine a half-century effort to establish international human rights standards as international law."⁶⁹

2. Customary international law as self-executing federal common law.

The Supremacy Clause makes no mention of customary international law (referred to at the time of the Founding as part of the "law of nations"). Indeed, the only mention in the Constitution of this law is in Article I, which states that Congress shall have the power to "define and punish . . . Offenses against the Law of Nations."⁷⁰ The constitutional text therefore may suggest that, unlike treaties, customary international law can never be self-executing federal law.

Consistent with this textual inference, U.S. courts in the nineteenth century did not treat customary international law as federal law unless the political branches codified it in a treaty or statute. In the absence of such codification, courts applied customary international law only as a form of "general common law," akin to the general commercial law applied in *Swift v. Tyson*.⁷¹ As a result, customary international law did not preempt state law or provide a basis for federal question jurisdiction.⁷²

In *Erie Railroad v. Tompkins*,⁷³ the Supreme Court abrogated the federal court practice of applying general common law and mandated that federal courts apply state law in the absence of some controlling federal enactment. Notwithstanding this holding, the Court has approved the creation of common law by the federal courts in a few specialized areas.⁷⁴ Unlike pre-*Erie*

tion of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DEPAUL L. REV. 1183, 1202-03 (1993).

69. Henkin, *supra* note 67, at 349.

70. U.S. CONST. art. I, § 8, cl. 10.

71. 41 U.S. (14 Pet.) 1 (1842). See generally RESTATEMENT (THIRD), *supra* note 40, introductory note, at 41; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989).

72. See, e.g., *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (holding that whether a forcible seizure in a foreign country is a basis for resisting trial in state court is "a question of common law, or of the law of nations" that the Supreme Court has "no right to review"); *New York Life Ins. Co. v. Hendren*, 92 U.S. (2 Otto) 286, 286-87 (1875) (holding that the Court lacked jurisdiction to review issues concerning "the general laws of war, as recognized by the law of nations" because such issues did not involve "the constitution, laws, treaties, or executive proclamations, of the United States" but rather concerned only "principles of general law alone"). See generally Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 824 (1997) (explaining this point).

73. 304 U.S. 64, 78 (1938) (holding that "[t]here is no federal general common law" and that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State").

74. See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (describing the emergence of "specialized federal common law"). See generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* ch. 6 (2d ed. 1994).

general common law, post-*Erie* federal common law is truly federal law binding on the states.⁷⁵ Although scholars differ significantly regarding the proper scope of federal common law,⁷⁶ many agree that, in light of *Erie*, there must be some sort of authorization from the Constitution or federal legislation for the federal courts to engage in this lawmaking.⁷⁷

In recent years, numerous commentators,⁷⁸ as well as the *Restatement (Third)*,⁷⁹ have claimed that customary international law has the status of post-*Erie* federal common law. Under this view, all customary international law is self-executing federal law to be "applied by courts in the United States without any need for it to be enacted or implemented by Congress."⁸⁰ In support of this proposition, commentators frequently advance one or both of the following arguments. First, they argue that, because customary international law has essentially the same binding force on the international plane as a treaty, it should have a similar domestic law status as well.⁸¹ Second, they argue that customary international law must be either federal or state law and that, given its applicability to the nation as a whole, it makes more sense to treat it as federal law.⁸² These arguments can be criticized on a variety of grounds. For present purposes, it is important simply to note that these arguments assume that customary international law must have some sort of domestic law status and that international law is relevant to this status. In other words, these arguments assume at least some aspects of monism.

75. See Friendly, *supra* note 74, at 405-07 ("*Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum, and therefore is predictable and useful . . .").

76. For a discussion of various theories regarding federal common law, see George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?*, 12 PACE L. REV. 229 (1992).

77. See, e.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 895-96 (1986) ("In deciding whether a court has power to make a rule, the question in every case is whether the Constitution or any federal statute explicitly or implicitly confers such power on the judiciary."); Friendly, *supra* note 74, at 407, 421 (noting that, after *Erie*, "specialized federal common law [is] binding in all courts because of its source"); Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 46-47 (1985) (stating that, in order to be legitimate, federal common law must be tied to an "authoritative federal text"); see also Bradley & Goldsmith, *supra* note 72, at 856 n.263 (citing additional authority).

78. See generally Bradley & Goldsmith, *supra* note 72, at 837-38 n.151 (listing numerous books and articles). Prominent examples include Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Koh, *supra* note 67; and Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997).

79. See RESTATEMENT (THIRD), *supra* note 40, ch. 2, introductory note at 42; *id.* § 111.

80. Henkin, *supra* note 78, at 1561.

81. See, e.g., *id.* at 1564 ("In international law, customary law and treaties are of equal authority and the later in time will prevail in case of inconsistency, when the parties so intend.").

82. See, e.g., Koh, *supra* note 67, at 1827 ("Given our three-tiered hierarchy of constitutional, federal, and state law, one might reasonably deduce that if international law is neither constitutional nor federal law, it must be *state law* . . .").

Despite the near-unanimity of academic views on this issue,⁸³ there is no Supreme Court decision holding that customary international law is federal law. Indeed, at least one recent decision—*United States v. Alvarez-Machain*⁸⁴—could be read as suggesting the opposite.⁸⁵ Commentators often rely on statements in pre-*Erie* decisions referring to customary international law as “part of our law,”⁸⁶ but such statements simply demonstrate that customary international law was treated as part of the pre-*Erie* general common law.⁸⁷ There have been, to be sure, a number of lower court decisions in recent years holding that customary international law has the status of federal common law.⁸⁸ These holdings, however, have almost all been in the context of construing and applying the Alien Tort Statute⁸⁹ rather than any free-standing application of customary international law. None of these decisions preempts state law or otherwise gives substantive effect to customary international law’s purported federal-law status. And other decisions have expressly rejected such status.⁹⁰ As Professor Peter Spiro has noted, the propo-

83. There are a few dissenters. In addition to my work with Professor Goldsmith, see, for example, Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986), and A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1 (1995).

84. 504 U.S. 655 (1992).

85. In *Alvarez-Machain*, the Court held that the U.S. government-sponsored abduction of an individual from Mexico did not violate an extradition treaty between the United States and Mexico. The Court acknowledged that the abduction might have violated “general principles of international law” but the Court nevertheless held that the abduction “does not . . . prohibit [the defendant’s] trial in a court in the United States for violations of the criminal laws of the United States.” *Id.* at 668, 670.

86. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815).

87. As discussed above, general common law was subordinate to both federal and state law. See text accompanying note 72 *supra*. As a result, commentators have erred in suggesting that pre-*Erie* statements by the Supreme Court that international law is “part of our law” (in, for example, *The Paquete Habana*, 175 U.S. at 700) were endorsements of monism (which would entail some supremacy of international law over domestic law). See, e.g., Brilmayer, *supra* note 78, at 300 (stating that *The Paquete Habana* gave the monists “much of what they want”); Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT’L L. 913, 914 (1986) (stating that in *The Paquete Habana*, the Court “seemed to have adopted the monist view”).

88. See, e.g., *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493, 502 (9th Cir. 1992) (“It is also well settled that the law of nations is part of federal common law.”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (stating that the law of nations “has always been part of the federal common law”); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (“[I]t is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law.”).

89. The Alien Tort Statute, also known as the Alien Tort Claims Act, provides that the federal district courts shall have jurisdiction over “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.” 28 U.S.C. § 1350 (1994). For discussions of the constitutionality of this grant of jurisdiction, see Bradley & Goldsmith, *supra* note 72, at 872-73, and Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 356-63 (1997).

90. See, e.g., *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1176 (D.C. Cir. 1994) (Plaintiff’s customary international law claims “sound in tort and quasi contract, not in federal law”); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (“Our duty is to enforce the

sition that customary international law is self-executing federal law has, by and large, "never ruled beyond the pages of the Restatement and the law reviews."⁹¹

3. *More affirmative use of the Charming Betsy canon.*

The Supreme Court has long held that ambiguous federal statutes should be construed so that they do not violate international law. This "*Charming Betsy* canon" derives its name from an 1804 Supreme Court decision, *Murray v. The Schooner Charming Betsy*,⁹² in which the Court stated that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."⁹³ Since that decision, courts have applied the canon in a variety of contexts to avoid conflicts with respect to both treaties⁹⁴ and customary international law.⁹⁵ As for the latter, the canon primarily has been used to restrain the territorial reach of federal statutes so that they do not violate customary international law limits on prescriptive jurisdiction.⁹⁶

As traditionally applied, the canon fits well with the dualist approach to the relationship between international law and U.S. domestic law. The canon does not require either the incorporation of international law as a rule of decision or U.S. compliance with international law. Rather, it simply allows courts to avoid unintended clashes with international law, and it leaves the

Constitution, laws and treaties of the United States, not to conform the law of the land to norms of customary international law."); *United States v. Royal Caribbean Cruises*, 11 F. Supp. 2d. 1358, 1370 (S.D. Fla. 1998) ("[C]ustomary international law is not self-executing . . .").

91. Peter J. Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567, 578 n.40 (1997).

92. 6 U.S. (2 Cranch) 64 (1804).

93. *Id.* at 118; see also *RESTATEMENT (THIRD)*, *supra* note 40, § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); Bradley, *supra* note 10 (discussing canon in detail); Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 *VAND. L. REV.* 1103 (1990) (same).

94. See, e.g., *TWA v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action."); *Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); *Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884) ("[T]he Court should be slow to assume that Congress intended to violate the stipulations of a treaty . . ."); see also *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (applying canon to avoid conflict with executive agreement).

95. See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *MacLeod v. United States*, 229 U.S. 416, 434 (1913).

96. See Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 *HASTINGS L.J.* 185, 216-17 (1993). Prescriptive jurisdiction concerns "the authority of a state to make its law applicable to persons or activities." *RESTATEMENT (THIRD)*, *supra* note 40, pt. IV, introductory note at 231.

ultimate questions of incorporation and international law compliance to the U.S. political branches.⁹⁷ Nor does the canon give international law any supremacy over U.S. domestic law. Indeed, in applying the canon, courts have assumed that, if there is a conflict between international law and domestic law, *domestic* law will prevail.⁹⁸

In recent years, however, a number of commentators have conceived of the canon in more monistic terms.⁹⁹ Under this conception, the canon is not a mechanism for deferring to the political branches, but rather is a mandate for court-supervised incorporation of international law. A central argument for this expanded role is that international law itself has been expanding to encompass issues formerly of only domestic concern. For example, Professor Ralph Steinhardt argues that, "as the international legal system addresses more substantive aspects of economic and political life . . . the *Charming Betsy* principle should take on a heightened practical and theoretical significance."¹⁰⁰

There are several specific manifestations of this new conception of the *Charming Betsy* canon. Some commentators have claimed, for example, that the canon is itself confirmation that customary international law has the status in the United States of self-executing federal common law that supercedes inconsistent state law.¹⁰¹ Other commentators have recharacterized the canon so that it would require not only avoidance of conflict with international law but also *consistency* with international law. Thus, they have argued that, in light of the canon, the Foreign Sovereign Immunities Act¹⁰² should be construed to deny immunity for egregious human rights abuses because international law does not confer immunity in such circumstances.¹⁰³

97. See Turley, *supra* note 96, at 231 ("*Charming Betsy* represents the very essence of dualistic values: the decision whether to incorporate or exclude international principles rests with the municipal governmental structure.").

98. See, e.g., *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986); *Havana Club Holding, S.A. v. Galleon, S.A.*, 974 F. Supp. 302, 308 (S.D.N.Y. 1997); *United States v. Georgescu*, 723 F. Supp. 912, 921 (E.D.N.Y. 1989); see also RESTATEMENT (THIRD), *supra* note 40, § 114, cmt. a (noting that the canon "is influenced by the fact that the courts are obliged to give effect to a federal statute even if it is inconsistent with a pre-existing rule of international law or with a provision of an international agreement of the United States").

99. See generally Bradley, *supra* note 10, at 497-504 (describing this development).

100. Steinhardt, *supra* note 93, at 1197.

101. See, e.g., William Aceves, *Affirming the Law of Nations in U.S. Courts: The Karadzic Litigation and the Yugoslav Conflict*, 14 BERK. J. INT'L L. 137, 170 (1996); Brilmayer, *supra* note 78, at 335; Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 383, 417-18 (1997).

102. 28 U.S.C. §§ 1330, 1602-11 (1994).

103. See, e.g., Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 401 (1989); Paul Hoffman, Joan Fitzpatrick & Michael Bazzyler, *War Crimes and Other Human Rights Abuses in the Former Yugoslavia*, 16 WHITTIER L. REV. 433, 446 n.55 (1995); Thora A. Johnson, *A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity Under the Foreign Sovereign Immunities Act*, 19 MD. J. INT'L L. & TRADE 259, 283-91 (1995).

These commentators do not argue that a statutory grant of immunity in these cases would violate international law, just that it would be different from international law. Similarly, commentators have argued that, because of the canon, international law should be considered in construing the scope of U.S. constitutional provisions.¹⁰⁴ Again, the argument is not that current constructions of the Constitution violate international law, just that they are not as expansive as international law. As with other features of the internationalist approach, U.S. courts generally have not been receptive to these arguments.¹⁰⁵

B. *Domestic Supremacy of International Law*

Commentators have asserted that international law not only is presumptively incorporated into the U.S. legal system, but also is supreme in various ways over U.S. domestic law. These assertions fit the pattern described above: They tend to rely heavily on the structure and content of international law, and they do not sit well with settled U.S. jurisprudence.

1. *Challenges and modifications to the last-in-time rule.*

As we have seen, the Supremacy Clause tells us that treaties (at least, self-executing treaties) are *federal* law supreme over inconsistent state law. The clause tells us nothing, however, about the relative status of treaties vis-à-vis other forms of federal law. The Supreme Court has long held that, as a

104. See Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 35-36 (1983); Joan Fitzpatrick, *The Relevance of Customary International Norms to the Death Penalty in the United States*, 25 GA. J. INT'L & COMP. L. 165, 179-80 (1995/96); Joan F. Hartman, "Unusual" Punishment: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 659-99 (1983); Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1243-49 (1987); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 824-41 (1990).

105. Every circuit court to have considered the Foreign Sovereign Immunities Act argument has rejected it. See *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996); *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). But see *Princz*, 26 F.3d at 1177 (Wald, J., dissenting) ("I believe that Germany's treatment of Princz violated *jus cogens* norms of the law of nations, and that by engaging in such conduct, Germany implicitly waived its immunity from suit within the meaning of § 1605(a)(1) of the FSIA."). As for the constitutional argument, recent decisions suggest that the Supreme Court is unsympathetic to it. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) ("We emphasize that it is *American* conceptions of decency that are dispositive [of the meaning of the Eighth Amendment], rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant.").

matter of domestic law, treaties are inferior to the U.S. Constitution.¹⁰⁶ The Court also has held that treaties and federal statutes have equal status in the U.S. legal system, such that, in the case of a conflict, the one enacted last in time will control.¹⁰⁷ This latter proposition is the so-called "last-in-time" rule.

Because customary international law is not mentioned in the Supremacy Clause, its relationship with federal legislation is less certain.¹⁰⁸ If customary international law is never self-executing federal law, then it is obviously subordinate to federal legislation. Even assuming (as many commentators have argued) that it has the status of federal common law, it still would seem to be subordinate to federal legislation, since it is well settled that non-constitutional federal common law applies only in the absence of a contrary command by Congress.¹⁰⁹ And, indeed, the lower courts uniformly have held that, in the case of a conflict between a federal statute and a rule of customary international law, the statute prevails.¹¹⁰ These courts do not purport to be applying any last-in-time rule; they simply hold that customary international law is subordinate to federal legislation.

Several commentators have questioned the last-in-time rule for conflicts between treaties and statutes, suggesting that treaties should in fact be superior.¹¹¹ Again, the argument is monistic in character. These commentators argue, for example, that "[u]nlike an act of Congress, under the law of na-

106. See, e.g., *Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Cherokee Tobacco Case*, 78 U.S. (11 Wall.) 616, 620 (1870).

107. See *Moser v. United States*, 341 U.S. 41, 45 (1951); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *The Head Money Cases*, 112 U.S. 580, 599 (1884).

108. Most commentators appear to assume that, for domestic law purposes, customary international law is subordinate to the U.S. Constitution. But cf. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 869 (1987) ("Arguably, the fact that treaties are subject to constitutional limitations does not conclude the issue with respect to customary law. Customary law is general law binding on all nations, and no country should be able to derogate from it because of that country's particular constitutional dispositions.").

109. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-15 (1981); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 756 (4th ed. 1996); CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 412-13 (5th ed. 1994); see also *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) ("Federal common law implements the federal Constitution and statutes, and is conditioned by them.").

110. See, e.g., *Galo-Garcia v. INS*, 86 F.3d 916, 918 (9th Cir. 1996); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-54 (11th Cir. 1986); *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959).

111. See, e.g., Henkin, *supra* note 108, at 871-72; Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1109-13 (1985).

tions a treaty is binding on the United States and therefore on all branches of the government."¹¹² These commentators appear to recognize, however, that the Supreme Court is unlikely to eliminate the rule. As a result, their emphasis has been less on abolishing the rule than on limiting and modifying it.

First, commentators have, consistent with the discussion above, argued that courts should vigorously apply the *Charming Betsy* canon to minimize situations in which federal statutes override treaties.¹¹³ Second, commentators have sought to include within the last-in-time rule not only treaties, but also customary international law. Under this view, customary international law would supersede prior inconsistent federal statutes. Once again, the argument for this view tends to be monistic in character, relying on international law to support a certain domestic law result. Professor Henkin, for example, argues that customary international law should generally be given as much weight as treaties because, "[i]n international law, customary law and treaties are of equal authority."¹¹⁴

Some commentators have gone even further, suggesting that, even if Congress can override treaties, it may not be able to override customary international law. For example, Professor Jordan Paust argues that, since customary international law is continually being renewed by the actions and beliefs of the international community, it will always be latest in time and thus should always supersede inconsistent federal statutes.¹¹⁵ Professor Henkin advances the somewhat different argument that "[c]ustomary international law is universal and lasting and has better claim to supremacy than do treaties, which govern only the parties and can be readily terminated or replaced by those parties."¹¹⁶ Professor Jules Lobel argues more narrowly that recently developed "*jus cogens*" norms should be superior to federal legislation, noting that "[t]his basic change in the structure of international law suggests definite limitations on the foreign affairs powers of the political

112. Henkin, *supra* note 108, at 871.

113. See text accompanying notes 92-105 *supra*; see also, e.g., Henkin, *supra* note 108, at 872 & n.84; Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 412 (1985).

114. Henkin, *supra* note 78, at 1564. In order to get around the usual inferiority of federal common law to federal statutory law, Henkin describes customary international law as "resembl[ing]" or "like" federal common law—that is, possessing the supremacy of federal common law over state law but not its inferiority to federal legislation. See Henkin, *supra* note 108, at 876; Henkin, *supra* note 78, at 1561. The argument here, once more, is monistic: Professor Henkin distinguishes customary international law from other federal common law on the ground that customary international law is not created within the U.S. domestic system but rather is "'legislated' through the political actions of the governments of the world's States." Henkin, *supra* note 78, at 1562.

115. See Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 418-19 (1988).

116. Henkin, *supra* note 108, at 877.

branches.”¹¹⁷ What is important here, once more, is the format of these arguments: They all rely on the structure and content of international law in support of a certain domestic law status for international law.

2. *Binding the President.*

Article II of the Constitution states that the President “shall take Care that the Laws be faithfully executed.”¹¹⁸ In light of this provision, is the President constitutionally obligated to comply with international law? With respect to treaties, there does not appear to be any scholarly consensus.¹¹⁹ The Constitution tells us that the President has the constitutional authority to *make* treaties (subject to obtaining two-thirds Senate consent),¹²⁰ but it does not tell us who has the power to terminate or suspend treaty obligations. An answer from the courts may not be forthcoming, given the Supreme Court’s plurality decision in *Goldwater v. Carter*¹²¹ that the authority of the President to terminate a treaty is a nonjusticiable political question.¹²²

Most scholarly discussion of the President’s authority to violate international law has focused instead on customary international law. A number of commentators have argued that the President never possesses such authority (at least without congressional approval),¹²³ while other commentators have argued that he has this authority only in limited circumstances.¹²⁴ Only a few

117. Lobel, *supra* note 111, at 1137. A “*jus cogens*” norm is a rule of customary international law “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, *supra* note 68, art. 53.

118. U.S. CONST. art. II, § 3.

119. Compare, e.g., MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 152-61 (1990) (concluding that, in the face of congressional silence, the President has the ability to terminate but not to violate treaties), with HENKIN, *supra* note 65, at 214 (“At the end of the twentieth century, it is apparently accepted that the President has authority under the Constitution to denounce or otherwise terminate a treaty, whether such action on behalf of the United States is permissible under international law or would put the United States in violation.”) (footnote omitted).

120. See U.S. CONST. art. II, § 2, cl. 2.

121. 444 U.S. 996 (1979) (plurality opinion).

122. See *id.* at 1002. It appears to be accepted, however, that courts may order remedies in response to breaches of self-executing treaties by lower-level executive officials. See HENKIN, *supra* note 65, at 214; see also, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655, 662 (1992) (assuming that a criminal defendant might be entitled to relief from prosecution if federal officials had violated a self-executing treaty in obtaining his custody).

123. See, e.g., Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT’L L. 923, 923-30 (1986); Lobel, *supra* note 111, at 114-30; Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT’L L. 377, 377-88 (1987).

124. See, e.g., Frederic L. Kirgis, Jr., *Federal Statutes, Executive Orders and “Self-Executing Custom,”* 81 AM. J. INT’L L. 371, 374-75 (1987); Louis Henkin, *The President and International Law*, 80 AM. J. INT’L L. 930, 934-36 (1986); Monroe Leigh, *Is the President Above Customary International Law?*, 86 AM. J. INT’L L. 757, 762-63 (1992); Stefan A. Riesenfeld, *The Powers of*

commentators have taken the position that the President has general authority to violate customary international law.¹²⁵

The arguments for restricting the President's authority are largely the same as those discussed above—that customary international law should be considered part of U.S. law and should be given at least as much weight as treaty law. Some commentators point out that, on the international plane, customary international law is equal in status to treaty law, and they argue that the President should as a result have no greater authority to violate it.¹²⁶ Other commentators suggest that the President should have even *less* authority to violate customary international law because it is formed not by presidential action per se but by the international community.¹²⁷

These scholarly views do not match up well with the case law. With the exception of a single district court,¹²⁸ all courts that have addressed the issue in recent years have held that the President—as well as lower-level executive officials such as the Attorney General—have the authority to violate customary international law.¹²⁹ Among other things, the courts rely on the Supreme Court's famous dictum in *The Paquete Habana* that customary international law should be applied "where there is no . . . controlling executive or legislative act or judicial decision."¹³⁰ As one court explained, this language makes clear that the Supreme Court's other famous statement in *The Paquete Habana*—that international law is "part of our law"—"does not contemplate the judicial surrender of our country's political sovereignty."¹³¹

3. *Supremacy over state law.*

The Supremacy Clause indicates that treaties are, like federal legislation, supreme over state law. It does not tell us, however, whether the treaty

Congress and the President in International Relations: Revisited, 75 CAL. L. REV. 405, 413-14 (1987).

125. See, e.g., Charney, *supra* note 87, at 917-22 (arguing that the President, but not lower-level executive officials, has this power); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1206-09 (1988) (arguing that the President has this power).

126. See, e.g., Henkin, *supra* note 108, at 878-82. The purported equality of treaties and customary law under international law is not free from question. See, e.g., Jack M. Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143, 148-49 (1984).

127. See, e.g., Henkin, *supra* note 108, at 877, 880-81.

128. See *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980) (ordering release of Cuban citizen awaiting deportation because of conflict with customary international law), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

129. See, e.g., *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995); *Gisbert v. Attorney Gen.*, 988 F.2d 1437, 1447-48 (5th Cir. 1993); *Echeverria-Hernandez v. INS*, 923 F.2d 688, 694 (9th Cir. 1991); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir. 1986).

130. 175 U.S. 677, 700 (1900).

131. *Echeverria-Hernandez*, 923 F.2d at 692.

power, like Congress's legislative powers, is subject to Tenth Amendment or related federalism limitations. A number of commentators have claimed that it is not.¹³² Under this view, there are essentially no states' rights restrictions on what the federal government can do pursuant to a treaty. Thus, for example, Professor Gerald Neuman recently suggested that the Religious Freedom Restoration Act,¹³³ which has been held unconstitutional by the Supreme Court on the ground that it exceeds Congress's legislative powers,¹³⁴ could simply be reenacted as an implementation of a treaty.¹³⁵ In support of the proposition that the treaty power extends to issues such as religious freedom, Professor Neuman relies in part on international law, observing that "[h]ow a country treats its own nationals is no longer a matter of exclusive domestic concern, but rather a subject of international cooperation and oversight."¹³⁶

At first glance, it might appear that this purported immunity of the treaty power from federalism restraints has been endorsed by the Supreme Court. The Court's 1920 decision in *Missouri v. Holland*¹³⁷ is often cited for this proposition.¹³⁸ The *Holland* decision, however, is far from clear on this point.¹³⁹ In any event, the current viability of such an expansive reading of *Holland* is questionable, given changes in the nature of treaty-making, the growth of the legislative power of Congress (which reduces the need for special Tenth Amendment immunity for the treaty power), and the Supreme Court's renewed interest in protecting federalism.¹⁴⁰ Indeed, as discussed below, the Executive Branch in *Breard* expressed the view that, under existing law, its ability to enforce treaty obligations is subject to federalism limitations.¹⁴¹

132. See, e.g., HENKIN, *supra* note 65, at 189-93; Damrosch, *supra* note 67, at 530-31; Gerald Neuman, *The Global Dimension of RFRA*, 14 CONST. COMM. 33, 34 (1997).

133. 42 U.S.C. §§ 2000bb to bb-4.

134. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2160 (1997).

135. See Neuman, *supra* note 132, at 42-46.

136. *Id.* at 46 (footnote omitted).

137. 252 U.S. 416 (1920).

138. See, e.g., HENKIN, *supra* note 65, at 191; 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 6.5, at 509 (2d ed. 1992); Damrosch, *supra* note 67, at 530.

139. The Court in *Holland* noted, among other things, that "[w]e do not mean to imply that there are no qualifications to the treaty-making power." 252 U.S. at 433; cf. Daniel O. Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 663-64 (1998) (arguing that the Court in *Holland* "did not reject the federalism argument out of hand" but rather "balanced the competing interests that were at stake"); Marci A. Hamilton, *Slouching Toward Globalization: Charting the Pitfalls in the Drive to Internationalize Religious Human Rights*, 46 EMORY L.J. 307, 317 (1997) (noting that the Court in *Holland* "did not . . . say that any time the President signs, and the Senate approves, a treaty the states' rights are automatically controverted").

140. See generally Bradley, *supra* note 51.

141. See text accompanying notes 199-200 *infra*.

Federalism issues also arise with respect to customary international law. As noted above, many commentators contend that customary international law has the status of federal common law. This view implies, at the very least, that customary international law, like treaties, supersedes prior inconsistent state law.¹⁴² Arguments for the supremacy of customary international law over state law, like many of the other arguments discussed herein, frequently invoke international law to support the domestic law result. In particular, commentators note that customary international law is binding on the whole nation, making "the United States, not the individual states, . . . the relevant national entity for international purposes."¹⁴³

Although relatively uncontroversial in the academic community, the purported supremacy of customary international law over state law has essentially no support in American case law. As discussed above, customary international law before *Erie* was treated as general common law and thus did *not* preempt inconsistent state law. Indeed, there were a number of instances in the nineteenth century when states violated customary international law and, because of the lack of preemptive federal legislation, the federal government believed itself powerless to do anything about it.¹⁴⁴ As Quincy Wright explained in 1922, "[a] state constitution or legislative provision in violation of customary international law is valid unless in conflict with a Federal constitutional provision or an act of Congress."¹⁴⁵ Since *Erie*, lower courts have hinted that customary international law might be supreme over state law,¹⁴⁶ but no court actually has adopted such a holding. Although the Supreme Court has not addressed the issue, it recently repudiated the somewhat analogous doctrine of "dormant foreign commerce clause preemption," by holding that even when state tax laws cause foreign relations controversies, it is for Congress, not the courts, to decide whether to preempt them.¹⁴⁷

142. See Brilmayer, *supra* note 78, at 303. Interestingly, this view may actually give customary international law greater status than treaties, since many commentators appear to assume that customary international law, unlike treaties, is *always* self-executing. See, e.g., *id.* at 328-29 ("[T]here does not currently exist a recognized customary law analogue of the self-executing treaty requirement."); Henkin, *supra* note 78, at 1561 (Customary international law "is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.").

143. Henkin, *supra* note 78, at 1559.

144. See Bradley & Goldsmith, *supra* note 72, at 824-26.

145. QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 161 (1922).

146. See, e.g., *Fioconci v. Attorney Gen.*, 462 F.2d 475, 479 n.7 (2d Cir. 1972); *Republic of Argentina v. New York*, 250 N.E.2d 698, 700-01 (N.Y. 1969).

147. See *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 328-31 (1994).

C. *Opportunistic Use of Foreign Affairs Exceptionalism*

The third strand of the internationalist conception is the opportunistic way in which commentators invoke foreign affairs exceptionalism. In a number of early twentieth-century decisions, including the *Holland* decision referred to above, the Supreme Court suggested that the usual constitutional standards governing the federal government's exercise of power did not apply in the area of foreign affairs.¹⁴⁸ The Court's basic reasoning was that the federal government, especially the President, requires wider latitude in conducting foreign affairs because the United States needs to speak with one voice in the international community.¹⁴⁹

International law commentators have often criticized this foreign affairs exceptionalism when it has been used to justify either judicial abstention in foreign affairs cases or expansion of the powers of the Executive in its relations with the other federal branches. For example, commentators have criticized the use of foreign affairs exceptionalism to justify dismissal of cases pursuant to the political question doctrine,¹⁵⁰ refusal to adjudicate international law issues pursuant to the act of state doctrine,¹⁵¹ or enhancement of the powers of the Executive in its relations with Congress.¹⁵² These commentators have correctly pointed out that there is no sharp line between foreign and domestic affairs and that "one voice" is neither desirable nor possible in a government, like ours, of limited and separated powers.¹⁵³

These same commentators, however, rely heavily on foreign affairs exceptionalism when it adds support for the incorporation and supremacy of international law in the U.S. legal system. For example, they rely on exceptionalism to overcome separation of powers and federalism objections to the

148. See, e.g., *United States v. Belmont*, 301 U.S. 324, 332 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936); *Missouri v. Holland*, 252 U.S. 416, 433 (1920). For discussions of the rise of foreign affairs exceptionalism in U.S. jurisprudence, see Walter LeFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AM. HIST. 695 (1987) and G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. (forthcoming 1999).

149. See *Belmont*, 301 U.S. at 331 ("Plainly, the external powers of the United States are to be exercised without regard to state laws or policies."); *Curtiss-Wright*, 299 U.S. at 319 ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as representative of the nation."); *Holland*, 252 U.S. at 435 ("Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power.").

150. See, e.g., Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

151. See, e.g., GLENNON, *supra* note 119, at 275-77.

152. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 208-28 (1990).

153. See, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS, JUDICIAL ANSWERS* 5-9 (1992); Ralph G. Steinhardt, *Human Rights Litigation and the "One Voice" Orthodoxy in Foreign Affairs*, in *WORLD JUSTICE?: U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS* 23 (Mark Gibney ed., 1991); Koh, *supra* note 11, at 2357-58, 2362-64.

claim that customary international law has the status of federal common law,¹⁵⁴ to avoid states' rights limitations on the treaty power,¹⁵⁵ and to justify the federal government's ability to enter into international obligations by means of executive agreements rather than treaties.¹⁵⁶ In these and other contexts, commentators cite the very cases and quote the very dicta that they criticize in other contexts.¹⁵⁷ Moreover, they generally do so without even acknowledging the apparent inconsistency.¹⁵⁸

If there is a unifying theme to this opportunistic use of foreign affairs exceptionalism, it is that the U.S. federal courts should play an active and independent role in incorporating and applying international law. Indeed, some of these commentators have expressed the view that federal courts, when confronted with international law issues, should operate essentially as international tribunals.¹⁵⁹ These commentators typically do not attempt, however, to reconcile this vision with domestic constitutional constraints on federal court power.

III. THE *BREARD* CASE REVISITED: A REAFFIRMATION OF DUALISM

The *Breard* case demonstrates in dramatic fashion the significant difference between the academy's conception of the U.S. relationship with international law and the approach actually taken by the courts and other U.S. government actors. Throughout the *Breard* proceedings and in subsequent

154. See, e.g., Koh, *supra* note 67, at 1846-47; Neuman, *supra* note 78, at 375; Stephens, *supra* note 101, at 438-47.

155. See, e.g., Neuman, *supra* note 132, at 46.

156. See, e.g., HENKIN, *supra* note 65, at 215-24.

157. A particularly glaring example of the opportunistic use of foreign affairs exceptionalism is Professor Henkin's 1987 article in the *Harvard Law Review* discussing the *Chinese Exclusion* case. See Henkin, *supra* note 108. The first half of the article heavily criticizes foreign affairs exceptionalism with respect to the federal government's power to exclude and detain aliens, *see id.* at 858-63; the second half relies on such exceptionalism to justify, among other things, special treatment for customary international law as compared with other purported forms of federal common law, *see id.* at 876-78. For a similar contrast, compare GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996) (criticizing foreign affairs exceptionalism in the immigration area), with Neuman, *supra* note 78, at 373-76 (relying on foreign affairs exceptionalism cases like *Curtiss-Wright* to justify federal law status of customary international law).

158. In another writing, Professor Goldsmith and I similarly criticized Professor Koh for relying on foreign affairs exceptionalism. Professor Koh recently described this criticism as "curious and ironic," pointing out that he has written an entire book arguing against the exemption of foreign affairs "from our constitutional system of checks and balances, particularly the check of judicial review." Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 668 n.222 (1998) (quoting KOH, *supra* note 146, at 223). This response, however, misunderstands the criticism. The claim is not that commentators like Professor Koh are always in favor of foreign affairs exceptionalism, but rather that they invoke it opportunistically.

159. See, e.g., Henkin, *supra* note 108, at 876 ("[W]hen courts determine international law, they do not act as surrogates for the national legislature . . . [D]etermining international law, for purposes of adjudication in a decentralized, international system, is inherently the role of domestic courts.").

commentary, the international law academy vigorously advocated its internationalist conception. By contrast, all of the relevant government actors approached the case from a dualist framework and at least implicitly repudiated the internationalist conception.

A. The Academy Posits its Internationalist Conception

The international law academy was heavily involved in the *Breard* case. A group of international law scholars first entered the debate by filing an amicus curiae brief in the Fourth Circuit to oppose an argument by the Justice Department that Paraguay's treaty claims were nonjusticiable.¹⁶⁰ In explaining their interest in the case, these scholars stated that "[e]ach member of this group of Law Professors is concerned that the development of this area of law be consistent, coherent, and effective in enforcing the United States' obligations under treaties, which are part of the supreme law of the land."¹⁶¹ These scholars argued that treaty claims, even when asserted by a foreign government, should be subject to the usual standards governing judicial review. They argued that, "[i]f the United States' argument is countenanced here it would result in a marked erosion of judicial power allocated under the Constitution."¹⁶² In other words, they argued *against* foreign affairs exceptionalism in this context.¹⁶³

Twelve prominent international law scholars subsequently filed an amicus curiae brief in the Supreme Court urging the Court to grant a stay of execution.¹⁶⁴ After describing themselves as "expert in the fields of interna-

160. See Brief Amicus Curiae of a Group of Law Professors Including Frederick M. Abbott, David J. Bederman, Richard B. Bilder, David D. Caron, Anthony D'Amato, Lori Fisler Damrosch, William Dodge, Martha A. Field, Joan M. Fitzpatrick, Egon Guttman, Louis Henkin, Harold Hongju Koh, Burt Lockwood, Stefan Riesenfeld, Oscar Schachter, Herman Schwartz, Anne-Marie Slaughter, Ralph Steinhardt & David Weissbrodt, *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1997) (No. 96-2770).

161. *Id.* at 1.

162. *Id.* at 4.

163. The Fourth Circuit declined to rule on the Justice Department's justiciability argument. See 134 F.3d at 626. As pointed out by the amicus curiae law professors, the Department's reasoning was rather weak. Federal courts have been granted the authority under Article III and 28 U.S.C. § 1331 to decide cases arising under treaties, and courts have in fact decided a number of such cases (albeit none, apparently, involving foreign states as plaintiffs). The Department relied heavily on dicta from *Head Money Cases*, 112 U.S. 580 (1884), but that decision merely held that, as a matter of U.S. law, later-in-time federal statutes trump earlier inconsistent treaties. See *id.* at 599. That decision did not hold that treaty claims are nonjusticiable. Of course, even if a treaty claim is justiciable, it may face domestic law hurdles, such as the self-execution requirement, the last-in-time rule, and the Eleventh Amendment. Moreover, justiciability does not tell us what rights and remedies are created under the treaty.

164. See Statement Amicus Curiae of International Law Professors George A. Bermann, David D. Caron, Abram Chayes, Lori Fisler Damrosch, Richard N. Gardner, Louis Henkin, Harold Hongju Koh, Andreas F. Lowenfeld, W. Michael Reisman, Oscar Schachter, Anne-Marie Slaughter,

tional law and the application of international law by the courts of the United States," these scholars noted that academic writings "are among the sources to be consulted in determining rules of international law" and that scholarly views "are likewise taken into account when such questions arise in U.S. courts."¹⁶⁵ Turning to the merits, the scholars argued that a failure to grant a stay "would work irreparable harm, not only to the Petitioner but also to the national interest."¹⁶⁶ They explained that a failure to abide by the ICJ order "could impair the credibility of the United States not only in the case brought by Paraguay in the ICJ, but also in matters before other international bodies."¹⁶⁷ They also argued that federalism interests should not preclude a stay because, "[w]hen . . . the ICJ has unanimously indicated provisional measures to prevent irreparable harm, the national interests of the United States are directly engaged."¹⁶⁸ In other words, they argued here *in favor* of foreign affairs exceptionalism. A stay was necessary, they concluded, to prevent "incalculable and irreparable damage on the international plane."¹⁶⁹

Some of these scholars made similar statements to the press. Professor Anne-Marie Slaughter, for example, wrote an editorial arguing that the Supreme Court should grant a stay "both as an exercise of its own power of review and as a response to a request from a fellow court."¹⁷⁰ And Professor Harold Koh was quoted as saying that the Supreme Court should enter a stay because its decision "will send a message about our respect for international bodies."¹⁷¹

Other scholars were at least indirectly involved in an *amicus curiae* brief in support of certiorari filed on behalf of the Human Rights Committee of the American Branch of the International Law Association.¹⁷² That brief stated that "amici are deeply concerned by the consistent disregard of the Vienna Convention on Consular Relations" as well as by the lower courts' "refusal

ter, and Edith Brown Weiss, *Breard v. Greene*, 118 S. Ct. 1352 (1998) (No. 97-1390) [hereinafter *Statement Amicus Curiae*].

165. *Id.* at 1.

166. *Id.* at 7.

167. *Id.* at 8.

168. *Id.* at 9.

169. *Id.*

170. Anne-Marie Slaughter, *On a Foreign Death Row*, WASH. POST, Apr. 14, 1988, at A15.

171. Brooke A. Masters, *Albright Urges Va. to Delay Execution*, WASH. POST, Apr. 14, 1998, at B1 (quoting Professor Harold Koh).

172. Brief of Amicus Curiae for the Human Rights Committee of the American Branch of the International Law Association and the Lawyers Committee for Human Rights in Support of Petitioners, *Breard v. Greene*, 118 S. Ct. 1352 (1998) (No. 97-1390). One scholar, Professor William Aceves, was co-counsel on the brief. In addition, many of the members of the Human Rights Committee of the American Branch of the International Law Association are international law scholars. The brief does note, however, that, although it expresses the views of the Committee, "[n]ot all members of the Committee participated in the preparation of this *amicus* brief." *Id.* at 1 n.2.

to act upon these violations.”¹⁷³ After emphasizing the importance of the Vienna Convention, the brief, quoting from foreign affairs exceptionalism cases like *Holland*, argued that the Convention takes precedence over any federalism concerns.¹⁷⁴ The brief concluded: “If the United States seeks to affirm and rely on the rule of law, it must fully implement its international obligations. It is up to the courts to ensure that these obligations are fulfilled.”¹⁷⁵

Since Breard’s execution, many of these same scholars, as well as others, have written articles about the case.¹⁷⁶ Most of these articles are, not surprisingly, critical of the way in which the Supreme Court and other government actors handled the *Breard* case.

Professor Henkin argues that the ICJ order was legally binding on the United States and had the status in the United States of a self-executing treaty obligation.¹⁷⁷ He further argues that even if the order did not have this status, the Secretary of State’s request that Virginia stay the execution, as an expression of U.S. foreign policy, should have been treated as binding on Virginia. For this proposition, he cites foreign affairs exceptionalism cases, including *Holland*.¹⁷⁸ He concludes by critically observing that the U.S. failure to stay the execution “did not contribute to the rule of law in international affairs” and “did not strengthen the place of international law in the United States.”¹⁷⁹

Unlike Professor Henkin, Professor Carlos Vazquez does not take a definite position on whether the ICJ order was binding on the United States.¹⁸⁰ Like Henkin, however, he argues that if the order was binding, it had the status in the United States of self-executing federal law, such that “the law of the land required compliance with the Order and thus preempted the conflicting state order setting the execution date.”¹⁸¹ Vazquez further argues that, while it is improper for presidents to claim “inherent powers in the area of foreign affairs at the expense of both the legislative and judicial branches,” here the President had the power to compel Virginia’s compliance

173. *Id.* at 2-3.

174. *See id.* at 16-17.

175. *Id.* at 20.

176. Some of these articles are contained in a recent “Agora” in the American Journal of International Law. *See* 92 AM. J. INT’L L. 666 (1998).

177. *See* Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT’L L. 679, 681 (1998).

178. *See id.* at 681-82.

179. *Id.* at 683.

180. *See* Carlos Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT’L L. 683, 686 (1998).

181. *Id.* at 685. Professor Vazquez leaves open the possibility that this federal obligation might have been judicially unenforceable by virtue of the political question doctrine, arguing that, even if this were so, it was enforceable by the President. *See id.* at 685-86.

with the order—even if the order was not binding—pursuant to his foreign affairs powers and the authority delegated to him by existing treaties.¹⁸² Citing *Holland*, Vazquez contends that federalism concerns would not limit the President's exercise of such power.¹⁸³

Professor Lori Damrosch argues that foreign states should be allowed to bring treaty claims in U.S. courts, notwithstanding the foreign affairs implications of such claims, and she criticizes the Justice Department's argument that Paraguay's claims were nonjusticiable.¹⁸⁴ In addition, both she and Professor Jordan Paust argue that the Eleventh Amendment immunity of the states, although applicable to domestic law claims, should be no barrier to treaty claims.¹⁸⁵ Paust further contends that, pursuant to the *Charming Betsy* canon, the procedural default doctrine "should be interpreted consistently with international law."¹⁸⁶

Professor Fred Kirgis suggests that Virginia's decision to execute Breard, because it implicated foreign affairs, should have been subject to dormant preemption.¹⁸⁷ The fact that the Executive Branch expressly decided not to try to preempt Virginia's execution is "irrelevant," says Kirgis.¹⁸⁸ He suggests that preemption was proper, at least in part, because of the "disdain" purportedly shown by Virginia's Governor for the ICJ.¹⁸⁹

Finally, Professor Slaughter contends (as she did in her earlier newspaper editorial) that the Supreme Court should have treated the ICJ order as self-executing federal law, binding on Virginia, "as a matter of judicial comity."¹⁹⁰ In support of this proposition, she invokes the "global allocation of

182. *Id.* at 688-89.

183. *See id.* at 687. Professor Vazquez suggests that the Justice Department either "mis-spoke" or was "disingenuous" in stating in its brief to the Supreme Court that the federal government lacked the power to compel Virginia's compliance with the ICJ order. *See id.* at 688, 690.

184. *See* Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AM. J. INT'L L. 697, 699-701 (1998).

185. *See id.* at 702; Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 AM. J. INT'L L. 691, 696 (1998).

186. *See* Paust, *supra* note 185, at 692.

187. *See* Frederic L. Kirgis, *Zschemig v. Miller and the Breard Matter*, 92 AM. J. INT'L L. 704 (1998).

188. *Id.* at 706.

189. *Id.* at 707. Professor Kirgis does not cite or discuss the Supreme Court's recent *Barclays Bank* decision, *see* text accompanying note 147 *supra*, which rejected dormant preemption in the international taxation context.

190. Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708, 708 (1998). Her argument illustrates the malleability of the concept of "comity." Invoking this concept, Professor Slaughter relies on cases where courts sometimes voluntarily stay or dismiss (a) cases pending before them (b) in civil proceedings (c) out of deference to another sovereign nation, to support (a) federal court compulsion of a state government (b) in a criminal proceeding (c) out of deference to an international tribunal.

judicial responsibility" and argues that a Supreme Court-ordered stay of execution was the "minimum respect required" in light of this allocation.¹⁹¹

As should be apparent from the above description, the international law academy's approach to the *Breard* case is highly reflective of the internationalist conception of the relationship between international law and domestic law. The briefs, press statements, and articles presume that international law and decisions of international bodies, such as the ICJ order, should automatically be incorporated into the U.S. legal system. They also reflect the belief that international law generally should take precedence over domestic law, such as federal and state law limitations on post-conviction relief. And they opportunistically rely on foreign affairs exceptionalism as a basis for overriding states' rights limitations on the federal government's powers (including the Eleventh Amendment limitation on federal court jurisdiction) while disavowing it when it might be used either to limit judicial enforcement of international law or to expand the President's authority vis-à-vis Congress. More generally, these writings are focused almost entirely on the importance of international law and institutions, to the exclusion of countervailing domestic considerations. Thus, for example, there is essentially no discussion in these writings of Virginia's interest in retaining control of its criminal justice system, the need for courts to insist on timely presentation of claims, or the danger of ceding domestic judicial authority to a body not necessarily representative of U.S. interests.

B. *All Government Actors Reaffirm Dualism*

The above academic consensus contrasts sharply with the views of the various government actors involved in the *Breard* litigation. Virginia's Governor, the lower federal courts, the Justice Department, the State Department, and the Supreme Court all assumed the dualist framework, implicitly rejecting the three strands of the internationalist conception.

Virginia's Governor, perhaps not surprisingly, expressed the view that it was Virginia's and the federal government's decision, not the ICJ's, whether *Breard* should be executed. In response to the ICJ decision, the Governor's spokesperson stated that the Governor would "continue to follow the U.S. courts and the United States Supreme Court."¹⁹² In ultimately refusing to stay the execution, the Governor voiced concern that such a stay would have the effect of improperly transferring domestic authority to the ICJ.¹⁹³

191. *Id.* at 711.

192. Frank Green, *Try to Stop Execution, U.S. Told*, RICHMOND TIMES DISPATCH, Apr. 10, 1998, at A1.

193. See text accompanying note 47 *supra*.

The federal government actors may have been more sensitive than Virginia's Governor to the foreign relations implications at stake, but they did not differ with him regarding the basic conceptual framework. The lower federal courts, when presented with Breard's and Paraguay's claims under the Vienna Convention, expressed dismay that the Convention had been violated.¹⁹⁴ One judge on the Fourth Circuit went so far as to write a special concurrence emphasizing the importance of the Convention.¹⁹⁵ Nevertheless, these courts all held that the domestic law procedural default doctrine and the Eleventh Amendment prevented adjudication of the claims.¹⁹⁶

The Justice Department, in its brief in the Supreme Court, also espoused the dualist approach. The Department noted that the United States "takes very seriously both the obligations embodied in the Vienna Convention on Consular Relations and instances of violation of those obligations."¹⁹⁷ Nevertheless, it argued that the Convention did not provide Paraguay with a judicial cause of action to have a criminal conviction or sentence vacated, and that Breard's claim under the Convention was barred by domestic law limitations on habeas corpus relief.¹⁹⁸ The Department further argued that the ICJ order, while again something that the United States takes very seriously, was not binding and, even if it were binding, the federal government did not have the domestic law power to compel Virginia's compliance with it.¹⁹⁹ With respect to the latter point, the Department stated that "our federal system imposes limits on the federal government's authority to interfere with the criminal justice system of the States."²⁰⁰ Implicit in the Department's position was the view that, notwithstanding *Holland*, the national government is not free from federalism restraints when enforcing international obligations.

The State Department, while expressing concern over Virginia's violation of the Vienna Convention and taking various steps to reduce the likelihood of future violations,²⁰¹ agreed with the Justice Department's position.

194. See text accompanying notes 18-28 *supra*.

195. See *Breard v. Pruett*, 134 F.3d 615, 621 (4th Cir. 1998) (Butzner, J., concurring). Judge Butzner also argued, and the majority did not dispute, that the Vienna Convention is self-executing. See *id.* at 622.

196. See text accompanying notes 18-28 *supra*.

197. U.S. Amicus Brief, *supra* note 30, at 12.

198. See *id.* at 15-46.

199. See *id.* at 51.

200. *Id.*

201. In January 1998, the State Department published a booklet for law enforcement agencies containing instructions and advice relating to consular notice and access. In February 1998, it began distributing pocket-sized cards to law enforcement officials describing the requirements for such notice and access. The State Department subsequently began holding briefings with state and local law enforcement agencies concerning this issue. See *id.* at 7, 10-11; William J. Aceves, *International Decisions: Application of the Vienna Convention on Consular Relations*, 92 AM. J. INT'L L.

In addition to signing the Justice Department's brief, the State Department made clear that it was Virginia's prerogative whether to stay the execution. In a letter to Virginia's Governor, the Secretary of State referred to "Virginia's right to go forward with the sentence imposed on Mr. Breard by Virginia's courts," described the ICJ order as "[u]sing non-binding language," and only "with great reluctance" *requested* that Virginia's Governor voluntarily exercise his power to stay the execution.²⁰²

The Supreme Court, too, assumed dualism. The Court acknowledged that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such."²⁰³ It nonetheless rejected as "plainly incorrect" Breard's contention that the Vienna Convention trumped the procedural default doctrine.²⁰⁴ The Court first noted that, "absent a clear and express statement to the contrary," treaties must be implemented in accordance with domestic procedural rules, including the procedural default doctrine.²⁰⁵ A treaty's status as "supreme law" under Article VI did not affect this conclusion, the Court reasoned, for the Constitution is also supreme law, and its provisions are subject to procedural default as well.²⁰⁶

The Court also reaffirmed that treaties and federal statutes are on an equal plane in domestic law and subject to a last-in-time rule.²⁰⁷ Any enforceable rights that Breard might have had under the Vienna Convention, which was in force in the United States since 1969, were thus limited by the 1996 Antiterrorism and Effective Death Penalty Act, which provides that federal courts ordinarily should not hold evidentiary hearings on habeas claims, including claims based on alleged treaty violations, "[i]f the applicant

517, 523 (1998); Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT'L L. 243 (1998).

202. Letter from Madeleine Albright to James Gilmore III, *supra* note 43.

203. *Breard v. Greene*, 118 S. Ct. 1352, 1354 (1998).

204. *Id.*

205. *Id.*

206. *Id.* at 1355. The obvious constitutional analogue to the Vienna Convention's notice requirement is the requirement of *Miranda* warnings. It is well settled that a *Miranda* claim is subject to the procedural default doctrine. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). For a recent argument that, because of federalism concerns, the Vienna Convention rights should be *less* enforceable against states than *Miranda* rights, see James A. Deeken, *A New Miranda for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of Printz v. United States*, 31 VAND. J. TRANSNAT'L L. 997 (1998).

The Court also rejected Breard's argument that he was prejudiced by the Vienna Convention violation. The Court explained that Breard's claim of prejudice—that, if he had received consular assistance, he would have accepted a plea bargain pursuant to which he would have avoided the death penalty—"is far more speculative than the claims of prejudice courts routinely reject in those cases where an inmate alleges that his plea of guilty was infected by attorney error." *Breard*, 118 S. Ct. at 1355.

207. *See id.*

has failed to develop the factual basis of [the] claim in State court proceedings."²⁰⁸ Perceiving no direct conflict between those requirements and the Vienna Convention,²⁰⁹ the Court apparently viewed the *Charming Betsy* canon as irrelevant.²¹⁰

As for Paraguay's claims, the Court said that "neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions."²¹¹ The Court also held that "[t]he Eleventh Amendment provides a separate reason why Paraguay's suit might not succeed."²¹² Finally, the Court expressed the view that the ICJ order did not, by itself, create enforceable domestic law. While noting that "[i]t is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier," the Court observed that it "must decide questions presented to it on the basis of *law*."²¹³ The Court closed its opinion by observing that it was the "prerogative" of Virginia's Governor to decide whether to stay the execution and that "nothing in our existing case law allows us to make that choice for him."²¹⁴

208. 28 U.S.C. § 2254(e)(2) (1994 & Supp. 1996). In response to Breard's contention that his Vienna Convention claim was too novel to discover before his federal habeas corpus petition, the Court noted that "such novel claims would be barred on habeas review under *Teague v. Lane*, 489 U.S. 288 (1989)." *Breard*, 118 S. Ct. at 1355 (alternate cite omitted).

209. The Court noted that the Vienna Convention provides that the rights it confers "shall be exercised in conformity with the laws and regulations of the receiving State." *Breard*, 118 S. Ct. at 1355 (citing Vienna Convention, *supra* note 2, art. 36(2)).

210. As noted above, the *Charming Betsy* canon has traditionally been applied only to avoid conflicts between domestic and international law, not to make the two perfectly consistent. See text accompanying notes 92-98 *supra*. With this in mind, it is far from clear that application of the procedural default doctrine in the *Breard* case was inconsistent with the Vienna Convention. The Convention states that the rights it confers "shall be exercised in conformity with the laws and regulations of the receiving State." Vienna Convention, *supra* note 2, art. 36(2). As the Supreme Court noted: "By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia." *Breard*, 118 S. Ct. at 1355. The Convention also states that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Vienna Convention, *supra* note 2, art. 36(2). But it is far from clear that a limitation on post-conviction relief denies "full effect" to the rights in the Convention, any more than such a limitation on U.S. constitutional rights would preclude them from having full effect. In any event, this vague "full effect" provision would seem to be weak support for concluding that nations have committed themselves to the rather burdensome requirement of keeping their domestic courts open indefinitely to criminal defendants alleging violations of the Convention. For these reasons, it is incorrect to characterize the Supreme Court as holding "that the Antiterrorism and Effective Death Penalty Act of 1996 had overruled Article 36 of the Vienna Convention." Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458, 459 (1998).

211. *Breard*, 118 S. Ct. at 1356.

212. *Id.*

213. *Id.* (emphasis added).

214. *Id.*

In sum, all the government actors involved in the *Breard* case followed the dualist approach. These actors did not deny the importance of international law, but they evaluated its domestic effect through the lens of domestic law. In particular, these actors assumed that U.S. domestic law determines how and to what extent international law is incorporated into the U.S. legal system. And they resisted the internationalist claims that international law presumptively creates enforceable domestic law, that it generally is supreme over domestic law, and that foreign affairs exceptionalism gives the federal government special power to incorporate and enforce international obligations.

CONCLUSION

In some respects, *Breard* could be described as an easy case. In addition to the procedural justifications for denying a stay of execution—such as the procedural default doctrine and the Eleventh Amendment—there may have been little equitable basis for a stay. After all, Breard had indisputably committed a brutal murder, his claim of prejudice from the Vienna Convention violation was weak, and the ICJ order was the result of a last-minute proceeding initiated in an obvious attempt to delay the pending execution. Despite these facts, almost every international law scholar who has commented on the *Breard* case has expressed the view that the execution should have been stayed. How can this be explained?

Part of the explanation may lie with the uncertain status of international law. There has long been skepticism regarding whether international law is properly called “law.”²¹⁵ Skeptics point out, among other things, that there is no central international sovereign and that the mechanisms for enforcing international norms are often quite limited. International law scholars naturally have resisted this skepticism. In doing so, they may have a tendency both to overstate the significance of international law and to understate competing domestic considerations.

This tendency appears to have been evident in *Breard*. Existing case law strongly suggested, for example, that U.S. courts would not treat the ICJ order as self-executing federal law, yet many scholars essentially assumed that it would have this status. Similarly, many scholars assumed that principles of federalism were irrelevant to the *Breard* situation, notwithstanding the sensitivity to those principles displayed in recent years by all three branches of the federal government.

215. See Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. Rev. 665, 665-68 (1986); see also Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 808 (1989) (noting that “skepticism abounds over whether there is international law and whether courts called upon to apply it really are applying law”).

One consequence of such unrealistic expectations is that they may heighten the very skepticism that international law scholars are seeking to overcome. If the international law described in academic commentary bears little resemblance to the actual attitudes and practices of government actors, international law itself may be taken less seriously. These unrealistic expectations may also hinder the academy's ability to contribute to the development of the law. International law scholars were heavily involved in the *Breard* case, and yet their views seemed to have had little influence. The reason for this lack of influence, I would suggest, is that the academy's internationalist conception departs dramatically from U.S. constitutional traditions. In particular, international law scholars often assume that, because something is a certain way on the international plane, it must similarly be that way on the domestic plane. This is the assumption of monism and, as *Breard* makes clear, it is inconsistent with our dualist Constitution.