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The Engagement of U.S. Courts with International Law

David Sloss

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This chapter addresses the engagement of U.S. courts with international law. Part One provides a brief overview of international law in the U.S. legal system. Part Two applies the analytic framework developed by the ILA Study Group and examines cases in which courts have engaged in various forms of avoidance, alignment, and contestation. Part Three offers tentative conclusions.

I.
International Law in the U.S. Legal System

A. Modes of Reception and Application

The U.S. Constitution divides power between one national government and fifty state governments. Consequently, judicial power is divided between one system of federal courts and fifty independent state judiciaries. Although the national government has primary responsibility for the conduct of international relations, state courts in the United States have applied international law for more than two centuries.

Originally written in 1787, the Constitution has been amended several times, but the textual provisions related to international law remain unchanged. The document mentions the law of nations only once. Article I, section 8 grants Congress the power "to define and punish . . . offenses against the Law of Nations."[1] The Constitution does not specify whether courts should apply customary international law (CIL). However, U.S. courts applied CIL even before the Constitution was written and continued to do so after its adoption.[2]

In contrast to CIL, the text of the Constitution specifically directs courts to apply treaties. Article II grants the President the power to make treaties "with the advice and consent of the Senate."[3] Article I makes clear that the treaty power is a national power; states may not enter into "any treaty" with a foreign government.[4] Article III grants federal courts jurisdiction over cases "arising under" treaties.[5] Whereas Article III addresses federal courts, the Supremacy Clause in Article VI addresses state courts. It specifies that treaties are "the supreme Law of the Land; and the judges in every State shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding."[6] The Supremacy Clause serves two important functions. First, it specifies that conflicts between treaties and state law should be resolved in favor of treaties.

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[1] U.S. Const. art. I, § 8, cl. 10.

[2] *See generally* David L. Sloss, Michael D. Ramsey, and William S. Dodge, International Law in the U.S. Supreme Court: Continuity and Change 23-36 (2011) [hereinafter, "Continuity and Change"].

[3] U.S. Const. art. II, § 2, cl. 2. The President may bypass the Article II requirement to obtain a two-thirds Senate majority for a treaty by concluding an international agreement in the form of a "sole executive agreement" or a "congressional-executive agreement." *See* Louis Henkin, Foreign Affairs and the U.S. Constitution 215-24 (2d ed. 1996).

[4] U.S. Const. art. I, § 10, cl. 1.

[5] U.S. Const. art. III, § 2, cl. 1.

[6] U.S. Const. art. VI, cl. 2.

Second, as originally understood, it created a constitutional duty for state courts to apply treaties whenever they confronted a conflict between a treaty and state law.[7]

Judicial doctrine distinguishes between self-executing and non-self-executing treaties. For much of U.S. history, self-execution doctrine did not affect judicial application of the Constitution's treaty supremacy rule. The treaty supremacy rule, rooted in the text of the Supremacy Clause, governed the relationship between treaties and state law. Self-execution doctrine operated at a federal separation-of-powers level to divide power over treaty implementation between Congress and the President.[8] In the early 1950s, though, in response to the advent of modern international human rights law, lawyers created an exception to the treaty supremacy rule for non-self-executing (NSE) treaties.[9] NSE doctrine provides a rationale for courts to engage in affirmative avoidance—or, in some cases, negatory contestation—to avoid application of international law.[10]

U.S. courts often apply international law indirectly in the context of statutory interpretation. More than two centuries ago, in *Murray v. Schooner Charming Betsy*, Chief Justice Marshall declared that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[11] The principle that courts should interpret statutes in conformity with the nation's international legal obligations is known as the *Charming Betsy* canon. The canon can be a powerful tool for aligning domestic law with international law. However, U.S. courts often engage in evasive avoidance by disregarding the *Charming Betsy* canon in cases where it is arguably applicable.

The *Charming Betsy* canon is broadly accepted in the United States, at least in principle, but the use of international law in constitutional interpretation is more controversial. In the past two decades, the Supreme Court has cited foreign and international sources in decisions applying the Fourteenth Amendment Due Process Clause[12] and the Eighth Amendment ban on cruel and unusual punishments.[13] However, the Court's reliance on foreign and international sources provoked strident dissents from Justice Scalia and other conservative Justices.[14]

B. Broad Themes

The constitutional text related to international law has not changed in the past two centuries, but judicial attitudes towards international law have changed substantially. The United

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[7] *See* David L. Sloss, The Death of Treaty Supremacy: An Invisible Constitutional Change 47-51 (2016) [hereinafter, Sloss, "Treaty Supremacy"].
[8] *See id.*, Parts One and Two.
[9] *See id.*, Part Three.
[10] *See infra* notes 111-16 and accompanying text (discussing application of NSE doctrine in *Medellín v. Texas*).
[11] 6 U.S. 64, 118 (1804).
[12] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 576-77 (2003).
[13] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575-78 (2005) (noting that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty").
[14] *See Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) ("this Court . . . should not impose foreign moods, fads, or fashions on Americans"); *Roper*, 543 U.S. at 622-28 (Scalia, J., dissenting).

States in the eighteenth century was a weak, insecure nation eager to gain acceptance from older, established European powers.[15] Accordingly, during the eighteenth and nineteenth centuries, judicial engagement with international law was often characterized by alignment, rather than avoidance or contestation.[16] By the dawn of the twenty-first century, though, the United States was the world's preeminent superpower. Whereas an international law violation in the eighteenth century might have provoked a sharp response from a more powerful country that posed a threat to national survival, the consequences of most international law violations today are far less serious. Not surprisingly, then, judicial engagement today is more likely to involve avoidance or contestation. However, one must not overstate the point. One could cite examples of avoidance and contestation in the nineteenth century. Moreover, this chapter will identify several examples of alignment in the twenty-first century.

Analysis of judicial engagement with international law in the United States must account for three broad factors that influence the behavior of U.S. courts: federalism, separation of powers, and individual rights. U.S. judges generally believe that they have an institutional responsibility to protect individual rights. However, in exercising that responsibility, courts are often constrained by considerations related to the division of power among the three branches of the federal government (separation of powers) and the division of power between the federal government and the states (federalism). Federalism and separation of powers factors influence judicial decision-making in purely domestic cases, but those factors sometimes persuade courts to adopt a posture of avoidance or contestation with respect to international law. Two examples help illustrate this point.

In *Matar v. Dichter*, Palestinian plaintiffs alleged "that they were injured or lost family members in the 2002 aerial bombing of a Gaza apartment complex" and that defendant "Avraham Dichter, former head of the Israeli Security Agency, personally participated in the decision to bomb" the complex.[17] Plaintiffs alleged that Dichter committed war crimes in violation of international law. The court dismissed plaintiffs' claims against Dichter, without addressing the merits of the war crimes claim, holding that he was entitled to immunity. The court's immunity ruling relied heavily on a government "Statement of Interest" in which the Executive Branch argued that Dichter was entitled to immunity under common law principles derived from international law.[18] The court invoked the "traditional rule of deference to such Executive determinations" to support its immunity holding.[19] *Dichter* could be categorized as an example of "evasive avoidance," insofar as the court refused to address the merits of the war crimes claim. However, *Dichter* could also be classified as an example of "consubstantial contestation," because the court relied on immunity rules derived from international law to bar a decision on the war crimes claim. Regardless of how *Dichter* is classified, the transnational context of the case (both factually and legally) shifted the usual balance between the judiciary and the executive branch, leading the court to defer to the executive's view on the immunity defense.

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[15] *See* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 923 (2010).
[16] *See* Continuity and Change, *supra* note 2, parts I and II.
[17] Matar v. Dichter, 563 F.3d 9, 10 (2nd Cir. 2009).
[18] *Id.*, at 14.
[19] *Id.*, at 15.

In *Bond v. United States*,[20] the federal government charged Carol Anne Bond with violating the Chemical Weapons Convention Implementation Act (CWC Act), a federal statute designed to implement U.S. obligations under the Chemical Weapons Convention. Bond argued that the federal government exceeded its authority by prosecuting her for conduct that, under the Constitution, fell within the exclusive regulatory authority of state governments. The Supreme Court avoided the constitutional question, deciding on statutory interpretation grounds that the CWC Act did not reach "a purely local crime."[21] (The Court did not explain why the crime at issue was "a purely local crime," nor did it articulate any criteria for distinguishing between "local crimes" and "non-local crimes.") The majority defended its interpretation of the statute—an interpretation that was arguably inconsistent with the text and purpose of the CWC Act[22]—by arguing that the statute "must be read consistent with principles of federalism inherent in our constitutional structure."[23] *Bond* provides an example of "negatory contestation," which "consists in the denial of the validity or applicability of an international law norm."[24] The Court denied applicability of the CWC Act to Bond's criminal conduct. In doing so, the Court implicitly denied applicability of the treaty itself because the relevant statutory provisions were almost identical to the parallel treaty provisions.[25] The Court contested the applicability of the international norm because, in its view, application of the norm would have posed a threat to the Constitution's federal structure.

II.
Mapping Engagement by U.S. Courts

The Study Group's Final Report identifies three broad categories of engagement with international law: avoidance, alignment, and contestation. In accordance with that framework, Part Two analyzes cases where U.S. courts have adopted these three strategies.

A. Avoidance

The Final Report defines avoidance as "the general posture or strategy of a domestic court avoiding the application of international law in circumstances where the latter may be applicable."[26] The Report distinguishes between "evasive avoidance" and "affirmative avoidance."

Evasive avoidance is "where international law is not applied without any relevant argument being made and without any discussion by the court."[27] U.S. courts routinely engage in evasive

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[20] 134 S. Ct. 2077 (2014).
[21] *Id.*, at 2083.
[22] For a critique of the Court's opinion in *Bond*, see David Sloss, *Bond v. United States: Choosing the Lesser of Two Evils*, 90 Notre Dame L. Rev. 1583 (2015).
[23] *Bond*, 134 S. Ct. at 2088.
[24] Study Group on Principles on the Engagement of Domestic Courts with International Law, Final Report: Mapping the Engagement of Domestic Courts with International Law, para. 61 [hereinafter, "Final Report"].
[25] *See* Sloss, *supra* note 22, at 1584-89.
[26] Final Report, *supra* note 24, para. 39.
[27] *Id.*, para. 40.

avoidance. For example, between 2010 and 2015, the Supreme Court decided three cases involving the Foreign Sovereign Immunities Act (FSIA) that involved evasive avoidance: *OBB Personenverkehr AG v. Sachs*,[28] *Republic of Argentina v. NML Capital, Ltd.*,[29] and *Samantar v. Yousuf*.[30] Congress enacted the FSIA to codify the international rules governing immunity of foreign sovereigns from the jurisdiction of domestic courts.[31] Even so, in these three FSIA cases the Court made virtually no reference to international law. Instead, the Court's approach to interpreting the FSIA was similar to the approach it adopts when interpreting ordinary domestic statutes. Indeed, a casual reader who is not familiar with the FSIA would not know, based on the Court's opinions, that the cases implicated any international law issues.

In *OBB Personenverkehr AG v. Sachs*, the Court ruled that Austria's state-owned railway was entitled to immunity.[32] That decision yielded a result of consubstantial alignment: "the application by the domestic court of domestic norms that are consubstantial with international norms."[33] In contrast, it is debatable whether the results in *Republic of Argentina* or *Samantar* align with international law. Regardless, insofar as judicial application of the FSIA produced alignment with international norms in *OBB Personenverkehr*, the alignment resulted primarily from congressional enactment of the statute, rather than a conscious judicial effort to harmonize interpretation of the FSIA with international norms.

A court practices *affirmative avoidance* when it "considers the application of international law but explicitly rejects it."[34] Justice Scalia's dissenting opinion in *Thompson v. Oklahoma* provides a classic example. In *Thompson*, the majority held that the Eighth Amendment to the Constitution bars imposition of capital punishment for a crime committed by a 15-year-old defendant.[35] The Court noted that its conclusion was "consistent with the views that have been expressed . . . by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."[36] Justice Scalia criticized the majority for relying on international sources. He asserted: "We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [T]he views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."[37]

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[28] 136 S. Ct. 390 (2015) (holding that Austria's state-owned railway company was immune from the jurisdiction of U.S. courts).
[29] 134 S. Ct. 2250 (2014) (holding that the FSIA did not preclude a U.S. court from issuing a subpoena to a private bank ordering disclosure of documents related to accounts belonging to Argentina).
[30] 560 U.S. 305 (2010) (holding that an individual foreign official sued for conduct undertaken in his official capacity is not a "foreign state" under the FSIA).
[31] *See* Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976), *codified as amended at* 28 U.S.C. §§ 1602-11.
[32] 136 S. Ct. 390 (2015).
[33] Final Report, *supra* note 24, para. 49.
[34] *Id.*, para. 41.
[35] 487 U.S. 815 (1988).
[36] *Id.*, at 830.
[37] *Id.*, at 868 n.4 (Scalia, J., dissenting).

The Ninth Circuit decision in *Republic of Marshall Islands v. United States* is another example of affirmative avoidance.[38] Article VI of the Nuclear Non-Proliferation Treaty (NPT) obligates the United States "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race . . . and to nuclear disarmament."[39] The Marshall Islands sued the U.S. government in federal court, claiming that the United States is violating its obligations under the NPT. The Ninth Circuit dismissed the case. Judge McKeown's opinion avoided the question whether the United States is violating its treaty obligations under the NPT. She dodged that question by reasoning that Article VI is non-self-executing,[40] the Marshall Islands lacked standing to bring the claim,[41] and the case raised non-justiciable political questions.[42] The common thread linking all three rationales is that the case raised issues that "fall quintessentially within the realm of the executive, not the judiciary."[43]

Read together, Justice Scalia's dissenting opinion in *Thompson* and Judge McKeown's majority opinion in *Marshall Islands* suggest that judges often practice affirmative avoidance when presented with issues that they believe are "too political" for judicial resolution.

B. Alignment

The Final Report defines alignment as a posture where "an attempt is made to align with international law or at least to harmonize domestic law or practice with international regulation."[44] The Report distinguishes among four types of alignment: fair weather alignment, consubstantial alignment, overriding alignment, and hyper-alignment. This section addresses each category in turn.

Fair weather alignment is "alignment with international law in run-of-the-mill, politically unproblematic situations."[45] One could cite hundreds, perhaps thousands, of cases in which U.S. courts practice fair weather alignment. Many of those cases involve judicial application of multilateral, private international law treaties, such as the 1980 Vienna Convention on the International Sale of Goods (CISG), the 1980 Hague Convention on International Child Abduction, and the 1999 Montreal Convention on International Carriage by Air.[46]

For example, in *Cohen v. Cohen*,[47] an Israeli father filed a complaint in U.S. federal court, seeking a judicial order to return his child to him in Israel. The court applied the Hague Convention, as implemented by the International Child Abduction Remedies Act,[48] and

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[38] 865 F.3d 1187 (9th Cir. 2017).
[39] Treaty on the Non–Proliferation of Nuclear Weapons. art. VI, July 1, 1968, 729 U.N.T.S. 161.
[40] 865 F.3d at 1192-99.
[41] *Id.*, at 1199.
[42] *Id.*, at 1200-01.
[43] *Id.*, at 1190.
[44] Final Report, *supra* note 24, para. 37.
[45] *Id.*, para. 44.
[46] For analysis of judicial application of multilateral, private law treaties, see David L. Sloss and Michael P. Van Alstine, *International Law in Domestic Courts*, *in* Research Handbook on the Politics of International Law (Sandholtz & Whytock eds 2017), at 92-102.
[47] 858 F.3rd 1150 (8th Cir. 2017).
[48] 22 U.S.C. §§ 9001 – 9011.

determined that the United States was the child's "habitual residence" under the treaty.[49] Accordingly, the court denied the request to order the child's return to Israel. Similarly, in *Baah v. Virgin Atlantic Airways, Ltd.*,[50] plaintiff filed a tort claim against an airline, seeking compensation for personal injury sustained during air travel. The court noted that the Montreal Convention is a self-executing treaty.[51] The court applied Article 33 of the Convention as the governing jurisdictional rule and concluded that it lacked jurisdiction because the treaty required plaintiff to bring his claim in the United Kingdom.[52]

The Supreme Court's decision in *Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co.*[53] provides another example of fair weather alignment. *Bolivarian Republic* involved judicial application of the Foreign Sovereign Immunities Act (FSIA). In contrast to the FSIA cases discussed in the previous section, where the Court practiced evasive avoidance by ignoring international law, Justice Breyer's opinion in *Bolivarian Republic* explicitly addressed the international law implications of the statutory interpretation issue.[54] It bears emphasis that Justice Breyer is among the most "international-law-friendly" members of the Supreme Court. Thus, in FSIA cases, the particular predilections of individual judges may well affect the choice between evasive avoidance and fair weather alignment.

Consubstantial alignment is "the application by the domestic court of domestic norms that are consubstantial with the international norms."[55] The Final Report notes that, in many cases, "the distinction between evasive avoidance and consubstantial alignment is not easy to draw."[56] In the United States, this is especially true for international human rights because the U.S. has achieved a high degree of consubstantial alignment with international human rights norms through "silent incorporation" of those norms into federal constitutional and statutory law. The fact that incorporation occurs silently—i.e., without explicit reference to international norms—means that silent incorporation involves both consubstantial alignment and evasive avoidance.

Between 1948 and 1976, the United States aligned federal law with the human rights norms in the Universal Declaration of Human Rights through a process of silent incorporation.[57] During that period, the United States employed three primary mechanisms to align federal law with the Universal Declaration. First, in a series of decisions known as "incorporation cases," the Supreme Court made most provisions of the Bill of Rights binding on state governments. The consensus view in 1791 was that the Bill of Rights bound the federal government, but did not bind state governments. With minor exceptions, that consensus prevailed until 1948, when the UN adopted the Universal Declaration. Between 1948 and 1971, the Supreme Court decided about fifteen cases that "incorporated" specific provisions of the Bill of Rights and made them binding on state

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[49] *Cohen*, 858 F.3rd at 1153-54.
[50] 473 F.Supp.2d 591 (SDNY 2007).
[51] *Id.*, at 593.
[52] *See id.*, at 593-97.
[53] 137 S. Ct. 1312 (2017).
[54] *See id.*, at 1319-22.
[55] Final Report, *supra* note 24, para. 49.
[56] *Id.*, para. 50.
[57] This discussion of consubstantial alignment borrows liberally from Wayne Sandholtz & David Sloss, *The Universal Declaration and the Living Constitution* (work in progress, draft on file with author).

governments.[58] For example, in *Robinson v. California* (1962), the Court held that the Eighth Amendment ban on cruel and unusual punishments binds state governments.[59] Before 1962, the states decided for themselves what types of punishment were "cruel and unusual." After 1962, the Supreme Court imposed a uniform federal standard. The Court's decision in *Robinson* did not mention international law, but *Robinson* and its progeny produced a high degree of alignment between U.S. constitutional law and the international prohibition on cruel, inhuman or degrading punishment.

Second, in addition to the incorporation cases, the Supreme Court decided numerous cases between 1948 and 1976 establishing federal constitutional protection for "unenumerated rights"—i.e., rights that are not specifically enumerated in the Constitution's text. For example, the Court decided in *Loving v. Virginia* (1967) that state laws prohibiting interracial marriage are unconstitutional.[60] The U.S. Constitution says nothing about marital rights. Before 1967, many states prohibited interracial marriage. In *Loving*, though, the Court created a federal constitutional rule protecting an individual's right to marry the person of his or her choice. The Court's opinion did not reference international law, but *Loving* produced consubstantial alignment with Article 16 of the Universal Declaration, which protects the right of "men and women of full age" to marry "without any limitation due to race, nationality, or religion."[61]

Third, apart from Supreme Court decisions, Congress also promoted silent incorporation of human rights norms by enacting federal statutes that had the effect of aligning federal law with international norms. For example, Title II of the Civil Rights Act of 1964 guarantees "all persons" equal access to "any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."[62] The statute defines the term "public accommodation" to include hotels, restaurants, theaters, and other similar establishments. Many such establishments are privately owned and operated. The Fourteenth Amendment Equal Protection Clause bars discrimination by governments, but does not regulate private conduct. Thus, the 1964 Act expanded the scope of federal anti-discrimination law by prohibiting discrimination by private actors. The statute helped promote alignment with the Convention on Racial Discrimination—still in draft form in 1964—which obligates states to prohibit "racial discrimination by any persons, group, or organization."[63] The legislative history of the 1964 Civil Rights Act shows that Cold War politics was a significant factor in generating political support for the legislation.[64] However, the legislative history does not indicate that Congress had the conscious objective of aligning U.S. law with international human rights norms.

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[58] *See* David Sloss, *Incorporation, Federalism, and International Human Rights*, in Human Rights and Legal Judgments: The American Story (Austin Sarat ed. 2017).
[59] 370 U.S. 660 (1962).
[60] 388 U.S. 1 (1967).
[61] Universal Declaration of Human Rights, art. 16. For other examples of Supreme Court decisions involving unenumerated rights, see Sandholtz & Sloss, *supra* note 57.
[62] Pub. L. No. 88-352, 78 Stat. 241, 243 (July 2, 1964).
[63] International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(d), 660 U.N.T.S. 195, Mar. 7, 1966 (entered into force Jan. 4, 1969).
[64] *See* Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy (2000).

In sum, between 1948 and 1976—through a combination of federal legislation, judicial recognition of unenumerated rights, and the Supreme Court's incorporation decisions—the United States achieved a high degree of consubstantial alignment with international human rights norms. As of 1948, federal law in the United States provided significant protection for only 31 percent of the rights articulated in the Universal Declaration. In contrast, by 1976 federal law provided significant protection for about 87 percent of the rights in the Universal Declaration.[65] Many of the relevant judicial decisions could be classified as examples of evasive avoidance because the Court did not refer explicitly to international law. However, those decisions may also be properly classified as cases of consubstantial alignment because they generated alignment between U.S. federal law and international human rights norms.

International human rights aside, consubstantial alignment also characterizes judicial decisions in other areas of law. For example, the United States enacted the Refugee Act of 1980 to implement its obligations under the 1967 Protocol Relating to the Status of Refugees. U.S. courts have applied the Refugee Act in thousands of cases; most of those decisions do not refer explicitly to the Protocol or other international law sources. Even so, straightforward application of the domestic statute on its own terms often promotes alignment with international norms because Congress incorporated those norms into the statute.[66]

Overriding alignment is "the application of international law by the domestic court over conflicting domestic law."[67] In the United States, the "later-in-time rule" provides that a later-enacted statute overrides a prior conflicting treaty and a later-ratified treaty overrides a prior conflicting statute. Thus, in principle, judicial application of a later-in-time treaty to override a prior conflicting statute would entail overriding alignment. The Final Report notes that, in many cases, "apparent conflicts may be resolved" by interpreting the treaty and statute to be in harmony, thus avoiding application of the later-in-time rule.[68] In practice, U.S. courts rarely apply a later-in-time treaty to override a prior statute because they avoid conflicts by interpreting the two instruments to be in harmony with each other. (In contrast, U.S. courts often apply later-in-time statutes to override prior conflicting treaties. At least some such cases involve "negatory contestation."[69])

Cook v. United States is one of the few cases where the Supreme Court applied a treaty under the later-in-time rule to override a prior statute.[70] In *Cook*, U.S. Coast Guard officers boarded a British vessel that was allegedly engaged in illegal smuggling. Cook argued that the seizure was unlawful because it violated a 1924 treaty with Britain. The government argued that Section 581 of the Tariff Act of 1922 authorized the seizure. The Court held that the seizure was unlawful because the 1924 treaty superseded the 1922 statute under the later-in-time rule.[71] However, that

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[65] *See* Sandholtz & Sloss, *supra* note 57.

[66] *See, e.g.*, Matter of Kasinga, 21 I&N Dec 357 (BIA 1996) (holding that the practice of female genital mutilation can be the basis for a grant of asylum under the statute).

[67] Final Report, *supra* note 24, para. 45.

[68] *Id.*

[69] *See infra* notes 107-16 and accompanying text for discussion of negatory contestation.

[70] 288 U.S. 102 (1933). This paragraph borrows liberally from Sloss, Treaty Supremacy, *supra* note 7, at 138-40.

[71] *See Cook*, 288 U.S. at 111-19.

was not the end of the matter because Congress had re-enacted "section 581 in the Tariff Act of 1930 in the identical terms of the act of 1922."[72] The government argued that the 1930 statute superseded the 1924 treaty under the later-in-time rule. Justice Brandeis, writing for the Court, rejected that argument. He said: "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,"[73] and he found no evidence that Congress intended to abrogate or modify the 1924 treaty. Thus, the Court found a conflict between the 1924 treaty and the 1922 statute and applied the later-in-time rule to override the statute. However, it applied the presumption of consistency to support its holding that 1930 statute did not conflict with the 1924 treaty, even though the 1930 statute was virtually identical to the 1922 statute.

The Final Report says: "[I]n some instances a very strong presumption of consistency of domestic law with international obligations, even in the face of little or no ambiguity in domestic law, may produce overriding alignment."[74] It is difficult to identify modern examples of this phenomenon in U.S. judicial practice. However, the Supreme Court decision in *Chew Heong v. United States* provides an example of overriding alignment from an earlier era.[75] An 1868 treaty between the United States and China promised "free migration and emigration of their citizens and subjects, respectively, from the one country to the other."[76] A decade later, with mounting political pressure to restrict Chinese immigration, an 1880 treaty permitted the United States to restrict immigration of Chinese laborers.[77] Then Congress enacted the Chinese Exclusion Act of 1882, suspending immigration of Chinese laborers for ten years.[78] Under the treaties and the statute, Chinese laborers who lived in the United States before passage of the 1882 Act retained the right to exit and return. However, the government soon learned that courts were permitting entry of Chinese laborers who had not previously resided in the U.S., but who claimed falsely that they lived in the U.S. before 1882.[79] Accordingly, Congress enacted an 1884 amendment requiring Chinese laborers to produce a government-issued certificate establishing residence in the United States before May 1882 as "the only evidence permissible to establish this right of re-entry."[80]

The Court held in *Chew Heong* that a Chinese laborer was entitled to enter the country without the statutorily required certificate if he resided in the United States before enactment of the 1882 Act, left the country without a certificate before Congress passed the 1884 amendment, and then sought re-entry after passage of that amendment. The Court said: "[Because] the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputes to Congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction [of the statute] which

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[72] *Id.* at 119-20.
[73] *Id.* at 120.
[74] Final Report, *supra* note 24, para. 46.
[75] 112 U.S. 536 (1884).
[76] Burlingame Treaty, U.S.-China, July 28, 1868, 16 Stat. 739.
[77] Treaty Concerning Immigration, U.S.-China, art. I, Nov. 17, 1880, 22 Stat. 826.
[78] Act of May 6, 1882, 22 Stat. 58.
[79] *See* David Sloss, *Polymorphous Public Law Litigation: The Forgotten History of Nineteenth Century Public Law Litigation*, 71 Wash. & Lee L. Rev. 1757, 1814-18 (2014).
[80] Act of July 5, 1884, 23 Stat. 115.

recognized and saved rights secured by the treaty."[81] Thus, despite the unambiguous statutory language requiring a certificate to gain re-entry, and despite ample evidence that Congress probably did intend to abrogate treaty rights, the Court avoided a conflict between the statute and the treaties by applying a strong presumption of consistency and construing the statute in harmony with prior treaties.

The Final Report cites the Supreme Court decision in *Roper v. Simmons*[82] as an example of consubstantial alignment.[83] However, *Roper* might also be classified as an example of overriding alignment. *Roper* presented the question whether it is lawful to impose capital punishment on a person who was 17-years-old when he committed murder. The Court held in *Stanford v. Kentucky* (1989) that the Constitution permits capital punishment for crimes committed by 16 and 17-year-olds.[84] The ICCPR explicitly bars capital punishment "for crimes committed by persons below eighteen years of age."[85] When the United States ratified the ICCPR, it adopted a reservation to preserve the nation's right to impose capital punishment in cases where it would be constitutionally permissible under *Stanford*.[86] Hence, when *Roper* came to the Supreme Court in 2005, *Stanford* provided the governing domestic rule. In *Roper*, though, the Court overruled *Stanford* and created a new rule—barring capital punishment for crimes committed by 16 and 17-year-olds[87]—that aligned U.S. constitutional law with the international rule in the ICCPR. As a formal matter, the Court in *Roper* simply reinterpreted the Eighth Amendment. As a practical matter, though, the Court created a new rule of constitutional law that superseded the previous constitutional rule in *Stanford*. Thus, insofar as the *Roper* Court relied partly on international sources to justify its decision to overrule *Stanford*,[88] *Roper* is as a case of overriding alignment.

Hyper-alignment occurs when a domestic court goes "beyond what international law actually requires . . . finding international obligations where none actually exist or are at least debatable."[89] It is difficult to identify examples of hyper-alignment in recent U.S. judicial practice; the D.C. Circuit decision in *Zuza v. Office of the High Representative* may fit in this category.[90] The 1995 Dayton Peace Agreement, which ended the war in the former Yugoslavia, created the Office of the High Representative to oversee implementation of the agreement. Before 2004, Zoran Zuza held a government position in the Republic of Srpska, a region within Bosnia and Herzegovina. In January 2004, Jeremy Ashdown, then serving as High Representative, exercised his authority as High Representative to remove Zuza from his government post.[91] Ten years later, Zuza sued Ashdown for wrongfully terminating his employment as a government official in the Republic of Srpska. At that time, Ashdown was no longer employed as High Representative. The

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[81] *Chew Heong*, 112 U.S. at 549.
[82] 543 U.S. 551 (2005).
[83] Final Report, *supra* note 24, para. 52.
[84] 492 U.S. 361 (1989).
[85] International Covenant on Civil and Political Rights, art. 6(5), 999 U.N.T.S. 171, Dec. 16, 1966 (entered into force Mar. 23, 1976).
[86] *See* 138 Cong. Rec. S4783 (1992).
[87] *Roper*, 543 U.S. 551.
[88] *See id.*, at 575-78.
[89] Final Report, *supra* note 24, para. 55.
[90] 857 F.3d 935 (D.C. Cir. 2017).
[91] *See* Zuza v. Office of High Representative, 107 F.Supp.3d 90, 91-92 (D.D.C. 2015).

court dismissed Zuza's claim against Ashdown, reasoning that Ashdown was entitled to immunity under the International Organizations Immunities Act, a federal statute.[92] From an international law perspective, it is debatable whether Ashdown—as a retired officer of an "ad hoc international institution"[93]—was legally entitled to immunity from the jurisdiction of U.S. courts. Regardless, the court relied on a domestic statute that implements international rules to justify its ruling on the immunity issue.

C. Contestation

The Final Report distinguishes among three types of contestation: affirmative, negatory, and consubstantial contestation. This section addresses each of these categories.

Affirmative contestation occurs when a domestic court accepts "the validity or applicability of the international law norm but giv[es] it a meaning different from that which is generally accepted."[94] The Supreme Court decision in *United States v. Alvarez-Machain* provides an example.[95] Humberto Alvarez-Machain was a citizen and resident of Mexico. Agents of the U.S. Drug Enforcement Administration (DEA) organized an operation to kidnap him from his home in Mexico and bring him to the United States for a criminal trial. At trial, Alvarez-Machain argued that his forcible abduction violated the bilateral extradition treaty between the U.S. and Mexico. The Court ruled that the treaty merely provided one permissible method for extradition, but did not prohibit other methods, such as transnational abduction.[96] Alvarez-Machain argued "that the Treaty must be interpreted against the backdrop of customary international law, and that international abductions are so clearly prohibited in international law that there was no reason to include" a prohibition on forcible abductions in the treaty itself.[97] Most international law experts would presumably agree that the treaty, construed in light of customary international law, bars transnational forcible abductions. Even so, the Court applied its own, idiosyncratic approach to treaty interpretation and concluded that the treaty did not prohibit transnational kidnapping.

The Final Report notes that a special type of affirmative contestation occurs "when a domestic court diverges from the interpretation of international law given by an international court."[98] Here, *Sanchez-Llamas v. Oregon* is on point.[99] The Supreme Court decided *Sanchez-Llamas* shortly after the International Court of Justice issued its decision in *Avena*.[100] In *Avena*, the ICJ ruled that the United States was obligated under the Vienna Convention on Consular Relations (VCCR) to provide judicial hearings for individual prisoners who were sentenced to death or lengthy prison terms after their rights under article 36 had been violated. The ICJ held specifically that the United States may not invoke procedural default rules to prevent such

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[92] *See Zuza*, 857 F.3d at 938-39.
[93] *See* Office of the High Representative, General Information, http://www.ohr.int/?page_id=1139
[94] Final Report, *supra* note 24, para. 58.
[95] 504 U.S. 655 (1992).
[96] *See id.* at 663-70.
[97] *Id.* at 666.
[98] Final Report, *supra* note 24, para. 58.
[99] 548 U.S. 331 (2006).
[100] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12.

individuals from obtaining a judicial hearing.[101] Mario Bustillo, one of the petitioners in *Sanchez-Llamas*, sought a judicial hearing to secure a remedy for a violation of article 36. State courts in Virginia held that procedural default rules precluded him from obtaining a judicial hearing. On appeal to the Supreme Court, Bustillo argued that Virginia's decision to deny him a hearing violated the VCCR, as interpreted by the ICJ in *Avena*. The Supreme Court held, in essence, that the ICJ's interpretation of article 36 was incorrect. Properly interpreted, article 36 did not prohibit U.S. courts from applying procedural default rules to prevent individuals in Mr. Bustillo's position from obtaining a judicial hearing.[102]

The Final Report notes that affirmative contestation may sometimes "be the result of the court explicitly or implicitly deferring to the position of the executive on the" particular interpretive question.[103] Judicial deference to the executive branch probably contributed to the outcomes in both *Alvarez-Machain* and *Sanchez-Llamas*. The U.S. Government submitted an amicus brief in *Sanchez-Llamas*, arguing that the VCCR does not preclude application of procedural default rules.[104] The Court did not explicitly rely on the government's brief to support its interpretation of article 36, but it did note that "the meaning given [to treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight."[105] In *Alvarez-Machain*, the Court agreed with the government's construction of the treaty, but did not expressly defer to the government's interpretation. Justice Stevens, dissenting, argued that the government's "wish to reinterpret the Treaty to allow for an action that the Treaty in no way authorizes should not influence this Court's interpretation."[106] This passage suggests that Justice Stevens may have believed that the majority was unduly influenced by the government's interpretation of the treaty.

Negatory contestation involves "the denial of the validity or applicability of an international law norm."[107] *Breard v. Greene* is one example of negatory contestation.[108] Angel Breard was a Paraguayan national on death row in Virginia. In state court proceedings, Virginia denied him his rights under the VCCR. Accordingly, he filed a habeas corpus petition in federal court to challenge the validity of his death sentence and to vindicate his treaty rights. Shortly before Breard filed his federal habeas petition, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). AEDPA limited the availability of federal habeas relief by requiring petitioners to "develop the factual basis of [the] claim in State court proceedings"[109] before filing a federal habeas petition. The Supreme Court denied federal habeas relief because Breard failed to develop the factual basis of his VCCR claim in state court and because AEDPA superseded the

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[101] *See id.*, paras. 128-34.
[102] *See Sanchez-Llamas*, 548 U.S. at 350-60.
[103] Final Report, *supra* note 24, para. 58.
[104] Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006), Brief for the United States as Amicus Curiae Supporting Respondents.
[105] *Sanchez-Llamas*, 548 U.S. at 355.
[106] *Alvarez-Machain*, 504 U.S. at 686-87 (Stevens, J., dissenting).
[107] Final Report, *supra* note 24, para. 61.
[108] 523 U.S. 371 (1998).
[109] *Id.*, at 376 (quoting 28 U.S.C. § 2254(a)).

VCCR under the later-in-time rule.[110] Thus, the Court denied the applicability of the VCCR because AEDPA superseded the VCCR as a matter of domestic law.

Breard differs from *Sanchez-Llamas* in two respects. First, the Supreme Court decided *Sanchez-Llamas* after the ICJ judgment in *Avena*, but the Court issued its judgment in *Breard* before *Avena* was decided, so the *Breard* Court was not contesting the ICJ's interpretation of the VCCR. Second, AEDPA was not applicable to Mr. Bustillo's claim in *Sanchez-Llamas* because Bustillo sought habeas relief in state court and AEDPA applies only to federal habeas proceedings. Therefore, the later-in-time rule provided the basis for contestation in *Breard*, but not in *Sanchez-Llamas*.

The Supreme Court's decision in *Medellín v. Texas* provides a different example of negatory contestation.[111] Like both *Breard* and *Sanchez-Llamas*, *Medellín* arose from a VCCR violation. However, in contrast to *Sanchez-Llamas*—where the claimants in U.S. courts were not included in the *Avena* case—Mr. Medellín was one of the Mexican nationals specifically covered by the ICJ judgment in *Avena*. Therefore, *Medellín* implicated Article 94 of the UN Charter, which obligates the United States "to comply with the decision of the International Court of Justice in any case to which it is a party."[112] The ICJ judgment in *Avena* obligated the United States to provide a judicial hearing for Medellín and Article 94 obligated the United States to comply with that judgment. Medellín argued that the Article 94 obligation was directly binding on Texas state courts under the Supremacy Clause, which stipulates that treaties (such as the UN Charter) are "the supreme Law of the Land," and that "judges in every State (including Texas) shall be bound thereby."[113]

The Supreme Court rejected Medellín's claim on the ground that Article 94 is not self-executing.[114] The Court's rationale in *Medellín* is subject to conflicting interpretations. Ultimately, the Court failed to clarify the meaning of the term "non-self-executing"; it failed to articulate useful criteria for distinguishing between self-executing and non-self-executing treaties; and it failed to provide a coherent rationale to support its conclusion that Article 94 is non-self-executing.[115] Regardless, *Medellín* provides a good example of negatory contestation. The Court denied the applicability of Article 94 because, in the Court's view, Article 94 is not self-executing.[116]

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[110] *See id.*, at 375-77.
[111] 552 U.S. 491 (2008).
[112] UN Charter, art. 94.
[113] U.S. Const. art. VI, cl. 2.
[114] *See Medellín*, 552 U.S. at 504-14.
[115] For detailed critiques of *Medellín*, see David L. Sloss, *Taming Madison's Monster: How to Fix Self-Execution Doctrine*, 2015 BYU L. Rev. 1691, 1721-36 (2015); David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 Harv. Int'l L. J. 135, 182-87 (2012).
[116] One could also classify *Medellín* as an example of affirmative avoidance because the Court considered application of Article 94 but explicitly rejected it.

Consubstantial contestation occurs when domestic courts contest "the content of one rule of international law . . . because of the application, even if indirect, of the substance of another rule of international law."[117] *Owens v. Republic of Sudan* provides an example.[118] *Owens* arose under the "terrorism exception" to the Foreign Sovereign Immunities Act (FSIA). Congress first enacted the terrorism exception in 1996, then made major amendments in 2008.[119] The current version provides, in part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office . . . .[120]

The statute expressly creates a private right of action for claims against foreign states.[121] However, the statute authorizes claims against only a small number of foreign states designated by the government as "state sponsor(s) of terrorism."[122]

The *Owens* plaintiffs were victims of terrorist bombings carried out by al Qaeda against U.S. embassies in Kenya and Tanzania. "Starting in 2001 victims of the bombings began to bring suits against the Republic of Sudan and the Islamic Republic of Iran," alleging that Iran and Sudan provided material support to al Qaeda.[123] The D.C. Circuit largely affirmed the lower court judgments awarding damages against both Iran and Sudan. *Owens* clearly involves contestation: the damage awards against sovereign states are at odds with international rules protecting sovereign immunity. Even so, the decision in *Owens*—and the "terrorism exception" that it applies—might be justified as an effort to implement other international law principles, such as Article 14 of the Convention Against Torture,[124] and the UN guidelines on the right to a remedy.[125]

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[117] Final Report, *supra* note 24, para. 63.
[118] 864 F.3d 751 (D.C. Cir. 2017).
[119] *See id.*, at 763-65 (summarizing the history of the terrorism exception).
[120] 28 U.S.C. § 1605A(a)(1).
[121] 28 U.S.C. § 1605A(c).
[122] 28 U.S.C. § 1605A(a)(2).
[123] *Owens*, 864 F.3d at 762.
[124] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (Dec. 10, 1984) (entered into force June 26, 1987). Article 14 grants torture victims "an enforceable right to fair and adequate compensation."
[125] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N.G.A. Res. 60/147 (Dec. 2005).

III.
Conclusions

U.S. courts routinely practice fair weather alignment and consubstantial alignment to harmonize domestic law with international law. In the past decade alone, U.S. courts have decided hundreds of cases involving fair weather alignment and thousands of cases involving consubstantial alignment. In contrast, cases involving overriding alignment or hyper-alignment are quite rare.

In the decade after the Supreme Court decision in *Breard v. Greene*,[126] cases implicating the Vienna Convention on Consular Relations (VCCR) yielded dozens, perhaps hundreds, of judicial decisions involving either affirmative or negatory contestation. Setting aside VCCR cases, though, judicial decisions involving affirmative or negatory contestation are relatively rare. Since Congress enacted the terrorism exception to the FSIA in 1996, federal courts have decided dozens of cases implicating the terrorism exception, many of which involve consubstantial contestation. Similarly, since enactment of the Torture Victim Protection Act (TVPA) in 1992,[127] federal courts have decided a few hundred cases under that statute. Insofar as the TVPA imposes civil liability for torture committed by foreign government officials who might be entitled to immunity under international law, some of those cases also involve consubstantial contestation.[128] Aside from these examples, though, decisions involving consubstantial contestation seldom arise.

U.S. courts routinely engage in evasive avoidance by deciding cases without reference to international law, even though international law could potentially apply. In many cases, courts engage in evasive avoidance because the parties do not raise relevant international law arguments. When the parties do not invoke international law, courts are unlikely to do so on their own initiative. The failure of parties to present international law arguments is partially attributable to the fact that many U.S. lawyers are not familiar with international law. However, to some extent, evasive avoidance may also be a product of tactical decisions by litigants. In cases where international human rights norms are potentially applicable, human rights claimants may have a better chance of winning by focusing on domestic law arguments to the exclusion of international law arguments.

US courts sometimes invoke NSE doctrine to justify a posture of affirmative avoidance.[129] A prior empirical study, based on judicial decisions between 1970 and 2006, estimated that U.S. courts decided almost ninety percent of treaty cases without even mentioning NSE doctrine. Courts specifically held that treaties were non-self-executing in only about five or six percent of treaty cases.[130] It is possible that lower courts have been applying NSE doctrine to support affirmative avoidance with greater frequency since the Supreme Court's 2008 decision in *Medellín*. However,

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[126] 523 U.S. 371 (1998).
[127] Pub. L. No. 102-256, 106 Stat. 73 (1992).
[128] *See, e.g.*, Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012) (rejecting defendant's immunity defense to a claim under the TVPA).
[129] *See, e.g.*, Republic of Marshall Islands v. United States, 865 F.3d 1187 (9th Cir. 2017).
[130] David Sloss, *United States*, in The Role of Domestic Courts in Treaty Enforcement: A Comparative Study (Sloss ed. 2009).

available scholarly analysis is inconclusive in this respect.[131] Aside from judicial decisions involving NSE doctrine, cases where courts practice affirmative avoidance are relatively rare.

[131] *See* Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 Yale J. Int'l L. 51, 70-76 (2012); David Sloss, Medellin's Influence on the Judicial Application of Treaties (Feb. 2012), available at http://opiniojuris.org/2012/02/24/medellin%E2%80%99s-influence-on-the-judicial-application-of-treaties/