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Lately, a great deal of academic commentary has been devoted to the Supreme Court's international interpretive work.[1] Writings consistently highlight the Court's failure to use accepted rules, principles, or canons of construction when interpreting treaties or statutes affecting foreign governments and nationals. The Court's work product, which generally reflects a routine adoption of the executive's interpretation, variously has been termed "bankrupt"[2] and "monstrous."[3]

This criticism of the Court's foreign interpretive efforts is a bit surprising in view of the ongoing absence of intelligible principles in much of the Court's domestic statutory construction work. Local Court watchers and critics recognize, however, that fidelity to neutral principles is not an interpretive cornerstone for the Court.[4] Consequently,

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1. *See* David J. Bederman, *Revivalist Canons And Treaty Interpretation*, 41 UCLA L. REV. 953 (1994); Harold Hongju Koh, *Reflections On Refoulement And Haitian Centers Council*, 35 HARV. INT'L L.J. 1 (1994) [hereinafter REFLECTIONS]; Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994) [hereinafter HAITI PARADIGM]; Jordan J. Paust, *After* Alvarez-Machain, *Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims*, 67 ST. JOHNS L. REV. 551 (1993); Herman de J. Ruiz-Bravo, *Monstrous Decision: Kidnapping is Legal*, 20 HASTINGS CONST. L.Q. 833 (1993); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1993).

2. Bederman, *supra* note 1, at 954.

3. Jonathan Bush, *How Did We Get Here? Foreign Abduction After* Alvarez-Machain, 45 STAN. L. REV. 939, 943 (1993). Justice Stevens previously made this observation in *Alvarez-Machain. See* United States v. Alvarez-Machain, 504 U.S. 655, 687 (1992) (Stevens, J., dissenting) ("I suspect most courts throughout the civilized world—will be deeply disturbed by the 'monstrous' decision the Court announces today.").

4. As examples, see Hans W. Boade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991); Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413 (1993); Vincent Di Lorenzo, *A Fixed Principle Approach to Statutory Construction: The Glass-Steagall Act as a Test Case*, 1991 B.Y.U. L. REV. 1285; Jonathan R. Macey & Geoffrey P. Miller, *The*

academics live with the frustrations of politicized decision making while searching for analytical strategies that bring coherence to the Court's work and effectuate congressional intent.[5]

The primary goal of this article is to go beyond the "rule of deference"[6] theory and explore how and why the Court routinely rejects or ignores the interpretations offered by foreigners when their views conflict with those of the executive. By exposing the imbalance and unfairness of the Court's approach, perhaps this article will open the door for remedial measures.

This article does not provide an exhaustive historical analysis of Supreme Court response to amici efforts, but rather sets out several historical spotlights which illuminate the futility of foreign amici. This illumination is accomplished by exploring three different types of amici "picketing": (1) purely domestic, (2) domestic-foreign, and (3) purely foreign. The term "amici picketing" refers both to formal brief submission as well as extra-judicial activities intended to influence the Court.

Canons of Statutory Construction and Judicial Preferences, 45 VAND. L. REV. 647 (1992); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995).

5. The primary mechanism for reining in the Court after statutory detours is the congressional override. Initial popular outcry often crystallizes into concrete advocacy which serves as a catalyst for congresspersons to introduce legislation designed to overturn the Court's interpretation. The civil rights area is a constant battlefield for the Court and Congress as evidenced by repeated congressional overrulings of the Court's construction of civil rights statutes. For a discussion of the ongoing battle between Congress and the Court, see Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095 (1993).

Another strategy used to avoid a harmful meaning assigned by the Court is to litigate the issue before a judge who does not share the Court's view. For example, in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), the Court ruled that an employment discrimination plaintiff is not entitled to judgment as a matter of law if he proves a prima facie case and also proves that the employer's defense was a total fabrication. *Id.* at 2747-48. The Court interpreted Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, as requiring that the employee show not only that the employer was lying, but that the lies were intended to hide discrimination. However, the Hicks decision conceded that proof from the prima facie case and proof that the employer's reason is incredible "may" in some instances be sufficient to support a judgment for the employee. *Id.* at 2749. This "loophole" gives judges who do not believe in the pretext-plus rule an opportunity to rule for the employee without evidence that the real motivation for the employer's decision was prohibited discriminatory animus.

6. *See* Bederman, *supra* note 1, at 960-61, 1015-16 (noting that the rule of deference is ingrained and has been taken to new heights by the Rehnquist Court).

First, the article looks at a scenario of purely domestic protest and amici brief submission, noting this approach's political nature, high costs and limited benefits. This inquiry is fleshed out in a discussion of the Court's response to domestic amici in statutory interpretation cases. The article traces the Court's intermittent accountability when interpreting domestic legislation to the integration of amici in the tripartite democratic structure—a status foreign amici are unable to achieve. Because foreign constituencies do not have access to the democratic processes that help make the Court accountable,[7] and because the American public seldom cares about an executive interpretation that adversely affects foreigners, principled construction becomes a weak weapon to use in attacking the Court's rule of deference to the executive.

This article concludes that domestic protest and amicus brief submissions have the most influence over the Court. But even this approach has its limitations because it tends to be temporary, especially when the Court is particularly activist.

Second, this article uses the Haitian refugee cases to demonstrate the results that occur when the efforts of domestic and foreign constituencies coalesce in exerting pressure on the Court. The article concludes that this second approach will more likely get the executive's attention, but will have little or no effect on the Court.

Third, this article considers the effectiveness of purely foreign extrajudicial and amici pressure, showing that this approach is the least beneficial and is typically received with judicial indifference. Because foreign critics have never been able to impugn the Court's institutional legitimacy in any meaningful way,[8] the article concludes that focus on the

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7. At the outset, Congress' role in treaty creation and interpretation is limited. Participation in the process is limited to the Senate, U.S. CONST. art II, § 2, and senatorial interpretations are given little weight. *See* Bederman, *supra* note 1, at 959. In any event, at the treaty-making stage, congressional focus is on promoting national interests, not advocating for non-constituency foreign states. *See* James C. Wolf, Comment, *The Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023, 1058 (1988) (Senators rarely hear views of foreign treaty parties and rely heavily on the executive when voting). Further, influence buying through financial contributions is not an option for foreign nationals because they are statutorily barred from doing so. *See* 2 U.S.C. § 441(e) (1994); *see also, Turley, supra* note 1, at 250 (foreign interests must turn to the executive because Congress is not readily accessible).

8. Although dismay can be found in narrow academic circles when the Court's treaty construction is unprincipled, the outcry is never as widespread or heartfelt as when the Court botches domestic legislation. It could be that, like the

Court's interpretive methodology is misplaced. Absent an internal political mechanism that triggers popular American outcry, the Court will likely remain insulated from, and indifferent to, foreign amici.

I. DOMESTIC CONSTITUENCY OUTCRY

Applying public or political pressure on the United States Supreme Court in order to shape its deliberations is commonplace. Extrajudicial pressure tactics include marches, mail, academic commentary, or even such radical demonstrations as publicly displaying a fetus in a bottle.[9] Attempts to influence are particularly notable when the Court is adjudicating sensitive constitutional cases. While the Court is theoretically insulated from political forces,[10] there is weighty evidence that such strategies sometimes influence outcomes.[11] In fact, there is evidence that the Justices sometimes write opinions designed to incite public response, so as to mold future interpretive deliberations.[12]

Another common form of potential influence on the Court is amicus briefs.[13] Such briefs are a prescribed part of the Court's adjudicative mechanism,[14] and are often preceded and backed by public outcry. In constitutional and statutory

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Court, most American scholars react to treaty language with aloofness, and have a default rule of deference to both the executive and judiciary. A good part of the explanation, however, probably lies in self-interest, in the sense that the American populace and critics have no stake in challenging decisions that aggrandize "American" privileges.

9. *See* Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685 (1990).

10. Richard Delgado, *Judicial Influences and the Inside-Outside Dichotomy: A Comment On Professor Nagel*, 61 U. COLO. L. REV. 711 (1990); Larry G. Simon, *The Supreme Court's Independence: Accountability, Majoritarianism, and Justification, Comments on Seidman*, 61 S. CAL. L. REV. 1607 (1988).

11. *See* Nagel, *supra* note 9, at 697 ("[M]onumental civil rights decisions were not the product of Justices oblivious to people in the streets.").

12. Professor Nagel offers as examples Justice Blackmun's dissent in the abortion case Webster v. Reproductive Health Services, 492 U.S. 490, 537 (1989) (Blackmun, J., dissenting), and Justice Rehnquist's dissent in the flag burning case Texas v. Johnson, 491 U.S. 397, 421 (1989) (Rehnquist, C.J., dissenting). Nagel, *supra* note 9, at 687-89.

13. For a discussion of the origins and development of amicus curiae, see Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963); Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave*, 41 AM. U. L. REV. 1243 (1992).

14. *See* Sup. Ct. R. 37.

interpretation cases, domestic amici have sometimes had persuasive impact on the Court.[15] *Patterson v. McClean Credit Union*[16] offers some good insights into how local protest filters through our domestic processes and affects judicial conclusions.

A. Patterson v. McClean Credit Union

Patterson is a good example of the influence of domestic amici on the Court's interpretive choices. At issue in *Patterson* was a civil rights statute, § 1981, which provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[17]

Brenda Patterson sued her employer under this provision alleging racial harassment on the job. The district court dismissed her complaint, finding that § 1981 does not police racial harassment while employed. The court of appeals agreed, finding that § 1981 regulates only the right to make and enforce contracts, not terms and conditions of employment.[18] The Supreme Court agreed to hear the case in order to determine whether it should extend *Runyon v. McCrary*'s[19] prohibition of private contractual discrimination to on-the-job discrimination. In 1976, the Court had decided in *Runyon* that § 1981 prohibits discrimination by private bodies.[20]

The Court heard arguments in *Patterson* in February 1988. However, a short time later it ordered the parties to reargue the case, this time requesting that they address the question of

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15. *See, e.g.*, Susan Hedman, *Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group Amici Curiae in Environmental Cases Decided by the Supreme Court*, 10 VA. ENVTL. L.J. 187 (1991); David S. Ruder, Address, *The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 WIS. L. REV. 1167.

16. 491 U.S. 164 (1989), *superseded by statute*, 42 U.S.C. § 1981 (1994).

17. 42 U.S.C. § 1981(a) (1988).

18. Patterson v. McClean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986) *aff'd in part, vacated in part*, 491 U.S. 164 (1994), *superseded by statute*, 42 U.S.C. § 1981 (1994).

19. 427 U.S. 160 (1976).

20. *Id.* at 171-74.

whether the *Runyon* Court's interpretation of § 1981 was correct. The decision to test the legitimacy of *Runyon* triggered a firestorm of criticism from many segments of American society.[21] After all, neither party to the lawsuit had questioned the legality of *Runyon* and that issue was not before the Court.

Congress as well as civil rights, labor, and religious groups, among others, saw this move by the Court as an attempt by conservative Justices to roll back important civil rights protection; these groups filed amicus briefs with the Court arguing that *Runyon* was correctly decided.[22] The briefs apparently influenced the Court as evidenced by its ruling that even if *Runyon* was not correctly decided, stare decisis supported deference to its interpretation that § 1981 prohibits private discrimination.[23] The Court stated that: "Whether *Runyon's* interpretation of § 1981 as prohibiting racial discrimination in the making and enforcement of private contracts is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country."[24]

The influence of amici in *Patterson* can hardly be overstated. In *Patterson* the Court interpreted § 1981 as not prohibiting on-the-job discrimination although the language of the statute is susceptible to such a construction.[25] In addition, the Court

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21. *See* Reginald C. Govan, *Framing Issues and Acquiring Codes: An Overview of the Legislative Sojourn of the Civil Rights Act of 1991*, 41 DEPAUL L. REV. 1057, 1063 (1992) ("That request by the Supreme Court unleashed a firestorm of opposition from Congress, religious groups, and the civil rights and labor communities, all of whom filed amicus briefs essentially saying to the Court, 'Don't you dare.'" (footnote omitted)); Barbara L. Kramer, Comment, Runyon *Reconsidered: The Future of Section 1981 as a Basis for Employment Discrimination Claims*, 38 CLEV. ST. L. REV. 251, 268 n.178 (1990) ("No one could have expected the organized outcry generated by the order. By early June, a coalition of 112 civic groups, 47 state attorneys general, 66 U.S. senators, and 118 members of the House of Representatives were preparing amicus briefs in defense of *Runyon*.").

22. *See* Govan, *supra* note 21 at 1063; Kramer, *supra* note 21 at 268.

23. *See* Govan, *supra* note 21 at 1063. ("Ultimately, the Court, backing down from a frontal attack on the scope of section 1981, reaffirmed its earlier decision in *Runyon*.") (footnote omitted); *see also* Lawrence C. Marshall, *"Let Congress Do It": The Case For An Absolute Rule Of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 179 n. 12 (1989) ("Perhaps an argument can be made that the decision to reaffirm *Runyon* was not really based on stare decisis, but was a response to the remarkable public outcry accompanying the Court's announcement that it would reconsider *Runyon*.").

24. Patterson v. McClean Credit Union, 491 U.S. 164, 174 (1989) *superseded by statute*, 42 U.S.C. 1981 (1994).

25. *Id.* at 177. The Court ruled that the statute's prohibition was limited to discrimination in the hiring process. It found that "make" related to discriminatory offers and refusals to contract, *id.* at 176, and that "enforce" only related to an

rejected critical legislative history on the statute's origin and evolution which showed that it was "designed to protect the freedmen from the imposition of working conditions that evidence an intent on the part of the employer not to contract on nondiscriminatory terms."[26] Retention of *Runyon's* prohibition of private discrimination was one of a few victories discrimination victims enjoyed when the Court completely constricted the ambit of § 1981 in *Patterson*.

Patterson left discrimination victims with limited protection and left the *Runyon* decision open to future challenge. While amici input in *Patterson* may have shielded *Runyon*, that protection was only superficial because the Court did not rule that *Runyon* correctly interpreted § 1981. Civil rights advocates had to step up their efforts politically and persuade Congress that the Court's decision in *Patterson* was wrong. After a two year battle, Congress passed the Civil Rights Act of 1991,[27] which included a provision that essentially overruled *Patterson* and provided more security for *Runyon*.[28]

As *Patterson* illustrates, amici protest requires backing from an array of institutional organizations, which serve as reflectors of public outcry. Couple this with the check of Congress as a "veto-empowered" coordinate branch, and the potential to chart the Court's interpretive course can be realized. But the democratic model as an institutional restraint on the Court's wayward interpretive choices is unreliable because the Court has demonstrated a willingness to act outside of constitutional constraints. In the civil rights area, for example, the Court has been willing to revisit statutory provisions after congressional amendments in order to "legislate" its preferences.[29]

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individual's right to equal access to the legal process, *id.* at 177.

26. *Id.* at 206 (Brennan, J., dissenting).

27. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

28. *Id.* § 101. The relevant provisions provide: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 101(b). To insulate *Runyon*, Congress also provided: "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." *Id.* § 101(c).

29. The Court's decision to return and review burden allocations in disparate treatment cases soon after the Civil Rights Act of 1991 was passed is one example. *See* St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993) (holding that plaintiff's proof that an employer's defense is a lie is not sufficient to support judg-

B. Democratic Rigors As Check On Judicial Abuse

The Court's willingness to offer interpretations grounded in popular majoritarian preferences also undermines the notion that the Court is most susceptible to influence when protest is grounded in and filters through the rigors of the democratic process. Recent examples include the Court's hurried lead in defining the parameters for civil rights[30] and affirmative action.[31] Cases in these areas show that the Court sometimes assumes the role of political pollster and offers interpretations consistent with popular majoritarian sentiments prior to the appropriate coordinate branch acting. The Court's majoritarian action preempts domestic popular outcry and amici—the most powerful type of nonparty protest.

National civil rights attention has moved from sympathy and support for minorities[32] to concerns about the rights of "innocent white victims." In the public sphere, polls suggest a growing concern among caucasians regarding affirmative action programs.[33] This unpopularity has set executive, legislative, and judicial forces in motion.

At the political level, "angry-white-male[s]" have voted their opposition by abandoning the Democratic Party and helping Republicans gain control of Congress.[34] These individuals are also supporting ballot initiatives that would eliminate preferential programs instituted by state governments.[35] Presidential hopefuls have tapped into affirmative action's disfavor to

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ment as a matter of law).

30. Missouri v. Jenkins, 115 S. Ct. 2038 (1995); Miller v. Johnson, 115 S. Ct. 2475 (1995).

31. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

32. As late as 1991, "rainbow" support could be found for minority-protective schemes. Civil rights advocates were able to overcome a presidential veto and return with bipartisan support sufficient to secure passage of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C.).

33. Richard Lacayo, *A New Push for Blind Justice*, TIME, Feb. 20, 1995, at 39; Steven V. Roberts, *Affirmative Action on the Edge*, U.S. NEWS & WORLD REP., Feb. 13, 1995, at 32.

34. *See* Angie Cannon, *Stand up for What Works, Clinton Urges*, MIAMI HERALD, April 9, 1995, at A13 ("While Clinton was trying to placate the Democrats who have long been supporters of affirmative action, he also was trying to appease the so-called angry-white-male voters, who abandoned the Democratic Party in droves in November and helped catapult Republicans to power.").

35. *See id.*; *see also* Angie Cannon & Donna St. George, *Clinton Stands Firm on Affirmative Action*, MIAMI HERALD, July 20, 1995, at A5; Peter Schrag, *Son of 187*, NEW REPUBLIC, January 30, 1995, at 16.

galvanize the Republican party, divide Democrats, and appeal to suburban white male voters.[36] At the legislative level, Senator Dole and others have threatened to introduce legislation to ban preferential schemes grounded in race or gender.[37] At the executive level, President Clinton is reviewing an array of preferential programs in order to weed out the "unnecessary" ones and placate Democrats and white swing voters.[38]

The scores of preferential schemes at issue have their genesis in executive orders, statutes, and other regulatory schemes. Furthermore, the public concerns that triggered the creation of these programs are now giving way to public outcry that seeks their elimination. Rather than wait for statutory or regulatory repeal, the Supreme Court joined the fray and decided *Adarand Constructors, Inc. v. Pena*,[39] a minority set-aside case. In a decision that smacks of popular white anger, the Court ruled that any public preferential scheme grounded in race must be subjected to strict scrutiny analysis.[40] This conclusion effectively overruled two Supreme Court precedents which established a lesser level of scrutiny for federal actors.[41]

Adarand also sends a grim signal to supporters of employment affirmative action schemes, soon after these supporters were able to salvage some preferential programs in Congress. After expending a great deal of political energy and bargaining chips on the Civil Rights Act of 1991,[42] civil rights advocates

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36. *See* Howard Fineman, *Race and Rage*, NEWSWEEK, April 3, 1995, at 23; Dave Lesher & Amy Wallace, *Battle Looms on Move to Color-Blind Colleges*, MIAMI HERALD, July 22, 1995, at A14; Carl Mollins, *A White Male Backlash*, MCCLEAN'S, March 20, 1995, at 22.

37. *See* Harvey Berkman, *Guide to Affirmative Action is Sent to Agencies*, NAT'L L.J., July 17, 1995, at A12.

38. Fineman, *supra* note 36, at 22. The President's first report released on July 19, 1995, concluded that federal affirmative action programs are necessary and fair. *See* Harvey Berkman, *Clinton Report Makes Case for Affirmative Action*, NAT'L L.J., July 31, 1995, at A11.

39. 115 S. Ct. 2097 (1995).

40. *Id.*

41. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (permitting intermediate scrutiny of two FCC policies that gave preferences to racial minorities), *overruled by*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. (1995); Fullilove v. Klutznick, 448 U.S. 448 (1980) (holding that federal preferential programs need not be subjected to the most searching judicial inquiry because the federal government stands above racial politics).

42. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified largely in scattered sections of 42 U.S.C.). For a discussion of the political energy expended to secure passage, see Stephen A. Plass, *Bedrock Principles, Elusive Construction, and the Future of Equal Employment Laws*, 21 HOFSTRA L. REV. 313 (1992).

were able to protect schemes recognized as legal at that time.[43] In view of *Adarand*, it is doubtful the Court intends to wait on congressional initiatives designed to roll back or eliminate employment preferential schemes.[44] In 1991, affirmative action opponents did not have the political muscle to legislate affirmative action out of Title VII.[45] Even now, they may not have the popular or legislative strength to statutorily ban such preferences. But the Court's alliance with this majoritarian cause will likely keep it off the sidelines. Whether or not there is sufficient public support or congressional will to legislate out employment preferences, the Court is likely to find congressional intent barring such programs, or congressional indecision and deference to the Court's "expertise."[46] As a result, even domestic efforts which sometimes yield principled results remain costly and susceptible to future Court activism.

II. FOREIGN AND DOMESTIC PROTEST COMBINED

Another approach picketers may use to influence the Court combines foreign and domestic protest and amicus brief submission. This approach is sometimes pursued in treaty interpretation cases. The United States Constitution recognizes treaties as the law of the land. Clause 2 of Article VI provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

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43. *See* Pub. L. No. 102-166, § 116, 105 Stat. 1071, 1079 (1991) ("Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.").

44. Several bills already have been sponsored by Senator Helms. *See* Civil Rights Restoration Act of 1995, S. 26, 104th Cong., 1st Sess. (1995); *see also* S. 318, 104th Cong., 1st Sess. (1995).

45. Republican opponents of affirmative action settled for statements in the record such as Senator Hatch's comment that "[the Act] expresses neither congressional approval nor disapproval of any judicial decision affecting court-ordered remedies, affirmative action, or conciliation agreements."). *See* 137 CONG. REC. S15,320 (daily ed. Oct. 29, 1991) (statement of Sen. Hatch).

46. The Court took this route when it was called upon to say whether the 1991 Civil Rights Act applied retroactively. *See* Landgraf v. USI Film Prod., 114 S. Ct. 1483 (1994); Rivers v. Roadway Exp., Inc., 114 S. Ct. 1510 (1994) (holding that the Act does not apply retroactively and that statutory text and legislative history suggest that Congress failed to resolve this issue).

> the Constitution or Laws of any State to the Contrary notwithstanding.[47]

The Constitution also provides an advice and consent role for the Senate in the treaty-making process.[48]

The Constitution vests the Supreme Court with final authority to interpret treaties,[49] and the jurisprudential rules for treaty interpretation are akin to those utilized in statutory construction cases. In that regard, the Court has long recognized that textual mandates should take precedence; when text is clear it should be given its obvious meaning.[50] In harmony with its position of textual preeminence, the Court has also noted that interpretations offered by the executive are not conclusive,[51] yet historically the Court has gone on to adopt such interpretations no matter how controversial.[52] Further, the Court may be influenced by express senatorial declarations made at the time a treaty is ratified.[53] In contrast, interpretations offered by foreign treaty parties have been rejected[54] or

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

48. U.S. CONST. art. II, § 2 ("He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

49. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .").

50. Maximov v. United States, 373 U.S. 49, 52-54 (1963); *see also* United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992) (text is the first source of guidance).

51. However, the Court has also repeatedly concluded that such interpretations should be given great weight. *See* Sumitomo Shoji Am., Inc., v. Avagliano, 457 U.S. 176, 184-85 (1992) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); Kolovrat v. Oregon, 366 U.S. 187, 194 (1960) ("While courts interpret treaties for themselves, the meaning given them by the department of government particularly charged with their negotiation and enforcement is given great weight." (footnote omitted)); *see also* Factor v. Laubenheimer, 290 U.S. 276, 295 (1933).

52. Recent examples include the *Haitian Refugee* and *Alvarez-Machain* cases. *See* Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993); United States v. Alvarez-Machain, 504 U.S. 655 (1992).

53. *See* Bederman, *supra* note 1, at 959. For a broader discussion of the Senate's role in treaty making and interpretation, see Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991).

54. *See* Itel Containers Int'l Corp. v. Huddleston, 113 S. Ct. 1095 (1993). In *Itel*, an American cargo container company argued that it was exempt from state sales tax because, among other things, this tax conflicted with two international conventions to which the United States is a signatory. *Id.* at 1098. To support this argument, Itel relied heavily on an amicus brief filed by the United Kingdom

ignored[55] although foreign governments have been encouraged by the United States State Department to file amicus briefs.[56]

Foreign amici's failure is in some measure due to the historic rule of deference to executive interpretations.[57] But this is only part of the story. The opinions, actions, and inaction of foreign governments have played a role in the Court's interpretive work, but only when they confirm and buttress executive interpretations.[58] The Court's selective consideration and reli-

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which demonstrated that the United Kingdom imposed no such tax on container leases of that kind. *Id.* at 1100. The Court rejected this argument and other supporting evidence by noting that:

> As further evidence in support of its position, Itel points to the statements of signatory nations objecting to Tennessee's taxation of container leases. With all due respect to those statements, we adhere to our interpretation. We are mindful that 11 nations (Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Norway, Spain, Sweden and the United Kingdom), each a signatory to at least one Container Convention have sent a diplomatic note to the United States Department of State submitting that they do not "impose sales taxes (or equivalent taxes of different nomenclatures) on the lease of cargo containers that are used in international commerce among the Contracting Parties to the Conventions."

Id. at 1100-01 (quoting Appendix to Brief for United Kingdom and Northern Ireland as Amicus Curiae at 1a, *Itel*, 113 S. Ct. 1095).

55. In United States v. Alvarez-Machain, 504 U.S. 655 (1992), no reference to Mexico's amicus brief was made in the majority opinion. The persuasive interpretation offered by Mexico as amicus had to be developed in dissent. *See id.* at 671 n.1, 673-75 & n.14 (Stevens, J., dissenting).

56. *See Diplomatic Missions and Embassy Property: Communications to Courts*, 1978 DIGEST § 1, at 560 (discussing the switch from diplomatic notes transmitted to the Court to amicus briefs).

57. *See generally* Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988). For a discussion associating this deference with conservative Justices, see Erwin Chemerinsky, *Is the Rehnquist Court Really that Conservative?: An Analysis of the 1991-92 Term*, 26 CREIGHTON L. REV. 987 (1993). For discussions on how this deferential posture plays itself out in immigration matters, see Johnson, *supra* note 4; and Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

58. *See* Air France v. Saks, 470 U.S. 392 (1985), in which the Court relied on the "opinions" expressed by signatories of the Warsaw Convention made at an international conference on air law, in interpreting that treaty's use of the word "accident." The Court ruled, "'we find the opinions of our sister signatories to be entitled to considerable weight.'" *Id.* at 404 (citing Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)); *see also id.* at 403 ("Reference to the conduct of the parties to the Convention . . . helps clarify the meaning of the term.").

The Court's willingness to rely on the conduct of foreign states when it coincides with the executive's interpretation is evidenced by several decisions. See Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243 (1984), which relied on the past practice of foreign states to interpret the air cargo liability limitation

ance on foreign sources highlights the potential influence these sources may have when presented to the Court in the form of amici. Yet that potential has gone unrealized for so long that it is evident that that form of protest suffers significant limitations. The Haitian refugee cases illustrate some of the weaknesses of foreign amici, even of foreign amici who have domestic constituencies rallying by their side.

A. Domestic Interpretation of the INA and Refugee Protocol

The Haitian refugee crisis arose when, on May 23, 1992 President Bush by Executive Order implemented a policy of interdicting refugees in international waters and returning them to their country of origin without screening to determine

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provision of the Warsaw Convention. Siding with the executive's interpretation that the Convention's liability limit remains enforceable, the Court stated: "Our task of construing those purposes is, however, made considerably easier by the 50 years of consistent international and domestic practices under the Convention." *Id.* at 255. The Court added:

> We may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories in the first 40 years of the Convention's existence. In determining whether the Executive Branch's domestic implementation of the Convention is consistent with the Convention's terms, our task is to construe a "contract" among nations. The conduct of the contracting parties in implementing that contract in the first 50 years of its operation cannot be ignored.

Id. at 259-60 (citations omitted); *see also* Sumitomo Shoji America Inc. v. Avagliano, 457 U.S. 176 (1981) (the Court accepted an interpretation of the Friendship, Commerce and Navigation Treaty offered by Japan's Ministry of Foreign Affairs). In *Sumitomo*, the Court noted that "[b]oth the Ministry of Foreign Affairs of Japan and the United States Department of State agree that a United States corporation, even when wholly owned by a Japanese company, is not a company of Japan under the Treaty and is therefore not covered by Article VIII(1). . . . Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Id.* at 183-85.

An example of foreign state inaction serving as a reliable interpretive guide can be found in O'Connor v. United States, 479 U.S. 27 (1986). In *O'Connor* the Court relied on the government of Panama's silence as support for the Court's conclusion that the Panama Canal Treaty did not exempt from United States income taxes certain employees of the Panama Canal Commission. The Court found that

> [i]t is undisputed that, pursuant to clear Executive Branch policy, the Panama Canal Commission consistently withheld United States income taxes from petitioners and others similarly situated and that Panama, which had four of its own nationals on the Board of the Commission, did not object. The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning.

Id. at 33 (citations omitted).

their eligibility for asylum.[59] Although the order did not men-

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59. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992), *reprinted in* 8 U.S.C. § 1182 (1994). The Executive Order reads:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1) . . .), and whereas:
>
> (1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States;
>
> (2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;
>
> (3) Proclamation No. 4865 [set out [above]] suspends the entry of all undocumented aliens into the United States by the high seas; and
>
> (4) There continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally;
>
> I, GEORGE BUSH, President of the United States of America, hereby order as follows:
>
> SECTION 1. The Secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.
>
> SEC. 2. (a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.
>
> (b) Those instructions shall apply to any of the following defined vessels:
>
> (1) Vessels of the United States, meaning any vessel documented or numbered pursuant to the laws of the United States, or owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; 13 U.S.T. 2312).
>
> (2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; 13 U.S.T. 2312).
>
> (3) Vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.
>
> (c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:
>
> (1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons

tion Haiti, a contemporaneous press release made it clear that the order was directed at Haitian refugees.[60] This policy was

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or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.

(3) To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

SEC. 3. This order is intended only to improve the internal management of the Executive Branch. Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create, or shall be construed to create, any right or benefit, substantive or procedural (including without limitation any right or benefit under the Administrative Procedure Act [5 U.S.C. 551 et seq., 701 et seq. . . .]), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order be construed to require any procedures to determine whether a person is a refugee.

SEC. 4. Executive Order No. 12324 is hereby revoked and replaced by this order.

SEC. 5. This order shall be effective immediately.

60. *See* White House Statement on Haitian Migrants, 28 WEEKLY COMP. PRES. DOC. 924 (May 24, 1992).

President Bush has issued an Executive order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti. This action follows a large surge in Haitian boat people seeking to enter the United States and is necessary to protect the lives of the Haitians, whose boats are not equipped for the 600 mile sea journey.

The large number of Haitian migrants has led to a dangerous and unmanageable situation. Both the temporary processing facility at the U.S. Naval Base, Guantanamo and the Coast Guard cutters on patrol are filled to capacity. The President's action will also allow continued orderly processing of more than 12,000 Haitians presently at Guantanamo.

Through broadcasts on the Voice of America and public statements in the Haitian media, we continue to urge Haitians not to attempt the dangerous sea journey to the United States. Last week alone, 18 Haitians perished when their vessel capsized off the Cuban coast.

Under current circumstances, the safety of Haitians is best assured by remaining in their country. We urge any Haitians who fear persecution to avail themselves of our refugee processing service at our Embassy in Port-au-Prince. The Embassy has been processing refugee claims since February. We utilize this special procedure in only four countries in the world. We are prepared to increase the American Embassy staff in Haiti for refugee processing if necessary.

The United States Coast Guard has picked up over 34,000 since the coup in Haiti last September 30. Senior U.S. officials are seeking the

criticized by candidate and President-elect Clinton who vowed to reverse it upon taking office.[61] However, just prior to inauguration, Clinton reversed his position and adopted the Bush policy of forced repatriation without screening.[62]

Clinton's decision to continue the Bush policy implicated both domestic statutory law,[63] international conventions,[64] and a cooperative agreement between the United States and Haiti.[65] However, political concerns appeared to be the driving force for the President's decision. For instance, many support-

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assistance of other countries and the United Nations to help deal with the plight of Haitian boat people, and we will continue our intensive efforts to find alternative solutions to avoid further tragedies on the high seas.

The President has also directed an intensification of our ongoing humanitarian assistance efforts in Haiti. Our current programs total $47 million and provide food for over 600,000 Haitians and health care services which reach nearly 2 million. We hope other nations will also increase their humanitarian assistance as called for in the resolution on Haiti passed by the OAS foreign ministers on May 17.

61. *See* Christopher Marquis, *Clinton: Summary Repatriations to Haiti to End*, MIAMI HERALD, Nov. 13, 1992, at A24.

62. *Aides Say Clinton Will Extend Policy on Returning Haitians*, WASH. POST, Jan. 14, 1993, at A1.

63. The Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in various sections of 8 U.S.C.).

64. The United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. The United States acceded to the convention on Jan. 31, 1967. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 189 U.N.T.S. 150.

65. Agreement effected by exchange of notes; signed at Port-au-Prince September 23, 1981: This interdiction agreement dealt with the subject of *illegal* immigration. It provides in relevant part:

> The United States Government confirms the understandings discussed by representatives of our two governments for the establishment of a cooperative program of interdiction and selective return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti.
>
> . . .
>
> The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.
>
> It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine qualify for refugee status.
>
> . . .
>
> [This accord] shall continue in force until six months from the date either government gives notice to the other of its intention to terminate the agreement.

19 U.S.T. 6223.

ers of fleeing Haitians viewed President Bush's institution of the repatriation policy as partly motivated by racism[66] especially since Cubans were simultaneously being warmly received.[67] Clinton certainly did not want this label, particularly from blacks and Haitian immigrants who are generally supporters of the Democratic party. Once in office, however, Clinton had to respond to a national constituency which increasingly has voiced its disfavor with the heavy immigrant influx.[68] Pressure also came from groups and officials opposed to the admission of Haitian refugees, including state and county officials from Florida[69] whose call for an exclusionary policy for Haitian refugees coincided with a fairly widespread desire for increased immigration enforcement.[70] In effect, the deci-

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66. *See* Malissia Lennox, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687 (1993); Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269 (1993); *see also* HAITI PARADIGM, *supra* note 1, at 2422 ("[T]he archetypal 'good' alien favored by American immigration law is a white, European, healthy, heterosexual, self-sufficient refugee, arriving alone in search of political asylum--Mikhail Baryshnikov, for example . . . ."); Motomura, *supra* note 57, at 587-89 (discussing race discrimination against Haitians in the context of constitutional and statutory law).

67. *See* Andres Viglucci & Paul Anderson, *Immigration Nominee Opposes Special Treatment for Cubans*, MIAMI HERALD, June 19, 1993, at A1 ("Doris Meissner, nominated by President Clinton on Friday to be immigration commissioner, has advocated repeal of the 1966 Cuban Adjustment Act, saying the special treatment it affords to Cuban refugees over Haitians and other immigrants is 'a national embarrassment.'").

68. There is some evidence that both Presidents Bush and Clinton had learned hard political lessons from previous immigration crises. For example, the Mariel boatlift had hurt the Carter administration and cost Clinton the governor's office in Arkansas. *See* Jonathan Atler, *This Boy's Life*, NEWSWEEK, Feb. 13, 1995, at 32; Matthew Cooper, *Clinton's Last Comeback*, U.S. NEWS & WORLD REP., July 20, 1992, at 32; Gary Wills, *Beginning of the Road*, TIME, July 20, 1992, at 33, 59. For a critique of the role anti-immigrant sentiments may have played, see HAITI PARADIGM, *supra* note 1, at 2410-11.

69. For example, Florida Republican Senator Connie Mack, although opposed to the Bush policy of repatriation, was primarily concerned about any changes that could lead to mass entry that would negatively impact South Florida. Nancy Wittenberg, the state's refugee coordinator, similarly stated that she hoped President Bill Clinton would prohibit mass entries because the state of Florida and Dade County were experiencing tough economic times and therefore were unprepared to handle large numbers of Haitian immigrants. *See* Paul Anderson, *Clinton's Florida Ties Put to Test*, MIAMI HERALD, Nov. 8, 1992, at A26.

70. Tolerance for new immigrants has faded over the years, resulting in increasing cries for more stringent immigration laws. *See* Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum Seekers*, 7 GEO. IMMIGR. L.J. 1 (1993).

sion on Haitian refugees got caught up in election politics and community agitation stemming from a slow economy, high unemployment, and limited governmental resources at all levels.[71]

But fleeing Haitians had broad-based support for their case. Besides wide-ranging popular support,[72] able legal muscle joined the fray,[73] along with civil and human rights organizations[74] and members of Congress.[75] President Clinton's interpretation of American immigration laws and the interdiction agreement between the United States and Haiti was therefore made in the context of possible popular constituency fallout and congressional involvement in revising the Immigration and Nationality Act.

National political concerns, real or speculative, seem to have dominated executive thinking about Haitian asylum seekers. Though it seems clear that the original repatriation order did not stem from a genuine interpretation of refugee laws, the

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71. *See* Johnson, *supra* note 70, at 16-18.

72. *See* Holly Idelson, *Black Leaders Criticize Continuation of Policy*, 51 CONG. Q. WKLY. REP. 520 (1993) (black leaders oppose the Clinton repatriation policy which denies Haitians opportunity to state their claims.); Christopher J. Farley, *Reading, Writing, 'Rithmetic, Rage*, TIME, April 19, 1993, at 15 (students rally in support of Haitian refugees); William Gibson, *President George Bush's Policy on Haitians is Indefensible, Cruel Racism*, CRISIS, June-July 1992, at 6 (dancer and choreographer Katherine Dunham goes on hunger strike and calls Bush's Haitian policy undemocratic); Sally Guard, *For the Record*, SPORTS ILLUSTRATED, Sep. 21, 1992, at 66 (Arthur Ashe and others protesting treatment of Haitians arrested in front of White House); *Notes of Protest*, NATION, March 29, 1993, at 401 (Yale students hold protest, teach-in, rally and hunger strike in support of Haitian refugees).

73. *See* HAITI PARADIGM, *supra* note 1, at 2395 n.21. The Haitian Refugee Center in Miami also filed suits continuing their advocacy on behalf of fleeing Haitians. *See, e.g.*, Haitian Refugee Ctr., Inc. v. Baker, 789 F. Supp. 1552 (S.D. Fla.) (suing and obtaining preliminary injunction against interdiction policy), *injunction dissolved*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 502 U.S. 1122 (1992); *see also* Victoria Clawson et al., Essay, *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 YALE L.J. 2337 (1994).

74. *See, e.g.*, Bernard Diederich, *Send 'Em Back!*, TIME, June 8, 1992, at 43 (noting the participation of the U.S. Catholic Conference's Office of Migration and Refugee Services); Bill Frelick, *Haitians at Sea: Asylum Denied*, REPORTS ON THE AMERICAS, July 1992, at 34 (noting the involvement of human rights activists and movements); Lydio F. Tomasi, *End the Haitian Refugee Crisis*, MIGRATION WORLD MAG., May-June 1992, at 52 (condemning the repatriation policy as shameful and noting the political efforts of the Center for Migration Studies in support of Haitian refugees).

75. *See* Pamela Fessler, *Members Decry Haiti Policy, Vow to Seek Changes*, CONG. Q. WKLY. REP. 1547 (1992) (many legislators view President Bush's Haitian refugee policy as an election year political ploy and will introduce legislation to overturn it).

Clinton Administration defended its continuation of the Bush policy and argued before the Supreme Court in *Sale v. Haitian Centers Council, Inc.* that neither United States immigration laws nor the United Nations Protocol Relating to the Status of Refugees apply extraterritorially.[76] Section 243(h)(1), the contested provision of the Immigration Act, provides in relevant part:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[77]

Article 33 of the Protocol provides in relevant part: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened. . . ."[78] The United States ratified the Protocol in 1967.[79]

Prior to the litigation in *Sale*, the United States had taken the position that the Protocol's provision on return (refouler) applied to the high seas.[80] Despite this acknowledgment and strong textual support for this interpretation, the government argued the opposite throughout the litigation. The government also knew that political persecution was common in Haiti with its long history of coups and political bloodshed, the most recent associated with the ouster of the first democratically elected President, Jean Bertrand Aristide.[81] The government argued that, read as a whole, the INA does not apply to actions taken by the President or Coast Guard outside the United States.[82] Further, the government asserted that the statute's negotiations history supported this interpretation.[83] The gov-

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76. 113 S. Ct. 2549 (1993).

77. 8 U.S.C. § 1253(h)(1) (1988).

78. United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 19 U.S.T. 6259, 189 U.N.T.S. 150.

79. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

80. *See Sale*, 113 S. Ct. at 2568 (Blackmun, J., dissenting); Andrew I. Schoenholtz, *Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugees Convention and Protocol*, 7 GEO. IMMIGR. L.J. 67, 72-73 (1993).

81. *See* Johnson, *supra* note 70, at 11-14.

82. *Sale*, 113 S. Ct. at 2558.

83. *Id.* at 2558-59.

ernment made the same argument for Article 33 of the Protocol, contending that its text and negotiations history do not support extraterritorial application.[84]

It is very difficult, however, to impose this interpretation on the INA and Protocol which seemingly contain plain language. The INA provides that the Attorney General shall not deport or return any alien.[85] This prohibition is explicit. Moreover, this language amends the previous textual formulation: "The Attorney General *is authorized to withhold deportation.*"[86] When the current text of the INA is juxtaposed against its predecessor, there is an evident design to limit the Attorney General's powers of repatriation. Congress went further when it amended the INA in 1980. Besides the limitation on the Attorney General, Congress added the word "return" after "deport," thereby broadening the literal and legal ambit of the statute.[87] In addition, Congress removed the limitation "within the United States" that appeared in the old INA in order to eliminate any territorial constraints on the statute's application.[88] Nonetheless, the Court concluded that the statute does not apply extraterritorially.[89]

Because Congress limited the power of the Attorney General in the areas of deportations and returns, the Court relied on elusive distinctions among powers of the President, the Attorney General, and the Coast Guard in reaching its conclusion. Using the presumption that acts of Congress ordinarily do not apply outside United States territory, the Court interpreted section 243(h)(1) as regulating *only* the Attorney General in carrying out her normal responsibilities.[90] The Court further reasoned that the INA provided a grant of presidential powers that superseded the limitations imposed on the Attorney General.[91] Therefore, the Court found that even if Congress had restricted the Attorney General from acting extraterritorially to return asylum seekers, the same restriction did not apply to the President or the Coast Guard.[92] This analytical ploy

84. *See id.*
85. 8 U.S.C. § 1253(h)(1).
86. Pub. L. No. 82-414, § 243(h), 66 Stat. 163 (1952).
87. *See Sale*, 113 S. Ct. at 2574 (Blackmun, J., dissenting).
88. *See id.* at 2574-75.
89. *Id.* at 2560-63.
90. *Id.* at 2559-60.
91. *Id.*
92. *See id.* at 2559.

prompted Justice Blackmun to comment: "The majority suggests indirectly that the law which the Coast Guard enforces when it carries out the order to return a vessel reasonably believed to be violating the immigration laws is somehow not a law that the Attorney General is charged with administering. That suggestion is baseless."[93] In fact, the much contested history of 243(h) and its ultimate amendment in 1980 demonstrate an intent to ensure its conformity with Article 33 of the Protocol.[94]

The Court also agreed with the government's argument that Article 33 of the Protocol does not apply extraterritorially. Faced with clear language that contravened its interpretation, the Court resorted to "legal meaning" analysis to construe the word "return" rather than accept its ordinary or literal meaning. The Court condemned dictionary definitions of return and refouler although dictionaries have become a standard tool in the Court's interpretive work.[95] Instead, the Court relied on its fabricated interpretive device (legal meaning) which, when applied to the word "return," produced a meaning narrower than its ordinary, literal, or customary meaning.[96] The Court decided that the legal meaning of "return" refers to the exclusion of aliens and that:

> The drafters of the Convention and the parties to the Protocol—like the drafters of section 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.[97]

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93. *Id.* at 2573 (Blackmun, J., dissenting) (citation omitted).

94. *See* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 386-88 (1985).

95. *See* David O. Stewart, *By the Book*, A.B.A. J., July 1993, at 46 ("An informal survey reveals that in decisions announced between Jan. 1, 1992 and May 17, 1993, the justices [sic] recited dictionary definitions of key phrases 54 times in 38 cases, drawing on 23 different dictionaries. About half of the definitions came from legal dictionaries, with the rest pulled from a variety of general compendia. By contrast, in 1951-52 the Court recited dictionary definitions in opinions in only four cases.").

96. *Sale*, 113 S. Ct. at 2563-64.

97. *Id.* at 2565.

Like the treatment of customary international law in the *Machain* case, international obligations were given only lip service.

The Court found further support for its interpretation of the Protocol in the Protocol's negotiations history. Heavy reliance was placed on an interpretation "placed on record" by the Netherlands delegate that Article 33 does not cover mass migrations or attempted mass migrations across frontiers.[98] This statement, read during the draft stages of the Convention, was substituted for plain text as the Court's controlling guide. The Court was not persuaded that the statement of the Netherlands representative was unreliable because it was not *adopted* or *agreed to* by Convention participants.[99] Nor did the Court consider the abundant evidence that the mass migration concerns of the Netherlands were never intended to limit the operation of the nonrefoulement provision.[100] The negotiations history makes clear that the concern about mass migration did not translate into an agreement that Article 33 would operate in a limited territorial way.[101] Convention participants agreed that it would be the antithesis of Article 33, and inhumane, to return a legitimate refugee to his country of persecution.[102] Thus, the Netherlands' concern related only to illegal mass migrations and therefore does not support an insertion of territorial boundaries into Article 33.

In a compelling dissent, Justice Blackmun explained that the Court botched its interpretation of the INA and the Protocol. He observed that the Court stacked the deck against Haitians by establishing a presumption against extraterritoriality.[103] Hence, although no territorial limitation appears in the text of the INA or the Protocol, the Court was able to find such a restriction. To accomplish its desired construction the Court had to abandon all recognized rules of interpretation. Specifically, the Court refused to accept the ordinary meaning of plain words when there was no compelling reason to do so.[104] Justice Blackmun concluded that the INA's legislative history did not support the Court's interpretation because in 1980 "Con-

98. *Id.* at 2565-67.
99. *See id.* at 2571-73 (Blackmun, J., dissenting).
100. *See* Schoenholtz, *supra* note 80, at 79-84.
101. *Id.* at 82.
102. *See id.* at 82 n.49.
103. *Sale,* 113 S. Ct. at 2576 (Blackmun, J., dissenting).
104. *See id.* at 2568-71 (Blackmun, J., dissenting).

gress (1) deleted the words 'within the United States'; (2) barred the Government from 'return[ing],' as well as 'deport[ing],' alien refugees; and (3) made the prohibition against return mandatory, thereby eliminating the discretion of the Attorney General over such decisions."[105]

Justice Blackmun regarded the Court's reading of a territorial limitation into the INA as restoring the specific language Congress excised in 1980 when it removed the phrase "within the United States."[106] Justice Blackmun stated that "'[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'"[107] With respect to the Protocol, Justice Blackmun emphasized the absence of any territorial restriction in the treaty language and highlighted the Court's failure to give it its ordinary meaning.[108] He added that the statement of one country's delegate cannot override the treaty provisions, particularly when that statement was not adopted or agreed to and when the United States had previously taken the opposite view.[109] Justice Blackmun noted that if there is doubt, the Court, in a case such as this, should construe congressional action in a way that would not do violence to international law.[110]

B. The Interpretation Of International Amici

Fleeing Haitians had further support from international amici. The Office of the United Nations High Commissioner for Refugees ("UNHCR") submitted an amicus brief in *Sale* opposing the United States policy of repatriation and explaining the relevant international law.[111]

> The views of UNHCR are informed by over 40 years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides international protection and direct assistance to refugees

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105. *Id.* at 2574.
106. *Id.*
107. *Id.* (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987)).
108. *Id.* at 2568-70.
109. *Id.* at 2570-72.
110. *Id.* at 2577.
111. Brief of The Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993) (No. 92-344).

> throughout the world and has representatives in over 80 countries. It has twice received the Nobel Peace Prize, in 1954 and 1981, for its work on behalf of refugees.[112]

Through its extensive expertise and experience, UNHCR made available to the Court historical, evolutionary, contextual, and textual information to illuminate the meaning of Article 33.

Specifically, UNHCR pointed out that the 1951 Convention Relating to the Status of Refugees was remedial and humanitarian in character as evidenced by its preamble which declares an intent "to assure refugees the *widest possible* exercise of these *fundamental* rights and freedoms."[113] One of the fundamental freedoms which Article 33 guarantees is the right of nonreturn the minute an individual satisfies the definition of refugee, irrespective of whether asylum is ultimately granted.[114] This right of nonreturn was endorsed and advocated by the United States as demonstrated by statements of the United States delegate to the Convention. The United States delegate, Mr. Henkin stated,

> Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same.
> *Whatever the case might be . . . he must not be turned back to a country where his life or freedom could be threatened.* No consideration of public order should be allowed to overrule that guarantee, for if the state concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.[115]

The principle of nonreturn was also endorsed by the United States as a member of the Organization of American States

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112. *Id.* at 2.

113. *Id.* at 12 (quoting the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 606 U.N.T.S. 267.).

114. *See id.* at 8 ("Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.") (citing UNHCR Handbook on Procedures and Criteria for Determining Refuge Status ¶ 28 (1992)).

115. *See id.* at 25 (quoting Ad Hoc Committee on Statelessness and Related Problems, *Summary Record of the Twentieth Meeting*, 11-12, ¶ 54-55, U.N. Dec. E/AC.32/SR.20 (1950) (emphasis added)).

(OAS) General Assembly[116] and by the United States delegate to UNHCR's Executive Committee.[117]

Because of the universal acceptance of the principle of non-refoulement, UNHCR noted in its brief that the principle was regarded as a "peremptory norm of international law"[118] that had neither geographical nor territorial limitations.[119] The UNHCR Executive Committee, of which the United States is a member, established many guidelines that recognized Article 33's protection on the high seas.[120] Further, the "basic principle of non-refoulement has been reaffirmed every year by the Executive Committee of the UNHCR Programme."[121]

In addition to the powerful historical data, UNHCR presented convincing text-based evidence to support its interpretation of the Convention. It noted that the text of Article 33 is plain, unequivocal, and broad.[122]

> It prohibits both the expulsion of a refugee from a contracting State and, of critical importance here, the return of a refugee to a territory where his or her life or freedom would be endangered. . . . [T]he term "return" necessarily looks to the place 'to' which a refugee is returned. The word "expel," by contrast, refers to the treatment of refugees present in a State's territory, since, by definition, refugees cannot be expelled from a country in which they are not present. . . . [B]y its plain terms Article 33 announces two broad proscriptions. The second, known as non-refoulement or non-return, bars "in any manner whatsoever" the involuntary repatriation of refugees to a place where their lives or freedom would be threatened.[123]

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116. *Id.* at 17. The OAS General Assembly endorsed the Cartagena Declaration which regarded "the principle of *non-refoulement* [as] 'imperative in regard to refugees and in the present state of international law should be acknowledged and observed as rule of *jus cogens*.'" *Id.* (quoting Colloquium on the International Protection of Refugees in Central America, Panama and Mexico (Cartagena de Indias, Nov. 22, 1984)).

117. *Id.* at 18.

118. *Id.* (citing 1985 *Report of the United Nations High Commissioner for Refugees*, U.N. Doc. E/1985/62 (1985), at 9/9/22-23.).

119. *Id.*

120. *Id.* at 20 ("These guidelines recognize that the bedrock protections of Article 33 extend to international waters, and thus beyond the borders of any particular State.").

121. *Id.* n.39.

122. *See id.* at 5.

123. *Id.* (footnotes omitted).

With a dictionary and many Court precedents as support, UNHCR called for application of the ordinary meaning of the words of Article 33 while noting that the government's definition of the word refouler would lead to redundancy and absurdity.[124]

UNHCR offered additional support for the extraterritorial application of the nonreturn principle by noting that other articles in the treaty had territorial limitations while Article 33 did not.[125] This contrast demonstrates that the drafters were aware of territorial considerations, and intentionally decided not to place geographic limitations in Article 33. Further, UNHCR noted that the Immigration and Nationality Act was amended to conform to Article 33;[126] that customary international law supported the principle of nonreturn;[127] and that the negotiations statements cited by the government were not accepted by the Convention delegates nor relied on by the government at the time of ratification.[128]

Despite this compelling, readily available guidance, the Court sided with the government. The Court's action belies the Court's claim that longstanding domestic and international practices will not be ignored.[129] By effectively avoiding the data provided and contentions made by UNHCR, the Court continued to signal that such data is only useful if it coincides with the executive branch's interpretation.

The Court's interpretive work in *Sale* highlights the Court's aloofness toward joint protests by foreign and domestic

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124. *See id.* at 8, 10-11, 16-21. In recent years the Court has increasingly turned to dictionaries and less to legislative history in fulfilling its interpretive task. *See* Stewart, *supra* note 95. The Court has also been more text-focused in recent years and less willing to consult extratextual sources, particularly when language is plain. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

125. *See* Brief of The Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, at 11, Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993) (No. 92-344).

126. *Id.* at 15.

127. *Id.* at 16.

128. *Id.* at 23-28. Besides noting that the statement by the Netherlands delegate was not "agreed to" or "adopted," *id.* at 26 n.47, but rather simply placed on the record, UNHCR noted that formal changes to Article 33 were followed by the comments "adopted unanimously" and "[i]t was so agreed." *Id.* (citing Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-Fifth Meeting*, 22,U.N.Doc A/Conf.2/Sr.35 (1951)).

129. *See* Trans World Airlines Inc. v. Franklin Mint Corp., 466 U.S. 243, 255, 259-60 (1983).

forces. Obviously unafraid of challenges to its institutional integrity, the Court easily rejected sound principles of construction and plain text in favor of weaker guides in order to adopt the interpretations offered by the United States government. Although fleeing Haitians garnered support from some domestic groups, they also faced growing domestic opposition. This kept the strength of their protest at the "margin" in terms of its potential to influence the Court.

III. PURELY FOREIGN OUTCRY

When foreign protest rises alone to challenge executive decisions which come before the Court, amici influence is virtually non-existent. The recent government supported kidnapping of a Mexican doctor in Mexico serves as a good case study. On April 2, 1990, Dr. Humberto Alvarez-Machain was kidnapped in Mexico and brought to the United States to stand trial before an American court for his suspected involvement in the brutal murder of a federal Drug Enforcement Administration (DEA) agent. Dr. Machain is a citizen of Mexico and the federal agent was killed in Mexico.[130] It was later determined that the American government sponsored the abduction.[131]

The United States is a party to an extradition treaty with Mexico which sets out a procedure for the United States to request the delivery of a Mexican national suspected of murdering an American national.[132] The American government had reason to believe, however, that a formal treaty request for Machain would not be honored,[133] and Mexico was not legally obliged to deliver him under the treaty.[134] Article 9, section 1

130. *See* Andreas F. Lowenfeld, Comment, *Kidnapping by Government Order: A Follow-up*, 84 AM. J. INT'L L. 712 (1990).

131. *See* United States v. Caro-Quintero, 745 F. Supp. 599, 602-04, 609, 612 (C.D. Cal. 1990) *aff'd* 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992). Prior to the court's determination, a variety of stories surfaced about the role of the DEA and Mexican officials in capturing Machain and transferring him to the United States. The various stories posited official cooperation, a bounty offer by the DEA, cash payments and protection for Machain captors by the DEA, a swap of fugitives (Machain for a Mexican fugitive residing in the United States), and misconduct by the Mexican Federal Judicial Police. *See* Lowenfeld, *supra* note 130, at 713-16.

132. *See generally* Extradition Treaty, May 4, 1978, U.S.-Mexico, 31 U.S.T. 5059 [hereinafter Extradition Treaty]. Of course the procedure would apply equally if Mexico were the requesting state.

133. Informal attempts by the Drug Enforcement Administration to gain custody of Machain through Mexican officials had apparently failed. *See Caro-Quintero*, 745 F. Supp. at 602-04.

134. Article 9 of the treaty gives the requested State the option of turning

of the treaty provides: "Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so."[135]

Had Mexico decided not to extradite Machain, the treaty would have required Mexico to "submit the case to its competent authorities for the purpose of prosecution, provided that [Mexico had] jurisdiction over the offense."[136] Consequently, Machain could have been brought to justice either in the United States or Mexico under the treaty, making abduction unnecessary.[137]

Mexico had already demonstrated its commitment to bringing the DEA agent's murderers to justice by trying, convicting, and sentencing several other individuals involved in the murder.[138] However, the United States executive branch had an extraordinary interest in ensuring that the American criminal justice system handle this case.[139] Seizing Machain, therefore, would avoid a refusal by Mexico to extradite and would create an opportunity to test the legality of government sponsored kidnapping of foreign national suspects wherever they may be found in the world.[140]

In retrospect, the United States' decision was pragmatic since it yielded the results sought by the American government. Custody of Machain was gained to facilitate his prosecution in the United States, and the Supreme Court ruled that

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over the suspect or trying him locally. Extradition Treaty, *supra* note 132, at 5065.

135. *Id.*

136. *Id.*

137. However, as the judge found in *Caro-Quintero*, 745 F. Supp. at 612, negotiations between American and Mexican officials broke down and Mexico's attempts to revive those negotiations were rebuffed. *Id.* The United States at this point apparently believed that Mexico did not have the requisite commitment to ensure that Machain was brought to justice.

138. *See* United States v. Alvarez-Machain, 504 U.S. 655, 671 n.2 (1992) (Stevens, Blackmun, O'Connor, J.J., dissenting) ("Mexico has already tried a number of members involved in the conspiracy that resulted in the murder of the DEA agent. For example, Rafael Caro-Quintero, a co-conspirator of Alvarez-Machain in this case, has already been imprisoned in Mexico on a 40-year sentence.").

139. *Id.* at 686. The American government probably wanted to demonstrate to the American public and to law enforcement officers its fierce commitment to the war on drugs.

140. The DEA may not have been motivated by a desire to test Supreme Court doctrine on this issue, but the DEA must have analyzed the abduction's legal implications.

the kidnapping did not violate the extradition treaty.[141] Mexico's immediate protest of the abduction and request for Machain's return confirmed that Mexico may not have delivered him to American authorities under the treaty. The Supreme Court's holding that the abduction did not violate the extradition treaty ensured Machain's retention in the United States and appearance before an American court. However, justice for Machain was not what his accusers envisioned, because the charges against him were ultimately dismissed.[142]

From the outset, Machain's abduction had the makings of a significant foreign policy blunder. News of the abduction triggered instant and widespread international outcry.[143] So, although the United States may have fulfilled national interests, some damage to its foreign policy and treaty interpretation image was inevitable. Once the Court accepted the interpretation proffered by the United States government, foreign indignation only increased. Understandably, therefore, concerns still linger about the decision to abduct and the integrity of the Supreme Court for upholding the abduction.

A. Interpreting The Text and Intent of the Treaty

The abduction of Machain presented a case of first impression for the Supreme Court. Although the Court had a line of precedents on the issue of seizures covered by extradition treaties, the specific issue of government sponsored abduction of a

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141. *Alvarez-Machain*, 504 U.S. at 670.

142. "U.S. District Judge Edward Rafeedie dismissed all charges Dec. 14, after the evidence had been presented in Alvarez-Machain's trial." Debra C. Moss, *Scant Evidence Frees Abducted Doctor*, A.B.A. J., Feb. 1993, at 22.

143. *See* David O. Stewart, *The Price of Vengeance*, A.B.A. J., Nov. 1992, at 50 ("Although Supreme Court rulings rarely attract international attention, the Court's decision last June . . . triggered a firestorm of diplomatic criticism."); *see also Canada Blasts U.S. Court Ruling on Abducting Suspects, on* REUTERS (radio broadcast from Ottowa, Can., June 15, 1992) (The External Affairs Ministry spokesman stated: "Any attempt by foreign officials to abduct someone from Canadian territory is a criminal act. . . . We will continue to insist that the extradition treaty between Canada and the United States is the only method of obtaining custody of fugitives between our two countries."); *Latin American Nations Fight U.S. Supreme Court Decision* NOTIMEX MEXICAN NEWS SERVICE, June 18, 1992 (Argentine Foreign Minister denounced the decision as "deplorable" and vowed to formally protest despite his nation's "good relationship with the United States."); *Caribbean: Region Angry at U.S. Supreme Court Ruling,* INTER PRESS SERVICE, June 18, 1992 (Foreign Minister of Barbados "called on regional governments to speak as one in objecting to the Supreme Court ruling.").

foreign national in his homeland for a crime committed there had not been previously addressed.

In addressing its primary task of treaty construction, the Court articulated the well-recognized rule that one must first look to the words of the convention to ascertain its meaning.[144] This text-focused approach is an old rule that has recently increased in significance with many Justices on the Court.[145] However, the Court swiftly moved away from the treaty's text since it quickly determined that the treaty was silent on the issue of abductions of the type at bar.[146] Under the Court's analytical scheme, the treaty's silence was evidence that the treaty did not limit the jurisdiction of American courts. Only express and specific treaty language could limit the Court's jurisdiction.

The Court's focus on the text thus only lasted long enough to discern what the treaty parties *failed* to include. Conveniently passed up were the terms which the United States and Mexico intentionally agreed on as governing their conduct in extradition matters. For example, the treaty sets out a comprehensive scheme on how, against whom, and for what offenses and circumstances extradition is available to the treaty parties.[147] This bilateral agreement also gives each party the discretion to deliver or refuse delivery of a requested person.[148] Read as a whole, the provisions of the treaty offer a ready answer to the question of whether abductions are permissible. The Court's abandonment of text in favor of speculative inquiries as to why the parties did not insert a specific provision on the abduction

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144. *See Alvarez-Machain*, 504 U.S. at 663 ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning.").

145. The Court's use and reliance on extratextual materials has declined over the years. *See* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990). Justice Scalia, who advocates what is tantamount to a text-exclusive approach for statutes and treaties has been increasingly influencing other members of the Court. *See* United States v. Stuart, 489 U.S. 353, 373 (1989) (Scalia, J., concurring) ("'[T]reaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties.'" (quoting Rocca v. Thompson, 223 U.S. 317, 332 (1912))).

146. In fact, the Court's conclusion that the treaty did not resolve the abduction issue can be found in the sentence immediately following the Court's statement that the Court should look first to the treaty's text to determine the treaty's meaning. *See Alvarez-Machain*, 504 U.S. at 663.

147. *See generally* Extradition Treaty, *supra* note 132, at 5061.

148. *See id.* art. 9, at 5065.

issue suggests that the Court was not searching for the intent of the contracting parties.

A literal and contextual reading of the treaty indicates that the treaty provides the exclusive mechanism for obtaining foreign nationals. Such a reading would carry out the intent of the parties and preserve the structural integrity of the treaty. Instead of deferring to the means chosen by the parties to establish their obligations, however, the Court concluded that the treaty procedure was not the *only way* one country may gain custody of another's citizens.[149] As support for its extratreaty options, the Court did not cite treaty language but instead relied on negotiations history and past practice. The Court concluded that although the treaty did not authorize the abduction, it did not prohibit it either.[150] Unfortunately, citations and language from the negotiations history were not provided[151] and the referenced practice seems to be a single incident which occurred in 1905 and which, incidentally, did not involve government-sponsored conduct.[152]

As further support for its interpretation of the extradition treaty, the Court cited *Ker v. Illinois*,[153] an 1886 case which the Court believed notified Mexico as early as 1906[154] that abductions would not defeat the jurisdiction of American courts notwithstanding the existence of an extradition treaty.[155] In addition, the Court determined that, had Mexico disagreed with *Ker,* it should have known about and secured the inclusion, in the extradition treaty, of a 1935 proposal by American legal scholars which had specific language prohibiting abductions of the type involved in *Ker*.[156] Using a "timing" analysis,

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149. *Alvarez-Machain,* 504 U.S. at 664.

150. *Id.* at 665 n.11.

151. *Id.* at 675 n.15 (Stevens, Blackmun, O'Connor, J.J., dissenting) ("The United States has offered no evidence from the negotiating record, ratification process, or later communications with Mexico to support the suggestion that a different understanding with Mexico was reached.").

152. *Id.* at 665 n.11.

153. *Id.* at 660-66; Ker v. Illinois, 119 U.S. 436 (1886).

154. *Alvarez-Machain,* 504 U.S. at 665 n.11. *Ker* had apparently been brought to the attention of the Mexican government in 1906 through correspondence from the Secretary of State to Mexican officials informing them that American courts had jurisdiction to try a Mexican national abducted in Mexico and brought to the United States. The correspondence also informed the Mexican government that their relief option was to request the extradition of the abductor, which was done and extradition granted.

155. *Id.*

156. *See id.* at 666 & n.13. The referenced proposal states:

the Court concluded that the current version of the extradition treaty[157] was informed by these prior events and, in particular, that Mexico's failure to prohibit *Ker*-type abductions evidenced acquiescence in their legality.

Notice, is of course, not a substitute for text. Even more, the type of notice informing future conduct should be reasonably specific to and predictive of the harm it seeks to guard against. *Ker* warns treaty parties about the potential jurisdiction of American courts over persons *privately* kidnapped.[158] The scholarly proposal referenced by the Court makes an abduction in violation of international law an invalid basis for gaining jurisdiction over a suspect.[159] Neither *Ker* nor the proposal address state-sponsored abductions under a treaty. Thus, even if *Ker* and the cited scholarly work should be given some weight, neither can be held to have notified the Mexican government of the Court's state-sponsored abduction rule.

Nor should the mere existence of *Ker* and the scholarly proposal override, without more, a document that expressly defines the obligations of Mexico and the United States. The representatives of these nations who negotiated the latest version of the treaty may well have regarded predecessor events as superseded by the treaty.

Had the Court cited negotiations history showing that the United States rejected a proposal by Mexico to prohibit *Machain*-type abductions, its interpretation would be more responsive to the deal the parties struck. However, the Court's citations to distinguishable events as guides to ascertaining the intent of the parties suggest an outcome-oriented analysis rather than pursuit of principled construction.

A more plausible construction of the treaty was offered by the dissenting Justices who stuck to the text of the extradition treaty and to related treaty provisions. The dissenters argued

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> In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

Id. (citation omitted).

157. The latest version of the treaty was agreed to in 1978 and remains in effect, thereby governing this case. *Id.* at 665-66.

158. *See Ker*, 119 U.S. at 443-44.

159. *See supra* note 156.

that treaty mandates cannot be trumped by nonlanguage. In addition, they found the treaty to be consensual, comprehensive, and exclusive on the question of extradition.[160] Further, they maintained that the parties *must* comply with treaty terms, for if either party were free to use extratreaty procedures or methods, the treaty would become a nullity.[161] The dissenters buttressed their interpretation with purposes and goals analysis.[162] They noted that "cooperation" was the touchstone of the treaty as evidenced by its preamble and that unilateral action threatened that goal.[163] Further, they argued that the "scope and object" of the treaty ought to take precedence over its silence on a particular issue.[164] By focusing their analysis on the expectations of the parties as stated in the treaty's text, the dissenters established a better vehicle for ascertaining the parties intent.

The dissenters also noted that the effect of the majority's construction was at odds with the language of the treaty. By saying that the treaty was not the *only* way American courts could obtain jurisdiction over Machain, the Court in effect found that, at its discretion, either party without the other's consent may abduct the other's national.[165] Not only would such an interpretation render an absurd result under a finely crafted agreement, it would also evidence a shocking, secret reservation of right to seize by one party.[166]

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160. *Alvarez-Machain*, 504 U.S. at 675.

161. *Id.* at 673-74.

162. Confirming a treaty or statute's text with general textual and related legislative materials is a sound construction approach commonly used by the Court; *see* United States v. Stuart, 489 U.S. 353 (1989) (confirming interpretation of treaty with preratification materials); *see also* INS v. Cardoza-Fonzeca, 480 U.S. 421 (1987); California Fed. S&L Ass'n. v. Guerra, 479 U.S. 272 (1987).

163. *Alvarez-Machain*, 504 U.S. at 672 n.4.

164. *See id.* at 675.

165. *Id.*

> To make the point more starkly, the Court has, in effect written into Article 9 a new provision, which says: "Notwithstanding paragraphs 1 and 2 of this Article, either Contracting Party can, without the consent of the other, abduct nationals from the territory of one Party to be tried in the territory of the other."

Id. at 674 n.11.

166. *Id.* at 678-79.

B. The Role of Precedent in Construing the Treaty

In support of its interpretation the Court cited several of its precedents. While precedents have their place in treaty construction, they do not rise to the level of text and should be weighted accordingly. Further, precedents that are distinguishable on factual or legal grounds are less persuasive than those on point in either regard. *Ker v. Illinois* figured prominently in the Court's analysis. However, *Ker* is distinguishable from *Machain* on numerous grounds. Ker's abduction was not government sponsored.[167] Ker was tried and convicted in an Illinois court prior to fleeing to Peru, the country from which he was abducted and with which the United States had an extradition treaty.[168] Further, Ker was not a citizen of Peru and the Peruvian government did not object to his seizure.[169] On these facts the Court held that Ker had no rights under the extradition treaty since the treaty was not triggered by his private kidnapping.[170] As a result, Ker could not defeat the Court's jurisdiction by relying on the treaty.

To confirm the vitality of *Ker* the Court cited its 1952 decision in *Frisbie v. Collins*.[171] *Frisbie* involved an interstate kidnapping of a suspect in Chicago who was taken to Michigan for trial. The Court upheld the conviction despite the defendant's claim that the abduction vitiated the trial court's jurisdiction.[172] Reliance on *Ker* and *Frisbie* would be appropriate if these cases dealt with facts that bore closer resemblance to the Machain incident. As the descriptions noted herein demonstrate, however, the *Ker* and *Frisbie* decisions hardly prepare treaty parties for a *Machain*-type scenario. Once convinced of the mistaken premise that *Ker* was on point, the Court could not get off track, and its conclusion that *Ker* controlled became inevitable.

Parallel and more weighty interpretive aides were available in precedents such as *United States v. Rauscher*[173] and

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167. Although Ker's custody was initially sought through an extradition treaty between the United States and Peru, his abduction by the messenger sent to collect him was not done under official authority. *See Alvarez-Machain*, 504 U.S. at 660.

168. Ker v. Illinois, 119 U.S. 436, 437-38 (1886).

169. *Id.* at 441-42.

170. *Id.* at 443-44.

171. 342 U.S. 519 (1952).

172. *Id.* at 522.

173. 119 U.S. 407 (1886).

Cook v. United States.[174] *Rauscher* arose under an extradition treaty between the United States and Great Britain, and raised the issue whether a defendant may be tried for a crime other than the one for which he was extradited.[175] Interpreting the treaty as the exclusive mechanism for obtaining jurisdiction over someone within Britain's territorial boundaries, the Court held that Rauscher, the defendant, could only be tried for the extradited offense, murder.[176] Coincidentally, the Court in *Rauscher* pointed to the specificity of the treaty language, its procedural mechanism, evidentiary requirements, and purpose to support its territorial interpretation.[177] The treaty's silence on the jurisdictional authority of the receiving state was not a hindrance to this construction.[178] Unlike the decision in *Machain*, the decision in *Rauscher* stuck to text and did not treat silence on the contested issue as a broad jurisdictional grant.

Curiously, the *Machain* Court decided that the application of *Rauscher* would be a great "inferential leap, with only the most general of international law principles to support it."[179] The glaring similarities in text and context of the two treaties, however, command similar construction, even in the absence of supporting principles of international law. In fact, international law can only reinforce construction of the U.S.-Mexico extradition treaty as condemning abductions that violate a nation's territorial integrity.

Cook v. United States, another neglected precedent, also involved a treaty between the United States and Great Britain.[180] This treaty regulated the importation of alcoholic beverages into the United States during prohibition.[181] In *Cook*,

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174. 288 U.S. 102 (1933).

175. United States v. Rauscher, 119 U.S. 407, 409 (1886). The treaty limitation on crimes for which the extradited defendant may be prosecuted is known as the doctrine of specialty. *Id.* at 411. Specialty claims are apparently the most commonly alleged treaty violations. For a discussion of the doctrine and arguments favoring a grant of standing to defendants to make specialty claims, see Kenneth E. Levitt, Note, *International Extradition, the Principle of Specialty, and Effective Treaty Enforcement*, 76 MINN. L. REV. 1017 (1992).

176. *Rauscher*, 119 U.S. at 430.

177. *See id.* at 423.

178. In fact, Britain remained silent on Raucher's conviction but the Court nonetheless presumed an objection.

179. *Alvarez-Machain*, 504 U.S. at 669.

180. Convention for Prevention of Smuggling of Intoxicating Liquors, May 22, 1924, U.S.-Gr. Brit., 43 Stat. 1761.

181. *See id.* art. II, §§ 1-3. The relevant sections provided:

a British vessel was boarded off the Massachusetts coast and alcoholic beverages were found in violation of the treaty.[182] A penalty was assessed, and the vessel and cargo were seized by the Collector of Customs to secure payment.[183] It was determined that the boarding and seizure occurred outside the boundary set by the treaty.[184] As in *Machain*, the government argued that *Ker* controlled.[185] The Court rejected this argument, noting that the boarding and seizure were acts of the government, not of private individuals as in *Ker*.[186] Relying on the treaty language, the Court found a specific territorial limitation on government conduct and regarded the treaty as the exclusive mechanism by which vessels could be boarded and seized.[187] In giving primacy to the treaty terms, the Court ruled that the United States was obliged to fulfill the terms of the treaty by respecting its limitations. In effect, the Court held that the agreed upon rules for boarding and seizure had to be complied with before the adjudicatory powers of the

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(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

182. *Cook,* 288 U.S. at 107-08.
183. *Id.* at 108.
184. *Id.* at 107, 110.
185. *See id.* at 120-21.
186. *Id.* at 121-22.
187. *Id.* at 120-22.

Court could be legal and binding. The Court confirmed its conclusion with a reference to the treaty's purpose.[188]

C. *The Weight Assigned International Law*

An attempt was made to bootstrap customary international law to the treaty terms thereby establishing an implied prohibition of abductions. Specifically, Machain argued that the condemnation of abduction by customary international law, the United Nations Charter, and the Charter of the Organization of American States supported an interpretation that would deny jurisdiction to the courts of the abducting country. Machain's argument was couched in terms of an "implied" right so widely recognized that its inclusion in the treaty was unnecessary.[189]

The Court rejected the implied prohibition interpretation as a great "inferential leap" that "goes beyond established precedent and practice."[190] The Court reasoned that, in the past, customary international rules had informed its interpretive work because those rules specifically addressed the treaty issues in question.[191] However, in this case, the international principle relied on was only a general proscription that governments should not exercise their police power in each other's territory and not a specific prohibition against government sponsored abductions. Instead of using this principle as relevant contextual data, the Court reverted to its general conclusion that, regardless of whether Machain's abduction violated international law principles, it did not violate the treaty.

By using hypertechnical distinctions between general and specific international law principles, and by evading the contextual importance of these principles, the Court thus forged its conclusion that the treaty had not been violated. The Court's refusal to give international law principles some weight belies its suggestion that citations to international law that were "on point" would have changed the Court's interpretive course. In fact, the Court could have fairly concluded that widespread international condemnation of abductions is specific enough to support this principle's incorporation into the extradition trea-

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188. *Id.* at 120.

189. *Alvarez-Machain*, 504 U.S. at 666.

190. *Id.* at 669.

191. *Id.* at 667-68. As an example, the Court cited its *Rauscher* decision where the Court interpreted the Webster-Ashburton treaty as impliedly incorporating the doctrine of specialty.

ty. Instead, the Court assigned no value to this important contextual principle.

D. Interpretations Offered by Other Nation States

The United States is party to over one hundred extradition treaties with other nation-states.[192] None of these treaties contains a provision prohibiting *Machain*-type abductions.[193] Other countries' interest in the Court's ruling was therefore high. Both Mexico and Canada filed amicus briefs arguing that the abduction violated the treaty. Mexico explained that it interpreted the treaty as "govern[ing] comprehensively the delivery of all persons for trial in the requesting state 'for an offense committed outside the territory of the requesting party.'"[194] Canada similarly argued that it interpreted and regarded its extradition treaty as "'the exclusive means for a requesting government to obtain . . . [the] removal' of a person from its territory, unless a Nation otherwise gives its consent."[195]

This unusual input and guidance from foreign nations largely went unnoticed, however. In fact, the Court did not even use the interpretations proffered by Mexico and Canada as contextual data to determine the contracting nations' intent. The fact that international response consistently opposed the abduction on legal grounds should have increased the contextual value of the interpretations offered by Canada and Mexico. In fact, it should have been conclusive evidence of what other nations intended when they agreed on similar extradition treaty terms with the United States.

E. Ignoring Foreign Protest/Interpretation

The Court's demurrer to the foreign amici in *Alvarez-Machain* spotlights the Court's aloofness to purely foreign views and critique. The Court's sense of accountability, and its concerns about judicial integrity, is at its lowest when essentially "outsiders" are protesting. The reason for this goes beyond the fact that foreigners have another forum in which to

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192. *See* Michael J. Glennon, *State-Sponsored Abduction: A Comment on* United States v. Alvarez-Machain, 86 AM. J. INT'L L. 746, 748 (1992).

193. *Id.* at 747.

194. *See Alvarez-Machain*, 504 U.S. at 675 n.14 (Stevens, J., dissenting) (quoting Brief for United Mexican States as Amicus Curie, at 6).

195. *Id.* (quoting brief for government of Canada as Amicus Curiae, at 4).

resolve the general question.[196] The dispositive reason in *Alvarez-Machain* was that Machain did not have and could not marshall domestic popular support for his cause. In a public sense, his case boiled down to that of a foreigner, criminally accused of harming an American law enforcement officer. Viewed in this narrow light, Machain's protest lacked the mass appeal or the human dimensions that the interdicted Haitian refugees presented.

In addition, foreign amici were both pitted against an executive slated in advance to win by the Court's rule of deference and lacked an ally in any of the branches of government. At the political and popular level, the executive's case was strong because drugs and drug-related crimes are national problems and priorities. The President thus had no reason to fear voter backlash, and in fact may have received political mileage in backing the abduction. Congress certainly had no stake in pursuing a matter for which there was no real domestic constituency, and the Supreme Court as public opinion pollster was quite in tune with public sentiment. From the Court's vantage point, this was not a truly American issue that would stick in the minds of the American public.

When foreign amici show up alone, they represent the weakest check on the Court's institutional accountability. With such protests, the Court generally need not worry about demonstrations in the street or popular domestic outcry that may translate into congressional or Executive reaction against the Court's actions. The Court therefore indulges in complete discretion when selecting forms of construction, interpretation, and argument to formulate its positions.

IV. CONCLUSION

Because national interest is a stronger force than international law or principles, the Supreme Court will not likely change its deferential attitude to the executive when interpreting treaties. Foreign critics have nothing to bargain with when asking the Court to adopt their interpretations. As the purely foreign protest experience shows, offering sound construction and labeling the Court unprincipled do not change the Court's interpretive course. Securing domestic support improves the

196. In *Alvarez-Machain*, for example, the Court directed the Mexican amicus to the executive branch. *See Alvarez-Machain*, 504 U.S. at 669.

chance of influencing the Court. As the Haitian refugee cases demonstrate, however, this can be weakened by conflicting domestic views and politics. Further, the frustrations experienced by purely domestic protestors is a constant reminder that even "in-house" protestors are not consistent in achieving influence with the Court. And while accusations of dishonesty may be academically therapeutic, they make no progress in changing the Court's interpretive course. Foreign amici are therefore doomed to a response of indifference until they devise an internal check of the type available to domestic amici. But as the statutory interpretation cases show, even internal checks have their limitations. For example, even if protests of the type used in *Patterson* were to result in amendments to a statute, the Court remains free to interpret those amendments in a way that limits the intent and desires of popular and congressional protestors. As such, any mechanism, short of waiting for the Court to adopt international norms would be beneficial.