The Intent-to-Benefit: Individually Enforceable Rights under International Treaties

by

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Abstract

Citizens of foreign countries are increasingly using international treaties to bring claims against the U.S government. As a result, U.S. courts are being asked to determine whether treaties provide litigants with individually enforceable rights. Although courts have no consistent approach to it, they often apply the textualist methodology derived from statutory interpretation in determining whether a treaty gives rise to individually enforceable rights. Resolution of this issue in favor of individually enforceable rights is particularly beneficial for human rights and humanitarian law treaties, because without individually enforceable rights, those treaties are not likely to be enforced.

Instead of using theories of statutory interpretation, I argue that courts should apply a modified version of the "intent-to-benefit" test derived from contract law in determining whether a treaty is enforceable by a non-party. Three general grounds support my agreement. First, the structural similarities between contracts and treaties (and the correlative differences between statutes and treaties) justify applying the principles derived from contract interpretation to treaty interpretation. Second, Supreme Court jurisprudence supports the view that treaties have the *effect* of statutes, but are actually contracts. As such, it is appropriate to apply theories of contract interpretation to understanding treaties. Third, arguments used to justify using textualism for purposes of interpreting statutes are not relevant to interpreting treaties.

I apply the modified intent-to-benefit test to a case study-- the *Sanchez-Llamas* case, in which the Supreme Court decided last term that the Vienna Convention on Consular Relations does not provide individuals with any remedies.

Introduction

Globalization, marked by an increase in trade, migration, and capital flows among nations, creates opportunities for disputes between national governments and foreign nationals. International tribunals, however, are typically not receptive to claims brought

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by individual litigants for treaty violations.[1] As a result, non-U.S. citizens are increasingly asserting claims in U.S. courts based on treaty violations.[2]

Although courts have generally recognized that treaties may give rise to individually enforceable rights,[3] there is no consensus on correct methodology for determining whether a specific treaty gives rise to such rights. Yet many courts have increasingly applied the textualist methodology derived from statutory interpretation to determining whether a treaty gives individuals rights.[4] Courts thus look only to the text of the treaty and typically refuse to use extra-textual sources to inform their decision.[5] This methodology essentially creates a presumption against individually enforceable rights in treaties. The Restatement (Third) of Foreign Relations ("Foreign Relations Restatement") concurs that "[i]nternational agreements . . . generally do not create private rights or provide for a private cause of action in domestic courts.[6]

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[1] *See e.g.*, Restatement (Third) of Foreign Relations Law § 906 (1987) [hereinafter "Foreign Relations Restatement"] ("International tribunals and other fora are generally not open to claims by private persons.").

[2] I use the term "treaty" as defined in the Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, 1155 U.N.T.S. 331, 333 [hereinafter "Treaty Convention"] ("'Treaty' means an international agreement concluded between States in written form and governed by international law."). My use of "treaty" excludes "executive agreements," which may be concluded without the participation of the Senate. *See e.g.*, United States v. Belmont, et. al., 301 U.S. 324 (1937) ("A treaty signifies 'a compact made between two or more independent nations, with a view to the public welfare.' But an international compact, as this was, is not always a treaty which requires the participation of the Senate.") (*citing* B. Altman & Co. v. United States, 224 U.S. 583 (1912)).

[3] *See, e.g.*, Kolovrat v. Oregon, 366 U.S. 187 (1961) (enforcing a Yugoslav citizens' right under U.S.-Serbia treaty to inherit personal property located in Oregon); Clark v. Allen, 331 U.S. 503, 507-08 (1947) (enforcing a German citizens' right to inherit property a treaty); Bacardi Corp. of America v. Domenech, 311 U.S. 150, 311 U.S. 150, 161-62 (1940) (enforcing foreign trademark owner's rights under multilateral trademark treaty); Nielsen v. Johnson, 279 U.S. 47 (1929) (enforcing Danish citizen's right under U.S.-Denmark treaty to be free of discriminatory taxation); Jordan v. Tashiro, 278 U.S. 123 (1928) (enforcing U.S.-Japan treaty allowing Japanese citizens to conduct trade); Cheung Sum Shee v. Nagle, 268 U.S. 336 (1925) (holding that U.S.-China treaty prevented mandatory exclusion of wives and minor children of Chinese merchants under Immigration Act of 1924); Hauenstein v. Lynham, 100 U.S. 483 (1880) (enforcing treaty assuring Swiss citizens' right to inherit property); Hughes v. Edwards, 22 U.S. (9 Wheat.) 489 (1824) (enforcing British land owner's rights under treaty); Soc'y for Propagation of Gospel v. New-Haven, 21 U.S. (8 Wheat.) 454 (1823) (same).

[4] *See See* discussion *infra* Section II.

[5] *See id.*

[6] Foreign Relations Restatement, supra note 1, at § 907, cmt. a.

In this article, I argue that a modified version of the "intent-to-benefit" test used to determine third party rights in contracts should be used to determine whether a treaty gives rise to individually enforceable rights. Several reasons support this approach. First, treaties are characteristically more similar to contracts than to statutes, including in formation, governance, and structure.[7] Second, the text and history of the Constitution lends support to the view that treaties should be interpreted as contracts.[8] Finally, although textualism may be appropriate in the context of statutory interpretation, it is not appropriate for purposes of treaty interpretation.[9] I apply the modified intent-to-benefit test I propose to *Sanchez-Llamas v. Oregon*, a case decided by the Supreme Court last term in which it missed an important opportunity to clarify a muddy area of the law.[10]

In Section I, I describe the Court's march towards textualism in statutory interpretation. In Section II, I trace the Court's increasing tendency to apply textualism to treaty interpretation, particularly to the question of whether a treaty gives rise to individually enforceable rights. Section III shows the historical evolution of third party beneficiary rights and the intent-to-benefit test. In Section IV, I justify why the contract interpretation approach is preferable to the statutory interpretation approach to determining individually enforceable rights in treaties. Finally, in Section V, I propose a modified version of the intent-to-benefit test and apply it to the facts of the *Sanchez-Lllamas* case.

[7] *See* discussion *infra* Section IV (A).
[8] *See* discussion *infra* Section IV (B).
[9] *See* discussion *infra* Section IV (C).
[10] *See* discussion *infra* Section V.

I. *The Rise of Textualism in Statutory Interpretation*

The Supreme Court has increasingly used the textualist approach to determining whether a statute creates a private cause of action. The Court, however, has not always been swayed by textualism in this context. Indeed, as with statutory interpretation generally, the Court has applied three different theories of interpretation to determining whether a statute creates a private right of action—textualism, intentionalism, and purposevism.[11] Intentionalism emphasizes the intent of the legislature enacting the statute and thus, suggests that courts should examine both a statue's text and legislative history in determining its meaning.[12] Purposivists de-emphasize the legislature's intent and instead, seek to understand the statute's broad purposes to determine whether implication of a private right of action would further the statute's purpose.[13] Textualists generally attempt to ascertain the meaning of a statute by looking only at its text and de-emphasize the intent of those who enacted the statute.[14]

Although prior to 1964, the Supreme Court rarely implied private rights of action, in 1964, the Court recognized such a private right of action under the Securities and Exchange Act of 1934 in *J.I. Case Co. v. Borak*.[15] In *Borak*, applying a methodology based on purposevism, the Court noted that a private cause of action should be implied in

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[11] Branford C. Mank, Legal Context: Reading Statutes in Light of Prevailing Legal Precedent, 34 Ariz. St. L.J. 815, 818 (2002).

[12] *Id.* at 818. *See also* Ediberto Roman, "Statutory Interpretation in Securities Jurisprudence: A Failure of Textualism," 75 Neb. L. Rev. 377, 388 (1996). There are two types of intentionalism—archeological and hypothetical intentionalism. Archeological intentionalism seeks to identify the intent of the legislature based on the statute's text and legislative history, while hypothetical intentionalism seeks to determine how a legislature would wanted a particular issue resolved. *Id.*

[13] Mank, supra note 11, at 818-19. *See also*, Roman, supra note 12, at 389-90.

[14] Mank, supra note 11, at 819. *See also*, Antonin Scalia, A MATTER OF INTERPRETATION 39-40 (1997) ("My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning.").

[15] Mank, supra note 11, at 845. *See also* Cannon v. Chicago, 441 U.S. 677, 735 (1979) (J. Powell dissenting).

a statute whenever such a remedy would advance the statute's purpose.[16] Following the approach in *Borak*, between 1964 and 1975, the Court expanded private rights of actions to several other contexts—the Social Security Act of 1935, [17] the Voting Rights Act of 1965,[18] and the Harbors Act of 1989.[19]

However, in *Cort v. Ash*,[20] in attempting to narrow *Borak*'s approach, the Court proposed a four-factor test for deciding whether a private remedy is implicit in a statute: (1) whether the plaintiff is one of the class for whose special benefit the statute was enacted, (2) whether there is implicit or explicit evidence that Congress intended to grant the proposed right of action, (3) whether a private right of action would advance the "underlying purposes of the legislative schedule," and (4) whether the cause of action is traditionally identified with state law and whether a federal cause of action would impede on important state concerns.[21] A combination of two theoretical approaches underlie the *Cort* test—intentionalism and purposevism. Thus, courts must determine both the intent of the legislature as well as the purpose of the statute in question.[22]

Even though the four factors in *Cort* may have been intended to constrain courts from implying private rights of action, twenty federal appellate decisions implied private rights of action within four years of *Cort*.[23] After the late 1970s, however, the Court began to apply the *Cort* standard more narrowly by focusing on the prong requiring Congressional intent to create a right of action.[24] Emblematic of this shift was *Touche*

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[16] Mank, supra note 11, at 845.
[17] Rosado v. Wyman, 397 U.S. 397 (1970).
[18] Allen v. State Bd., 393 U.S. 544 (1969).
[19] Wyandotte Transp. Co. v. United States, 398 U.S. 191 (1967).
[20] 422 U.S. 66 (1975).
[21] *Id.* at 78.
[22] Roman, supra note 12, at 401.
[23] Mank, supra note 11, at 846.
[24] *Id.* at 846. *See also* Susan J. Stabile, The Role of Congressional Intent in Determining the Existence of

Rosse & Co. v. Redignton, 442 U.S. 560 (1979), in which the Court focused on the intent of Congress as expressed through the text of the statute.[25] The Court concluded that the statute in question did not create a private right of action, because it did not manifest Congressional intent to create such a remedy.[26]

Decided the same year as *Touche Rosse*, the majority opinion in *Cannon v. Chicago*[27] appears to be an aberration in the Court's embrace of textualism. Indeed, the majority opinion in *Cannon* applied the *Cort* test in a manner closely resembling the intent-to-benefit test under contract law.[28] In *Cannon*, the Court permitted a woman to sue two private universities for denying her admission on the basis of her sex, because it found that Title IX of the Education Amendments created an implied right of action.[29] The Court reasoned that, although the statute does not expressly authorize a private right of action, the statute satisfies the "threshold question" under *Cort* -- whether it was "enacted to benefit a special class of which plaintiff is a member."[30] The relevant statute stated that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[31] In holding that the statute satisfied the first factor of the *Cort* test, Justice Stevens noted that Congress

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Implied Private Rights of Action, 71 Notre Dame L. Rev. 861, 868-69 (1996); Richard B. Stewart and Cass R. Sunstein, Public Programs and Private Rights, Harvard L. Rev. 1196, 1196-97 (1982) ("The past few years, however, have seen a sharp reversal. The Supreme Court has all but repudiated Borak and has created a strong presumption against judicial recognition of private rights of action. The Court's restrictive approach has provoked sharp controversy. Some commentators argue that it has deprived regulatory beneficiaries of an appropriate and effective remedy for administrative failure.")

[25] Touche Rosse & Co. v. Redignton, 442 U.S. 560, 568 (1979). *See also* Roman, supra note 12, at 402-07 (noting the shift in the Court's approach towards textualism post-Cort v. Ash).

[26] Touche Rosse & Co. v. Redignton, 442 U.S. 560, 568 (1979).

[27] 441 U.S. 677 (1979).

[28] *See* discussion *infra* Section III.

[29] *Id.*

[30] *Id.* at 689.

[31] *Id.* at 681.

drafted the statute "with an unmistakable focus on the benefited class."[32] He further found that "the right or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action."[33] The opinion consulted liberally with the legislative history and concluded that every other factor of *Cort* was also satisfied.[34]

Despite the short-lived victory of intentionalism in *Cannon*, the Court's opinion in *Alexander v. Sandoval*[35] rang the death knell for all other theories in favor of textualism. In *Sandoval*, a private individual sued to enforce a regulation promulgated by the Department of Justice pursuant to Title IV.[36] The Court found that, although the regulation in question contained "rights-creating language," it could only create a right of action if the statute pursuant to which the section was enacted created a right of action.[37] By examining only the text of the statute, the Court concluded that the relevant statutory section did not create a right of action because it contained no "rights-creating language."[38] Justice Scalia wrote that "[w]e . . . begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."[39]

The Court extended the rigorous requirement for implying private causes of action to Section 1983 actions in *Gonzaga University v. Doe*.[40] In that case, the Court rejected prior precedent in the Section 1983 context that suggested that a private right of

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[32] *Id.* at 691.
[33] *Id.* at 693 fn. 13.
[34] *Id.* at 694-709.
[35] 532 U.S. 275 (2001).
[36] *Id.*
[37] *Id.*
[38] *Id.* at 287.
[39] *Id.* at 288.
[40] 536 U.S. 273 (2002).

action is created if the statute "benefits" the plaintiff.[41] Instead the Court found that the correct question to ascertain whether to imply a private right of action is "whether Congress intended to create a federal right."[42] In determining Congressional intent, the Court analyzed only the "text and structure" of the statute and concluded that Congress did not intend to create new individual rights.[43]

Consequently, although historically three different theories have been utilized by the Court in determining whether a statute gives rise to individually enforceable rights, the modern approach clearly marks a victory for textualism. And even when courts have used the language of intentionalism, they often refuse to look outside the text of the statute in determining Congressional intent. The practical effect of a textualist approach is that courts are less likely to imply a cause of action in a statute, because it prohibits courts from searching extra-textual sources that might otherwise show that Congress intended to benefit third parties.[44]

II. *The Rise of Textualism in Treaty Interpretation*

The principles of treaty interpretation employed by the Supreme Court loosely parallel the three theories that underlie statutory interpretation described in Section I above—intentionalism, purposevism and textualism. As in the statutory interpretation context, the theory that underlines a court's methodology informs whether or not it will use extra-textual sources in determining the meaning of a treaty. The Court's opinion last term in *Sanchez-Llamas* implicitly extends textualism to determining individually

[41] *Id.* at 282.
[42] *Id.* at 283.
[43] *Id.* at 286.
[44] Benjamin Labow, Note, "Federal Courts: Alexander v. Sandoval: Civil Rights Without Remedies," 56 Okla. L. Rev. 205, 224 (2003).

enforceable rights under treaties.[45] The consequence of using the textualist approach to treaty interpretation is that it is less likely that courts will allow individuals to bring claims based on treaties, because the text of treaties rarely explicitly provide for individually enforceable rights.

Courts that take an intentionalist approach[46] often employ a cannon of treaty interpretation that calls for treaties to be interpreted "liberally" and in "good faith."[47] This approach is often used by courts to justify employing a theory of intentionalism. *Choctaw Nation of Indians v. United States*,[48] exemplifies this approach. In that case, the Court wrote that "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."[49] Under the intentionalist approach, courts often consult extra-textual sources without regard to whether or not the text of the treaty is ambiguous and may even consult extra-textual sources when they find the text of the treaty to be clear.[50]

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[45] See discussion *infra* Section V.

[46] *See e.g.*, Jordan v. Tashiro, 278 U.S. 123, 127, 49 S.Ct. 47, 73 L.Ed. 214; Geofroy v. Riggs, 133 U.S. 258, 271, 10 S.Ct. 295, 33 L.Ed. 642; In re Ross, 140 U.S. 453, 475, 11 S.Ct. 897, 35 L.Ed. 581; Tucker v. Alexandroff, 183 U.S. 424, 437, 22 S.Ct. 195, 46 L.Ed. 264; Asakura v. Seattle, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041. Factor v. *Laubenheimer*. *See also* Michael S. Straubel, Textualism, Contextualism, and Scientific Method in Treaty Interpretation: How Do We Find the Shared Intent of the Parties? 40 Wayne L. Rev. 1191, 1192-93 (1994).

[47] In elaborating on "liberal interpretation," in the 1890 Supreme Court opinion in *Geofroy v. Riggs*, Justice Field stated that: "[i]t is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them." 133 U. S. 258, 267, 272 (1890). The notion of good faith is often linked with liberal interpretation and was described by Justice Brown in *Tucker v. Alexandroff*, where he said that a treaty, "should be interpreted . . . in a manner to carry out its manifest purpose.... [They] should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity [between nations], so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence." 183 U.S. 424, 435 (1902).

[48] 318 U.S. 423 (1943).

[49] 318 U.S. 423, 432 (1943).

[50] Straubel, supra note 46, at 1201.

Courts also use the purposevism theory advocated by the Vienna Convention on the Law of Treaties ("Treaty Convention"). The Treaty Convention calls for treaty interpreters to determine the "object and purpose" of the treaty.[51] Although the United States is not a party to the Treaty Convention, courts have applied its methodology as customary international law.[52] The Treaty Convention allows for consultation with extra-textual materials in limited circumstances.[53]

Justice Scalia is known as a proponent of the third approach to treaty interpretation – textualism.[54] In *Chan v. Korean Airways LTD*,[55] Justice Scalia stated that "[w]e must thus be governed by the text--solemnly adopted by the governments of many separate nations--whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous . . . But where the text is clear, as it is here, we have no power to insert an amendment."[56] Justice Brennan wrote a concurrence in *Chan* mainly to take issue with the textualist approach to treaty interpretation advocated by Justice Scalia in the majority opinion. The concurrence

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[51] Treaty Convention, supra note 2, at art. 31, § 1.
[52] *See e.g.*, Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 307-08 (2000) ("In some cases, the customary international law of a certain area is itself codified in a treaty. Such is the case with the customary international law of treaties, which to a large extent has been codified in the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331."); Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350, 1361-62 (1992) ("Although the United States has not ratified the Vienna Convention, it is a signatory. We have previously applied the Vienna Convention in interpreting treaties . . . as has the United States Department of State."); Gonzalez v. Gutierrez, 311 F.3d 942, 949 fn 15 (9th Cir. 2002) ("While the United States is not a signatory to the Vienna Convention, it is the policy of the United States to apply articles 31 and 32 as customary international law.").
[53] Treaty Convention, supra note 2, at art. 31, § 1. *See also* Sale v. Haitian Ctrs. Council, 113 S. Ct. 2549 (1993) ("Reliance on a treaty's negotiating history (travaux preparatoires) is a disfavored alternative of last resort, appropriate only where the terms of the document are obscure or lead to "manifestly absurd or unreasonable" results (citing Vienna Convention on the Law of Treaties, Art. 32, 1155 U.N.T.S., at 340, 8 I.L.M., at 692).
[54] Straubel, supra note 46, at 111-17.
[55] 490 U.S. 122, 134 (1989).
[56] *Id.* at 134.

pointed out that: ". . . . it is wrong to disregard the wealth of evidence to be found in the Convention's drafting history on the intent of the governments that drafted the document. It is altogether proper that we consider such extrinsic evidence of the treatymakers' intent."[57] Several commentators have observed that courts are increasingly applying textualist theories to treaty interpretation.[58]

The textualist approach and the language of statutory interpretation[59] have also manifested themselves in determining individually enforceable rights under treaties. For example, in *Sosa v. Alvarez-Machain*, [60] the issue was whether the law of nations creates a private cause of action that can be enforced through a federal statute (the Alien Tort Act). Although the case did not involve the interpretation of an international treaty in making that determination, the Court's reasoning demonstrates the influence of the

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[57] *Id.* at 136.

[58] *See e.g.*, Michael Van Alstine, Dynamic Treaty Interpretation, 146 U. Pa. L. Rev. 687, 691 (1998) [hereinafter "Dynamic Treaty Interpretation"] ("the Court's treaty jurisprudence has fallen under the strong influence of a resurgent strain of formalism in domestic statutory interpretation"); David Bederman, Revivalist Canons and Treaty Interpretation, 41 U.C.L.A Rev. 953, 1022 (1994) [hereinafter "Revivalist Canons"] ("So while the prevailing rhetoric of [treaty interpretation] is contractual, the underlying idiom and approach is statutory."). *See also id.* at 1019-20 (1994) ("recent trends in treaty construction have been subliminally influenced by current trends in statutory interpretation debate").

[59] *See e.g.,* Breard v. Greene, 523 U.S. 371 (1998) ("As for Paraguay's suits (both the original action and the case coming to us on petition for certiorari), neither the text nor the history of the Vienna Convention clearly provides a foreign nation *a private right of action* in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions.")(emphasis added); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989) ("These conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create *private rights of action* for foreign corporations to recover compensation from foreign states in United States courts.") (emphasis added); DiLaura v. Power Authority of State of New York, 786 F.Supp. 241, 252 (W.D.N.Y.1991) (citing Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir.), cert. denied, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976)) ("A treaty must provide expressly for *a private right of action* before a plaintiff can assert a claim thereunder in federal court.")(emphasis added); Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798, 802 (2d Cir.1971)). *See also* In re Letters Rogatory from Caracas, 1998 WL 107029, *1 (S.D.N.Y.1998) (holding that those plaintiffs lacked standing to enforce a provision of a treaty which did not confer any identifiable right upon them). Haudenosaunee Six Nations of Iroquois (Confederacy) of North America Not Reported in F.Supp.2d, 1998 WL 748351, W.D.N.Y.,1998 (It is readily apparent--and Judge Arcara of this Court has previously held--that the Treaty does not create *a private cause of action*)(emphasis added); Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir.), cert. denied, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 1 01 (1976) (A treaty must provide expressly for *a private right of action* before a plaintiff can assert a claim thereunder in federal court).

[60] 542 U.S. 692 (2004).

textualist methodology in determining private rights of actions under international law. Justice Souter delivering the opinion for the Court states that:

> . . . this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. . . . . even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly. While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.[61]

Moreover, the Court's decision last term in *Sanchez-Llamas* marked the direction of the Roberts Court in favor of textualism in determining private rights of action in treaties. The Court assumed (without attaching any precedential value to it) that the Vienna Convention on Consular Relations ("Consular Convention")[62] creates individually enforceable rights, but it nullified any such right by holding that the Consular Convention creates no remedies. Even though the majority opinion written by Justice Roberts' paid lip service to the cannon of liberal interpretation,[63] the approach he took was in line with textualism. The opinion failed to consult with extra-textual sources and found that the Consular Convention does not give an individual a remedy, because the text does not explicitly provide for it.[64]

III. *The Intent-to-Benefit Test: The Contract Law Approach to Determining Third Party Enforcement Rights.*

The Restatement (Second) of Contracts ("Second Restatement")[65] codifies the modern approach to determining whether a person who is not a party to a contract is

[61] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[62] April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter "Consular Convention"].
[63] Sanchez-Llamas, 126 S.Ct. at 2679.
[64] *Id*. at 2677-83.
[65] Restatement (Second) of Contracts (1981) [hereinafter "Second Restatement"].

nevertheless entitled to enforce the contract. The intent-to-benefit test derived from Section 302(1)(b) of the Restatement Second suggests that a third party should be entitled to enforce a contract if the parties intended to benefit such party and the circumstances (including extra-textual materials) indicate that the promisor intended to give the benefit of the promised performance to the third party. The Second Restatement's intentionalist approach is a departure from the First Restatement of Contracts ("First Restatement")[66] more textualist approach to contract interpretation.

Modern third party beneficiary concepts trace their roots to English common law. *Dutton v. Poole*, decided in 1677, is often cited to illustrate the roots of third party beneficiary law.[67] In that case, a father was going to sell wood to raise money for a dowry for his daughter.[68] His son, who would have otherwise inherited the wood, promised the father that he would pay £1000 to the daughter if the father did not sell the wood.[69] The father died and the son refused to pay the money to the daughter. Although the daughter was not a party to the contract, the court held that the daughter could enforce the contract against the son.[70]

As classical contract theory gained popularity in England, courts became reluctant to grant rights to individuals who were not party to a contract since doing so often required deviating from the express text of the contract. Indeed, the principle favoring third party beneficiary rights was repudiated in 1861 in *Tweddle v. Atkinson*.[71] In that

[66] Restatement of Contracts (1932) [hereinafter "First Restatement"].
[67] 83 Eng.Rep. 523 (K.B.1677).
[68] *Id.* at 523.
[69] *Id.*
[70] *Id.* at 524.
[71] 1 B. & S. 393 (Q.B. 1861).

case the court found that a son-in-law could not enforce a contract against his father-in-law, who had promised to pay the son-in-law's father a certain sum of money.[72]

The same tension between acknowledging the rights of third party beneficiaries and classical contract theory played itself out in U.S. courts.[73] Although third party beneficiaries were permitted to enforce contracts long before *Lawrence v. Fox*,[74] decided in 1859 by the New York Court of Appeals, it is often cited as the turning point for recognition of third party beneficiary rights.[75] In that case, under a contract between Holly and Fox, Holly loaned $300 to Fox, and Fox in turn agreed to pay $300 to Lawrence in satisfaction of a preexisting debt that Holly owed to Lawrence.[76] The court held that Lawrence could enforce the contract against Fox even though he was not specifically named in the contract.[77] In subsequent years, New York courts pared back the holding in *Lawrence v. Fox* to its bare minimum.[78] Other state courts, notably Massachusetts, refused to recognize third party beneficiary rights all together.[79]

The rise of modern contract law in the 1920s led to the recognition of the enforcement of rights of third party beneficiaries, a shift that was ultimately codified in the First Restatement. Section 133 of the First Restatement provided:

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[72] *Id.* at 398.
[73] *See e.g.*, Melvin Aron Eisenberg, Third Party Beneficiaries, 92 Colum. L. Rev. 1358 (1992). Martin Eisenberg points out that recognizing third party beneficiary rights conflicts with the following three major premises of classical contract law: first, contract law can and should be developed in an axiomatic fashion; second, persons would not readily engage in contracting if they faced the threat of high liability; and third, standardized rules are preferable to individualized rules. *Id.* at 1365-68. Third party beneficiary law conflicts with all three principles because: first, it is at odds with basic principles of contract law that require that there must be privity and consideration in order to enforce a contract; second, allowing third-party beneficiaries to bring suit expands a promisors' liability; and third, in adjudicating suits by third-party beneficiaries, courts would need to conduct individualized inquiries into the facts and intent. *Id.* at 1365.
[74] 20 N.Y. 268 (1859).
[75] *Id.* at 1363-1364.
[76] *Id.* at 269.
[77] *Id.* at 269.
[78] *Id.* at 1367.
[79] *Id.* at 1368.

> (1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is ...:
> (a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary;
> (b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary ...;
> (c) an incidental beneficiary if neither the facts stated in Clause (a) nor those stated in Clause (b) exist.

Even though the First Restatement acknowledged enforcement rights for third parties, it narrowly circumscribed those rights. Under the First Restatement, only two categories of individuals were given enforceable rights—creditor beneficiaries and donee beneficiaries.[80] A donee beneficiary was a beneficiary to whom the promisee intended to benefit as a gift, while a creditor beneficiary was a beneficiary to whom the promisee owed a debt and wished to satisfy that debt by requiring the promisor to make a payment to the beneficiary.[81]

The Second Restatement broadened the scope of third parties that have enforceable rights.[82] Although contract disputes are governed by state law, many states have adopted the third party beneficiary test set forth in the Second Restatement.[83] Section 302(1) of the Second Restatement states that:

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[80] First Restatement, supra note 66, at §§ 135-36 (providing for enforcement rights for creditor and donee beneficiaries).
[81] *Id.* at § 133(1)(a).
[82] Second Restatement, supra note 65, at § 302.
[83] *See e.g.*, Septembertide Publishing v. Stein & Day, 884 F.2d 675 (2d. Cir. 1989) (the court identifies Section 302 of the Restatement (Second) of Contracts as the appropriate test to determine third party beneficiary rights under New York law); Flexfab, LLC v. U.S., 62 Fed. Cl. 139 (Fed. Cl. 2004) (subcontractor failed to establish that it was a third-party beneficiary of contract between contractor and the government because modification of contract made it a joint payee). *See also* David M. Summers, Third

> Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. [84]

In applying the Second Restatement test, one Federal Court of Appeals Court classified it into two components: (1) an intent-to-benefit test; and (2) a duty owed test.[85]

Party Beneficiaries and the Restatement (Second) of Contracts, 67 Cornell L. Rev. 880, 889-90 (1982) ("It is not surprising that the tentative provisions of the Restatement Second met with approval in both state and federal courts. The Restatement Second's approach potentially offers a consistent rationale for third party beneficiary cases falling outside the first Restatement categories, and for the new and complex factual situations likely to arise in the future."); Williston on Contracts, § 37:5. ("In a significant number of states, certain aspects of the law relating to contracts for the benefit of third persons are governed by statute. Most of these statutes are of a limited nature, regulating a few, well-defined areas of third party beneficiary doctrine, and governing specific contractual relationships. Some states, however, have broad statutory provisions which effectively codify and implement the common-law third party beneficiary doctrine. For example, the California statute, on which several others are based, provides that '[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.'"). *But see* Williston on Contracts, § 37:7. Donee, creditor, intended, and incidental beneficiaries ("The Restatement (Second) of Contracts also classifies the protected and unprotected beneficiaries, but eliminates the terminology "creditor" and "donee" beneficiaries, lumping the protected beneficiaries into one broad class, "intended" beneficiaries, and designating all other, unprotected beneficiaries as "incidental." This change in terminology has not been well received by the courts, in part because of their familiarity with the traditional phraseology and in part because of its helpful, descriptive qualities.").

[84] Comment (d) of section 302 of the Second Restatement adds another basis for a beneficiary to be considered an "intended beneficiary"—those who reliance on the promisee is both reasonable and probable. *Id.* at cmt. d ("Either a promise to pay the promisee's debt to a beneficiary or a gift promise involves a manifestation of intention by the promisee and promisor sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable. Other cases may be quite similar in this respect. Examples are a promise to perform a supposed or asserted duty of the promisee, a promise to discharge a lien on the promisee's property, or a promise to satisfy the duty of a third person. In such cases, if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary. Where there is doubt whether such reliance would be reasonable, considerations of procedural convenience and other factors not strictly dependent on the manifested intention of the parties may affect the question whether under Subsection (1) recognition of a right in the beneficiary is appropriate. In some cases an overriding policy, which may be embodied in a statute, requires recognition of such a right without regard to the intention of the parties.")

[85] Dayton Development Co. v. Gilman Financial Services, Inc., 419 F.3d 852 (8th Cir. 2005). *See also* McCarthy v. Azure, 22 F.3d 351 (1st Cir. 1994) (finding that as is generally the case in matters of contract interpretation, the crux of third party beneficiary analysis is intent of parties); Camco Oil Corp. v. Vander Laan, 220 F.2d 897 (5th Cir. 1955) ("in order for a third party to recover on a contract to which he is not a party, it must clearly be shown that the contract was intended for his benefit."); E.B. Harper & Co., Inc. v. Nortek, Inc., 104 F.3d 913 (7th Cir. 1997) (in order for third party to have right to sue, the contract must be undertaken for plaintiff's direct benefit and contract itself must affirmatively make this intention clear; if

The intent-to-benefit test flows from Section 302(1)(b), while the "duty owed" test is set out in Section 302(1)(a) of the Second Restatement. The duty owed test requires that "the promisor's performance under the contract must discharge a duty otherwise owed the third party by the promisee."[86] To satisfy the intent to-benefit test, "the contract must express some intent by the parties to benefit the third party through contractual performance."[87] In breaking with the First Restatement, the intent-to-benefit test suggests that a third party does not have to be either a creditor or a donee to enforce a contract. Under the intent-to-benefit test whether a non-party has the right to enforce a contract turns on intent rather than on the relationship between the promisor and the party attempting to enforce the contract.[88]

The shift in approach to third party beneficiaries from the First Restatement to the Second Restatement is consistent with the diverging contract law theories espoused by the drafters of the Restatements. Samuel Williston, the main drafter of the First

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intent is not express on face of contract, its implication at least must be so strong as to be practically an express declaration); Hairston v. Pacific 10 Conference, 101 F.3d 1315, 114 Ed. Law Rep. 771 (9th Cir. 1996), as amended, (Dec. 19, 1996) ("to create a third party beneficiary contract, the parties must intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract, and to determine the contracting parties' intent, the court should construe the contract as a whole, in light of the circumstances under which it was made").

[86] Dayton, 419 F.3d at 857.

[87] *Id.* at 856. Some courts adopt a test that requires the contract to manifest not only an intent-to-benefit the third party, but also an "intent to create a right of action." *See e.g.*, Dureiko v. United States, 62 Fed. Cl. 340, 364 (Fed. Cl. 2004) (finding that the owner of a mobile home park was not an intended beneficiary of a contract between the government and a company that removes debris, because the contract did not "reflect an intent to create enforceable rights in plaintiffs"). However, such a test is inconsistent with the modern principles enshrined in the Second Restatement and is another manifestation of an attempt by courts to import the statutory interpretation model into determining whether a contract creates individual enforcement rights.

David Summers also points out that some courts incorrectly found that because the primary purpose of a contract was not to benefit the third party beneficiary, the contract did not give rise to individual enforcement rights. Summers, supra note 83, at 892-93 (*citing* Sachs v. Ohio Nat'l Life Ins. Co., 148 F.2d 128, 131 (7th Cir. 1945) (beneficiary of a reinsurance may not recover because agreement was not made "for his direct benefit, or . . . primarily for his benefit."); Daniel-Morris Co. v. Glen Falls Indem. Co., 126 N.E.2d 750 (1955) (materialman may sue as third party beneficiary on a payment bond because bond's primary purpose was payment of materialmen); Waterway Terminals Co. v. P.S. Lord Mechanical Contractors, 406 P.2d 556, 569 (1965) (subcontractors not third party beneficiaries of fire-insurance policy without proof that contracting parties "had in mind a benefit to anyone other than themselves")).

[88] Williston on Contracts, § 37:8.

Restatement, was influenced by classical contract theory, which rejects searching for the intent of the parties from outside of the "four corners" of the contract.[89] Williston believed that contracts should be interpreted in much the same manner as the textualists interpret statutes today.[90] Williston argued that evidence of contemporaneous agreements and negotiations about the contract and the meaning of its terms should not be used to explain the parties' intentions or to vary or contradict the plain meaning of the agreement.[91] Clearly, such a theory would frown upon granting rights to individuals who are not a parties to a contract unless such rights are explicitly written in the contract.

The Second Restatement, on the other hand, parted ways from utilizing the textualist theory suggested by classical contract theory in favor of an intentionalist approach.[92] The underpinning of the intentionalist theory is that contract interpretation is a search for the shared intent of the parties and the written language of the contract is only probative, but not conclusive of such intent.[93] In line with this theory, Corbin, the

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[89] *See e.g.*, Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale L.J. 997, 1012-13 (1985).

[90] Stephen F. Ross & Daniel Tranen, The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation, 87 Geo. L.J. 195, 199-200 (1998).

[91] *Id.*

[92] One commentator has pointed out the difficulty in determining the intent of the parties. Orna S. Paglin, Criteria for Recognition of Third Party Beneficiary Rights, New England Law Review 66-67 (1989). *See also* American Jurisprudence, Proof of Facts 2d, § 5 ("Unfortunately, determining the intention of the contracting parties with respect to a third person is not the easiest of legal tasks.").

[93] *See e.g.*, Mark L. Movsesian, Are Statues Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation, 76 N. C. L. Rev. 1145, 1162 (1998) ("Yet, in significant respects, contemporary contract interpretation has come to reject the classical model. Under contemporary principles, contract interpretation is not principally a search for the objective meaning of a text, but rather a search for the shared intent of the parties. To be sure, the words of the parties' written agreement will be probative of their intent; in most cases, in fact, the words will provide conclusive evidence. But the goal, as Arthur Corbin once explained, "is the ascertainment of the intention of the parties (their meaning), and not the meaning that the written words convey . . . to any third persons, few or many, reasonably intelligent or otherwise." Under contemporary principles, where extrinsic evidence shows that the parties shared an intent at odds with the objective meaning of the written agreement, their intent, not the writing, prevails."). *See also id.* at 1149 ("Contract interpretation is properly intentionalist: in interpreting a contract, a court properly looks to the shared intent of the parties rather than the objective meaning of the written agreement. A contract, after all, is a private agreement that binds only the parties who make it. It exists independently of any writing the parties have adopted to memorialize it: the writing is not the contract, but merely

principal influence behind the Second Restatement, advocated the liberalization of the parol evidence rule to make extrinsic evidence more readily admissible by allowing a written contract to be supplemented by extrinsic evidence unless the written contract was a complete integration.[94] Consequently, the intentionalist approach that prevailed in the drafting of the Second Restatement would favor determining the intent of the parties from both the text and extrinsic sources. Moreover, this approach is more comfortable with allowing third parties who were not specifically identified in a contract to enforce the contract.

IV. *Justifications for Applying Intentionalism from Contract Interpretation instead of Textualism from Statutory Interpretation to Determining Individually Enforceable Rights Under Treaties*

The theory of intentionalism that underlies third party beneficiary rights under contract law should be used in determining whether or not a treaty gives rise to individually enforceable rights. Three general grounds support this view. First, interpretive theories reflect the characteristics of the document they seek to interpret and treaties should be interpreted like contracts because they bear greater similarities to contracts than to statutes. Second, the Constitution and the Supreme Court interpretations thereof support the notion that treaties are contracts, even though they have the effect of statutes. Third, the rationales offered to support a textualist approach to implying private rights of actions in statutes do not apply to treaty interpretation.

A. Treaties as Contracts

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evidence of the contract. In traditional form, moreover, a contract comprises just two parties and a limited subject matter. Given all this, intentionalism is a sensible interpretive strategy. Concerns about notice to third persons do not exist; the writing bears little formal significance; and there is small chance that examining a contract's negotiating history will present great practical burdens.").

[94] *Id.* at 205-06.

1. *Structural Similarities Between Treaties and Contracts*

David Bederman points out that "[m]ost of the confusion over essential principles in treaty interpretation has to do with whether international agreements are more like contracts than legislation or whether they are something altogether *sui generis*."[95] Cannons of interpretation take into account the characteristics of the document they are meant to interpret. I argue that treaties are characteristically similar contracts and as such, courts should apply the prevailing interpretive rules developed for contracts[96] to treaty interpretation.

As the chart below illustrates, treaties are virtually identical to contracts in how they are drafted, negotiated, approved and amended. Both treaties and contracts have signatories whereas statutes do not. The parties bound by treaties and contracts are the ones who are signatories to them, while the parties who are governed by a certain statute are those within the jurisdiction of the statute. The Treaty Convention confirms the view that a treaty is fundamentally similar to a contract—it defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[97] Statutes, on the other hand, are negotiated, approved and may be repealed or superseded by a majority of the relevant legislative body. Given the close similarities between treaties and contracts and differences between treaties and statutes, it is more appropriate to interpret treaties using the interpretive rules that are accepted for contracts rather than for statutes.

Chart Comparing the Characteristics of Contracts, Treaties, and Statutes

[95] Bederman, Revivalist Canons, supra note58, at 963.
[96] My use of the word "contract" herein, refers to written contracts.
[97] Treaty Convention, supra note 2, at Article 1(a).

	Contracts	Treaties	Statutes
Signatories	The parties to a contract are signatories to it	Same as contracts	There are no signatories to a statute
Structure	The provisions reflect agreements among the parties to do or abstain from doing certain things	Same as contracts	The provisions are intended to govern people within the applicable jurisdiction
Drafting & Negotiation	The parties to a contract negotiate and draft it	Same as contracts	The applicable legislators negotiate and their staff drafts it
Approval	Approved by all parties thereto	Same as contracts[98]	Approved by a majority of the applicable legislature
Amendment	May be amended by consent of all the parties	Same as contracts[99]	May be amended by a majority of the applicable legislature
Parties Bound	Typically only signatories are bound by it	Same as contracts[100]	People or entities within the relevant jurisdiction are bound by it[101]

[98] Although Article 9(2) of the Treaty Convention provides that "[t]he adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule," a State is not bound by a treaty unless it expresses its intent to be bound. Treaty Convention, supra note 2, at Article 9(2) and Article 11 ("The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.").

[99] *See* The Federalist No. 64, at 14-15 (John Jay) (E.G. Bourne ed., 1937) ("but let us not forget that treaties are made, not only by one of the contracting parties, but by both; and consequently, that as the context of both was essential to their formation at first, so it must ever afterwards be to alter or cancel them").

[100] *See* Anthony Aust, MODERN TREATY LAW AND PRACTICE 131 (Cambridge University Press 2003) ("When a treaty has entered into force, it is in force *only* for those states who have consented to be bound by it. A treaty therefore is not like national legislation, which, once in force, is in force for all to whom it is directed. A treaty is much closer in character to a contract"). *See also* The Federalist No. 75 at 450 (Clinton Rossiter ed, 1961) ("Its objects are CONTRACTS with foreign nations which have the force of law . . . . They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign).

[101] *See e.g.*, Movsesian, supra note 93, at 1175 ("A statute is not a private agreement that binds only the legislators who enact it, but a public document that establishes rules of conduct for people outside the legislature-- rules those people must follow, in many instances, on pain of fine or imprisonment.").

2. *Response to Critics*

Some scholars have argued that treaties should be viewed as statutes while others have advocated viewing treaties as neither statutes nor contracts.[102] Michael P. Van Alstine believes that certain types of treaties, which he calls "legislative treaties," are more like legislation. One example he gives of such a treaty is the United Nations Convention on the International Sales of Goods ("UN Convention"). He argues that treaties such as the UN Convention have "have the look and feel of standard federal statutes" because, among other things, "their operative provisions impose no formal obligations on the United States in its internal conduct as a sovereign entity" and their "provisions merely regulate the relations between private entities involved in defined commercial transactions."[103] However, contracts impose no liability on governmental entities (unless they are party to them) and typically only regulate the conduct of private entities. Thus, what he labels "legislative treaties" appear to be more like contracts than statutes.[104]

Alex Glashausser argues that treaties are neither contracts nor statutes, but *sui generis*.[105] First, Glashausser notes that a treaty, unlike a statute, has diplomatic purposes: "it is a symbol of the bond between nations."[106] While it is true that some treaties may only have diplomatic purposes, many treaties manifest binding agreements--

[102] One commentator points out that the "matter of treaty interpretation has thus far received only limited scholarly attention." Michael P. Van Alstine, The Judicial Power and Treaty Delegation, 90 Cal. L. Rev. 1263, 1266 (2002) [hereinafter "Treaty Delegation"].
[103] Alstine, Dynamic Treaty Interpretation, supra note 58, at 706.
[104] Some scholars have even argued that statutes should be interpreted like contracts. *See e.g.*, Daniel A. Farber, Legislative Deals and Statutory Bequests, 75 Minn. L. Rev. 667, 667 (1991) (arguing that statutes should be interpreted like contracts); McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 Geo. L.J. 705 (1992) (arguing that statutes should be interpreted like contracts). *But see* Movsesian, supra note 93 (arguing against the contact analogy for statutes).
[105] Alex Glashausser, What We Must Never Forget When it is a Treaty We Are Expounding, 73 U. Cinn. L. Rev. 1243 (2005).
[106] *Id.* at 1271.

such as delineating boundaries, agreements on trade tariffs or the treaties relating to the rights of individuals. Second, Glashausser argues that treaties differ from contracts because the bargaining power of parties to a treaty may be unequal,[107] people who negotiate treaties come from different cultures,[108] words are difficult to translate across languages.[109] While all of these characteristics distinguish treaties from very standard contracts, many sophisticated cross-border commercial contracts share the same characteristics as treaties— the bargaining power among the parties may be unequal and they may be negotiated by parties who speak different languages and come from different cultures.

Third, Glashausser argues that treaties are different from contracts because States may not intend to be bound by them even though they may outwardly support the treaty.[110] Even if this is true, not only is not possible for courts to divine the hidden intent of the parties at the time the parties entered into the treaty, it would contravene the law of nations and the rule of law to support such a principle. Finally, Glashausser argues that treaties impact people beyond just the parties to the treaty and treaties may not have the same enforcement mechanisms as contracts.[111] I fully agree that people who are intended to be benefited by treaties do not have the same enforcement rights as individuals who are intended beneficiaries of contracts and propose in this paper that they should have greater rights.

In creating his own proposed interpretative norms for treaty interpretation that blend statutory norms and contractual norms, James Wolf appears to view treaties as *sui*

[107] *Id.* at 1272-1273.
[108] *Id.* at 1280-1282.
[109] *Id.* at 1277-1278.
[110] *Id.* at 1288.
[111] *Id.* at 1282-1288.

generis.[112] He argues that treaties are like statutes because they are rules of decision[113] and are like contracts because they confer rights and impose duties on the nations parties to them.[114] Wolf argues that treaties diverge from contracts mainly because no consideration is necessary for a treaty to be valid.[115] Wolf, however, is incorrect in concluding that treaties have no consideration. Indeed, treaties do have consideration in the broad sense of the term.

Consideration in the broad sense "cover[s] all the reasons deemed sufficient to render a promise enforceable, while the narrow concept of the term, singles out one reason deemed sufficient for enforcement of promises: the bargained-for exchange."[116] Although there may be no formal requirement in international law that a treaty manifest a bargain-for exchange, there are other formal requirements necessary to make a treaty valid and enforceable. Indeed, the Treaty Convention states that the parties to a treaty must have the capacity and full powers to enter into a treaty,[117] must consent to be bound by the treaty,[118] and that treaties may be invalidated for reasons such as fraud,[119] error,[120] or duress.[121] Thus, the requirements for the validity and enforceability of a treaty are consistent with the broad definition of consideration.

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[112] James C. Wolf, Comment, The Jurisprudence of Treaty Interpretation, 21 U.C. Davis L. Rev. 1023, 1069-1070 (1988).
[113] *Id.* at 1051.
[114] *Id.* at 1052-53.
[115] *Id.*
[116] *See* Corbin on Contracts § 5.1. Consideration in the narrow sense is designed primarily to prevent donative promises from being enforced. *See* Corbin on Contracts, § 5.2.
[117] Treaty Convention, supra note 2, arts. 6 and 7.
[118] *Id.* at arts. 12-15.
[119] *Id.* at art. 49.
[120] *Id.* at art. 48.
[121] *Id.* at arts. 50-52.

B. Treaties are Like Contracts That Have the Effect of Statutes

Many courts probably consider treaties to be statutes and apply theories of statutory interpretation to them because the Constitution calls treaties the "law of the land."[122] However, even though the Constitution indicates that treaties should have the effect of statutes, Supreme Court jurisprudence supports the position that treaties are more like contracts. For example, in *Diamond Rings*,[123] the Court clearly identified a treaty as a contract by calling it "an agreement, league or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the sovereigns or the supreme power of each state."[124] The Court further stated that a treaty "[i]n its essence . . . is a contract. It differs from an ordinary contract only in being an agreement between independent states instead of private parties."[125] More recently, the Court in *Washington Commercial Passenger Fishing Vessel Ass'n,* noted that "[a] treaty is essentially a contract between or among sovereign nations."[126]

While some courts have clearly stated that a treaty is a contract, other courts have created rules to give treaties the effect of statutes. First, courts have invalidated state laws that are deemed to be inconsistent with treaties, giving treaties the effect of federal

[122] U.S. Const. art. VI, § 2 ("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 the Constitution or Laws of any State to the Contrary notwithstanding.")
[123] 183 US 176 (1901).
[124] *Id.* at 182.
[125] *Id.*
[126] 443 U.S. 658, 675 (1979). *See also* Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) ("As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations.'") (*citing* De Geofroy v. Riggs, 133 U. S. 258, 271 (1890)); Harris v. United States, 768 F.2d 1240, 1242 (11th Cir. 1985) *vacated and remanded*, 479 U.S. 957 (1986) ("International agreements should be construed more like contracts than statutes."); Worcester v. Georgia, 31 US 515, 581 (1832) (stating that a treaty "is a compact between two nations or communities having the right of self-government").

statutes.[127] Second, courts have found that, as the case with statutes, a treaty can be trumped by a later in time statute.[128] Finally, the Supreme Court created the *Charming Betsy* principle, a cannon of interpretation that calls for U.S. statutes to be interpreted in harmony with treaties to which the U.S is a party, which elevates a treaty to the status of a statute.[129]

Even though treaties have the effect of statutes, the Constitution distinguishes them from federal legislation in several important ways. First, unlike in the statutory ratification process, the House of Representatives does not play a role in the approval of a treaty.[130] Second, while the Senate can modify a statute that it enacts, the Senate has the right only to approve or disapprove of a treaty and cannot change it.[131] Third, the President negotiates and enters into treaties while the legislature enacts a statute.[132]

The Constitution and Supreme Court interpretations thereof reflect the dual character of treaties in our democratic system. Treaties have the effect of statutes, but are recognized to be characteristically similar to contracts. The characteristics of a document and not its effect should guide what interpretive principles are applied to it. The Constitution and interpretations thereof confirm that a treaty is a contract. Consequently, it is more appropriate to apply modern contract theories to treaty interpretation than theories emanating from statutory interpretation.

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[127] *See e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968); Baker v. Carr, 369 U.S. 186 (1962); Bacardi Corporation of America v. Domenech, 311 U.S. 150 (1940); U.S. v. Belmont, 301 U.S. 324 (1937); Asakura v. City of Seattle, 265 U.S. 332 (1924). *See also* Aust, supra note 100, at 159.
[128] *See e.g.*, Clark v. Allen, 331 U.S. 503, 508-09 (1947); Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138 (1933); Head Money Cases (Edye v. Robertson), 112 U.S. 580, 597-99 (1884).
[129] Murray v. Charming Betsy, 2 Cranch 64, 6 U.S. 64 (1804). *See also* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005) (applying the *Charming Betsy* principle); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (same); Young v. U.S., 97 U.S. 39 U.S. (1877) (same).
[130] U.S. Const. art. II, § 2.2.
[131] *Id.*
[132] *Id.*

C. Justifications for Textualism from Statutory Interpretation are Not Applicable in the Treaty Interpretation Context

Reasons offered to support textualism for purposes of determining whether a statute gives rise to a private right of action are not applicable in the context of treaty interpretation. First, those who support textualist readings of statutes argue that courts usurp legislative powers when they imply private rights of actions in statutes. Justice Powell's dissent in *Cannon* is emblematic of this view.[133] He argued that it is Congress under Article III of the Constitution that has the power to determine the jurisdiction of courts and that implying a private cause of action "extends the authority of the court to embrace a dispute that Congress has not assigned it to resolve."[134] Others have pointed out that courts invade the legislative domain by creating remedies that Congress has not provided by implying private rights of actions in statutes.[135] Yet others argue that legislatures are better able than courts to assess the costs and benefits of enforcing a statute and to fine-tune the level of compliance with the statute.[136]

Second, others argue that not only do courts usurp the constitutional powers of the legislative branch, they infringe upon the Executive when they imply private rights of action in statutes. Congress has delegated the enforcement of certain statutes to executive agencies. When courts imply private rights of action in those statutes, they invade the discretion of the Executive about what actions should be enforced.[137] Third, some textualists argue that it is futile to use extra-textual sources to determine intent, because it

[133] Cannon v. Chicago, 441 U.S. 677 (1979) (J. Powell dissenting).
[134] *Id*. at 746.
[135] Stabile, supra note 24, at 884.
[136] Stabile, supra note 24, at 882.
[137] Stabile, supra note 24, at 882-83.

is impossible to find a single intent within a large collective body such as Congress.[138] Others argue that even if legislative history provides insight into intent, it should not be used because it would not provide the view of Congress collectively, but rather of just individual representatives.[139]

None of the arguments offered to support refraining from implying private rights of actions in legislation apply to treaties. First, in interpreting treaties, courts do not intervene on Congressional powers.[140] Unlike statutes, it is the President, and not Congress, that has the power to "make treaties" under the Constitution.[141] Moreover, the Executive may even terminate United States' participation in a treaty without consulting with the Senate.[142] The Senate only has the limited power to accept or reject a treaty.[143] This power is vastly different from formulating and adopting statutes.[144] Thus, when courts interpret treaties to imply individually enforceable rights, they are not usurping the constitutional powers of the Senate.

Second, courts do not infringe on powers that Congress has delegated to the Executive when they determine that treaties have individually enforceable rights. Because Congress has the power to make statutes under the Constitution, it has the

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[138] Mank, supra note 11, at 824.
[139] Roman, supra note 12, at 386.
[140] Bederman, Revivalist Canons, supra note 58, at 1022 (noting that the statutory interpretation debate is "preoccupied with the balance of power between judges and legislatures," while "[t]his concern is simply irrelevant in the treaty sphere").
[141] John C. Yoo, Treaty Interpretation and the False Sirens of Delegation, 90 Cal. L. Rev. 1305, 1309 (2002) ("Unlike the authority to enact legislation, the treaty power as a whole is located in Article II of the Constitution, which indicates that it ought to be regarded as an exclusively executive power. Although the Senate plays a role in providing its advice and consent, there are several reasons that this exception to the President's general power over treaties should be read narrowly.").
[142] *Id.*
[143] U.S. Const. art. II, § 2.2.
[144] Yoo, supra note 141, at 1309 ("The Senate's participation, however, does not transform the treaty power into a quasi-legislative power so much as it represents the dilution of the unitary nature of the executive branch, just as the inclusion of the presidential veto over legislation does not undermine the fundamentally legislative nature of the Article I, Section 8 powers.").

correlative power to delegate enforcement of statutes to the Executive. However, Congress does not have the power to make treaties and, therefore it has no power to delegate enforcement of treaties to Executive agencies. Consequently, when a court determines that a treaty creates individually enforceable rights it is not usurping any powers delegated by Congress to the Executive. In addition, when a court determines that a treaty gives rise to individually enforceable rights, it is not infringing on any inherent constitutional powers granted to the Executive either. Although the President has the authority to make treaties, Article II courts have the authority to interpret them by virtue of the fact that the Constitution declares a treaty "the law of the land."[145]

Third, while it may not be possible to determine the intent of a legislature that adopted a statute, it might be possible to determine the intent of the parties to a treaty. Statutes only require that a majority vote in favor of approving legislation, while treaties require unanimous approval by all treaty parties.[146] Therefore, it would be more appropriate to find a shared intent among the parties to a treaty than the members of a legislature.

V. *Application of the Intent-to- Benefit Test to Determining Individually Enforceable Rights under Treaties: The Sanchez-Llamas Case*

The main issue raised in *Sanchez-Lllamas v. Oregon*[147] was whether individuals may assert rights under the Consular Convention in criminal proceedings brought against them in the U.S. courts.[148] Instead of providing guidance to lower courts who have come

[145] U.S. Const. art. VI, § 2. *See also* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) (stating that "courts interpret treaties for themselves").
[146] Bederman, Revivalist Canons, supra note 58, at 1022.
[147] 126 S.Ct. 2669 (2006). The Sanchez-Llamas case consolidated two cases.
[148] The precise question presented before the Court in Sanchez-Llamas did not require the Court to determine whether the petitioners had the right to bring a cause of action on the basis of the Consular Convention, but rather whether the Consular Convention "create[d] rights that defendants may invoke against the detaining authorities in a criminal trial or in a post conviction proceeding." Sanchez-Lllamas,

to diverging conclusions on this question,[149] Justice Roberts, who wrote the majority opinion, avoided the issue all together by presuming (without deciding) that the Consular Convention gives rise to individually enforceable rights. The Court then held that the Consular Convention does not offer individuals any remedies.[150] Consequently, even if the Court had reached the conclusion that the Consular Convention provides individually enforceable rights such rights would be ineffective because they could not be enforced.

On the other hand, Justice Breyer, the author of the dissent, argued in favor of reaching the question of individually enforceable rights.[151] Referring to the *Head Money Cases*, the dissent stated that "a treaty 'is the law of the land as an act of Congress is,

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126 S.Ct. at 2674. The dissent further pointed out that the "[t]he parties also agree that we need not decide whether the Convention creates a 'private right of action,' i.e., a private right that would allow an individual to bring a lawsuit for enforcement of the Convention for damages based on its violation." *Id.* at 2694.

Although the "intent-to-benefit" test was developed to determine whether a third party has the right to bring a cause of action on the basis of a contract, this test can be successfully applied to determining both whether a non-party to a treaty can bring a cause of action on the basis of the treaty or whether a non-party can use a treaty as a defense in criminal proceedings against him or her.

[149] Some courts have held that the Consular Convention creates private rights. *See, e.g.*, Jogi, 425 F.3d at 378-84; United States ex rel. Madej v. Schomig, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); Standt v. City of New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); United States v. Superville, 40 F. Supp. 2d 672, 677 (D.V.I. 1999); United States v. Hongla-Yamche, 55 F. Supp. 2d 74, 77-78 (D. Mass. 1999); Breard v. Greene, 523 U.S. 371, 376 (1998) (Article 36 "arguably" confers individual rights). On the other hand, other courts have held that the Consular Convention does not create individually enforceable rights. *See e.g.*, United States v. Jimenez-Nava , 243 F.3d 192 (5th Cir. 2001).

The party briefs in the case also reflects the lack of clear standards. Brief for Petitioner Mario A. Bustillo at 16-34, Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006) (No. 05-51) [hereinafter "Bustillo Brief"] (arguing that that the Vienna Convention creates individual rights on the basis of its text, its travaux préparatoires, United States' post-ratification conduct, post-ratification conduct of other signatories and opinions of the ICJ); Brief for Petitioner Moises Sanchez-Llamas at 14-27, Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006) (No. 04-10566) [hereinafter "Moises' Brief"] (arguing that Article 36 creates individual rights because of the ordinary meaning of the provision, the purpose of the Consular Convention, the Travaux Préparatoires of the Consular Convention, the contemporaneous view and subsequent practice of the United States, and the ICJ opinions); Brief of the Respondent at 10-19, Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006) (No. 05-51) [hereinafter "Virginia Brief"] (arguing that the Consular Convention does not create individual rights because of the text of the Consular Convention, the interpretation given to it by the Executive, the ratification history of the Consular Convention, and the fact that other nations have not interpreted it to provide for individual rights); Brief for Respondent State of Oregon at 10-37, Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006) (No. 04-10566) [hereinafter "Oregon Brief"] (arguing that the Consular Convention does not create individual rights because of its plain text, its negotiation history, its ratification history, the executive's interpretation, and the interpretation of other parties).

[150] Sanchez-Llamas, 126 S.Ct. at 2674-87.

[151] *Id.* at 2695.

whenever its provisions prescribe a rule by which the rights of a private citizen or subject may be determined.[152] And when such rights are of a nature to be enforced in a court of justice,' in such case the court is to 'resor[t] to the treaty for a rule of decision for the case before it as it would a statute.'"[153] The dissent further outlines the following methodology for determining whether a treaty provides for individually enforceable rights: First, is the treaty self-executing? Second, does the treaty "prescribe a rule by which the rights of the private citizen ... may be determined" or "[a]re the obligations set forth in [treaty] of a nature to be enforced in a court of justice?"[154]

Despite the apparent clarity of the methodology articulated by the dissent, the weakness of the test becomes obvious when it is applied. The dissent concludes that the Consular Convention gives rise to individually enforceable rights on the basis of numerous factors: first, the "nature" of the Consular Convention,[155] second, the "rights" language in the Convention, [156] third, the position of the government that other provisions of the Consular Convention give rise to individually-enforceable rights, [157] and fourth findings by the Court that other treaties have given rise to individually enforceable rights.[158] The dissent's methodology does not provide a predicable set of rules for courts in adjudicating the issue, while the intent-to-benefit does. [159]

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[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.* at 2695.
[156] *Id.*
[157] *Id.* at 2696.
[158] *Id.*
[159] The majority and the dissent in Sanchez-Llamas also took opposing positions on whether or not there is a presumption against finding individually enforceable rights in treaties. The majority opinion in Sanchez-Llamas states that "there is a presumption that a treaty will be enforced through political and diplomatic channels rather than through courts." Sanchez-Llamas, 126 S.Ct. 2677. On the other hand, the dissent believes that no such presumption exists and cites the Head Money Cases, which provide that a treaty "may confer certain enforceable 'rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other,'" for support. Id. at 2697.

A. The Modified Intent-to-Benefit Test

1. *Class of Individuals as Intended Beneficiaries*

In order for a class of individuals to be deemed beneficiaries of a contract, the class must be sufficiently described or designated as intended beneficiaries in the contract.[160] Furthermore, a third party who seeks rights under such a contract must show that he or she is within the class of intended beneficiaries. For example, the Ninth Circuit found the parties to a consent decree intended to benefit all prisoners held in a certain jail, because the consent decree referred to "inmates" and "residents."[161] In addition, although they were not specifically named in the consent decree, the court found that all 300 prisoners held in the jail were within the class of intended beneficiaries.[162]

In another case, a district court in New York held that garment workers who were not specifically identified in an agreement between a clothing manufacturer and the Department of Labor could, nevertheless, enforce the agreement as third party beneficiaries.[163] The court found that the contract evidenced an intent-to-benefit the workers who were not even employees of the clothing manufacturer, but rather were employees of another company with whom the clothing manufacturer had contracted.[164] The court found that the parties intended to benefit the workers because the contract with the Department of Labor required that the clothing manufacturer not only pay minimum wages to its own workers, but that it not outsource any work to companies who do not

[160] *Id.* ("Where the third-person beneficiary is so described as to be ascertainable, it is not necessary that he or she be named in the contract in order to recover thereon. Indeed he or she may be one of a class of persons, if the class is sufficiently described or designated.").
[161] Hook, et. al., v. State of Arizona, Department of Corrections, 972 F.2d 1012, 1015 (9th Cir. 1992) ("decree lists 'inmates' and 'residents' as the intended beneficiaries of the consent decree. Thus, the 265 inmates are intended third party beneficiaries that have standing to enforce the rights of the inmates under the consent decree").
[162] *Id.*
[163] Chen, et. al., v. Street Beat Sportswear, et. al., 226 F.Supp.2d 355 (E.D.N.Y. 2002).
[164] *Id.* at 357-58.

pay their workers minimum wages and overtime.[165] The garment workers were within the class of intended beneficiaries because they were employees of a company to whom the defendant outsourced its work.[166] Consequently, in order for a treaty to give rise to individually enforceable rights, it must be deemed to benefit a class of individuals and the third party claiming rights under the treaty must be found to be within such class of individuals.

2. *Consulting Extra-Textual Sources*

In determining whether the parties intended to benefit a class of individuals, the intentionalist theory underlying the intent to benefit test counsels that courts should look not only to the written words of the treaty, but also to extrinsic materials.[167] Indeed, Section 302(b) of the Restatement Second specifically states that courts should look to the "circumstances" surrounding a contract.[168] As discussed in Section II above, courts

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[165] *Id.* at 363 ("Based on the language of the agreement itself, it is strikingly obvious that the entire purpose of the ACPA is to ensure that employees of factories which contract with Street Beat are paid minimum wage and overtime, and that it was they who were directly intended to be benefited."). *See also* Klamath Irrigation District, et. al. v. United States, 67 Fed.Cl. 504 (Fed Cl. 2005) (finding that irrigators were third party beneficiaries of contracts between the United States and certain water districts because contracts expressed intent of the relevant district and the United States to benefit irrigators directly by having the district assume the primary responsibility for providing water within the district in exchange for collecting amounts owed by the irrigator in payment for their water).

[166] *Id.*

[167] *See e.g.*, Movesesian, supra note 93, at 1162. *See also* Beverly v. Macy, 702 F.2d 931, 940 (11th Cir.1983) ("[W]hen determining whether the parties to the contract intended to bestow a benefit on a third party, a court may look beyond the contract to the circumstances surrounding its formation."); Southridge Capital Management, LLC v. Lowry, 188 F. Supp. 2d 388 (S.D.N.Y. 2002) (determining third party beneficiary status under New York law, it is permissible for the court to look at the surrounding circumstances as well as the agreement).

[168] Second Restatement, supra note 65, at § 302. On the other hand, Movesesian argues that consulting extra-textual sources to determine the intent of the parties to a contract could be detrimental to a third party who might be bound by terms that he or she never consented to. Movesesian, supra note 93, at 1174. The concern raised by Movesesian would be applicable in only one very limited circumstance – when the parties to a contract colluded to deceive the third party by writing favorable provisions in the contract in favor of the beneficiary, but their true intent was to provide the third party with no benefit. This situation is not likely to occur often. In addition, parties to a contract would fail in an attempt to refer to extrinsic material that might directly contradict the text of a contract. Finally, other doctrines, such as those requiring good faith and clean hands, would probably prevent the parties from arguing that their true intent of deceiving the third party should govern to deny the third party any benefit.

do consult with extra-textual sources for purposes of treaty interpretation, [169] but they have not followed any "principled ways to choose among extra-textual materials."[170] The intent-to-benefit test suggests that courts focus on the intent of the parties who drafted the treaty. Consequently, courts should consult with sources such as the *travaux préparatoires*, also known as the drafting history or the negotiating history, of a treaty[171] because it reveals the shared intent of the parties to the treaty. [172]

On the other hand, courts should not give any weight to the domestic ratification history of a treaty because it reflects either the intent of a non-party (the Senate) or the intent of just one party to the treaty (the Executive).[173] As Justice Scalia pointed out in *Stuart*,[174] the question is "what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a single one of them, thought it agreed to. And to

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[169] *See e.g.,* Jogi v. Voges, 425 F.3d 367, 383 (7th Cir. 2005) ("In the area of statutory construction, it is the intent of Congress that governs whether a private action exists); Zicherman v. Korean Air Lines Co., Ltd., 516 U.S. 217, 226 ("Because a treaty ratified by the United States is not only the law of this land, but also an agreement among sovereign powers, [this Court has] traditionally considered as aids to its interpretation the negotiating and drafting history . . . and the postratification understanding of the contracting parties."). *See* also Anthony Aust, Modern Treaty Law and Practice, Cambridge University Press, p. 160 (2003) (noting that in interpreting a treaty, "a US court follows a similar approach to that which it adopts for the interpretation of legislation, where 'legislative history' may be examined in depth").

[170] David Bederman, CLASSICAL CANONS: RHETORIC, CLASSICISM AND TREATY INTERPRETATION 267-68 (Ashgate 2001) [hereinafter "Classical Canons"].

[171] Jonathan Pratter, À la Recherche des Travaux Préparatoires: An Approach to Researching the Drafting History of International Agreements, Dec 2005., *available at* http://www.nyulawglobal.org/globalex/Travaux_Preparatoires.htm

[172] Alstine justifies the use of drafting history on four alternate grounds that are consistent with my conclusion. Alstine, Dynamic Treaty Interpretation, supra note 58, at 744-748. First, it helps to create a uniform international interpretation, because courts in other countries can also consult the drafting history of a treaty. *Id.* at 744-45. Second, treaties are negotiated by representatives of the Executive so concerns about unconstitutional "self-delegation" on the part of Congress are not relevant. *Id.* at 745-46. Third, the argument advanced by textualists that refusing to consult extra-textual sources enhances democracy by disciplining Congress to draft more carefully and be more diligent in amending outdated legislation is not applicable because once a multilateral treaty is effective it is almost impossible to amend. *Id.* at 746. Finally, drafting history is increasingly important because of the indeterminacy of international standards and the difficulty in amending a treaty. *Id.* at 747.

[173] The principles suggested in this article apply to the interpretation of treaties and not necessarily to interpreting the legislation implementing treaties. For example, in the Auguste v. Ridge, 395 F.3d 123 (2005), it may have been appropriate for the court to consult with ratification history of the treaty to determine the meaning of the federal statute and regulations implementing the treaty. Auguste v. Ridge, 395 F.3d at 130-134.

[174] U.S. v. Stuart, 489 U.S. 353 (1989).

answer that question accurately, it can reasonably be said, whatever extra-textual materials are consulted must be materials that reflect the mutual agreement (for example, the negotiating history) rather than a unilateral understanding."[175] At first blush Justice Scalia's position in *Stuart* might seem to contradict his theory of textualism, but no such contradiction exists. Although Justice Scalia rallied against the use of domestic ratification history he did not advocate the use of any other extra-textual sources for determining the meaning of the treaty in question.[176]

Constitutional arguments also support the view that courts should not consult with domestic ratification history in interpreting the meaning of a treaty. Giving credence to what the Senators of the ratifying Congress thought a treaty meant is akin to allowing the Senators to amend the meaning of a treaty. Even though Section 2 of Article II of the Constitution gives the Senate the power to provide "advice and consent" to the President in ratifying a treaty, it does not give the Senate the unilateral right to change the terms or meaning of a treaty. Indeed, in a concurring opinion in the *Diamond Rings* case, Justice Brown made the point that a treaty cannot be amended simply by a resolution adopted by Congress.[177]

Commentators have also critiqued courts for determining the meaning of a treaty based on Senate interpretations. In a challenge to the dual approach to treaty interpretation, John Norton Moore argues that "the Senate does not have an independent lawmaking power to attach 'domestic conditions' to treaties during the advice and

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[175] *Id.* at 374 (*emphasis added*).
[176] *Id.*
[177] The Diamond Rings Case, 183 U.S., at 182-83 (1901) ("To be efficacious such resolution must be considered either (1) as an amendment to the treaty, or (2) as a legislative act qualifying or modifying the treaty. It is neither. It cannot be regarded as part of the treaty, since it received neither the approval of the President nor the consent of the other contracting power. . . . The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty.").

consent process."[178] He also believes that "non self-executing declarations" are a suspect domestic condition under modern constitutional law.[179] In proving his point, Moore argues that courts have never consulted Senate materials to determine the intent of the Senate, but should only consult those materials to "ascertain the intent of the parties or the views of the President."[180] Thus, he argues that it is appropriate for a court to consider the President's transmittal message to the Senate or its accompanying documents in interpreting the meaning of a treaty.[181]

While I agree with Moore that Senate conditions during the "advice and consent" process should not impact the interpretation of a treaty, I part ways with him on the view that courts should consider unilateral statements made by the President to Congress in interpreting treaties. The meaning of a treaty must be determined by the shared intent of the parties, and not the intent of one of the parties. It is not fair to expect every signatory of a treaty to monitor all domestic ratification processes to ensure that other parties do not put forth interpretations that are contrary to the shared intent of the parties. Moreover, Executives have many political reasons to distort the meaning of a treaty during the ratification process—first, they may make statements that are more likely to convince the Senate to ratify the treaty, and second, they might spin the meaning on a treaty that is more advantageous to them at a time when they know that the other parties do not have an opportunity to object.[182]

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[178] John Norton Moore, TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF Law 108 (2001).
[179] *Id.* at 109.
[180] *Id.* 141-149.
[181] *Id.* at 151.
[182] *But see* Glashausser, supra note 105, at 1275 (arguing that that domestic ratification history is an appropriate source for determining a treaty's meaning because a treaty is not considered binding for domestic purposes until it is ratified).

Finally, another question that is important to address is what (if any) level of ambiguity justifies consulting extrinsic sources to determine the intent of the parties under the intent-to-benefit test. Some courts that apply textualist approaches refuse to consult with extra-textual sources under any circumstances, while others require a high level of ambiguity in the text.[183] On the middle of the spectrum are those who follow the Treaty Convention approach, which suggests consulting with extra-textual sources more readily than textualists, but still requires a relatively high level of ambiguity.[184] However, the intent-to-benefit test suggests that extra-textual sources may be consulted even if the text is not ambiguous.[185]

3. *Intent in Multi-party Contracts*

Determining the intent of parties to a contract is difficult, but it is even more difficult in multi-party contracts. This endeavor is further complicated by the fact that the intent-to-benefit test in the Second Restatement does not clarify whose intent should govern—the intent of the promisor, the intent of the promisee or the mutual intent of the parties.[186] David Summers' proposes that a party should be considered an intended beneficiary as long as the promisee intended to benefit such third party and the promisor assented.[187] Summers proposal can be broadened to apply to multilateral treaties -- the "intent" requirement of the intent-to-benefit test would be satisfied so long as one

[183] *See* discussion *supra* Section I.
[184] *See* discussion *supra* Section II.
[185] *See* discussion *supra* Section III.
[186] Summers, supra note 83, at 894-96 ("The Restatement Second . . . may, in fact, add to the confusion. It does not clearly indicate whether the promisee's intention alone should govern, or whether courts must require the intention of both the promisor and the promisee before the third party is an 'intended' beneficiary. The confusion stems from ambiguity in the language of section 302. In its two-part test for determining when a third party is an 'intended beneficiary,' section 302(1) refers to the 'intention of the parties' under its first requirement, but only to the promisee's intention under subsection b of its second requirement.").
[187] Id. at 897.

signatory to the treaty indicated an intent to benefit a third party (or class of third parties) and other parties assented (including by means of failing to raise an objection during the drafting convention).

Based on the discussion above, the intent-to-benefit test, adopted for purposes of determining whether a treaty gives an individual the right to enforce it, is as follows:[188]

1) Does the treaty identify a class of individuals who are intended beneficiaries of the treaty?

    a. Extra-textual sources may be consulted in answering the question regardless of whether the text of the treaty is ambiguous.
        1. Courts may refer to extra-textual sources such as the drafting history of the treaty.
        2. Courts should not, however, consult statements made by Senators during the ratification of the treaty and representations made by the Executive to the Senate during such process.
    b. If one party made a statement during the drafting process of the treaty, which was not refuted by another party that statement should be considered the intent of all of the parties for purposes of determining the meaning of a treaty.

2) Is the individual within the class of people that the parties intended to benefit?

B. The Modified Intent-to-Benefit Test and the *Sanchez-Llamas* Case

The modified intent-to-benefit test set forth above suggests the petitioners the Consular Convention gives petitioners individually enforceable rights. Although the text

[188] Before courts determine whether treaties give rise to individually enforceable rights, they typically determine whether a treaty is self-executing or not. *See e.g.*, Medallion; Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006); Foreign Relations Restatement, supra note 1, at § 111 cmt. (h) (1987). In ratifying a number of human rights treaties Congress adopted a resolution that indicating that the treaties are not "self-executing". *See e.g.*, David Sloss, The Domestication of International Human Rights: Non-Self Executing Declarations and Human Rights Treaties, 24 Yale Journal of International Law 129, 131-32 (1999). Some have argued that this principle may be unconstitutional, but I do not engage that debate here. *See e.g.*, Jordan J. Paust, Self-Executing Treaties, 82 Am. J. Int'l L. 760, 760 (1988) (arguing that the distinction between self-executing and non-self-executing treaties is inconsistent with the Supremacy Clause). The methodology proposed herein would only be applied to a treaty once it has been determined to be self-executing.

of the Consular Convention is arguably ambiguous as to whether the parties intended to benefit individuals, reference to the appropriate extra-textual sources suggests that the parties to the treaty intended to benefit a certain class of individuals--citizens of one party to the Consular Convention who were detained by the national government of another party to the Consular Convention. Both petitioners, Sanchez-Llamas and Bustillo, were within that class of citizens.

Article 36 of the Consular Convention identifies a class of individuals that is to benefit from the Consular Convention--individuals of one nation detained by authorities of another national government. Article 36 states that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner."[189] In addition to requiring a detaining authority to notify the national government of the detainee if the detainee so requests, the Consular Convention places an affirmative obligation on the detaining authority to notify the detainee of his "rights" under the Consular Convention. Article 36(1)(b) further states that "[t]he said authorities shall inform the person concerned [i.e., the detainee] without delay of his rights under this sub-paragraph."[190]

Several courts have found that the language of Article 36 of the Consular Convention creates individually enforceable rights.[191] On the other hand, other courts have noted that language of the preamble of the Consular Convention, which states that the "purpose of such privileges and immunities is not to benefit individuals but to ensure

[189] See Consular Convention, supra note 62 , art. 36(1)(b).
[190] *Id.*
[191] *See* supra note 149.

the efficient performance of functions by consular posts on behalf of their respective States," weighs against concluding that the Consular Convention was meant to benefit individuals. [192] Although the intent-to-benefit test does not require any ambiguity in the meaning of the relevant treaty provisions before consulting with extra-textual sources, referring to extra-textual sources is even more compelling when there is ambiguity. However, the majority opinion in *Sanchez-Llamas* refused to consult with extra-textual sources in determining whether the Consular Convention provided for any remedies.

The drafting history and the committee and plenary debates[193] surrounding the adoption of Article 36 demonstrate the intent of the delegates to protect the rights of individuals. [194] The negotiators at the conference extensively discussed the rights of foreign nationals.[195] The delegate to the United Kingdom objected to the proposal that a consul be notified only if the detained national so requested, because "it could well make the provisions of Article 36 ineffective because the person arrested might not be aware of his rights."[196] The Australian delegate stated that "there was no need to stress the extreme importance of not disregarding, in the present or any other international document, the

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[192] See generally Wooster, Construction and Application of Vienna Convention on Consular Relations (VCCR), Requiring that Foreign Consulate be Notified When One of its Nationals is Arrested, 175 A.L.R. Fed. 243, 2002 WL 181172 (2002) (collecting federal cases).

[193] The Consular Convention was the product of the United Nations Conference on Consular Relations, held in Vienna from March 4 through April 22, 1963. At the conference, representatives of the governments of 92 nations met to negotiate the Convention, a proposed draft of which had been prepared by the International Law Commission.

[194] At least one other author has argued that the Consular Convention should be interpreted to give rise to individually enforceable rights principally because of its drafting history, but did not provide a contract law methodology to justify his conclusion. *See e.g.*, Brittany P. Whitesell, Note, Diamond in the Rough: Mining Article 36(1)(B) of the Vienna Convention on Consular Relations for an Individual Right to Due Process, 587 Duke Law Journal (2004) ("As a self-executing treaty, the Vienna Convention is capable of granting individual rights, and the treaty's language and drafting history indicate that it does so. The treaty explicitly references an individual, and the drafting history indicates that the drafters intended to vest an individual right in foreign nationals.").

[195] See 1 United Nations Conference on Consular Relations: Official Records, at 3, U.N. Doc. A/Conf. 25/6, U.N. Sales. No.63.X.2 (1963);

[196] *Id.* at 83-84; *see also id.* at 339, 344.

rights of the individual."[197] In fact, the U.S. delegate proposed an amendment to Article 36(1)(b) requiring consular notification to be made at the request of the national, "to protect the rights of the national concerned."[198] The United Kingdom submitted the amendment that became the final version of paragraph (b)(1), requiring the detaining nation to inform the detained foreign national of his right to consular access. The United States delegate voted with the majority in favor of the amendment.[199]

Although the Conference extensively debated various terms of Article 36, the view that its language operated to confer rights on individual foreign nationals was widely voiced by delegates and that view went unchallenged. For example, Spain's delegate observed that "[t]he right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own country ... [i]s one of the most sacred rights of foreign residents in a country."[200] The delegate from India emphasized that "the right given to consulates implied a corresponding right for nationals."[201] The South Korean delegate stated that "the receiving State's obligation under [Article 36(1)(b)] was extremely important, because it related to one of the fundamental and indispensable rights of the individual."[202] Consequently, the drafting history suggests that the treaty signatories intended to benefit a certain class of individuals. Both petitioners were within that class of individuals—citizens of foreign

[197] *Id.* at 331.
[198] *Id.* at 337.
[199] *See* Report of the United States Delegation to the United Nations Conference on Consular Relations at 60, reprinted in Vienna Convention on Consular Relations, S. Exec. Doc. No., 91-9 (1969).
[200] Official Records, vol. I, U.N. Conference on Consular Relations, 2d Comm., 15th mtg., at 332, ¶ 36, U.N. Doc. A/CONF.25/16 (Mar. 4-Apr. 22, 1963) (*emphasis added*).
[201] *Id.* at 333, ¶ 50 (*emphasis added*).
[202] *Id.* at 338, ¶ 11 (*emphasis added*).

nations who are party to the Consular Convention and were detained in the United States by the United States government.[203]

Conclusion

This article provides a methodology for adjudicating an issue that has been increasingly raised in U.S. courts—does a treaty give rise to individually enforceable rights. This question, at least with respect to the Consular Convention, was left unresolved by the Supreme Court when it had the opportunity to do so last term in *Sanchez-Lllamas*. The Supreme Court's failure to provide guidance has allowed courts to reach differing conclusions on the issue. This article attempts to provide a predictable set of guidelines for courts.

I argue that in determining whether a treaty gives rise to individually enforceable rights, courts should apply a modified version of the intent-to-benefit test from the Restatement (Second) of Contracts. Courts have tended to import principles of statutory interpretation in determining individually enforceable rights under treaties. However, because treaties are more similar to contracts than statutes, it is more appropriate to apply contract principles in determining the meaning of a treaty. Conceiving of treaties as contracts also finds support in the text of the Constitution and Supreme Court jurisprudence. The traditional justifications offered to support textualism in the context

[203] On the other hand, the respondents argued that the drafting history does not give rise to individually enforceable rights, because no delegate ever mentioned that individuals would have the right to raise it as a defense in a domestic criminal proceeding. In reliance on statutory interpretation models, the respondents framed the question incorrectly—the correct question is whether the drafting history indicates an intent-to-benefit certain individuals not whether the signatories intended to given individuals enforceable rights under the treaty. Oregon Brief, supra note 149, at 15 (frames individual rights test in statutory language and rejects the contract law approach by stating that: "The proper question is not whether the delegates were aware that individuals would benefit from the obligations undertaken by the signatory states. Rather, the question is whether the parties negotiating the convention intended to create a right that an individual detainee could enforce against the receiving state."). *See also* Brief Amicus Curiae of The Association of the Bar of The City of New York in Support of Petitioners at 7, Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006) (No. 04-10566; No. 05-51) ("[t]o decide whether Article 36 of the Convention creates individual rights, this Court engages in an analysis similar to statutory interpretation.").

of implying private rights of action in statutes do not translate into the treaty interpretation context. Consequently, the theory underlying modern statutory interpretation, textualism, should be rejected in favor of the theory guiding the intent-to-benefit test—intentionalism.

Application of the intent-to-benefit test is more likely to lead courts to rule in favor of individually enforceable rights than the current statutory approach, because it allows courts to consider sources other than the text of the treaty. Treaties that negotiate the relationships between the individuals and nations, such as human rights treaties and humanitarian law treaties, are more likely to give rise to individually enforceable rights under the approach suggested by this article, because the signatories often manifest an intent to benefit individuals.