THE INTENT-TO-BENEFIT: INDIVIDUALLY ENFORCEABLE RIGHTS UNDER INTERNATIONAL TREATIES

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Abstract

Citizens of foreign countries are increasingly using international treaties to assert claims against Federal and state governments. 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 determining whether a treaty gives rise to individually enforceable rights, they often apply the textualist methodology derived from statutory interpretation. However, instead of using textual theories of statutory interpretation, I argue that courts should use intentionalist theories developed from contract interpretation in determining individually enforceable rights under treaties. Two positive arguments and one negative argument support my approach. First, the question of whether a non-party can enforce a treaty is structurally similar to the question of whether a non-party can enforce a contract, but structurally different from the issue of whether there is a private cause of action under a statute. Second, Supreme Court jurisprudence supports the view that treaties are contracts even though they have the effect of statutes. 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 suggest that courts use a modified version of the "intent-to-benefit" test derived from contract law in determining whether a treaty is enforceable by a non-party. Under the modified "intent-to-benefit" test, a non-party will have individually enforceable rights and remedies under the treaty if the treaty identifies a class of individuals who are intended beneficiaries of the treaty and if such non-party is within that class of individuals. Applying this test suggests that courts should privilege the drafting history over the ratification history of a treaty in interpreting it.

I apply the modified "intent-to-benefit" test to a case study—the Vienna Convention on Consular Relations. The Supreme Court recently

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decided in Sanchez-Llamas v. Oregon that the Vienna Convention on Consular Relations does not provide individuals with any remedies, but refused to decide whether the treaty provides individuals with rights. Since that decision, two Federal Courts of Appeals have come to differing conclusions on the question of whether that treaty creates individually enforceable rights. Under the modified "intent-to-benefit," the Vienna Convention on Consular Relations would be found to give rise to individually enforceable rights.

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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 not typically receptive to claims brought 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] The efforts of the Executive in the war against terrorism have also led non-U.S. citizens to assert claims under international treaties.[3]

Although courts have generally recognized that treaties may give rise to individually enforceable rights,[4] there is no consensus on the correct methodology for adjudicating the issue. Yet many courts have increasingly applied the textualist methodology that has become popular in statutory interpretation to determining whether a treaty gives individuals rights.[5] Courts thus only look to the text of the treaty and typically refuse to use extra textual sources to inform their decision.[6] Courts that apply this methodology typically disfavor finding individually enforceable rights in treaties.[7] 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."[8]

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[1] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 906 (1987) ("International tribunals and other fora are generally not open to claims by private persons."). *But see* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 54, 124 (Hurst Hannum ed., 3d ed. 1999) (noting that the Inter-American Commission on Human Rights, as well as certain treaty monitoring bodies, allow individuals to file petitions against nations acceding to their jurisdiction).

[2] I use the term "treaty" as defined in the Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331, 333 [hereinafter Treaty Convention] ("'[T]reaty' 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, 301 U.S. 324, 330 (1937) ("A treaty signifies 'a compact made between two or more independent nations with a view to the public welfare.' But an international compact . . . is not always a treaty which requires the participation of the Senate." (quoting B. Altman & Co. v. United States, 224 U.S. 583, 600 (1912)).

[3] *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

[4] *See, e.g.*, Kolovrat v. Oregon, 366 U.S. 187 (1961) (enforcing a Yugoslav citizen's right under U.S.-Serbia treaty to inherit personal property located in Oregon); Clark v. Allen, 331 U.S. 503 (1947) (enforcing a German citizens' right to inherit property in California); Bacardi Corp. of America v. Domenech, 311 U.S. 150 (1940) (enforcing foreign trademark owner's rights under Pan-American Trade-Mark Treaty); Nielsen v. Johnson, 279 U.S. 47 (1929) (enforcing a 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 in the United States); 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 (1879) (enforcing treaty assuring Swiss citizens' right to inherit property in Virginia); Hughes v. Edwards, 22 U.S. (9 Wheat.) 489 (1824) (enforcing British land owner's rights under treaty of 1794); Soc'y for Propagation of Gospel in Foreign Parts v. New-Haven, 21 U.S. (8 Wheat.) 464 (1823) (same).

[5] *See* discussion *infra* Part II.

[6] *See id.*

[7] *See infra* note 84 and accompanying text.

[8] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 907 cmt. a. (1987).

This article argues 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. Under the modified "intent-to-benefit" test, a non-party will have individually enforceable rights under a treaty if such non-party is within a class of individuals that are intended beneficiaries of the treaty.[9] Applying this test suggests that courts should consult with the drafting history of the treaty in interpreting it.[10] Finally, this approach suggests that the text of the document in question does not need to create both a right and a remedy, once a party is determined to be an intended beneficiary, he or she will have the right to enforce the document.[11]

I justify using an approach based in contract law with two positive reasons and one negative reason. First, the question of individually enforceable rights in treaties is more structurally similar to the question of third party beneficiary rights under contracts than to the issue of private rights of action in statutes.[12] Second, the text and history of the Constitution lend support to the view that treaties should be interpreted as contracts.[13] Finally, although textualism may be appropriate in the context of statutory interpretation, it is not appropriate for purposes of treaty interpretation.[14] I apply the modified intent-to-benefit test that I propose to the Vienna Convention on Consular Relations (Consular Convention),[15] focusing on the facts of *Sanchez-Llamas v. Oregon*,[16] a case decided by the Supreme Court last term, and two cases by Federal Appellate Courts decided since then.[17]

Sanchez-Lllamas consolidated two cases in which two non-U.S. citizen petitioners, who were arrested and tried in state courts, claimed that the United States violated Article 36 of the Consular Convention by failing to notify them about their right to receive assistance from their country's consulate.[18] Both petitioners argued that the Consular Convention provided them with individual rights that were enforceable in a court.[19] As a remedy to the U.S. violation of Article 36 of the Consular Convention, Sanchez-Llamas argued that certain statements he made to the police should be suppressed,[20] while the other petitioner, Bustillo, wanted to suspend Virginia's procedural default rule that

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[9] *See infra* Part III.B.1.

[10] *See infra* Part III.B.2.

[11] *See* discussion *infra* Part III.A.

[12] *See* discussion *infra* Part IV.A.

[13] *See* discussion *infra* Part IV.B.

[14] *See* discussion *infra* Part IV.C.

[15] Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Consular Convention].

[16] 126 S. Ct. 2669 (2006).

[17] *See* discussion *infra* Part V.

[18] *Sanchez-Llamas*, 126 S. Ct. at 2671.

[19] *Id.*

[20] *Id.*

would have otherwise barred his claim because he did not raise it during his trial.[21]

Instead of providing guidance to lower courts that had come to diverging conclusions on this question,[22] Justice Roberts, who wrote the majority opinion, avoided the issue altogether by assuming (without deciding) that the Consular Convention gives rise to individually enforceable rights.[23] The Court then held that the Consular Convention does not, however, give the petitioners the remedies they sought.[24] In so holding, the Court essentially required that in order for a litigant to sue and seek a remedy under a treaty, the treaty must state that the individual has individually enforceable rights, and its text must expressly provide the exact remedy that the individual seeks.[25]

Given the Court's failure to answer the question of whether the Consular Convention creates individually enforceable rights, it is not surprising that a circuit split has emerged on the question.[26] The Ninth and Seventh Circuits have recently considered whether a civil claim under the Consular Convention against state officials can proceed through a 42 U.S.C. § 1983 action, which allows individuals to sue state actors for violation of the "Constitution and laws."[27] While the Ninth Circuit rejected the argument that the Consular Convention could be enforced through Section 1983,[28] the Seventh Circuit found that Section 1983 provides a remedy for treaties that confer rights on individuals.[29]

Part I describes the Court's march towards textualism in statutory interpretation. Part II traces 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. Part III describes the historical evolution of the intent-to-benefit test and lays out a proposal for a

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[21] *Id.*

[22] Before the *Sanchez-Llamas* decision, some courts had held that the Consular Convention created private rights. *See, e.g.*, 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). However, other courts had held that the Consular Convention does not create individually enforceable rights. *See, e.g.*, United States v. Jimenez-Nava, 243 F.3d 192, 196 (5th Cir. 2001).

[23] *Id.* at 2677–78 ("Because we conclude that Sanchez-Llamas and Bustillo are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights. Therefore, for purposes of addressing petitioners' claims, we assume, without deciding, that Article 36 does grant Bustillo and Sanchez-Llamas such rights.").

[24] *Sanchez-Llamas*, 126 S. Ct. at 2674–87.

[25] The Supreme Court found that "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own." *Sanchez-Llamas*, 126 S. Ct. at 2680.

[26] *Compare* Jogi v. Voges, 480 F.3d 822 (7th Cir. 2007), *with* Cornejo v. San Diego, No. 05-56202, 2007 U.S. App. LEXIS 22616 (9th Cir. Sept. 24, 2007).

[27] 42 U.S.C.A. § 1983.

[28] *Cornejo*, 2007 U.S. App. LEXIS 22616, at *30 ("Accordingly, we hold that Article 36 does not unambiguously give Cornejo a privately enforceable right to be notified.").

[29] *Jogi*, 480 F.3d at 835–36 ("Nothing in either the Vienna Convention or any other source of law has been presented to us that would rebut [the] presumption" that "once a plaintiff demonstrates that a statute confers an individual right, the right is enforceable by Section 1983.").

modified intent-to-benefit test. Part IV justifies why the intentionalist approach to contract interpretation is preferable to the textualist approach. Finally, Part V applies the modified version of the intent-to-benefit test to the Consular Convention in order to determine whether individuals have the right to bring claims for violations of the Consular Convention and the right to remedies for such violations.

I. THE RISE OF TEXTUALISM IN STATUTORY INTERPRETATION

The Supreme Court has increasingly used the textualist approach to determine 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—intentionalism, purposivism, and textualism.[30] Intentionalism emphasizes the intent of the legislature enacting the statute and thus suggests that courts should examine both a statute's text and legislative history in determining its meaning.[31] Purposivism de-emphasizes the legislature's intent and instead seeks to understand the statute's broad purposes to determine whether implication of a private right of action would further the statute's purpose.[32] Textualism attempts generally to ascertain the meaning of a statute by looking only at its text and de-emphasizes the intent of those who enacted the statute.[33]

In *J.I. Case Co. v. Borak*,[34] one of the first Supreme Court cases to imply a private right of action, the Court applied a methodology based on purposivism. The Court recognized a private right of action under the Securities and Exchange Act of 1934, because it noted that a private cause of action should be implied in a statute whenever such a remedy would advance the statute's purpose.[35]

In an attempt to narrow *Borak*, the Supreme Court proposed a four-factor test in *Cort v. Ash*,[36] that was motivated by both purposivism and intentionalism. Under the *Cort* test, courts had to determine: (1) whether the plaintiff is one of the class for whose special benefit the statute was enacted,

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[30] Branford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 818 (2002).

[31] *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. 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 have wanted a particular issue resolved. *Id.* at 388–89.

[32] Mank, *supra* note 30, at 818–19. *See also* Roman, *supra* note 31, at 389–90.

[33] Mank, *supra* note 30, at 819. *See also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29–30 (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.").

[34] 377 U.S. 426 (1964). The case is discussed in Mank, *supra* note 30, at 845. *See also* Cannon v. Univ. of Chicago, 441 U.S. 677, 735 (1979) (Powell, J., dissenting).

[35] Mank, *supra* note 30, at 845.

[36] 422 U.S. 66 (1975).

(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 scheme," and (4) whether the cause of action is traditionally identified with state law such that a federal cause of action would impede important state concerns.[37] Thus, courts were asked to consider both the intent of the legislature as well as the purpose of the statute when determining whether the statute gave rise to a private right of action.[38]

In *Touche Ross & Co. v. Redington*,[39] the Court purported to apply the *Cort* test, but it focused narrowly on the prong requiring congressional intent to create a right of action.[40] However, in determining such intent, the Court refused to consult extra-textual sources.[41] Consequently, the Court concluded that the statute in question did not create a private right of action, because the text of the statute did not manifest congressional intent to create such a right.[42]

On the other hand, *Cannon*, decided the same year as *Touche Ross*, also applied the *Cort* test, but its approach was motivated by intentionalism.[43] 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.[44] 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 for the benefit of a special class of which the plaintiff is a member."[45] 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."[46] In holding that the statute satisfied the first factor of the *Cort* test, Justice Stevens noted that Congress drafted the statute "with an unmistakable focus on the benefited class."[47] 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

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[37] *Cort*, 422 U.S. at 78.

[38] Roman, *supra* note 31, at 401.

[39] 442 U.S. 560 (1979).

[40] *Touche Ross*, 442 U.S. at 568.

[41] *See id. See also* Roman, *supra* note 31, at 402–05 (noting the shift in the Court's approach towards textualism post-*Cort v. Ash*); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 868–69 (1996); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. Rev. 1193, 1196 (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.").

[42] *Touche Ross*, 442 U.S. at 579.

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

[44] *Cannon*, 411 U.S. at 728–29.

[45] *Id.* at 689–94.

[46] *Id.* at 681–82.

[47] *Id.* at 691.

cause of action."[48] The opinion consulted liberally with the legislative history and concluded that every other factor of *Cort* was also satisfied.[49]

More recently, the Court's opinion in *Alexander v. Sandoval*,[50] marked the Court's clear direction towards textualism. In *Sandoval*, a private individual sued to enforce a regulation promulgated by the Department of Justice pursuant to Title VI.[51] Justice Scalia, who wrote the majority opinion, stated his methodology as such: "[w]e . . . begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."[52] Focusing solely on the words of the statute in question, the Court found that "§ 602 reveals no congressional intent to create a private right of action." [53]

In addition, in *Gonzaga University v. Doe*, [54] in distinguishing Section 1983 actions from other types of cases, the Court emphasized that a "plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'"[55] Thus, the Court refused to find that a private cause of action existed in the statute because the statute in question only contained language that suggested that individuals have rights, but did not explicitly state that individuals have a private right of action to enforce the statute.[56] 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.[57]

Consequently, although historically the Court has utilized three different theories to determine whether a statute gives rise to individually enforceable rights, and sometimes a hybrid of two theories, the modern approach favors textualism. Even when courts have used the language of intentionalism, they often refuse to look outside the text of the statute to determine congressional intent. The practical effect of the textualist approach is that courts are less likely to imply a cause of action in a statute, since this approach prohibits courts from searching extra-textual sources that might show that Congress intended to benefit third parties.[58]

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, purposivism and textualism. As

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[48] *Id.* at 690 n.13.

[49] *Id.* at 694–709.

[50] 532 U.S. 275 (2001).

[51] *Sandoval,* 532 U.S. at 278.

[52] *Id.* at 288.

[53] *Id.* at 289.

[54] 536 U.S. 273 (2002).

[55] *Gonzaga*, 536 U.S. at 284 (quoting *Sandoval*, 532 U.S. at 286).

[56] *Id.* at 283–84.

[57] *Id.* at 286.

[58] Benjamin Labow, Note, *Federal Courts: Alexander v. Sandoval: Civil Rights Without Remedies*, 56 OKLA. L. REV. 205, 224 (2003).

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* adopted a textualist framework in determining individually enforceable rights under the Consular Convention.[59] 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.

On the other hand, courts that take an intentionalist approach[60] often employ a canon of treaty interpretation that calls for treaties to be interpreted "liberally" and in "good faith."[61] Courts often use this approach to justify employing a theory of intentionalism. *Choctaw Nation of Indians v. United States*,[62] 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."[63] 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 consult extra-textual sources even when they find the text of the treaty to be clear.[64]

Alternatively, courts also use the purposivism theory advocated by the Vienna Convention on the Law of Treaties (Treaty Convention). The Treaty Convention calls for treaty interpreters to interpret the treaty "in light of its object and purpose."[65] Although the United States is not a party to the Treaty Convention, courts have applied its methodology as customary international law.[66] In limited circumstances, the Treaty Convention allows for consultation with extra-textual materials.[67]

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[59] *See* discussion *infra* Section V.

[60] *See, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 293–94 (1933); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Asakura v. Seattle, 265 U.S. 332, 342 (1924); Tucker v. Alexandroff, 183 U.S. 424, 437 (1902); *In re* Ross, 140 U.S. 453, 475 (1891); De Geofroy v. Riggs, 133 U.S. 258, 271 (1890). *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) (describing concerns in the debate between textualism and contextualism).

[61] In elaborating on "liberal interpretation," in the 1890 Supreme Court opinion in *De 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." *De Geofroy*, 133 U.S. at 267, 271. 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.

Tucker, 183 U.S. at 437.

[62] 318 U.S. 423 (1943).

[63] *Id.* at 431–32.

[64] Straubel, *supra* note 60, at 1201.

[65] Treaty Convention, *supra* note 2, art. 31, § 1.

[66] *See, e.g.*, Gonzalez v. Gutierrez, 311 F.3d 942, 950 n.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

The third approach to treaty interpretation, textualism,[68] is exemplified in *Chan v. Korean Airways, Ltd.*[69] In that case, Justice Scalia stated:

> We 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.[70]

In his concurrence in *Chan*, Justice Brennan took issue with the majority's textualist approach to treaty interpretation, asserting 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."[71]

According to some commentators, courts are increasingly applying textualist theories to treaty interpretation.[72] The textualist approach and the language of statutory interpretation[73] have also been used to determine whether

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31 and 32 as customary international law."); Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308 (2d Cir. 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 (the 'Vienna Convention')."); Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350, 1362 (2d Cir. 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.").

[67] Treaty Convention, *supra* note 2, art. 31, § 1. *See also* Sale v. Haitian Ctrs. Council, 509 U.S. 155, 194 (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 Treaty Convention, *supra* note 2, art. 32).

[68] Straubel, *supra* note 60, at 1191–92.

[69] 490 U.S. 122 (1989).

[70] *Chan*, 490 U.S. at 134.

[71] *Id.* at 136.

[72] *See, e.g.*, Michael Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 691 (1998) ("[T]he 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 UCLA L. REV. 953, 1022 (1994) ("So while the prevailing rhetoric of [treaty interpretation] is contractual, the underlying idiom and approach is statutory."); *id.* at 1019–20 (1994) ("[R]ecent trends in treaty construction have been subliminally influenced by currents in the statutory interpretation debate.").

[73] *See* Breard v. Greene, 523 U.S. 371, 377 (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); Haudenosaunee Six Nations of Iroquois (Confederacy) of N. Am. v. Canada, No. 98-CV-0112E(H), 1998 WL 748351, at *2 (W.D.N.Y. Oct. 16, 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); *In re* Letters Rogatory from Caracas, No. M15-377, 1998 WL 107029, at *1 (S.D.N.Y. Mar. 11, 1998) (holding that those plaintiffs lacked standing to enforce a provision of a treaty which did not confer any identifiable right upon them); DiLaura v. Power Auth. of N.Y., 786 F. Supp. 241, 252 (W.D.N.Y. 1991) ("A treaty must provide expressly for *a private right of action* before

individually enforceable rights exist under treaties. For example, the statutory language of "private right of action" appears in numerous Supreme Court treaty cases, including *Argentine Republic v. Amerada Hess Shipping Corp.*,[74] where the Court indicated that the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention "only set forth substantive rules of conduct and states 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."[75]

The Court's decision last term in *Sanchez-Llamas* signaled the inclination of the Roberts Court to apply textualism in questions of treaty interpretation. Although the majority opinion written by Chief Justice Roberts paid lip service to the canon of liberal interpretation,[76] in reality it did not liberally interpret the Consular Convention. Instead the Court applied a textualist interpretation—it denied the remedies sought by the petitioners because the document's text it did explicitly specify those remedies.[77] Thus, under *Sanchez-Llamas*, in order for a litigant to enforce a treaty, she must not only show that the treaty creates individually enforceable rights, but also that the text provides the remedy that the litigant seeks.

Although the Supreme Court has not adopted a presumption against individually enforceable rights in treaties,[78] in the last thirty years many lower courts have adopted such a presumption.[79] This approach represents a departure from the period between 1789 and 1975, when there were no judicial decisions "endorsing the nationalist presumption against individual enforcement of treaty rights"; rather, there were "dozens of Supreme Court decisions that applied the transnationalist presumption in favor of individual enforcement of treaty-based primary rights."[80] This shift from a presumption in favor of domestic judicial remedies to a presumption against it appears to coincide with a shift from an intentionalist approach to a textualist approach to determining whether a treaty creates individually enforceable rights.

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a plaintiff can assert a claim thereunder in federal court." (citing Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976))) (emphasis added); Smith v. Canadian Pac. Airways, Ltd., 452 F.2d 798, 802 (2d Cir.1971). *See also Dreyfus*, 534 F.2d at 30 (treaty must provide expressly for *a private right of action* before a plaintiff can assert a claim thereunder in federal court) (emphasis added).

[74] 488 U.S. 428 (1989),

[75] *Amerada Hess Shipping Corp.*, 488 U.S. at 442 (emphasis added).

[76] *Sanchez-Llamas*, 126 S. Ct. at 2679.

[77] *Id.* at 2677–83.

[78] Indeed, the dissent in *Sanchez-Llamas* disagreed with the government's position that there is a presumption against individually enforceable rights in treaties. *Sanchez-Llamas*, 126 S. Ct. at 2697.

[79] David Sloss, *When do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT'L L. 20, 27 (2006).

[80] *Id.*

III. THE HISTORICAL ROOTS OF THE INTENT-TO-BENEFIT TEST AND A PROPOSAL FOR A MODIFIED INTENT-TO-BENEFIT TEST

The shift towards textualism in statutory interpretation has carried over into inquiries about whether a treaty can be enforced by someone who is not a party to it.[81] For the reasons discussed in Part IV *infra*, courts should be guided by intentionalist theories used in determining third party beneficiary rights under contracts rather than textualist theories based in statutory interpretation. This Part III describes the basis for the intent-to-benefit test in contract law and develops a modified version of the test for purposes of treaty interpretation.

A. The Contract Law Approach to Determining Third Party Enforcement Rights

The Restatement (Second) of Contracts (Second Restatement)[82] codifies the modern approach to determining whether a person who is not a party to a contract is nevertheless entitled to enforce it. The intent-to-benefit test derived from Section 302(1)(b) of the Second Restatement 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.[83] The Second Restatement's intentionalist approach is a departure from the more textualist approach to contract interpretation used in the Restatement (First) of Contracts (First Restatement).[84]

Modern third party beneficiary concepts trace their roots to English common law. *Dutton v. Poole*[85] is often cited to illustrate the roots of third party beneficiary law. In that case, a father was going to sell wood to raise money for a dowry for his daughter.[86] His son, who otherwise would have inherited the wood, promised the father that he would pay £1000 to the daughter if the father did not sell the wood.[87] 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.[88]

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.

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[81] *See supra* Parts I, II.
[82] RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).
[83] *Id.* § 302(1)(b).
[84] RESTATEMENT OF CONTRACTS §§ 133–47 (1932).
[85] (1677) 83 Eng. Rep. 523 (K.B.).
[86] *Id.* at 523.
[87] *Id.*
[88] *Id.* at 524.

Indeed, the principle favoring third party beneficiary rights was repudiated in *Tweddle v. Atkinson.*[89] In that 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.[90]

The same tension between acknowledging the rights of third party beneficiaries and classical contract theory played itself out in U.S. courts.[91] Although third party beneficiaries were permitted to enforce contracts long before *Lawrence v. Fox*,[92] the New York Court of Appeals decision in that case is often cited as the turning point for recognition of third party beneficiary rights.[93] 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.[94] The court held that Lawrence could enforce the contract against Fox even though he was not in privity of contract.[95] In subsequent years, New York courts pared back the holding in *Lawrence v. Fox* to its bare minimum.[96] Other state courts, notably Massachusetts, refused to recognize third party beneficiary rights altogether.[97]

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:

> (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;

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[89] (1861) 121 Eng. Rep. 762 (Q.B.).

[90] *Id.* at 763–764.

[91] *See, e.g.*, Melvin Aron Eisenberg, *Third Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1365–68 (1992) (pointing 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. Third, standardized rules are preferable to individualized rules); *id.* at 1365 (arguing that 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. Third, in adjudicating suits by third party beneficiaries, courts would need to conduct individualized inquiries into the facts and intent).

[92] 20 N.Y. 268 (N.Y. 1859).

[93] Eisenberg, *supra* note 91, at 1363–64.

[94] *Lawrence*, 20 N.Y. at 269.

[95] *Id.* at 269–274.

[96] Eisenberg, *supra* note 91, at 1368.

[97] *Id.* at 1367.

> (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.[98] A donee beneficiary was a beneficiary to whom the promisee intended to benefit as a gift. A creditor beneficiary was a beneficiary to whom the promisee owed a debt that he or she wished to satisfy by requiring the promisor to make a payment to the beneficiary.[99]

The Second Restatement broadened the scope of third parties that have enforceable rights.[100] Although contract disputes are governed by state law, many states have adopted the Second Restatement's third party beneficiary test.[101] Section 302(1) of the Second Restatement states that:

> 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:

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[98] RESTATEMENT OF CONTRACTS §§ 135–36 (1932) (providing for enforcement rights for creditor and donee beneficiaries).

[99] *Id.* § 133(1)(a).

[100] RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

[101] *See, e.g.*, Septembertide Publishing v. Stein & Day, Inc., 884 F.2d 675 (2d. Cir. 1989) (identifying Section 302 of the Restatement (Second) of Contracts as the appropriate test to determine third party beneficiary rights under New York law); Flexfab, L.L.C. v. United States, 62 Fed. Cl. 139 (Fed. Cl. 2004) (explaining that the 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 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."); 13 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 37:5 (4th ed. updated May 2007) ("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 id.* § 37:7 ("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.").

> (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.[102]

In applying the Second Restatement test, one federal court of appeals classified it into two components: (1) an intent-to-benefit test; and (2) a duty owed test.[103] 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."[104] To satisfy the intent-to-benefit test, "the contract must express some intent by the parties to benefit the third party through contractual performance."[105] Breaking with the First Restatement, the intent-to-benefit test

[102] The Second Restatement adds another basis for a beneficiary to be considered an "intended beneficiary"—those whose reliance on the promisee is both reasonable and probable. RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d (1981). ("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.").

[103] Dayton Development Co. v. Gilman Financial Services, Inc., 419 F.3d 852 (8th Cir. 2005). *See also* E.B. Harper & Co. v. Nortek, Inc., 104 F.3d 913, 920 n.4 (7th Cir. 1997) ("In order for a third party to have a right to sue, the contract must be undertaken for plaintiff's direct benefit and the contract itself must affirmatively make this intention clear. . . . If the intent is not express on the face of the contract, its implication at least must be so strong as to be practically an express declaration.") (citations omitted); Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1320 (9th Cir. 1996) ("[T]o 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. . . . 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."); 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, 899 (5th Cir. 1955) ("[I]n 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.").

[104] *Dayton*, 419 F.3d at 857 (citing Cretex Cos., Inc. v. Constr. Leaders, Inc., 342 N.W.2d 135, 138 (Minn. 1984)).

[105] *Id.* at 856 (citing *Cretex*, 342 N.W.2d at 138). 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 removed debris, because the contract did not "reflect an intention 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 determinations of 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 101, at 892–93 (citing Sachs v. Ohio Nat'l Life

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.[106] In addition, under the Second Restatement an intended beneficiary may enforce the contract in question without having to show that the contract explicitly allows for the remedy sought by the intended beneficiary.[107] Intended beneficiaries may also obtain specific performance as a remedy.[108]

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 Restatement, was influenced by classical contract theory, which rejects searching for the intent of the parties outside of the "four corners" of the contract.[109] Williston believed that contracts should be interpreted in much the same manner as the textualists interpret statutes today.[110] He 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.[111] Clearly, such a theory would frown upon granting rights to individuals who are not parties to a contract unless such rights are explicitly written in the contract.

The Second Restatement, on the other hand, deviated from utilizing the textualist theory suggested by classical contract theory in favor of an intentionalist approach.[112] 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.[113] In line with this theory, Corbin, the principal influence behind the

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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 (N.Y. 1955) (holding that a 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 Mech. Contractors, 406 P.2d 556, 569 (Or. 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")).

[106] 13 WILLISTON & LORD, *supra* note 101, § 37:8.

[107] SECOND RESTATEMENT § 304. *See also* Gothberg v. Nemerovski, 208 N.E.2d 12 (Ill. App. Ct. 1965).

[108] SECOND RESTATEMENT § 307.

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

[110] 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).

[111] *Id.* at 200–02.

[112] 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*, 24 NEW ENG. L. REV. 66–67 (1989). *See also* AM. JUR. 2D *Proof of Facts* § 5 (2007) ("Unfortunately, determining the intention of the contracting parties with respect to a third person is not the easiest of legal tasks.").

[113] *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'

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.[114] Consequently, the intent-to-benefit test was influenced by the intentionalist approach that prevailed in the drafting of the Second Restatement. As such, the test favors allowing courts to consult with extra-textual sources in determining the intent of the parties.[115]

B. The Modified Intent-to-Benefit Test

The modified intent-to-benefit test proposed here broadens the approach of the Second Restatement's intent-to-benefit test by taking account of certain characteristics of multi-party treaties. First, a class of individuals rather than one specific individual may be the intended beneficiaries of multi-party treaties. Second, multi-party treaties are negotiated by delegates from numerous countries and often have drafting histories consisting of the discussion and proposals offered by the delegates. Third, determining the shared intent of parties to a multi-party treaty may be more complicated than determining the intent underlying contracts with a few parties. Thus, the modified intent-to-benefit test considers these factors in designing a test that is more applicable to multi-party treaties.

1. Class of Individuals as Intended Beneficiaries

The Restatement Second does not require that an intended beneficiary be identified at the time the contract is formed,[116] and allows for more than one intended beneficiary to a contract.[117] Courts have found that in order for a class of individuals to be deemed beneficiaries of a contract, the class of individuals

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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 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.").

[114] Ross & Tranen, *supra* note 110, at 205–06.

[115] It should be noted that some scholars have argued that, at least with respect to contracts between sophisticated firms, it is more appropriate to apply textualism than the Restatement Second's intentionalist approach, because textualism is more in line with the desires of those parties. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 618–19 (2003).

[116] SECOND RESTATEMENT § 308.

[117] *See, e.g.*, *id.* § 302, illus. 14.

must be sufficiently described or designated as intended beneficiaries in the contract. 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."[118] Thus, 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.[119]

In another case, a federal district court in New York held that garment industry 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.[120] 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 also required it not to outsource any work to companies that did not pay their workers minimum wages and overtime.[121] Thus, the court concluded that the contract evidenced an intent-to-benefit employees of a company with whom the clothing manufacturer had contracted.[122] The plaintiffs were within the class of intended beneficiaries because they were employees of a company to whom the defendant outsourced its work.[123] Thus, in order for a treaty to give rise to individually enforceable rights, it must benefit a class of individuals, and the third party claiming rights thereunder must be a member of the class of individuals.

2. Consulting Travaux Prêparatoires

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

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[118] Hook v. State of Ariz. Dep't of Corr., 972 F.2d 1012, 1015 (9th Cir. 1992) ("The 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."). *See also* 17 AM. JUR. 2D 740, § 3.13 ("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.").

[119] *Hook*, 972 F.2d at 1015–16.

[120] Chen v. Street Beat Sportswear, 226 F. Supp.2d 355 (E.D.N.Y. 2002).

[121] *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 Dist. 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).

[122] *Chen*, 226 F. Supp.2d at 357–58.

[123] *Id.* at 363.

also to extrinsic materials.[124] Indeed, Section 302(b) of the Restatement Second specifically states that courts may look to the "circumstances" surrounding a contract.[125] The Reporter's Note to the Section 302 of the Restatement Section also emphasizes the point: "[a] court in determining the parties' intention should consider the circumstances surrounding the transaction as well as the actual language of the contract."[126] The relevant extrinsic materials are the ones that provide insight into the shared intent of the parties to a contract.[127] The *travaux préparatoires*, also known as the drafting history or the negotiating history, of a treaty[128] demonstrates the intent of the parties to the treaty. Thus, under the modified intent-to-benefit test, courts should privilege the drafting history over other sources in interpreting a treaty.

Alstine provides four alternate grounds justifying the use of drafting history in treaty interpretation that are consistent with my conclusion.[129] First, using the drafting history helps to create a uniform international interpretation, because courts in other countries can also consult the same history.[130] Second, treaties are negotiated by representatives of the Executive, making concerns about unconstitutional "self-delegation" on the part of Congress irrelevant.[131] Third, the argument advanced by textualists that refusing to consult extra-textual sources enhances democracy by encouraging Congress to draft legislation more carefully and to be more diligent in amending outdated legislation is not applicable because once a multilateral treaty is effective, it is almost impossible to amend.[132] Moreover, since treaties are negotiated among many different countries, the drafters of treaties do not necessarily look to the legislature from any one country in drafting the treaty. Finally, the drafting

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[124] *See, e.g.*, Movesesian, *supra* note 113, 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, L.L.C. 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).

[125] RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981). Conversely, 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 113, 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.

[126] SECOND RESTATEMENT § 302 reporter's note.

[127] *Id.* (citing a number of articles that refer to the parties' intention as a key factor in third party beneficiary contracts).

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

[129] Alstine, *supra* note 72, at 744–48.

[130] *Id.* at 744–45.

[131] *Id.* at 745–46.

[132] *Id.* at 746.

history is increasingly important because of the indeterminacy of international standards and the difficulty in amending a treaty.[133]

On the other hand, the intent-to-benefit test suggests that courts should give less weight to a treaty's domestic ratification history because it reflects either the intent of a non-party (the Senate) or the intent of just one party to the treaty (the Executive).[134] As Justice Scalia pointed out in *United States v. Stuart*,[135] 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 answer that question accurately, it can reasonably be said, whatever extratextual materials are consulted must be materials that reflect the mutual agreement (for example, the negotiating history) rather than a unilateral understanding.[136]

At first blush Justice Scalia's statements in *Stuart* might seem to contradict his commitment to a textualist theory of interpretation, but in fact no such contradiction exists. Although Justice Scalia criticized using the domestic ratification history of the treaty to determine its meaning, he did not advocate the use of any other extra-textual sources.[137]

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 could be 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*,[138] Justice Brown made the point that a treaty cannot be amended simply by a resolution adopted by Congress.[139]

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[133] *Id.* at 747.

[134] The principles suggested in this article apply to the interpretation of treaties and not necessarily to interpreting the legislation implementing treaties. For example, in Auguste v. Ridge, 395 F.3d 123, 130–34 (3d Cir. 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.

[135] 489 U.S. 353 (1989).

[136] *Stuart*, 489 U.S. at 374 (emphasis added).

[137] *See id.*

[138] 183 U.S. 176 (1901).

[139] 183 U.S. at 182–83 (Brown, J., concurring) ("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.").

While courts have consulted with extra-textual sources for purposes of treaty interpretation,[140] they have not followed any "principled ways to choose among extratextual materials."[141] The contract law approach provides a principled way to choose among the sources. It suggests that sources that manifest the shared intent of the parties should be privileged over sources that might reveal only the intent of one of the parties or of a non-party.

3. *Level of Ambiguity Needed to Consult Extra-Textual Sources*

Another important question that should be addressed 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 even if there is ambiguity in the text, while others will consult such sources so long as there is a high-level of ambiguity in the text.[142] In the middle of the spectrum are those who follow the Treaty Convention approach, which suggests consulting with extra-textual sources more readily than the textualist approach, but still requires a relatively high level of ambiguity (although perhaps a lower level than the textualists).[143] However, the intent-to-benefit test suggests that extra-textual sources may be consulted even if the text is not ambiguous.[144]

4. *Intent in Multi-party Contracts*

Determining the intent of parties to any 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.[145]

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[140] *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."), *withdrawn and superceded by* 480 F.3d 822 (7th Cir. 2007); Zicherman v. Korean Air Lines Co. 516 U.S. 217, 226 (1996) ("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.") (citation omitted). *See also* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 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 the 'legislative history' may be examined in depth.").

[141] David Bederman, CLASSICAL CANONS: RHETORIC, CLASSICISM AND TREATY INTERPRETATION 267–68 (2001) [hereinafter CLASSICAL CANONS].

[142] *See* discussion *supra* Part I.

[143] *See* discussion *supra* Part II.

[144] *See* discussion *supra* Part III.

[145] Summers, *supra* note 101, 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.").

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.[146] Summers' proposal can be broadened to apply to multilateral treaties—the "intent" requirement of the intent-to-benefit test can be satisfied so long as one 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 of the 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:

1) Does the treaty identify a class of individuals who is intended to be benefited by it?
   a. *Travaux préparatoires* may be consulted in answering the question regardless of whether the text of the treaty is ambiguous and should be privileged over other extra-textual sources.
   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?

IV. JUSTIFICATIONS FOR APPLYING INTENTIONALISM FROM CONTRACT INTERPRETATION INSTEAD OF TEXTUALISM FROM STATUTORY INTERPRETATION IN DETERMINING INDIVIDUALLY ENFORCEABLE RIGHTS UNDER TREATIES

Intentionalism, the theory underlying third party beneficiary rights in contract law, should replace the more common textualist approach from statutory interpretation in determining whether a treaty gives rise to individually enforceable rights. Three general grounds—two positive and one negative—support this view. First, treaty enforcement closely parallels non-party contract enforcement, yet it diverges considerably from individual statutory enforcement. The explanation for this is quite simple: treaties bear greater structural similarities to contracts than they do to statutes. Thus, treaty interpretation can benefit from favoring interpretive theories from contract law over theories grounded in statutory interpretation. 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, rationales

[146] *Id.* at 897.

supporting a textualist approach to determining private rights of action in statutes do not translate into the context of treaty interpretation.

A. Treaties as Contracts

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*."[147] Canons of interpretation take into account the characteristics of the document they are meant to interpret. The structure of treaties generally parallels that of contracts, but diverges considerably from the structure of statutes. Since the question of non-party enforcement in treaties is structurally similar to that in contracts, and so structurally different from the private rights of action question under statutes, courts should apply the prevailing interpretive rule developed for contracts[148] to treaty interpretation.

As the chart below illustrates, treaties are virtually identical to contracts in their drafting, negotiation, approval, and amendment processes. Both treaties and contracts have signatories whereas statutes do not. Treaties and contracts bind their signatories, while statutes bind people within their jurisdiction. The Treaty Convention itself supports the view that treaties are fundamentally similar to contracts, defining 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."[149] Statutes, on the other hand, are negotiated, approved, and may be repealed or superseded by a majority of the relevant legislative body. Treaties differ from contracts in their potential enforcement mechanisms. While contracts are normally only enforceable in domestic courts, treaties may be enforceable in international tribunals if the parties thereto accede to the jurisdiction of the international tribunal.[150]

Chart 1: A Comparison of the Characteristics of Contracts, Treaties, and Statutes

	Contracts	Treaties	Statutes
Signatories	Signatories are	Signatories are	There are no

[147] Bederman, *supra* note 72, at 963.

[148] The use of "contract" herein refers to written contracts.

[149] Treaty Convention, *supra* note 2, art. 2(a).

[150] For example, U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 30, ¶ 1, *opened for signature* Feb. 4, 1985, 112 Stat. 2681, 1465 U.N.T.S. 85, provides that any party to the treaty can bring a claim against another party in the International Court of Justice if any dispute between them cannot be resolved through negotiations. However, state parties may opt-out of that provision. *Id.* art. 20, ¶ 2.

	Contracts	Treaties	Statutes
	parties	parties	signatories to a statute
Structure	The provisions reflect agreements among the parties to do or abstain from doing certain things	The provisions reflect agreements among the parties to do or abstain from doing certain things	The provisions are intended to govern people within the applicable jurisdiction
Drafting & Negotiation	The parties negotiate and draft it	The parties negotiate and draft it	The applicable legislators negotiate, and their staff drafts it
Approval	Approved by all parties thereto	Approved by all parties thereto[151]	Approved by a majority of the applicable legislature
Amendment	May be amended by consent of all the parties	May be amended by consent of all the parties[152]	May be amended by a majority of the applicable legis-lature
Parties Bound	Only signatories are bound by it	Signatories are bound by it and possibly also non-signatories that are mentioned in the	People or entities within the relevant jurisdiction are bound by it[154]

[151] 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, art. 9(2). *See id.* art. 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.").

[152] *See* THE FEDERALIST NO. 64, at 14–15 (John Jay) (E.G. Bourne ed., 1937) ("[B]ut still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so it must ever afterwards be to alter or cancel them.").

[153] *See* AUST, *supra* note 140, at 131 ("When a treaty has entered into force, it is in force *only* for those states which 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 (Alexander Hamilton) (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.").

	Contracts	Treaties	Statutes
		treaty[153]	
Enforcement	Contracts are enforceable in domestic courts	Treaties may be enforceable in domestic courts as well as international courts if the treaty parties have granted jurisdiction to such international courts	Statutes are typically only enforceable in the domestic courts

2. Response to Arguments that Treaties Are Sui Generis

Alex Glashausser argues that treaties are neither contracts nor statutes, but sui generis.[155] First, Glashausser notes that a treaty, unlike a statute, has diplomatic purposes: "it is a symbol of the bond between countries."[156] While it is true that some treaties may only have diplomatic purposes, many treaties manifest binding agreements—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,[157] people who negotiate treaties come from different cultures,[158] and words are difficult to translate across languages.[159] 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, despite their outward expressions of support, States—unlike parties to contracts, who are generally more likely to intend to comply with the contract when they enter into it—may not intend to be bound by the treaties they sign.[160] Even if it is true that some parties enter into treaties with no intention of complying with them, courts do not and

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[154] *See, e.g.*, Movsesian, *supra* note 113, 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.").

[155] Alex Glashausser, *What We Must Never Forget When it is a Treaty We Are Expounding,* 73 U. CIN. L. REV. 1243, 1246–1247 (2005) ("In these pages, I attempt to set out an interpretive framework, from the perspective of U.S. jurisprudence, that takes international agreements—which I will generally refer to as 'treaties,' in the broad sense of that term seriously as a unique genre of document.").

[156] *Id.* at 1271.

[157] *Id.* at 1272–73.

[158] *Id.* at 1280–82.

[159] *Id.* at 1277–78.

[160] *Id.* at 1288.

should not hold such parties less accountable for their promises than parties to contracts. To do so would contravene the rule of law.

In proposing interpretative norms for treaties that blend statutory norms and contractual norms, James Wolf also considers treaties as sui generis.[161] He argues that treaties are similar to statutes because they are primary rules—laws that have been affirmed by the legislative sovereign and whose validity relies on rules of recognition such as the Constitution.[162] Conversely, treaties are like contracts because they confer rights and impose duties on the nations party to them.[163] Wolf argues that treaties diverge from contracts mainly because treaties require no consideration to be valid.[164] 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 a narrow conception of the term singles out "one reason deemed sufficient for enforcement of promises: the bargained-for exchange."[165] Although there may be no formal requirement in international law that a treaty manifest a bargained-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,[166] must consent to be bound by the treaty,[167] and that treaties may be invalidated for reasons such as fraud,[168] error,[169] or duress.[170] Thus, the requirements for the validity and enforceability of a treaty are consistent with the broad definition of consideration.

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

Many courts probably handle treaties similarly to statutes because the Constitution confers the same authority to treaties and statutes—both are considered the "law of the land."[171] However, even though the Constitution indicates that treaties should have the effect of statutes, Supreme Court jurisprudence supports the position that treaties should be interpreted as

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[161] James C. Wolf, Comment, *The Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023, 1057 (1988).

[162] *Id.* at 1031.

[163] *Id.* at 1052–53.

[164] *Id.* at 1053.

[165] *See* 2 ARTHUR CORBIN, JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 5.1 (1995). Consideration in the narrow sense serves primarily to prevent donative promises from being enforced. *See id.*, § 5.2.

[166] Treaty Convention, *supra* note 2, arts. 6, 7.

[167] *Id.* arts. 12–15.

[168] *Id.* art. 49.

[169] *Id.* art. 48.

[170] *Id.* arts. 50–52.

[171] 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.").

contracts. For example, in *The Diamond Rings*, Justice Brown's concurrence 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."[172] The Court further stated that "[i]n its essence [a treaty] is a contract. It differs from an ordinary contract only in being an agreement between independent states instead of private parties."[173] More recently, the Court in *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*,[174] noted that "[a] treaty . . . is essentially a contract between two sovereign nations."[175]

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 they deem to be inconsistent with treaties, giving treaties the effect of federal statutes.[176] Second, courts have found that, as with statutes, a later-in-time statute can trump a treaty.[177] Finally, the Supreme Court created the *Charming Betsy* principle, a canon of interpretation that calls for U.S. statutes to be interpreted in harmony with treaties to which the United States is a party, which elevates a treaty to the status of a statute.[178]

Even though treaties have the effect of statutes, the Constitution distinguishes them from federal legislation in several important ways. First, the House of Representatives does not play a role in the approval of a treaty, as it would in the statutory ratification process.[179] Second, while the Senate can modify a statute that it enacts, the Senate can only approve or disapprove of a treaty and cannot change it.[180] Third, the President negotiates and enters into treaties while Congress enacts statutes.[181]

The Constitution and Supreme Court interpretations thereof reflect the dual character of treaties in our democratic system. Treaties have the effect of

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[172] 183 U.S. at 185 (Brown, J., concurring) (internal quotations omitted).

[173] *Id.*

[174] 443 U.S. 658 (1979).

[175] *Id.* at 675. *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*, 133 U. S. at 271)); Worcester v. Georgia, 31 U.S. 515, 581 (1832) (stating that a treaty "is a compact between two nations or communities having the right of self-government"); Harris v. United States, 768 F.2d 1240, 1242 (11th Cir. 1985) *vacated*, 479 U.S. 957 (1986) ("International agreements should be construed more like contracts than statutes.").

[176] *See, e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968); Baker v. Carr, 369 U.S. 186 (1962); Bacardi Corp. of Am. v. Domenech, 311 U.S. 150 (1940); United States v. Belmont, 301 U.S. 324 (1937); Asakura v. City of Seattle, 265 U.S. 332 (1924). *See also* AUST, *supra* note 140, at 158.

[177] *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, 161 (1934); The Head Money Cases, 112 U.S. 580, 597–99 (1884).

[178] Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."). *See also* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 130–32 (2005); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Young v. United States, 97 U.S. 39 (1877) (all applying the *Charming Betsy* principle).

[179] U.S. CONST. art. II, § 2.

[180] *Id.*

[181] *Id.*

statutes, but are recognized to be characteristically similar to contracts. The characteristics of a document and not its effect should guide what interpretive principles courts apply. The Constitution and interpretations thereof confirm that a treaty is a contract. Consequently, it is more appropriate to apply modern contract theories, rather than theories emanating from statutory interpretation, to treaty interpretation.

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

Textualists offer a number of reasons to justify textualism in the context of determining whether a statute gives rise to a private right of action. However, none of those reasons apply for purposes of determining whether a treaty creates individually enforceable rights. First, textualists 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.[182] He argued that, under Article III of the Constitution, Congress has the power to determine the jurisdiction of courts and that implying a private cause of action "extends [the court's] authority to embrace a dispute Congress has not assigned it to resolve."[183] Others have pointed out that, by implying private rights of action in statutes, courts are "likely to invade the legislative function" by creating remedies that Congress has not provided.[184] Yet others argue that "legislature[s] [are] better able than the courts to assess the costs and benefits of [enforcing a statute] and to fine-tune levels of compliance with the statute."[185]

However, in interpreting treaties, courts do not intervene on congressional powers.[186] Unlike with statutes, the President, and not Congress, has the power to "make treaties" under the Constitution.[187] Moreover, the President may even terminate the United States' participation in a treaty without consulting the Senate.[188] The Senate only has the limited power to accept or reject a treaty.[189] This power is vastly different from its power to formulate and adopt statutes.[190] Thus, when courts interpret treaties to imply

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[182] *Cannon*, 441 U.S. at 730–49 (Powell, J., dissenting).

[183] *Id.* at 746.

[184] Stabile, *supra* note 41, at 884.

[185] *Id.* at 882.

[186] Bederman, *supra* note 72, at 1022 (noting that the statutory interpretation debate is "preoccupied with the balance of power between judges and legislatures," and that "[t]his concern is simply irrelevant in the treaty sphere").

[187] U.S. CONST. art. II, § 2. *See also* 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.").

[188] *Id.* at 1310.

[189] U.S. CONST. art. II, § 2.

[190] Yoo, *supra* note 187, 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

individually enforceable rights, they are not usurping the constitutional powers of the Senate.

In addition, courts do not infringe on inherent executive constitutional powers in determining that a treaty gives rise to individually enforceable rights. While the President has the authority to enter into a treaty, [191] he does not necessarily have the constitutional authority to determine whether it may be enforced by treaty beneficiaries in U.S. courts. As discussed above, it is Congress that has the right to determine the jurisdiction of Article III courts and not the Executive.[192] Thus, even if arguably Article III courts impinge on Congressional authority in implying rights of actions in statutes, they do not interfere with inherent executive authority in the same way when they determine that treaties give rise to individually enforceable rights.

Second, others argue that, in implying private rights of action in statutes, Article III courts infringe upon powers delegated by Congress to the Executive. Congress has delegated the enforcement of certain statutes to executive agencies. When courts imply private rights of action in those statutes, some argue that the courts invade the discretion of the Executive about what actions should be enforced.[193] However, that same argument does not apply in the context of treaty interpretation. Because Congress has the power to make statutes under the Constitution, it has the 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.

Third, some textualists argue that it is futile to use extra-textual sources to determine intent, because it is "impossible to find a single intent within a large collective body such as Congress."[194] 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, only the views of individual representatives.[195] 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.[196] Therefore, it would be more appropriate to find a shared intent among the parties to a treaty than the members of a legislature.

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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.").

[191] U.S. CONST. art. II, § 2.

[192] U.S. CONST. art. III, § 1.

[193] Stabile, *supra* note 41, at 882–83.

[194] Mank, *supra* note 30, at 824.

[195] Roman, *supra* note 31, at 386.

[196] Bederman, *supra* note 72, at 1022.

V. APPLICATION OF THE INTENT-TO-BENEFIT TEST TO DETERMINING INDIVIDUALLY ENFORCEABLE RIGHTS UNDER TREATIES: THE VIENNA CONVENTION ON CONSULAR RELATIONS.

A. The Sanchez-Llamas Case and the Circuit Split

Courts lack uniform standards in adjudicating whether a treaty provides individually enforceable rights. As a result, they also lack principled ways to distinguish which extra-textual sources should be given more credence than others in determining the meaning of a treaty. The Supreme Court in *Sanchez-Llamas*, while it had the opportunity to do so, failed to provide courts with such guidance. By framing the issue as two separate questions—first, whether the treaty creates individual rights, and second, whether it creates the remedies that the petitioners were seeking[197]—the Court concluded that it did not need to address whether the treaty creates rights since it found that the treaty does not entitle the petitioners to the specific remedies they sought.[198]

On the other hand, a four-Justice dissent in *Sanchez-Llamas* concluded that the Consular Convention creates individually enforceable rights.[199] The dissent outlined the following methodology for determining whether a treaty provides for individually enforceable rights: First, does the treaty "prescribe a rule by which the rights of the private citizen . . . may be determined" and second, are "the obligations set forth in [the treaty] of a nature to be enforced in a court of justice."[200]

Despite the apparent clarity of the methodology articulated by the dissent, the weakness of the test became apparent when the Court applied it to the Consular Convention. Instead of having a focused rationale, the dissent concluded that the Consular Convention gives rise to individually enforceable rights on the basis of numerous factors: first, the "nature" of the Consular Convention;[201] second, the "rights" language in the Convention;[202] third, the position of the government that other provisions of the Consular Convention give rise to individually-enforceable rights;[203] and fourth, findings by the Supreme Court that other treaties have given rise to individually enforceable rights.[204]

After *Sanchez-Llamas*, the Ninth and Seventh Circuits have come to diverging opinions on whether the Consular Convention creates individual rights that can be enforced through a Section 1983 civil damages action against

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[197] *Sanchez-Llamas*, 126 S. Ct. at 2677–78.
[198] *Id.*
[199] *Id.* at 2690–2709 (Breyer, J., dissenting) (citing *Head Money Cases*, 112 U.S. 580).
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.* at 2696.
[204] *Id.*

law enforcement officials.[205] While the Seventh Circuit found that Article 36 of the Consular Convention created individual rights that could be enforced through Section 1983,[206] the Ninth Circuit found that the Consular Convention does not create individual rights that can be enforced through that statute.[207] In reaching the diverging results on the same issue, the courts applied two different standards and privileged different extra-textual sources.[208]

The Seventh Circuit's test for determining whether a treaty gives rise to individually enforceable rights enforceable through Section 1983 included two factors: "(1) [W]hether the [treaty] by its terms grants private rights to any identifiable class, and (2) whether the text of the [treaty] is phrased in terms of the persons benefited."[209] The court then concluded that "Article 36 of the Vienna Convention by its terms grants private rights to an identifiable class of persons—aliens from countries that are parties to the Convention who are in the United States—and that its text is phrased in terms of the person benefited."[210]

On the other hand, the Ninth Circuit, in denying that Section 1983 can be used to enforce Consular Convention violations, characterized the issue as "whether Congress, by ratifying the [Consular] Convention, intended to create private rights and remedies enforceable in American courts through Section 1983 by individual foreign nationals who are arrested or detained in this country."[211] Based on a textual reading of the Consular Convention, the court concluded that Article 36 does not create judicially enforceable individual rights, because it does not unambiguously create such rights.[212]

In reaching their findings, both circuit courts privileged different extra-textual sources. The Seventh Circuit referred extensively to the treaty's drafting history.[213] While the Ninth Circuit explicitly refused to do so[214] and

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[205] *Compare Cornejo*, 2007 U.S. App. LEXIS 22616 (finding that the Consular Convention cannot be enforced through a Section 1983 action) *with Jogi*, 480 F.3d 822 (finding that the Consular Convention can be enforced through a Section 1983 action).

[206] *Jogi*, 480 F.3d at 829.

[207] *Cornejo*, 2007 U.S. App. LEXIS 22616, at *2.

[208] At the heart of the matter is a fundamental disagreement between the Ninth and Seventh Circuits about the holding in *Gonzaga* 536 U.S. 273. In *Gonzaga*, the Supreme Court decided that the statute that the petitioner was seeking to enforce could not be enforced through Section 1983. *Gonzaga*, 536 U.S. at 283. The Seventh Circuit views *Gonzaga* as only requiring that the statute or treaty which the litigant is seeking to enforce be phrased in terms of the person benefited. *Jogi*, 480 F.3d at 827–828. Once it is determined that the statute confers an individual right, it is presumptively enforceable through a Section 1983 action. *Id.* On the other hand, the Ninth Circuit states that "[w]hile Article 36 may also benefit an individual detainee when properly followed, benefit is not enough to pass the *Gonzaga* test." *Cornejo*, 2007 U.S. App. LEXIS 22616, at *30. The dissent in the Ninth Circuit case supports the Seventh Circuit reading of *Gonzaga* to require only a determination that the Consular Convention "was intended to confer individual rights" and once it was determined that the treaty confers rights, such rights "would be presumptively enforceable under 42 U.S.C. 1983." *Id.* at *58–59.

[209] *Jogi*, 480 F.3d at 829.

[210] *Id.* at 836.

[211] *Cornejo*, 2007 U.S. App. LEXIS 22616, at *8.

[212] *Id.* at *18–19.

[213] *Jogi*, 480 F.3d at 829–30, 833–35.

instead cited the "contemporaneous understanding of Congress in ratifying [the treaty] as well as the view of the Department of State, and the uniform practice of States in implementing it over the years" to "buttress" its view.[215]

Thus, the dissenting opinion in *Sanchez-Llamas*, the Ninth Circuit case, and the Seventh Circuit case each applied a different test to determining individually enforceable rights in treaties, used differing interpretive theories from textual to intentionalist,[216] and consulted different sources in reaching their opinion.[217]

B. *The Modified Intent-to-Benefit Test and the Consular Convention*

The modified intent-to-benefit test provides a predictable and uniform methodology to assist courts in determining whether a treaty creates individually enforceable rights. In addition, it also provides courts with guidance on the source that should be privileged in interpreting the treaty. The test is based on a contract law approach, which is appropriate to use in determining individually enforceable rights in treaties for the reasons discussed in Part IV above. The contract approach takes into account modern principles that acknowledge that sometimes parties to contracts undertake their obligations intending to benefit non-parties. Under the test, courts must determine whether 1) the treaty in question identifies a class of individuals who are intended to be benefited by it and 2) the individual attempting to enforce the treaty is within such class.[218] In applying the test, courts should give greater credence to the drafting history of the treaty rather than other extra-textual sources, because it is this source that provides insight into the

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[214] *Id.* at *28 ("Given that Article 36 does not unambiguously confer a right in individual detainees to support a cause of action under Section 1983, we see no need for resort to the travaux préparatoires (citing the Treaty Convention).").

[215] *Cornejo*, 2007 U.S. App. LEXIS 22616, at *19. It appears that the Court required that the Convention specific state that its "creates privately enforceable rights." *Id.* at *22 ("Cornejo suggests that the proviso in paragraph 2 manifests an intent to create privately enforceable rights. Nowhere does it say so.").

[216] *See also supra* Part II above discussing the textualist methodology employed by the *Sanchez-Llamas* majority opinion.

[217] The party briefs in *Sanchez-Llamas* also reflect the lack of clear standards on this issue. Brief of 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 of 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 of 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).

[218] *See* discussion and modified intent-to-benefit test *supra* Part III.

shared intent of the parties.[219] Application of the modified intent-to-benefit test to the facts of *Sanchez-Llamas* as well as to the facts of the Ninth and Seventh Circuit cases suggests that the Consular Convention gives petitioners and appellants in those cases both rights and remedies.[220]

1. Does the Treaty Identify a Class of Individuals who are Intended to be Benefited by It?

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."[221] In addition to requiring a detaining authority to notify the national government of the detainee if he or she 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."[222]

On the other hand, courts have noted that the 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 the efficient performance of functions by consular posts on behalf of their respective States,"[223] weighs against concluding that the Consular Convention was meant to benefit individuals. [224] Although the intent-to-benefit test does not require 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.[225] The contract law approach suggests consulting with the *travaux preparatories*, also known as the drafting history, in determining the meaning of treaty provisions.

i. Consulting with *Travaux Preparatories*

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[219] *See supra* Part III.B.
[220] *See infra* Parts V.B.2–3.
[221] *See* Consular Convention, *supra* note 15, art. 36(1)(b).
[222] *Id.*
[223] *Id.* pmbl.
[224] *See, e.g.*, *Cornejo*, 2007 U.S. App. LEXIS 22616, at *13; United States v. Emuegbunam, 268 F.3d 377, 392 (6th Cir. 2001).
[225] *See, e.g.*, Treaty Convention, *supra* note 2, art. 32.

The drafting history, and the committee and plenary debates,[226] surrounding the adoption of Article 36 demonstrate the intent of the delegates to protect the rights of individuals.[227] The negotiators at the conference extensively discussed the rights of foreign nationals.[228] For example, 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 rights of the individual."[229] 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."[230] The United Kingdom delegate submitted the amendment that became the final version of paragraph (1)(b), requiring the detaining nation to inform the detained foreign national of his right to consular access. The U.S. delegate voted with the majority in favor of the amendment.[231] On the other hand, Venezuela proposed an amendment that would have eliminated the individual right of consular communication, but it was withdrawn after receiving strong opposition from other member states.[232]

ii. Determining Intent in Multi-party Contracts

The modified intent-to-benefit test suggests that if a party voiced a position and the other party or parties did not challenge or object to it, that view constitutes the shared intent of the parties.[233] 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

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[226] In 1963, ninety-two nations convened to negotiate the text of the Consular Convention. Mark Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 612 (1997).

[227] 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* 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*, 54 DUKE L.J. 587, 618 (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.").

[228] *See* 1 UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS: OFFICIAL RECORDS at 3, U.N. Doc. A/Conf. 25/6, (1963) [hereinafter CONSULAR RELATIONS CONFERENCE OFFICIAL RECORDS].

[229] *Id.* ¶ 34, at 331.

[230] *Id.* ¶ 39, at 337.

[231] *See* VIENNA CONVENTION ON CONSULAR RELATIONS WITH OPTIONAL PROTOCOL, S. EXEC. DOC. NO. 91-1, at 60 (1969) (Report of the United States Delegation to the United Nations Conference on Consular Relations).

[232] CONSULAR RELATIONS CONFERENCE OFFICIAL RECORDS, *supra* note 228, at 37, 38, 84, 85, 331–34.

[233] *See supra* Part IV.B.

country ... [i]s one of the most sacred rights of foreign residents in a country."[234] The delegate from India emphasized that "the right given to consulates implied a corresponding right for nationals."[235] 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."[236] Consequently, the drafting history suggests that the treaty signatories intended to benefit an identifiable class of individuals.[237]

2. Are the Individuals Within the Class of People that the Parties Intended to Benefit?

The class of individuals that benefit from the Consular Convention is composed of citizens of a State party to the Consular Convention who are detained by authorities of another State that is also party to the Convention.[238] U.S. government officials detained both the petitioners in the *Sanchez-Llamas* case and the appellants in the Ninth and Seventh Circuits, yet failed to notify either of their right to contact the consulates of his country.[239] Thus, both are within the class of individuals that are to be benefited by the Consular Convention.

3. Rights and Remedies

Under the intent-to-benefit approach, in order to enforce a contract a litigant must show that a right exists, but there is no requirement that the contract also specify a remedy.[240] On the other hand, the majority opinion in *Sanchez-Llamas* held that a treaty must not only specify that the individual has rights under it but also that it give rise to the specific remedies sought by the

[234] U.N. Conference on Consular Relations, Mar. 4–Apr. 22, 1963, 2d Comm., 15th mtg., ¶ 36, at 332, U.N. Doc. A/CONF.25/16 (emphasis added).

[235] *Id.* ¶ 50, at 333 (emphasis added).

[236] *Id.* ¶ 11, at 338 (emphasis added).

[237] On the other hand, the Government in *Sanchez-Llamas* 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. Oregon Brief, *supra* note 217, at 15. 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. Respondents also frame 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." *Id.* at 20. *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) (Nos. 04-10566, 05-51) (arguing that "[t]o decide whether Article 36 of the Convention creates individual rights, this Court engages in an analysis similar to statutory interpretation").

[238] *See supra* Part V.B.1.

[239] *Sanchez-Llamas*, 126 S. Ct. at 2676; *Cornejo*, 2007 U.S. App. LEXIS 22616 at *3; *Jogi*, 480 F.3d at 826.

[240] *See supra* Part III.B.

petitioner.[241] In the two circuit civil cases, the courts did not deal with the issue of whether or not the Consular Convention creates remedies, because an existing U.S. statute, Section 1983,[242] supplied the remedy.[243]

However, most courts that have addressed the issue in the criminal context have found that the Consular Convention does not give rise to any remedies.[244] One explanation for this may be that courts are less troubled by providing monetary damages as a civil remedy than by freeing someone who may have committed a crime. More importantly, though, unlike in the civil context where Section 1983 supplies the remedy, courts probably do not find remedies in the criminal context, because litigants who are challenging their criminal convictions have not cited a U.S. statute that explicitly supplies them the remedy for Consular Convention violations.

There is no principled doctrinal justification for why a violation of individual rights in a treaty should be enforced in a civil context, but not in a criminal context. The modified intent-to-benefit approach does not suffer from this shortcoming, because it does not require that the treaty need to specify both rights and remedies. Under the test, once it is determined that the individual is an intended beneficiary, courts would have to find some effective remedy for the violation of rights.

CONCLUSION

This article provides a methodology for adjudicating an issue that has been increasingly raised in U.S. courts—whether a treaty gives rise to individually enforceable rights. That question, at least with respect to the Consular Convention, was left unresolved by the Supreme Court last term in *Sanchez-Llamas*. The Supreme Court's failure to provide guidance on the issue has left room for courts to reach differing conclusions. This article attempts to provide a predictable set of guidelines for courts to use in determining whether an individual may enforce a treaty in U.S. courts.

When determining whether a treaty gives rise to individually enforceable rights, courts should apply a modified version of the intentionalist intent-to-benefit test from the Restatement (Second) of Contracts. An approach to determining individually enforceable rights rooted in contract law is the appropriate methodology, because it recognizes that treaties are essentially contracts between nations. Courts, however, have incorrectly imported principles of textual statutory interpretation to determining individually enforceable rights under treaties. The traditional arguments in favor of a textualist approach to private rights of action in statutes do not

[241] The dissent, however, cited to the language of the treaty that indicates that States must give it "full effect" to show that courts must provide remedies for violations of individual rights under a treaty. *Sanchez-Llamas*, 126 S. Ct. at 2698 (Breyer, J., dissenting).

[242] 42 U.S.C. §1983.

[243] *Sanchez-Llamas*, 126 S. Ct. at 2676; *Cornejo*, 2007 U.S. App. LEXIS 22616 at *1; *Jogi*, 480 F.3d at 825.

[244] *Jogi*, 480 F.3d at 831–32 (citing a number of circuit cases where courts have concluded that the Consular Convention does not provide remedies to criminal defendants).

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 modified intent-to-benefit test suggested by this article is more likely than the statutory approach to lead courts to find that certain treaties create rights in favor of certain individuals that are enforceable by those individuals in a U.S. court. First, under the approach, in order for someone to enforce a treaty in U.S. courts, the treaty does not need to explicitly state that non-parties may bring a suit to enforce it, but rather it requires courts to determine whether the treaty drafters intended to benefit such party. Second, in order for an individual to enforce the treaty, the modified intent-to-benefit test does not require that courts also find that the treaty text provide for the exact remedy that the intended beneficiary is seeking. Finally, it allows courts to consider extra-textual sources, which could confirm and/or manifest the intent in the first instance to benefit certain third parties. Treaties that affect the relationships between the individuals and nations, such as human rights treaties and humanitarian law treaties, are more likely than other types of treaties to give rise to individually enforceable rights under the modified intent-to-benefit test, because such treaties are often intended to benefit individuals.

Concerns that the intent-to-benefit test will open the floodgates to litigation against the United States and other nations in U.S. courts are not warranted for several reasons. First, claims of individually-enforceable rights under treaties may only proceed if the treaty in question is found to be self-executing.[245] Yet in ratifying a number of human rights treaties, Congress adopted a resolution indicating that such treaties are not "self-executing."[246] Thus, the universe of treaties under which individuals could claim enforcement rights in the United States is limited. Second, the intent-to-benefit test limits enforceable rights in favor of only intended beneficiaries; incidental beneficiaries, who may benefit indirectly, do not fall within the protected class with enforceable rights and will not be able to enforce the contract.[247] Indeed, although courts have increasingly allowed non-parties to enforce contracts between governmental entities and private parties on the basis of the third party beneficiary rule,[248] this has not led to a floodgate of litigation. Third, many claims by individuals against foreign governments based in treaties are

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[245] *Jogi*, 480 F.3d at 827. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987).

[246] *See, e.g.*, David Sloss, *The Domestication of International Human Rights: Non-Self Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 131–32 (1999). Some have argued that this principle may be unconstitutional, but this debate is not engaged 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).

[247] SECOND RESTATEMENT Section 315. *See also id.* § 302 cmt. a ("This Section distinguishes an 'intended' beneficiary, who acquires a right by virtue of a promise, from an 'incidental' beneficiary, who does not."); *id.* § 302 introductory note ("the terms 'intended' beneficiary and 'incidental beneficiary' are used to distinguish beneficiaries who have rights from those who do not.").

[248] Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1184–1191 (1985) (citing a number of cases in which courts have granted third party beneficiary rights to individuals in government contracts).

likely to be dismissed on procedural grounds. For example, cases against foreign governments may be dismissed on grounds of a lack of personal jurisdiction or on *forum non conveniens* grounds if the events in question occurred in another country and/or witnesses or evidence are located in such other country.

On the other hand, adopting a uniform test rooted in contract law would enhance the goal of comity among nations. First, adopting a uniform methodology would ensure that U.S. courts do not reach differing interpretations of the same treaty. Currently, U.S. courts have diverged in their interpretation of Article 36 of the Consular Convention. The modified intent-to-benefit test provides a set of guidelines that can be applied by courts to reach uniform results when determining whether a treaty gives rise to individually enforceable rights. Inconsistent interpretations by U.S. courts of treaty provisions undercut its relationships with other countries.

Second, adopting a methodology based in contract law would more likely lead U.S. courts to interpret treaties consistently with foreign and international courts. The Supreme Court's principle that opinions of foreign courts deserve "respectful consideration"[249] reflects the understanding that uniformity is an important goal of treaty interpretation.[250] If treaties are viewed as contracts, then U.S. courts would refer to the same body of extrinsic information that foreign and international courts use in determining the meaning of a treaty—the drafting history of the treaty. Referring to the same body of extrinsic information would more likely create uniform interpretations.

In addition, viewing a treaty as a contract suggests that interpretations placed by international and foreign courts should be given persuasive authority in U.S. courts. For example, although principles of res judicata[251] would prevent two courts in the United States from reviewing the same contract provision (unless one of the courts had appellate jurisdiction over the other court), if two courts did review the same provision, the second court is likely to consider and perhaps refer to the interpretation of the first court as persuasive authority. Similarly, a U.S. court adjudicating the interpretation of a treaty should consider a foreign or international court's interpretation as persuasive authority. Doing so would more likely lead U.S. courts to adopt interpretations of treaties that are more consistent with foreign and international courts. The modified intent-to-benefit test provides a predictable set of guidelines for courts in adjudicating an issue that currently lacks uniform standards.

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[249] *See* Olympic Airways v. Husain, 540 U.S. 644, 661 (2004) (Scalia, J., dissenting).

[250] *Sanchez-Llamas*, 126 S. Ct at 2700.

[251] *See, e.g.*, Allen v. McCurry, 449 U.S. 90 (1980).