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DYNAMIC TREATY INTERPRETATION

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INTRODUCTION

"[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an

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> usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind."[1]

With this passage in *Chan v. Korean Air Lines*, an opinion authored not surprisingly by Justice Antonin Scalia, a new strain of restrictive formalism in statutory interpretation spreads to the construction of an international treaty. Proponents of this "new textualism" assert that federal courts must refrain from any invasive interpretive techniques, regardless of the effects on the long-term health of a statutory body of law. Supporters of "dynamic" interpretation, in contrast, recognize an active judicial role in ensuring the vitality of statutes. As *Chan* illustrates, the construction of treaties has also now fallen under the influence of this enduring controversy over the powers of federal courts to develop statutory law.

Indeed, few subjects have fascinated—and divided—legal scholars in recent years as much as the appropriate role of the judiciary in the interpretation of statutes. For much of this country's legal history, statutory interpretation received little close scholarly attention.[2] Matters began to change in the latter half of this century, however, as the nation's social and economic problems increasingly required broad legislative (and in particular federal) solutions. By 1982, Guido Calabresi was able to observe with little risk of contradiction that this country had entered an "age of statutes."[3] The message was not lost on scholars. In the decade and a half since Judge Calabresi's telling observation, the interpretation of statutes as this nation's new

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[1] Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 135 (1989) (alteration in original) (quoting The Amiable Isabella, 19 U.S. 1, 32, 6 Wheat. 1, 71 (1821)).

[2] Notable exceptions include REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975); Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); and elements of the legal process theory developed in the 1950s by Professors Henry Hart and Albert Sacks, *see* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[3] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163 (1982).

"primary source of law"[4] has become one of the most animated themes of American legal scholarship.[5]

But as courts and scholars continue to dissect the implications of our "age of statutes,"[6] the law is already rapidly progressing into the next significant stage in its development: unification on a trans national level. The initial focus in this direction has been on private, and in particular commercial, law. Recent years have witnessed the emergence of a whole new generation of international conventions designed to unify the law governing international commercial transactions. The forward edge for this new generation now also has become its paradigm: the United Nations Convention on Contracts for the International Sale of Goods (the "U.N. Sales Convention" or CISG).[7] In addition to the United States, this Convention has already been ratified by nations whose combined economies account for nearly two-thirds of all world trade.[8]

The push toward an international unification of the law has not ended there. In the last decade, international conferences have adopted conventions governing such diverse subjects as financial leasing, factoring, bills of exchange and promissory notes, and stand-by letters of credit. Drafting work is also proceeding apace on a variety of like-minded projects, including international security interests as well as receivables financing.[9] Taken together, these conventions form the foundation for a proto-"International Uniform Commercial Code."

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[4] William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321 (1990).

[5] The current scholarly debate over statutory interpretation in this country is analyzed *infra* Part I.B.3.

[6] CALABRESI, *supra* note 3, at 163.

[7] *See* U.N. Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, S. TREATY DOC. NO. 98-9 (1983); 19 I.L.M. 668-99 (1980) [hereinafter CISG]. The official English language text also can be found in *Final Act of the United Nations Conference on Contracts for the International Sale of Goods*, Annex I, U.N. Doc. A/Conf.97/18 (1980) [hereinafter *Final Act*], *in* Official Records, Conference on Contracts for the International Sale of Goods 178, U.N. Doc. A/Conf.97/19 [hereinafter Official Records], and in 52 Fed. Reg. 6262-02 (1987)

[8] Based on statistics published by the International Monetary Fund, in 1996, the 51 present member states of the U.N. Sales Convention accounted for approximately 71% of all world imports of goods and 63% of all world exports. *See* DIRECTION OF TRADE STAT. Q., Sept. 1997, at 3-9.

[9] For an examination of this new generation of international commercial law conventions, see *infra* notes 32-43 and accompanying text. *See also infra* note 35 (discussing law unification efforts in other fields of private law).

This maturation of the law into the international dimension also carries subtle but powerful consequences for the allocation of authority in our federal system. The law unification efforts of this new generation take the constitutional form of treaties.[10] Senate ratification of a particular convention thus results (as was the case with the U.N. Sales Convention) in the federalizing of the law within its scope.[11] A derivative consequence is that questions of interpretation and application will "aris[e] under . . . [a] Treat[y]" of the United States,[12] and thus fall within the "federal question" jurisdiction of the federal courts.[13] At issue in the ratification process, in other words, is nothing less than federal arrogation of traditional state competence in the law governing private, and in particular commercial, relations.[14]

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[10] The conventions are structured to obtain their authority as law through the Senate treaty ratification procedure of Article II, Section 2 of the Constitution. *See* U.S. CONST. art II, § 2. For a discussion of this procedure in the context of the ratification of the U.N. Sales Convention, see Peter Winship, *Congress and the 1980 International Sales Convention*, 16 GA. J. INT'L & COMP. L. 707, 721-26 (1986).

[11] *See* Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1236 (S.D.N.Y. 1992) (stating that the convention, as a treaty, is the supreme law of the land); Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT'L L. & BUS. 165, 166 (1995) ("In the United States, [the U.N. Sales Convention] is a self-executing treaty with the preemptive force of federal law."). This effect arises from the Supremacy Clause of Article VI of the Constitution. *See* U.S. CONST. art. VI ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

[12] U.S. CONST. art. III, § 2.

[13] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 112(2) (1987) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS] ("The determination and interpretation of international law present federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States."). In theory, nothing prevents a state court from interpreting a treaty of the United States as an issue of federal law. Instances of this are rare, however. *See* Sei Fujii v. State, 242 P.2d 617, 619 (Cal. 1952) (construing a provision in the Charter of the United Nations). The reason for this is that federal courts have original jurisdiction in such cases, *see* 28 U.S.C. § 1331 (1994), and defendants have an automatic right of removal should the corresponding claims initially be pursued in state court, *see* 28 U.S.C. § 1441(b) (1994). In any event, pursuant to the Supremacy Clause in Article VI of the United States Constitution, the final authority for the interpretation of treaties will rest with the United States Supreme Court.

[14] As a consequence, the jurisprudence on the interpretation and development of the Uniform Commercial Code as the law of the several states will not, except through comparison and contrast, guide the interpretation of the international commercial law conventions. For a contrast between the interpretive philosophy of these conventions and the Uniform Commercial Code, see *infra* Part III.B.2. To be sure, the scope of private law unification efforts such as the U.N. Sales Convention is limited to relations with defined international attributes. *See infra* note 326 and accompanying text. But just as interstate trade supplanted purely intrastate trade in the maturing of our

Unfortunately, extant Supreme Court jurisprudence on the interpretation of treaties is ill-equipped to accommodate this next significant stage in the development of the law. In large measure, this jurisprudence remains rooted in the public international law premise that treaties solely reflect a "contract" between sovereign nations.[15] The consequence has been an inflated view of both the subjective intent of "the parties" and the degree of appropriate deference to the views of the Executive Branch in interpretive inquiries.[16] Whatever their propriety in that context, such considerations are considerably less compelling for international conventions that regulate solely commercial relations between private entities.[17]

Moreover, and more destructively, the Court's treaty jurisprudence has fallen under the strong influence of a resurgent strain of formalism in domestic statutory interpretation. Although sometimes liberal in rhetoric, the common practical outcome of treaty interpretation by the Court has been of a distinctly conservative nature. Echoing the *Chan* opinion with which this Article began, the Court has consistently refused to view a treaty as a body of integrated norms that is capable of generating internal solutions for gaps in its provisions.[18] Instead, when faced with an unsettled question under a treaty, the

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domestic economy, so too will the future of commerce lie in the growth of transactions with an international dimension.

[15] *See* Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 533 (1987) ("[I]n interpreting an international treaty, we are mindful that it is 'in the nature of a contract between nations . . . .'" (quoting Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984))); *see also* Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996) (observing with regard to interpretation that a treaty is "an agreement among sovereign powers"); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) ("A treaty . . . is essentially a contract between two sovereign nations."); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (stating that "treaties are contracts between independent nations").

[16] *See* O'Connor v. United States, 479 U.S. 27, 33 (1986) (stating that the executive application of a treaty is entitled to "great weight"); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *see also* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 151 n.15 (1989) (Brennan, J., concurring) (noting that the Court "owe[s] considerable deference to the views of the Executive Branch concerning the meaning of an international treaty"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 13, § 326(2) (stating that courts "will give great weight to an interpretation made by the Executive Branch"). For a more detailed analysis of this issue, see *infra* Part I.B.2.

[17] For a discussion of the "legislative" character of the U.N. Sales Convention and its progeny, see *infra* notes 67-69 and accompanying text.

[18] This restrictive approach to treaty interpretation by the Supreme Court is analyzed *infra* in notes 149-55 and accompanying text.

common approach has been to retreat to otherwise-applicable domestic law, "'whatever may be the imperfections or difficulties'"[19] this may leave in the fulfillment of the international law project.

This Article will demonstrate that the new generation of international conventions rejects this narrow conception of the judicial function. Inspired by a paradigm established in the U.N. Sales Convention, these commercial law conventions contemplate an active role for the courts in developing the law within their scope. I will argue that an essential element of this dynamic interpretive process is a delegation of authority to fashion new substantive law as normative gaps emerge in a convention's express provisions. The consequence is a repudiation of the resurgent strain of restrictive formalism that has gained recent prominence in domestic statutory interpretation and that has influenced Supreme Court treaty jurisprudence as well.

Parts I and II set the context for an analysis of this dynamic interpretive process. Part I first explores the contention that much of the Supreme Court's treaty caselaw is inapposite for the interpretation of international conventions that regulate purely private relations. It then examines the continuing controversy in the United States over the appropriate role of the judiciary in domestic statutory interpretation. The goal of this exercise is to set the jurisprudential context for a parallel analysis of the "autonomous" interpretive regime embraced in the U.N. Sales Convention and its progeny.

Part II introduces the core elements of this interpretive regime. I demonstrate there that the interpretive paradigm established in the U.N. Sales Convention endorses a policy favoring an "internal" filling of gaps and resolution of ambiguities. That is, it empowers adjudicators to resolve unsettled questions not through a retreat to domestic law, but rather on the basis of the "general principles" reflected in a convention's regulatory scheme.

Part III is the heart of this Article, for it is there that I address the repudiation of the essential tenets of the "new textualism" that has gained recent prominence in domestic statutory interpretation. Part III.A first demonstrates that, contrary to the animating theme of textualism, the U.N. Sales Convention and its progeny sanction a broad repertoire of interpretive techniques in the judicial development of the law. This includes an active resort to the drafting history that gave life to the relevant international convention.

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[19] *Chan*, 490 U.S. at 135 (quoting The Amiable Isabella, 19 U.S. 1, 32, 6 Wheat. 1, 71 (1821)).

But as Part III.B then shows, it is in the role of adjudicators in filling normative gaps that the effects of this dynamic interpretive process will be most pronounced. I argue that the "general principles" methodology amounts to a delegation of lawmaking authority to federal courts within the scope of an international convention. The particular significance of this conclusion emerges from an observation that such "general principles" are nowhere expressly identified, and many the existence of which is more evident (such as "good faith" and "reasonableness") have neither a preordained nor an immutable content. Implicit in this approach is thus an active role for the judiciary in identifying and giving substance to the principles that will guide the future development of the law.

This conclusion alone strikes at the foundation of a restrictive formalist approach to the lawmaking powers of federal courts. The international dimension raises its significance to a higher power. Bolstered by mandatory deference to the needs of international uniformity, I argue that the delegation of lawmaking authority amounts to an instruction to the federal judiciary to participate with courts of other member nations in fashioning an international common law around the frame of an international convention. Part III.B then contrasts this internal-development methodology with the substantial continuing influence of the preexisting common law under the Uniform Commercial Code in this country.

It is difficult to overstate the impact of an internal-development methodology as the law-unification movement progresses into the international dimension. Even a comprehensive effort such as the U.N. Sales Convention will fail to provide guidance on a variety of matters within its scope. Issues as significant as the treatment of a "battle of the forms" in contract formation, the appropriate role of "good faith" in international transactions, the proper interest rate on amounts in default (which alone has already generated well over one hundred reported decisions), and the power of equitable principles to discipline abuse all remain unresolved under the Convention. Unfortunately, such fissures in coverage are inevitable in the articulation of general legal standards to govern disparate cultural and legal traditions, and their frequency will only increase under the corrosive effect of time.

A restrictive formalist approach to interpretation permits domestic adjudicators to embrace their natural bias for familiar domestic legal norms in filling such gaps. The inevitable consequence is a pro-

gressive disintegration of whatever international uniformity a convention has achieved in the first place.

The "general principles" methodology, in contrast, seeks to preclude such a destructive retreat to domestic law. As the inevitable unsettled questions emerge, it empowers domestic courts to participate in the fashioning of solutions on an international level. In doing so, this internal-development methodology promotes in a particular way the long-term success of an international law unification effort.

Part III concludes with an examination of this methodology in action. Part III.C demonstrates that the authority delegated to adjudicators extends not only to filling substantive gaps. Rather, inspired by the dynamic jurisprudence of modern civil law courts, the "general principles" approach also empowers adjudicators to adapt a convention to accommodate social and technological changes in the regulated field of law. Finally, Part III.D examines certain procedural antidotes to the potential homesickness of domestic courts in this dynamic interpretive process.

Intense scholarly debate in this country in recent years has developed the jurisprudence of domestic statutory interpretation to a high art. But the boundaries of the debate are changing. As national economies continue toward global integration, so too is the law progressing toward unification on an international level. New, broader perspectives on interpretation are required to accommodate the dynamics of this process. The sum of my thesis is that the "general principles" methodology embraced in the U.N. Sales Convention and its progeny represents the most promising interpretive paradigm for this next significant stage in the development of the law.

I. THE DOMESTIC CONTEXT FOR THE INTERPRETATION OF INTERNATIONAL CONVENTIONS

A. *The Promise of International Private Law Conventions and Their Curious Legal Nature*

Since the rise of modern nation-states in the nineteenth century, the interests of international uniformity in the law have been left to cooperation among the formally sovereign nations.[20] Initial efforts in

[20] In the infant stages of its development, the law governing commercial transactions, interestingly, held the promise of maturing into a truly international body of unified legal norms. With the growth of commerce in the middle ages, the concept of a specialized "law merchant," the *lex mercatoria*, emerged as a system of uniform equi-

this direction began as early as the turn of the century.[21] After the upheavals of World War I brought the need for international cooperation into sharper focus, work began in earnest on the unification of the law governing the core international commercial transaction, the sale of moveable goods. Responsibility for this undertaking initially fell to one of the prime forces in the international unification of the law, the International Institute for the Unification of Private Law, commonly known by its French acronym, UNIDROIT.[22] After the delays occasioned by World War II, the drafting work of UNIDROIT led to the adoption at a conference in the Hague in April, 1964, of two separate conventions, one governing the substantive principles of in-

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table norms to govern the interaction of commercial traders at international fairs, markets, and seaports. *See* RUDOLF G. SCHLESINGER, COMPARATIVE LAW 184-85 (2d ed. 1959) (discussing the development of the "commercial customs and laws of the Western world"); Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221, 224-26 (1978) (discussing the development of an international commercial law in Europe between the 11th century and the 18th century). The rise of the modern nation-state brought an end to the promise of a transnational *lex mercatoria*. The elevated sense of nationalism and sovereignty which characterized this process manifested itself, in jurisprudential terms, in a strict positivist view of the state as the exclusive originator of law. In continental Europe, this view took the form of the codification movement, which established the civil codes as the exclusive source of law and thus rejected all norms of external origin. For an analysis of the approach of the European civil codes, see *infra* notes 188-200 and accompanying text. Even in common law countries such as England and the United States, the substantive principles of the law merchant were absorbed into, or displaced by, national law through judicial action. *See* Berman & Kaufman, *supra*, at 226-27. The consequent intellectual isolation led to the gradual development of different legal institutions and concepts, and ultimately to different solutions for the same practical problems. As Rudolf Schlesinger has observed, this problem was particularly acute in civil law systems. *See* SCHLESINGER, *supra*, at 188 (observing that the revolutionary changes initiated by the civil codes caused the jurists in each country "to concentrate their efforts on the interpretation and development of their own code systems" and that "[l]inguistic and conceptual barriers between lawyers of various civil law countries thus were bound to grow"). For similar observations, see Berman & Kaufman, *supra*, at 227-28.

[21] From the end of the last century until 1928, the Netherlands convened conferences in the Hague to discuss the unification of the law governing international commercial transactions. For a discussion of this historical background, see Paul Lansing, *The Change in American Attitude to the International Unification of Sales Law Movement and UNCITRAL*, 18 AM. BUS. L.J. 269, 269-70 (1980), and Bradley J. Richards, Note, *Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, 69 IOWA L. REV. 209, 212-14 (1983).

[22] Although it originally came into being as an entity affiliated with the League of Nations, UNIDROIT is now an independent organization with headquarters in Rome. *See* Charter of the International Institute for the Unification of Private Law, *done* Mar. 15, 1940, 15 U.S.T. 2494, U.K.T.S. 54 (1965) (entered into force for the United States on Mar. 13, 1964). Through special legislation in 1963, Congress officially authorized participation in UNIDROIT by the United States. *See* 22 U.S.C. § 269g (1994).

ternational sales law,[23] and the other the formation of international sales contracts.[24]

Although these "Hague Conventions" formally entered into effect for eight nations in 1972, the participants in their creation almost exclusively represented industrialized Western-European states.[25] The result was that nations of other cultural, legal, and political traditions did not regard the conventions as a serious attempt at a truly global unification of the law. It was clear almost from their adoption, therefore, that the Hague Conventions had "no chance for wide international acceptance."[26]

The failure of the Hague Conventions nonetheless led to the emergence of a second major force in the international unification of private law,[27] the United Nations Commission on International Trade Law (UNCITRAL).[28] As early as 1968, UNCITRAL began preliminary work for a comprehensive review of the Hague Conventions, and in

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[23] Convention Relating to a Uniform Law on the International Sale of Goods, *done* July 1, 1964, 834 U.N.T.S. 107 [hereinafter ULIS], *reprinted in* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 667-91 (2d ed. 1991).

[24] Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, *done* July 1, 1964, 834 U.N.T.S. 169 [hereinafter ULF], *reprinted in* HONNOLD, *supra* note 23, at 659-66.

[25] *See* Elizabeth Hayes Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN. J. INT'L L. 263, 266-70, 267 (1986) ("The countries which drafted the Hague Conventions were mainly European."); Martin L. Ziontz, Comment, *A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interest?*, 2 NW. J. INT'L L. & BUS. 129, 134 n.35 (1980) (observing that 19 of the 28 participating states at the Hague Conference were from Western Europe).

[26] Ulrich Huber, *Der UNCITRAL-Entwurf eines Übereinkommens über Internationale Warenkaufverträge*, 43 RABELSZ 413, 414 (1979) (translation by author).

[27] A final principal force in the international unification of private law is the Hague Conference on Private International Law. For information on the work of this organization, see *infra* note 35.

[28] UNCITRAL was created by Resolution 2205 of the United Nations General Assembly on December 17, 1966, in order "to promote the progressive harmonization and unification of the law of international trade." G.A. Res. 2205, U.N. GAOR, 21st Sess., 1497th plen. mtg. at 2, U.N. Doc. A/6396 (1966). For information on the workings of UNCITRAL in general, see John Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201 (1979). For a critical analysis of the conservative bias of such "private legislatures," see Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 701 (1997) (arguing that from the nature of the process, "private international lawmakers . . . will produce a large portion of open-ended rules that largely confirm the status quo").

1969 established a Working Group charged with this responsibility.[29] After nearly ten years of drafting efforts, this Working Group—with the active participation of representatives of the United States[30]—produced a unified convention governing both the formation and performance of international sales contracts. A diplomatic conference convened by the United Nations General Assembly in April, 1980, in Vienna, unanimously adopted the Convention on April 11, 1980.[31] The U.N. Sales Convention then entered into effect according to its terms on January 1, 1988, after the ratifications of the United States, China, and Italy exceeded the required threshold of ten member states.[32]

The success of this Convention has been little short of stunning. In the ten years since it entered into effect in 1988, fifty-one nations have either acceded to or ratified the Convention.[33] Significantly, represented among this number are nations from all geographic regions, from all political perspectives (including former socialist states as well as traditional western democracies), and from all stages of economic development (from highly and newly industrialized countries to developing economies).[34]

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[29] Scholars interested in a more detailed introduction to the history of the Convention should see Patterson, *supra* note 25, at 265-77; Maureen T. Murphy, Note, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law*, 12 FORDHAM INT'L L.J. 727, 728-36 (1989). For an official summary record of the history of the drafting and adoption of the Convention, see *Final Act*, *supra* note 7, *in* Official Records, *supra* note 7, at 176-77.

[30] For a discussion of the participation by the United States in the drafting of the U.N. Sales Convention, see Henry Landau, *Background to U.S. Participation in United Nations Convention on Contracts for the International Sale of Goods*, 18 INT'L LAW. 29, 30-31 (1984), and Patterson, *supra* note 25, at 265-77.

[31] *See Final Act*, *supra* note 7, *in* Official Records, *supra* note 7, at 177.

[32] *See* CISG, *supra* note 7, art. 99(1). The Senate of the United States ratified the U.N. Sales Convention in October, 1986, and the United States deposited the ratification with UNCITRAL on December 11 of the same year. For a history of this ratification, see Winship, *supra* note 10, at 708-10.

[33] A complete list of the member states of the various conventions adopted under the auspices of UNCITRAL is published periodically under the title *Status of Conventions*. *See Status of Conventions and Model Laws*, U.N. Office of Legal Affairs, International Trade Law Branch, U.N. Doc. A/CN.9/428 [hereinafter *Status of Conventions*]. The most current *Status of Conventions* can also be found on the internet. *See UNCITRAL Homepage* (last modified Mar. 16, 1998) <http://www.un.or.at/uncitral> [hereinafter *UNCITRAL Homepage*].

[34] The Convention's diverse membership includes, for example, France, Germany, and the United States; China, Cuba, and Russia (as well as nearly all formerly socialist, eastern European countries); Argentina, Chile, and Mexico; Syria, Uganda, and Zambia; and Australia, New Zealand, and Singapore. *See Status of Conventions*, *supra* note 33, at 3-4.

This success has also inspired unification efforts in other fields of international commercial law.[35] An international conference conducted under the auspices of UNIDROIT adopted, in 1983, a Convention on Agency in the International Sale of Goods.[36] Following extensive drafting work, a similar conference held in Ottawa, Canada, in 1988, adopted separate conventions governing two significant classes of international financial transactions: the UNIDROIT Convention on International Financial Leasing,[37] and the UNIDROIT Convention on International Factoring.[38] These latter two conventions have already entered into force.[39]

Similarly, an international conference adopted, in 1988, a UNCITRAL Convention on International Bills of Exchange and In-

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[35] Parallel to these commercial law unification efforts, a number of conventions of a private law character have been adopted under the auspices of the Hague Conference on Private International Law. This organization has primarily focused on conventions governing civil procedure and domestic relations matters, three notable of which the United States has already ratified: Convention on the Civil Aspects of International Child Abduction, *concluded* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89; Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention]; and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Evidence Convention]. For the Supreme Court's interpretation of the latter two conventions, see *infra* notes 149-50 and accompanying text. In a similar vein, the United States has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (commonly known as the New York Convention), which was prepared under the auspices of UNCITRAL.

[36] UNIDROIT Convention on Agency in the International Sale of Goods, *done* Feb. 17, 1983, 22 I.L.M. 249 [hereinafter Convention on Agency]. For more information on this and other UNIDROIT conventions, see Paula Howarth, *UNIDROIT Homepage* (visited Mar. 3, 1998) <http://www.agora.stm.it/unidroit/> [hereinafter *UNIDROIT Homepage*].

[37] UNIDROIT Convention on International Financial Leasing, *done* May 28, 1988, 27 I.L.M. 931 [hereinafter Convention on Financial Leasing]. Thirteen states, including the United States, are signatories to this Convention. *See UNIDROIT Homepage*, *supra* note 36.

[38] UNIDROIT Convention on International Factoring, *done* May 28, 1988, 27 I.L.M. 943 [hereinafter Convention on Factoring]. Thirteen states, including the United States, are signatories to this Convention. *See UNIDROIT Homepage*, *supra* note 36.

[39] Both the Convention on Factoring and the Convention on Financial Leasing entered into force in France, Italy, and Nigeria on May 1, 1995, and in Hungary on December 1, 1996. The latter Convention entered into force for Panama on October 1, 1997. For current information on the status of the ratification of these conventions, see *UNIDROIT Homepage*, *supra* note 36.

ternational Promissory Notes.[40] Most recently, UNCITRAL approved a Convention on Independent Guarantees and Stand-by Letters of Credit.[41] And work is proceeding under the auspices of UNIDROIT on a convention on security interests in large mobile equipment,[42] as well as under the auspices of UNCITRAL on a convention governing international receivables financing.[43] All of these projects have proceeded with the active participation of the United States.[44]

Taken as a whole, these conventions form a proto-"International Uniform Commercial Code."[45] To be sure, the diverse unification efforts reflect varying degrees of ambition, and stand at different stages in the ratification process. What is nonetheless significant is what they have in common. As we shall see below,[46] the projects (with certain exceptions) carry forward a core consensus achieved in the drafting of the U.N. Sales Convention on the methodology for their interpretation and supplementation. As a result, the depth and breadth of

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[40] Convention on International Bills of Exchange and International Promissory Notes, *approved* Dec. 9, 1988, 28 I.L.M. 170 [hereinafter Convention on Bills of Exchange]. Six states have signed the Convention, including the United States on June 29, 1990. Information on this and the other projects of UNCITRAL can be found in *UNCITRAL Homepage*, *supra* note 33. *See also* Peter Winship, *International Commercial Transactions: 1995*, 51 BUS. LAW. 1493, 1500 (1996) (discussing the status of various international private law conventions).

[41] *See* Convention on Independent Guarantees and Stand-by Letters of Credit, *done* Dec. 11, 1995, 35 I.L.M. 735 [hereinafter Convention on Guarantees].

[42] Proposed UNIDROIT Convention on International Interests in Mobile Equipment (Tentative Draft, Nov. 1997) (on file with author) [hereinafter Draft Convention on Security Interests]; *see also* Winship, *supra* note 40, at 1498.

[43] Draft UNCITRAL Convention on Assignment in Receivables Financing (Tentative Draft, Jan. 12, 1998) [hereinafter Draft Convention on Receivables Financing]. The most current draft of this Convention is available at the homepage of the American Bar Association. *See FTP Catalog—Business Law* (visited Mar. 27, 1998) <http://www.abanet.org/ftp/pub/buslaw/home.html>; *see also* Winship, *supra* note 40, at 1499-500.

[44] The specific representatives of the United States in such conferences are attorneys with the Office of the Legal Advisor of the United States Department of State and their appointees, who are typically law professors. For a comprehensive analysis of the work of this Office in the area of private international law, see Peter H. Pfund, *Contributing to Progressive Development of Private International Law: The International Process and the United States Approach*, 249 RECUEIL DES COURS 1, 51-75 (1996).

[45] UNCITRAL has also prepared model laws for consideration by member states as domestic legislation. The most significant of these is the 1996 UNCITRAL Model Law on Electronic Commerce. Others include the UNCITRAL Model Law on International Credit Transfers, the UNCITRAL Model Law on Procurement of Goods, Construction and Services, and the recently completed Model Law on Cross-Border Insolvency. Information on these projects can be found in *UNCITRAL Homepage*, *supra* note 33.

[46] *See infra* notes 172-76 and accompanying text.

the patterns established in the judicial elaboration of the U.N. Sales Convention will be of significance far beyond that unification effort alone.[47]

These private law conventions are of a curious legal nature, however. Viewed from one angle, they carry the constitutional character of self-executing treaties.[48] These obtain their authority as law from the power of federal preemption defined in the "treaty" clause of Article VI of the Constitution.[49] The U.N. Sales Convention thus entered into force in this country through the Senate treaty ratification procedure of Article II, Section 2 of the Constitution, and without separate legislation incorporating it into the formal body of the United States Code.[50]

From a substantive perspective, however, the conventions have the look and feel of standard federal statutes. Their operative provisions impose no formal obligations on the United States in its international conduct as a sovereign entity.[51] Rather, the focus is solely on the substantive law governing the interaction between private entities. That is, similar to a typical private law statute, the subjects of a convention's legal standards are solely private actors, and, derivatively,

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[47] Part III.C-D examines in detail the impressive body of interpretive caselaw under the U.N. Sales Convention.

[48] *See supra* note 11. For an examination of the legal nature of such "self-executing" treaties, see Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 NW. J. INT'L L. & BUS. 556, 560-62 (1997), and Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

[49] U.S. CONST. art. VI ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

[50] *See* U.S. CONST. art II, § 2; Winship, *supra* note 10, at 707-09. This procedure can be contrasted with that of previous substantive private law unification efforts, such as the Hague Convention for the Unification of Certain Rules Relating to Bills of Lading (the "Hague Rules"). The substance of the Hague Rules was adopted by separate legislative action in the form of the Carriage of Goods by Sea Act (COGSA). *See* ARNOLD W. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 118-32 (4th ed. 1953) (discussing American participation in the development of the Hague Rules); Benjamin W. Yancey, *The Carriage of Goods: Hague, COGSA, Visby, and Hamburg*, 57 TUL. L. REV. 1238, 1242-43 (1983) (discussing the enactment of COGSA on April 16, 1936). Indeed, the U.N. Sales Convention and its progeny do not even permit local amendments by the ratifying nations. *See, e.g.*, CISG, *supra* note 7, art. 98 ("No reservations are permitted except those expressly authorized in this Convention."); Convention on Factoring, *supra* note 38, art. 20 (same); Convention on Financial Leasing, *supra* note 37, art. 22 (same).

[51] To be sure, the conventions also contain certain diplomatic provisions. *See, e.g.*, CISG, *supra* note 7, arts. 89-101. But these merely respect formalities such as the procedure for accession, ratification, and denunciation, and impose no substantive obligations on the contracting states in their subsequent conduct as international actors.

the courts and arbitral tribunals whose jurisdiction is invoked to resolve disputes over scope and meaning.[52]

The interpretation of the new generation of international private law conventions[53] thus presents federal courts with somewhat of a paradox. On the one hand, because they regulate purely private relations, the interpretive standards developed for public international law treaties would appear inapposite in this context.[54] One can scarcely overlook, however, that the conventions are international in character. Indeed, their very mandate to interpreters is to bring about international uniformity in the regulated field of law.[55] A necessary component of this goal is harmony among the interpretive approaches of the domestic courts in the various member states that are charged with resolving disputes within their scope.

Part I.B sets the context for the resolution of this paradox. After a brief review in Part I.B.1 of the fundamental problem in interpretive inquiries, Part I.B.2 examines extant Supreme Court precedent on the interpretation of treaties. I then turn in Part I.B.3 to an examination of the continuing debate in this country over the appropriate role of the judiciary in domestic statutory interpretation. The goal in this process is to establish the jurisprudential environment for a paral-

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[52] Treaties are of the same constitutional dignity as statutes. In the event of a conflict between the two, the later in time will prevail. *See* Reid v. Covert, 354 U.S. 1, 18 (1957) (stating that "when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of the conflict renders the treaty null"); Chae Chan Ping v. United States, 130 U.S. 581, 602 (1889) (finding that an earlier treaty must yield to a later statute excluding aliens); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation .... [B]ut if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty ... is self-executing.").

[53] Although the term "private international law" is more commonly used in this context, it unfortunately has been used to address two separate subjects. In civil law countries, the term refers to what is known in this country as "conflict of laws." *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 13, § 101 cmt. c. In the United States, the term is often used in a more general sense to refer to all international legal standards that govern transactions between private entities, such as the international sale of goods or international letters of credit. To limit the confusion, I will use the term "international private law" when addressing this broader concept of substantive private law. For an earlier elaboration of this term, see John A. Spanogle, Jr., *The Arrival of International Private Law*, 25 GEO. WASH. J. INT'L L. & ECON. 477, 477 (1991).

[54] *See infra* notes 70-79 and accompanying text.

[55] *See infra* notes 179-84 and accompanying text.

lel analysis of the new generation of international conventions under consideration here.[56]

B. *The Domestic Debate over the Role of the Judiciary in Interpretive Inquiries*

1. The Fundamental Problem

Much of the friction in the identification and application of law stems from the simple fact that the rules of law "are finite, and the subject of it infinite."[57] In other words, however seriously a legal system takes the familiar maxim that "like cases should be decided alike," no two cases are, in fact, exactly alike. Moreover, lawmakers will often fail to foresee the implications of applying general standards of conduct, even to the specific circumstances known at the time of adoption. And the "inventiveness of reality" will mean that many such implications will not be foreseeable at all.[58] Some degree of indeterminacy is thus inherent in all legal standards, however carefully defined, and certain essential equitable values of their nature are not susceptible to precise articulation in any event.[59]

These problems appear with particular force when the subject of legal standards spans disparate legal and political cultures. The heterogeneity of the participants in the lawmaking process itself,[60] the di-

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[56] *See infra* Part III.A-B.

[57] *See* 1 HENRY BALLOW, A TREATISE OF EQUITY 9 (3d ed., Philadelphia, P. Byrne 1805).

[58] Konrad Zweigert & Hans-Jürgen Puttfarken, *Statutory Interpretation—Civilian Style*, 44 TUL. L. REV. 704, 704 (1970); *see also* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 333 (1989) ("Every statute is enacted against a congeries of background assumptions about law, society, and the operation of the statute itself. These assumptions often turn out to be wrong, or insufficiently sophisticated, as circumstances change over time . . . .").

[59] This unavoidable indeterminacy in legal standards is a well-known phenomenon. For an introduction to the literature on the subject, see H.L.A. HART, THE CONCEPT OF LAW 124-41 (1961) (discussing the two "connected handicaps" of "ignorance of fact" and "indeterminacy of aim" in the identification of general standards of conduct); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 559-94 (1993) (discussing arguments about the limits of determinacy).

[60] Interestingly, as we have seen, the U.N. Sales Convention arose precisely from the failure of the Hague Conventions to address the diversity of cultural and legal traditions involved in international commerce. *See supra* notes 25-32 and accompanying text. To address such concerns, the work on the creation of the U.N. Sales Convention began with the express goal of accommodating the differing cultural, legal, and political approaches to the regulation of international contracting. *See Report of the*

versity of cultural norms in the regulated sphere of conduct,[61] and the need to capture the agreed-upon legal concepts in different languages[62] all combine to increase substantially the risk of indeterminacy in transcultural legal standards.

International law unification efforts nonetheless share with traditional statutes an important institutional characteristic regarding the indeterminacy in legal standards: The institution charged with resolving the inevitable gaps and ambiguities (the Judiciary) is distinct and separate from that which established them (for statutes, the Legislature, in cooperation with the Executive; for treaties, the reverse). This poses a challenging jurisprudential problem. Controversies falling within the "open texture"[63] of a treaty or statute must be resolved just as those the outcome of which can be derived with relative clarity from their express provisions must be resolved. An adjudicator may not simply declare the law ambiguous and dismiss the litigants without a resolution of their dispute. But what is the appropriate role of

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Working Group on the International Sale of Goods, UNCITRAL Working Group on the International Sale of Goods, 1st Sess., para. 1(a), U.N. Doc. A/CN.9/35 (1970) [hereinafter *Report on First Session*], *reprinted in* [1968-1970] 1 Y.B. Comm'n Int'l Trade L. 177, U.N. Doc. A/CN.9/SER.A/1970 (reciting as the working group's goal "to ascertain which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further the harmonization or unification of the law of the international sale of goods"); *see also* CISG, *supra* note 7, pmbl. (stating the premise that "[t]he adoption of uniform rules which . . . take into account the different social, economic and legal systems would contribute" to the promotion of international trade).

[61] The inevitable differences among the drafters of the U.N. Sales Convention coalesced, not surprisingly, around the principal legal, political, and cultural fault lines of the times. For an analysis of the effect of these fault lines, see Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 347-52 (1983) (discussing the North-South and East-West debates); Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 450-80 (1989) (same).

[62] Legal concepts are not universal, nor do they come in neat, easily convertible atomic units. Any one legal concept in a given legal system may thus overlap with parts of two or more concepts in another. The problems inherent in capturing standards in the words of any one language thus increase exponentially with the number of required translations. As Professor John Honnold has aptly observed, "*words* [are] mushy, ambiguous things even for ordinary communications . . . . International unification of law raises these difficulties to a higher power." John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207, 207 (1988).

[63] This famous description of the indeterminacy of law originated with H.L.A. Hart, then Chair of Jurisprudence at Oxford University. *See* HART, *supra* note 59, at 124-25 (discussing the indeterminacy and "open texture" inherent in both precedent and legislation).

an interpreter in resolving ambiguities and, more important, in filling gaps? What principles should she apply to resolve such difficult cases?[64] And to what extent is she bound in her search for guidance?

Consider, for example, a statute that purports to regulate comprehensively the formation and performance of contracts, but fails to address (at least unambiguously so) the issue of liability for failed contractual negotiations.[65] Suppose, then, that a party's expectations are frustrated in the negotiation process and she now seeks judicial intervention in a dispute over reliance damages.

One is confronted squarely here with the problem of defining the appropriate standards and sources of law to resolve this issue left unsettled in the statute. Does the statute's failure to provide an express remedy preclude a court from recognizing one? Is the court limited to the statutory text in resolving the matter? May it step back a level of abstraction to consult the values of the drafters or to consider the broader spirit of the legislation? Finally, should it, in addition or instead, resort to the norms of the preexisting legal order, such as the customary or common law?

As the law assumes an increasingly international dimension, the significance of this complex of problems comes into sharper focus. With respect to international treaties, the adjudicators charged with filling in gaps and resolving ambiguities are themselves products of differing cultural, legal, and political traditions. Regardless of the substantive standards chosen, therefore, there is increased concern that adjudicators will turn to their familiar, and nonuniform, norms of domestic law in the interpretation of international standards. The risk, in other words, is that the verbal uniformity achieved by a particular unification effort may be frustrated by a "homeward trend"[66] in interpretation by the diverse domestic adjudicators.

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[64] H.L.A. Hart referred to these as the "unenvisaged" cases. *Id.* at 126. In Ronald Dworkin's terminology, these are the "hard cases." Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058 (1975).

[65] The Uniform Commercial Code in this country, for example, contains no provision relating to precontractual liability. For an analysis of the resolution of such a problem, see E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 239-40 (1987) (also describing various European approaches to precontractual liability) and Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 91-95 (1993) (discussing the U.C.C.'s good faith requirement in this context).

[66] *See* Michael F. Sturley, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L.J. 540, 542 (1986) (discussing the possibility that national courts may return to domestic law in applying the convention).

Unfortunately, much of Supreme Court treaty caselaw is at best unhelpful and at worst misleading in the resolution of these fundamental interpretive problems under the new generation of international private law conventions. We will see shortly that for conventions of such a "legislative" character, this caselaw merely returns the analysis to our original controversy over the appropriate role of the judiciary in developing statutory law.

2. The Limited Utility of the Existing Domestic Approaches to Treaty Interpretation

We have already observed that the U.N. Sales Convention and its progeny were born into a curious legal limbo. Although international in character, they directly implicate few public international law concerns.[67] The operative provisions of the U.N. Sales Convention, for example, impose no obligations on the United States in its conduct as a sovereign entity. Application of such a convention thus does not implicate as directly the foreign policy and sovereignty concerns inherent in treaties governed by public international law. Rather, these provisions merely regulate the relations between private entities involved in defined commercial transactions.[68] One might

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[67] Admittedly, the line between "public" and "private" international law is a fluid one. Public international law is traditionally understood as the law governing the obligations of states in their conduct as sovereign entities, whether among themselves or in their contact with private parties. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 13, § 101 (defining "international law" as the "rules and principles of general application dealing with the conduct of states . . . and with their relations inter se, as well as with some of their relations with persons"). For a comprehensive review of the functions, formation, and subjects of public international law, see Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law*, 255 RECUEIL DES COURS 9, 21-65 (1995). International private law, in contrast, deals with the interaction between purely private entities. Even some international conventions of a "private" nature, however, involve actions by state governments. Examples might include the 1965 Hague Convention on Service of Process Abroad and the 1970 Hague Convention on Taking Evidence Abroad, both of which require the Executive branch to establish a "Central Authority" to monitor their operation and assist in their implementation. *See* Hague Service Convention, *supra* note 35, arts. 2-6; Hague Evidence Convention, *supra* note 35, art. 2.

The operative provisions of the international commercial law conventions under consideration here, in contrast, regulate solely private law transactions without the direct involvement of state actors. The interpretation of the conventions will, of course, involve *judicial* officers of the member states, but this is precisely the role played by an independent judiciary in the interpretation of a purely domestic private law statute.

[68] For a discussion of the spheres of application of the conventions, see *infra* note 326 and accompanying text.

thus conceive of a private law convention in this respect as a "legislative treaty."[69]

In light of the U.N. Sales Convention's private sphere of application, the specific rules developed for the interpretation of treaties governed directly by public international law will provide little authoritative guidance. This conclusion obtains in particular for the interpretive standards defined in the Vienna Convention on the Law of Treaties.[70] Whatever force they otherwise may have in this country,[71] these standards focus on the interpretation of the international obligations of nations in their conduct as sovereign entities. As a result, the better view is that they are inappropriate for the interpreta-

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[69] *See* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 963 (1994) (arguing that "[s]ome treaties clearly have the flavor of legislation"); James C. Wolf, Comment, *The Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023, 1031-52 (1988) (discussing the implications of viewing treaties as legislation). The Supreme Court itself has often referred to the similarities between treaties and legislation. *See* Ross v. McIntyre, 140 U.S. 453, 475 (1891) (equating the interpretation of a treaty with that of a statute and noting that "[i]t is a canon of interpretation to so construe a law or treaty to give effect to the object designed"); Geofroy v. Riggs, 133 U.S. 258, 270 (1890) ("It is a rule in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable."); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (noting that self-executing treaties "have the force and effect of a legislative enactment"); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) ("Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.").

[70] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980) [hereinafter Vienna Convention on Treaties]. This convention is clearly directed to treaties that impose obligations on sovereign entities under public international law. *See id.* art. 2 (defining a "[t]reaty" as "an international agreement concluded between States in written form and governed by international law"); *cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 13, § 101 (defining "international law" as governing the relations between states as well as relations between states and private persons); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1206 (1988) ("Public international law, through its rules regulating the dealings between independent nations, purports to impose limits on the actions of . . . governments . . . .").

[71] The United States has not ratified the Vienna Convention on Treaties. The Third Restatement of Foreign Relations Law nonetheless suggests that the interpretive provisions of the Convention "represent[] generally accepted principles and the United States has also appeared willing to accept them despite differences of nuance and emphasis." RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 13, § 325 cmt. a (referring to the substance of article 31(1) and (3) of the Vienna Convention on Treaties that is restated in section 325). For an analysis of the role of the interpretive provisions of that Convention in courts of this country, see Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 326-52 (1988).

tion of the new generation of self-executing private law conventions that is best characterized by the U.N. Sales Convention.[72]

For similar reasons, much of the jurisprudence of the Supreme Court on treaty interpretation is inapposite in this context as it, too, is premised largely on the public international law paradigm.[73] One thus commonly finds statements by the Court that "[i]n interpreting an international treaty, we are mindful that it is 'in the nature of a contract between nations.'"[74] Because the subject of interpretation is presumed to be the definition by sovereign actors of their own formal obligations, the Court has traditionally placed particular emphasis on the subjective intent of "the parties" in construing the provisions of treaties.[75] In a similar vein, concerns about sovereignty and executive

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[72] *See* FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 55 (1992) (arguing that the methods of classic public international law should not control the interpretation of the substantive provisions in Parts I-III of the U.N. Sales Convention); HONNOLD, *supra* note 23, at 158-59 (arguing that rules of interpretation of the 1969 Vienna Treaty should not be applied to Parts I-III of the Sales Convention); Frank Diedrich, *Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE INT'L L. REV. 303, 313-14 (1996) (arguing that the Vienna Convention's rules of interpretation are appropriate only for Part IV of the U.N. Sales Convention, concerning the obligations of contracting states under public international law, and not for Parts I-III, which address obligations arising out of private contracts); Rolf Herber, *Article 7, in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 86, 89 (Ernst von Caemmerer & Peter Schlechtriem eds., 1990) [hereinafter KOMMENTAR] (arguing that the interpretive standards of public international law are inappropriate for the U.N. Sales Convention). *But cf.* HONNOLD, *supra* note 23, at 159 n.44 (suggesting that the provisions of the Vienna Convention may be of relevance in some respects); Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 22-23 (1993) (concurring with Professor Honnold in this respect).

[73] Admittedly, it is accepted practice, even with the commercial law conventions under consideration here, to refer to the member states as "contracting states." *See, e.g.*, CISG, *supra* note 7, art. 1(1). This formal designation does not, however, change the substance of such conventions which are directed solely to the commercial relations of *private* entities.

[74] Société Nationale Industrielle Aérospatiale vs. United States Dist. Court, 482 U.S. 522, 533 (1987) (quoting Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984)); *see also* Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) ("A treaty . . . is essentially a contract between two sovereign nations."); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (explaining that "treaties are contracts between independent nations"). For a more recent statement in the same vein, see Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996) (observing with regard to interpretation that a treaty is "an agreement among sovereign powers").

[75] The Court emphasized the intent of the parties as early as 1796 in the case of Ware v. Hylton, 3 U.S. (3 Dall.) 199, 238 (1796) (considering the "great and principal objects in view by both parties"). For a more recent emphasis of such intent in the in-

control over foreign relations have led the Supreme Court to accord great deference to the interpretive views of the Executive Branch.[76]

There is reason to doubt the dispositive effect of these considerations even for the public international law obligations of the United States.[77] Whatever their merit in that context, they carry considerably less weight for the interpretation of legal standards applicable only to private entities. Even here, of course, the intent of the drafters will be of relevance.[78] Nonetheless, because a "legislative treaty" such as the U.N. Sales Convention imposes no formal obligations on the sovereign states in their conduct in the international arena, there is no compelling reason to give controlling deference to the intent of the "contracting" parties or to the views of the Executive Branch in interpreting its substantive provisions.[79]

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terpretation of a treaty, see Air France v. Saks, 470 U.S. 392, 399 (1985) (affirming the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties" (citations omitted)); and Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982) (stating that in interpreting a treaty, a court's "role is limited to giving effect to the intent of the Treaty parties"). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 13, § 325 reporters' note 4 ("Both the Vienna Convention [on Treaties] and the United States approach seek to determine the intention of the parties; neither favors 'teleological interpretation' to achieve some purpose overriding that intention."); Bederman, *supra* note 69, at 963, 970-71 (discussing the "basic" canon that "treaty interpretation should effectuate the intent of the parties");.

[76] *See* O'Connor v. United Sates, 479 U.S. 27, 33 (1986) (stating that executive application of a treaty is entitled to "great weight"); *Sumitomo*, 457 U.S. at 184-85 ("Although not conclusive, the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight."); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 13, § 326(2) (stating that courts will give "great weight to an interpretation made by the Executive Branch"); Bederman, *supra* note 69, at 1016 ("Of the ten [treaty interpretation] cases considered by the Rehnquist Court, *in all but one* the holding followed the express wishes of the executive branch of the government."); Weisburd, *supra* note 70, at 1256-67 (canvassing the history of Supreme Court deference to the views of the Executive on the interpretation of treaties governed by public international law);.

[77] Indeed, one scholar has concluded that treaty interpretation in this country "is bankrupt because of unbridled deference" to the views of the Executive. Bederman, *supra* note 69, at 954.

[78] *See infra* Part III.A.2 (discussing the importance of the drafting records of a convention).

[79] *See* Herber, *supra* note 72, at 89 (arguing that, with respect to the U.N. Sales Convention, the interpretive standards of public international law "emphasize . . . too greatly the intent of the contracting states; they are, therefore, not appropriate for the interpretation of normative private law provisions in the contracting states." (translation by author)); *cf.* John O. Honnold, *Uniform Words and Uniform Application, The 1980 Sales Convention and International Juridicial Practice, in* EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 115, 139 (Peter Schlechtriem ed., 1987) (arguing that "public law conventions restricting the sovereign power of States

Stripped of these prudential considerations, we are left with the question of the appropriate interpretive standards for the substance of the international conventions themselves. Unfortunately, the guidance from the Supreme Court has been cryptic on this score. Most often, it has merely parroted the self-evident observation that "when interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used."[80] And although the Court has often referred to drafting records in interpreting a treaty, it is difficult to discern any consistency in this practice.[81]

Beyond this, the Court has simply observed that the "'[g]eneral rules of construction apply.'"[82] More questions are raised by these statements than are answered. For few issues have been as controversial in modern scholarly debate as the identification of what "general rules" a federal court may apply in interpreting legal standards established by coequal branches of government.

We return, then, to the basic controversy with which this Article began. I will ultimately argue in Part II that the paradigm established in the U.N. Sales Convention will require the development of an "autonomous" interpretive regime.[83] Nonetheless, the fundamental tension over the judicial function in interpretive inquiries unavoidably arises in this context as well. Indeed, we shall discover that the construction of treaties in this country has itself been borne along by the same jurisprudential currents that have influenced the debate over statutory interpretation.[84] To set the context for an analysis of

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call for stricter construction than conventions articulating the obligations of parties to a commercial contract").

[80] Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534-35 (1991) (internal quotation marks omitted) (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (quoting Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 534 (1987) (quoting *Air France*, 470 U.S. at 397))) *see also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 65 (1993) ("Our interpretation must begin . . . with the text of the Conventions.").

[81] For a more detailed review of the Court's approach to the use of drafting records, see *infra* notes 228-30 and accompanying text.

[82] *Société Nationale*, 482 U.S. at 533-34 (quoting Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 262 (1984)); *see also Eastern Airlines*, 499 U.S. at 535 (noting that general rules of construction are applied in treaty interpretation); *Volkswagenwerk*, 486 U.S. at 700 (noting that "general rules of construction may be brought to bear on difficult or ambiguous passages"); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 240-41 (1796) (Opinion of Chase, J.) (applying rules of general construction in interpreting a treaty).

[83] *See infra* notes 179-82 and accompanying text.

[84] *See infra* notes 143-54 and accompanying text.

the interpretive methodology embraced in the U.N. Sales Convention and its progeny, I turn to an analysis of this domestic debate.

3. The Jurisprudence of Statutory Interpretation in the United States

a. *The Context for the Contemporary Controversy*

The classical approach to statutory interpretation in this country fastened on the statutory text as the sole depository of legislative intent. In its practical manifestation, this formalist view took the form of the "plain meaning rule."[85] This familiar rule posits that when the words of a statute are unambiguous, the interpretive inquiry should come to an end, "regardless of the consequences."[86] On difficult issues, classical theory turned to "canons of construction,"[87] the most potent of which is reflected in the well-known maxim that "a statute in derogation of the common law is to be narrowly construed."[88]

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[85] This approach found its expression in the classic observation of Oliver Wendell Holmes that "[w]e do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). In spite of this pithy statement, as William Eskridge has observed, Justice Holmes himself often looked behind the statutory text to discover meaning in the legislative history. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 647 n.100 (1990) ("The new formalists uniformly fail to mention that Justice Holmes often relied heavily on legislative history to figure out 'what the statute means.'" (quoting Holmes, *supra*, at 419)). Scholars interested in a more detailed history of classical formalism in statutory interpretation in this country and in England in the 1800s should see William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 805-23 (1985) (discussing the 19th-century tensions between interpreting the law in a liberal or strict manner), and Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 6-9 (1993) (same).

[86] Blatt, *supra* note 85, at 812. The apotheosis of this approach came in *United States v. Missouri Pacific Railroad Co.*, in which Justice Butler observed: "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." 278 U.S. 269, 278 (1929). For a more detailed analysis of this rule, see Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975).

[87] Formalist courts employed these canons of construction as a surrogate for legislative intent. *See* Martineau, *supra* note 85, at 8 ("The canons enabled the judge purportedly to discover the intent of the legislature without consulting legislative history."). Prominent examples include rules that require an interpretation to avoid surplusage and ineffective provisions, that the expression of one thing is an implied exclusion of other possibilities within the same subject (the familiar *expressio unius est exclusio alterius*), and that special terms should prevail over general ones. *See id.*

[88] WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 242 (1988). At its core, this formalist approach reflected a judicial hostil-

When faced with an issue not clearly resolved on the face of a statute, this "canon" authorized courts to disregard the statute entirely and return to the familiar domain of the preexisting common law.[89]

The forces of realism destroyed much of the false edifice of this "mechanical"[90] formalism in the early part of this century.[91] For a time, two other notable "grand theories"[92] of statutory interpretation emerged in an attempt to fill the void. The first advocated a return to the strict formalist conception that a federal court merely "acts as the enacting legislature's faithful servant, discovering and applying the legislature's original intent."[93] More recent proponents of this new

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ity to obstruction of the time-tested rules of the common law by "half-baked statutory trespassers." *Id.* at 243. Justice Frankfurter once expressed similar sentiments. *See* Pope v. Atlantic Coast Line R.R. Co., 345 U.S. 379, 390 (1953) (Frankfurter, J., dissenting) (explaining that in the Victorian days, legislation was regarded "as wilful and arbitrary interference with the harmony of the common law and with its rational unfolding by judges").

[89] *See* Blatt, *supra* note 85, at 817-18 (discussing the role of this derogation canon in statutory interpretation in the 19th century); *see also* Shaw v. Railroad Co., 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.").

[90] *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908) (analyzing the problems with "mechanical" formalism).

[91] Inspired by a similar movement in Europe, scholars such as Max Radin and Karl Llewellyn challenged the very premise of formalism that statutory rules (or common law ones for that matter) could yield determinate results without the exercise of interpretive discretion by judges. Radin, in particular, rejected the notion of a collective legislative "intent," and argued that even if such a thing existed it should not bind courts in their subsequent application of a statute. *See* Radin, *supra* note 2, at 870-71 ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition."). Llewellyn also convincingly demonstrated that the canons of construction appeared in "opposing pairs." *See* Llewellyn, *supra* note 2, at 401 ("[T]here are two opposing canons on almost every point."). As a result, not only do the canons fail to provide definite guidance on difficult questions of statutory interpretation, they also permit a judge to mask subjective policy determinations behind the false veil of an "objective" rule of construction. *See id.*; *see also* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807 (1983) (observing that "two inconsistent canons can usually be found for any specific question of statutory construction").

[92] For the origin of the term "grand theory," see Eskridge & Frickey, *supra* note 4, at 321.

[93] *Id.* at 325-32 (discussing, but ultimately criticizing, intentionalism). The Supreme Court itself has variously suggested in more recent decisions that congressional intent is a guiding criterion in statutory interpretation. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) ("In determining [the scope of a statute, the] sole task is to ascertain the intent of Congress."); Commissioner v. Engle, 464 U.S. 206, 214 (1984) (noting that a court's "sole task" in interpreting a statute is to ascertain the intent of Congress).

form of "intentionalism"[94] have also elevated the debate to a constitutional dimension. These commentators argue that principles of federalism and separation of powers preclude federal courts from developing substantive law without the consent of Congress.[95] The second unified theory suggests that the answers to difficult interpretive issues should be found in the purposes that animate a particular statutory scheme. This "purposivism"[96] then posits that these broader objectives of a statute can be employed to resolve issues addressed only imperfectly, or not at all.[97] Neither purposivism nor intentionalism,

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[94] Identifying a legislature's collective "actual" intent, of course, will be a difficult task in most cases. Effective intentionalism will thus typically require reliance on the "conventional intent" that can be fashioned on the basis of a statute's legislative history. Where these means of identifying intent fail, Judge Richard Posner has suggested an "imaginative reconstruction." Posner, *supra* note 91, at 817; *see also* RICHARD A. POSNER, THE FEDERAL COURTS 286-93 (1985). This approach requires a judge to imagine herself in the position of the enacting legislature and to resolve any interpretive problems as the legislature most likely would have, if it had thought of them. Absent guidance on this score, the judge should apply a "reasonable result." *Id.* at 289. *But cf.* Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 445 (1989) (distancing himself somewhat from this position on imaginative reconstruction).

[95] *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 12-27 (1985) (noting the grant of exclusive legislative power to Congress in Article I, Section 1 of the Constitution). Other articles in the intentionalist vein include Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 832 (1988) (cautioning against the courts using their own "logic" in attempting to interpret legislative rules), and Kenneth W. Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703, 705 (1988) ("[T]he federal courts could well benefit from a . . . set of self-imposed constraints [on their ability to interpret laws] provided in our ancient legal culture by the common law.").

[96] *See* Eskridge & Frickey, *supra* note 4, at 332-39 (discussing "purposivism"). This approach finds its foundation in the legal-process analysis developed in the 1950s by Professors Henry Hart and Albert Sacks. *See* HART & SACKS, *supra* note 2, at 1376-80. Scholars interested in a broader review of the legal-process materials of Professors Hart and Sacks should see William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 693-700, 694 (1987) ("The legal process materials [developed by Hart and Sacks] were an ambitious attempt to show how public policy evolves from the interaction of the various branches of government . . . .").

[97] Purposivism proceeds from the general premise that every statute reflects "some kind of purpose or objective" arrived at through some manner of a reasoned deliberative process. *See* HART & SACKS, *supra* note 2, at 1378 (suggesting that judges should assume "unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably"). This purposive approach influenced the drafters of the Uniform Commercial Code in this country. *See* Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 800 (1978) ("As drafting the Code gave the realists a unique opportunity to legislate purposive interpretation, so experience under the Code now provides a basis for evaluating this distinctive approach."). For a

however, has succeeded in producing a convincing unified theory of statutory interpretation.[98]

The debate over statutory interpretation in this country in recent years has been characterized instead by a tension between two other principal jurisprudential views. One group of scholars, as we shall see shortly, assimilates elements of both intentionalism and purposivism in a more pragmatic approach to interpretive inquiries. In response to a perceived excessive liberality in statutory interpretation, an opposing school of scholars and judges seeks refuge in a new, and perhaps more resistant, strain of formalist restriction to statutory text.[99]

b. *Dynamic Approaches*

Continuing realist skepticism about the capacity of any one interpretive theory to produce determinate results, either descriptively or normatively, has given rise in recent years to a more pragmatic approach to statutory interpretation. The essence of this approach, as aptly described by Professor Daniel Farber, is that in interpreting statutes courts have at their disposal an "eclectic mix" of "text, statutory purpose, public policy, and legislative history."[100] In addition to Professor Farber, the principal recent proponents of this "practical reasoning" include Professors William Eskridge and Philip Frickey.[101]

Practical reasoning, as described by Eskridge and Frickey, is founded on three premises. The first is that statutory interpretation "involves creative policymaking by judges and is not just the Court's

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comparison of the approach of the U.C.C. with that contemplated by the paradigm of CISG article 7, see *infra* Part III.B.2.

[98] *See* Eskridge, *supra* note 85, at 667 ("Intellectually, intentionalism (even as modified by legal-process theory) collapsed in the 1980s."). Echoing the realist attack of the past, critics have questioned the ability of judges to reconstruct in any reliable way the "intent" or "purpose" of a past legislature, challenged the notion that these theories are able to generate determinate results, and objected to their failure to embrace other values of significance to our polity. *See* Eskridge & Frickey, *supra* note 4, at 326-32 (criticizing intentionalism); *id.* at 332-39 (criticizing purposivism); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 426-28 (1989) (criticizing purposivism); *id.* at 431-34 (criticizing intentionalism).

[99] *See infra* Part I.C.

[100] Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 522 (1996) (reviewing INTERPRETING STATUTES, *infra* note 114).

[101] *See* Eskridge & Frickey, *supra* note 4, at 345-84 (advocating and elaborating on a "practical reasoning" approach to statutory interpretation); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism and the Rule of Law*, 45 VAND. L. REV. 533, 534 (1992) (criticizing formalism and advocating an approach to statutory interpretation based on "practical reason").

figuring out the answer that was put 'in' the statute by the enacting legislature."[102] The second, closely related premise is that a judge's task involves a choice among several possible meanings.[103] There is, in short, no single "right" answer in interpretive inquiries. Finally, in making choices, judges will be influenced by a variety of competing values.[104]

As their own positive model of statutory interpretation, Eskridge and Frickey propose a "funnel of abstraction." This funnel orders interpretive sources from the concrete to the abstract; that is, from textual considerations to historical considerations (legislative history and legislative purpose) to evolutive considerations (evolution of the statute and current policy).[105] The proffered metaphor for interpretation in this sense is a cable: The task of a judge is to identify which of the competing values (threads) are the most important in a given circumstance, weigh the strength of each, and choose the interpretation that reflects "the strongest overall combination of threads."[106]

At the foundation of this approach to statutory interpretation is the pragmatic notion that no single source is adequate for all inter-

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[102] Eskridge & Frickey, *supra* note 4, at 345. In light of the inherent indeterminacy of legal standards, as well as the inevitable influence of the interpreter's own perspective, the process of interpretation, it is argued, requires more than uncovering the answers already prescribed by the legislature. *See id.* at 346-47 ("Even if the interpretive process were viewed as retrieving the answer Congress would have reached . . . , the inquiry involves 'imaginative' work by the judge.").

[103] *See id.* at 347 ("[B]ecause this creation of statutory meaning is not a mechanical operation, it often involves the interpreter's choice among several competing answers.").

[104] Decisionmaking in this respect is "[not] linear and purely deductive," but rather "spiral and inductive." *Id.* at 348; *see also* Farber, *supra* note 101, at 539 ("[P]ractical reason rejects . . . the view that the proper decision in a case can be deduced from a preexisting set of rules."); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 232-33 (1983) (criticizing the premise of formalism that there is a single "right" answer in statutory interpretation).

[105] *See* Eskridge & Frickey, *supra* note 4, at 353 (presenting a schematic of the "funnel of abstraction" from the "most concrete" source (statutory text) to the "most abstract" source ("current policy")); *see also id.* at 354-62 (analyzing the various sources in more detail); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1496-97 (1987) (advocating an "interpretive continuum" from textual considerations to evolutive considerations).

[106] Eskridge & Frickey, *supra* note 4, at 351. As further illustrations, Eskridge and Frickey employ the metaphors of "a web of intertwined beliefs," *id.* at 348, a "hermeneutical circle" in which "[a] part can only be understood in the context of the whole, and the whole cannot be understood without analyzing its various parts," *id.* at 351, and the use of justificatory arguments "'like the legs of a chair,'" *id.* at 352 (quoting ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 156 (1982)).

pretive issues.[107] Rather, "practical reasoning," like human decision-making in general, is "polycentric, spiral, and inductive—not unidimensional, linear, and deductive."[108] Statutory interpretation is thus best viewed as "problem-solving," in which the "practical reasoner" weighs the strengths of the various justificatory arguments (text, legislative history, current values) in applying the statute to the concrete dispute in need of resolution.[109]

The most innovative characteristic of this flexible, pragmatic approach to statutory interpretation is its "dynamic" element. Dynamic statutory interpretation proceeds on the premise that, when interpreting statutes, judges are not formally bound to the original value judgments of the enacting legislature.[110] That is, this view rejects the notion that "the meaning of a statute is set in stone on the date of its enactment."[111] Rather, it is argued, in the event of an evolution in the relevant public values, federal courts have the authority to develop new legal standards and even to adapt otherwise clear statutory text to accommodate a changed societal and legal environment.[112] An apt

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[107] *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 50 (1994) (discussing "[p]ragmatic [d]ynamism" and grounding dynamic statutory interpretation on the pragmatic argument that "there is no 'foundationalist' (single overriding) approach to legal issues").

[108] *Id.* at 55.

[109] *See id.* at 50 (discussing statutory interpretation as consistent with pragmatism, which "emphasizes the concrete over the abstract and is problem-solving in its orientation"); Eskridge & Frickey, *supra* note 4, at 354 (arguing that the interpreter should "move up and down [their funnel of abstraction], evaluating and comparing the different considerations represented by each source of argumentation"). This order also reflects a rough hierarchy. Thus, a compelling textual argument should prevail over an equally convincing contrary argument based on statutory purpose. But, not surprisingly, the hierarchy is not restrictive or prescriptive in any formalist sense. *See id.; see also* ESKRIDGE, *supra* note 107, at 56 (acknowledging, for example, that even under dynamic statutory interpretation, "a clear text that does not yield unreasonable results will not be undone simply because it is contradicted by some legislative history").

[110] For a detailed explanation of this contention, see ESKRIDGE, *supra* note 107, at 52-55 (arguing that "[b]ecause of gaps and ambiguities for issues unresolved or unanticipated by the legislative process, statutes begin to evolve from the moment people start applying them to concrete problems"), and Eskridge, *supra* note 105, at 1479 ("Statutes . . . should . . . be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context."). For a broader analysis of dynamic statutory interpretation in light of various jurisprudential theories, see *id.* at 107-204 (discussing "liberalism," "legal process theories," and "normativism").

[111] T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988).

[112] *See* Eskridge, *supra* note 105, at 1483 (noting that, in dynamic interpretation, courts should examine "the ways in which the societal and legal environment of the statute has materially changed over time"); *id.* ("[A]n apparently clear text can be

metaphor for this view, as advanced by Alexander Aleinikoff, is a nautical one:

> Congress builds a ship and charts its initial course, but the ship's ports-of-call, safe harbors and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail. . . . The dimensions and structure of the craft determine where it is capable of going, but the current course is set primarily by the crew on board.[113]

There is persuasive empirical evidence that the Supreme Court in some respect has followed a flexible approach in interpreting statutes.[114] But, as even one of its proponents has acknowledged, practical reasoning "is easier to invoke than define."[115] And in its dynamic dimension, this increased flexibility collides with the constitutional concerns advanced by "intentionalist" scholars.[116] If, in fact, constitutional constraints exist on the lawmaking powers of federal courts, then there also must be logical limits on the courts' authority to construct legal additions to statutory structures (or destroy existing wings) without a sufficient legislative foundation.

It is precisely these types of concerns that have provoked calls for a return to a more formalist approach to statutory interpretation. As

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rendered ambiguous by a demonstration of contrary legislative expectations or highly unreasonable consequences."); Eskridge & Frickey, *supra* note 4, at 358-62 ("[S]tatutory interpretation will consider current values . . . ."); *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1009 (1989) (arguing that "public values" play a "substantial role" in statutory interpretation).

[113] Aleinikoff, *supra* note 111, at 21; *see also* Eskridge, *supra* note 105, at 1480 (discussing the traditional premise "that the legislature fixes the meaning of a statute on the date the statute is enacted"); Martineau, *supra* note 85, at 20-21 (analyzing Professor Aleinikoff's observation in the context of dynamic statutory interpretation).

[114] *See* Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1091-120 (1992) (proffering empirical evidence that the Supreme Court relies on a broad range of sources in statutory interpretation); *see also* Eskridge, *supra* note 85, at 626-30 (describing the Court's present approach as a "soft plain meaning rule"); Robert S. Summers, *Statutory Interpretation in the United States*, *in* INTERPRETING STATUTES 407, 412-19 (D. Neil MacCormick & Robert S. Summers eds., 1991) [hereinafter INTERPRETING STATUTES] (canvassing the interpretive practices of the Supreme Court and identifying 22 separate justificatory arguments).

[115] Farber, *supra* note 101, at 539.

[116] *See*, Merrill, *supra* note 95, at 12-32 (arguing that considerations of federalism, separation of powers, electoral accountability, and the Rules of Decision Act deprive federal courts of independent lawmaking power); *supra* note 95 and accompanying text. Even Eskridge and Frickey acknowledge that "[e]volutive considerations" are "highly abstract" and thus have "less authority in a democracy." Eskridge & Frickey, *supra* note 4, at 358.

we shall see in the next section, the answer to the indeterminacy of statutory law for these "new textualists" is to be found not in increased flexibility, but rather in a more restrictive adherence to the text actually adopted by the legislature.

C. *The Rise of "New Textualism"*

Statutory interpretation, like many collective social activities, appears to fall under the influence of trends. As one approach begins to establish itself, a countertrend emerges. The response to the increasing flexibility in interpretation in the last few decades thus should not come as a surprise. The late 1980s witnessed the rise of a new, and perhaps more powerful, species of formalism now commonly known as "new textualism."[117] The principal adherents to this new approach are Justices Antonin Scalia and Clarence Thomas,[118] and a number of appellate judges, most notably Frank Easterbrook of the Seventh Circuit.[119]

New textualism posits that the role of judges in a democratic society is to apply statutory text strictly as written, and in particular without regard to notions of legislative intent or purpose. In this respect, proponents of textualism return to the old formalist view that statutory words are the best indication of legislative intent.[120] Indeed, in his concurring opinion in *INS v. Cardoza-Fonseca*,[121] which signaled the

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[117] The term "new textualism" was coined by William Eskridge. *See* Eskridge, *supra* note 85, at 623. Richard Pierce has termed this new strain of strict formalism "hypertextualism." *See* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995) (using the term to describe the Court's new interpretive techniques).

[118] *See* Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1237 (1996) (suggesting that Justice Thomas approves of Justice Scalia's textualist approach); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 351 (1994) (same).

[119] *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) [hereinafter Easterbrook, *Statutes' Domains*] (advocating a more limited role for judges in interpreting statutes); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994) [hereinafter Easterbrook, *Text and History*] (cautioning against overuse of legislative history in interpreting statutes).

[120] *See supra* notes 85-86 and accompanying text (discussing the classical formalist approach to statutory interpretation). The practical consequence of this approach is a return to the "plain meaning rule" in statutory interpretation. *See* Eskridge, *supra* note 85, at 656-60 (suggesting that, as a result of the influence of new textualism, the Supreme Court's "old soft plain meaning rule has become 'harder'").

[121] 480 U.S. 421, 452 (1987) (Scalia, J., concurring). At issue in *INS v. Cardoza-Fonseca* was the interpretation of the phrase "well-founded fear of persecution" in the

rise of "new textualism," Justice Scalia cited cases dating back as far as 1820 for the "venerable principle that if the language is clear, that language must be given effect—at least in the absence of patent absurdity."[122]

Implicit in this approach is also a conservative premise about the role of federal judges in the development of law. In a system founded on legislative supremacy and separation of powers, it is argued, the appropriate forum for policy making—for balancing the competing societal interests in the creation of generally applicable legal standards—is the legislature. The function of the judiciary, in contrast, is restricted to identifying and applying the objective meaning of those legislative standards without the exercise of independent policy-making discretion.[123]

This restrictive textualist philosophy thus has two principal corollaries, as discussed immediately below.

1. Rejection of Legislative History

The first principal corollary of new textualism is a rejection of extrinsic sources, in particular legislative history, in resolving statutory ambiguities.[124] Proponents have advanced a variety of arguments to

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Immigration and Nationality Act with regard to requests for asylum. *See id.* at 423-25. Interestingly, Justice Scalia objected to the majority's resort to legislative history that revealed that the Congress intended the interpretation of this *domestic* statute to be governed by an *international* treaty. *See id.* at 436-41 (deferring to the definition of "refugee" in the 1967 United Nations Protocol Relating to the Status of Refugees).

[122] *Id.* at 452-53 (Scalia, J., concurring) (citing, inter alia, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.), and United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1868)); *see also id.* at 452-53 (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."). It should not come as a surprise, then, that in expanding this textualist approach to the interpretation of treaties in *Chan v. Korean Air Lines,* Justice Scalia quoted from an 1821 opinion. *See* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 135 (1988) (quoting The Amiable Isabella, 19 U.S. 1, 32, 6 Wheat. 1, 71 (1821)).

[123] *See* Eskridge, *supra* note 85, at 646 (noting that the new "[f]ormalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened").

[124] *See* Dewsnup v. Timm, 502 U.S. 410, 422-23 (1992) (Scalia, J., dissenting) (criticizing the Court's reliance on legislative history over plain meaning in interpreting a statute); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 251-52 (1989) (Scalia, J., concurring) (criticizing overreliance on legislative history in interpreting the RICO Act); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring) (criticizing overreliance on historical and legislative material in interpreting the term "defendant" in Federal Rule of Evidence 609(a)(1)); United States v.

support this view. The prime argument carries forward the attack of realists fifty years earlier on the very notion that legislatures have any coherent collective "intent" at all.[125] Echoing Radin,[126] Judge Easterbrook, for example, has contended that "[i]ntent is elusive for a natural person, fictive for a collective body."[127] More recent support is found in "public choice theory," which is skeptical of the effectiveness of a legislative process influenced by powerful interest groups and the idiosyncratic motivations of individual legislators.[128]

Supporters of textualism further reject legislative history as lacking utility in resolving statutory ambiguities. That is, textualists contend that legislative history often proves more ambiguous than the text itself.[129] The variety of often conflicting statements in drafting records, textualists argue, enables judges to hide their own preexisting policy preferences behind a veil of citations to "legislative intent."[130]

Taylor, 487 U.S. 326, 344-46 (1988) (Scalia, J., concurring in part and dissenting in part) (criticizing the resort to legislative history in interpreting the meaning of a statutory phrase); *see also* Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 433-39 (1994) (discussing Justice Scalia's rejection of legislative history in favor of a plain meaning approach); Mank, *supra* note 118, at 1237-38 (discussing textualism).

[125] *See supra* note 91 and accompanying text (discussing criticism of the idea of a collective legislative intent).

[126] *See* Radin, *supra* note 2, at 870-71 (arguing that "the intention of the legislature is undiscoverable in any real sense").

[127] Easterbrook, *Text and History*, *supra* note 119, at 68 (concluding that "*[i]ntent is empty*"); *see also* Easterbrook, *Statutes' Domains*, *supra* note 119, at 547-48 (arguing that statutes do not reflect any collective intent of the legislature). Other opponents of "intentionalism" have pointed to the problems inherent in reconstructing the "intent" of a past legislature. *See* Eskridge, *supra* note 85, at 644-46 (discussing historicist skepticism about the ability of an interpreter to reconstruct a past event detached from the influence of current values).

[128] Justice Stephen Breyer has offered perhaps the most concise summary of the premise of public-choice theory: "[L]egislation simply reflects the conflicting interactions of interest groups; the resulting law sometimes reflects their private, selfish interests, and sometimes serves no purpose at all." Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864 (1992); *see also* Eskridge, *supra* note 85, at 642-44 (discussing the influence of public-choice theory on the value of legislative history); Mank, *supra* note 118, at 1269-71 (reviewing textualist challenges to the use of legislative history).

[129] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 31-32 (1997) (resort to legislative history "is much more likely to produce a false or contrived legislative intent than a genuine one"); Easterbrook, *Text and History*, *supra* note 119, at 68 ("*Laws lack spirit.* Legislation is compromise. Compromises have no spirit; they just are.").

[130] *See* SCALIA, *supra* note 129, at 17-18 (warning of the "*practical* threat . . . that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the comon law to the statutory field").

Consulting such a source thus amounts to little more than "looking over a crowd and picking out your friends."[131]

A final argument against the use of statutory history is founded on constitutional concerns. Textualists assert that a restriction to statutory text is constitutionally mandated because it is only that text, and not the legislative drafting records, that is voted on by Congress and presented to the President.[132] In a similar vein, proponents argue that reliance on drafting records prepared by congressional staff (and influenced by interest groups) sanctions a usurpation of the legislative power vested by the Constitution exclusively in the elected members of Congress.[133]

2. Restrictive View of Judicial Lawmaking Powers

The second principal corollary of new textualism is a limited view of the role of judges in filling statutory gaps. Consistent with their

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[131] This familiar statement has been attributed to former Judge Harold Leventhal by his colleagues on the United States Court of Appeals for the District of Columbia. *See* Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 982 (1989); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983); *see also* Easterbrook, *Statutes' Domains*, *supra* note 119, at 548 (arguing that attempts to determine collective intent from legislative history involve nothing more than "wild guesses").

[132] *See* Easterbrook, *Text and History*, *supra* note 119, at 68 ("*The Constitution limits what counts as 'law.'*. . . [T]he structure of our Constitution . . . requires agreement on a *text* by two Houses of Congress and one President."); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 64-65 (1988) (arguing the same); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 843 (1991) (grounding textualism in federalism); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375-76 (arguing that resort to legislative history impermissibly dilutes the role of the Executive Branch and injects unelected courts into the legislative process).

[133] *See* SCALIA, *supra* note 129, at 35 ("The legislative power is the power to make laws, not the power to make legislators. It is nondelegable. Congress can no more authorize one committee to 'fill in the details' of a particular law in a binding fashion than it can authorize a committee to enact minor laws."); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706-37 (1997) (arguing that reliance on legislative history violates the constitutional prohibition against delegation of lawmaking power to entities under the exclusive control of Congress); Starr, *supra* note 132, at 375 (arguing that committee reports prepared by a congressional subdivision are not indicative of Congress's intent); *see also* Breyer, *supra* note 128, at 862-64 (discussing the constitutional arguments of textualists); George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 41-44 (arguing that although the Supreme Court often defers to committee reports as legislative history, these reports are not subject to bicameralism and presentment, and thus "may not be accorded the force of law"); Mank, *supra* note 118, at 1270-71 (same).

emphasis on legislative supremacy and the incoherence of legislative "intent," many textualists argue that courts should not engage in an active search for answers to questions a statute leaves unresolved. In particular, they argue, judges should not seek to craft substantive solutions from the broader spirit of a statutory scheme, nor from a dynamic adaptation of the meaning of the enacted text.[134]

Instead, when faced with a gap, a court should disregard the statute, admit the limits on its lawmaking powers, and resort to whatever law would otherwise apply to the issue in dispute.[135] In the words of Judge Easterbrook:

> Hard questions have no right answers. Let us not pretend that texts answer every question. Instead we must admit that there are gaps in statutes, as in the law in general. When the text has no answer, a court should not put one there . . . ! Instead the interpreter should go to some other source of rules, including administrative agencies, common law, and private decision.[136]

This aspect of new textualism, too, reflects a return to the restrictive approach of classical formalism.[137] But these recent textualists also find support in constitutional considerations. Proponents argue that the prohibition on filling statutory gaps follows from the exclusive grant of federal lawmaking power to the legislative branch. Because federal courts do not have independent power to create substantive law, recent textualists argue, they likewise have no power to fill gaps in legislative standards.[138] Textualists also see a derivative

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[134] *See* Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. CIN. L. REV. 911, 935 (1996) (criticizing dynamic statutory interpretation as unjust and unconstitutional); Easterbrook, *Text and History*, *supra* note 119, at 69 ("Laws are designed to bind, to perpetuate a solution devised by the enacting legislature, and do not change unless the legislature affirmatively enacts something new.").

[135] *See* Easterbrook, *Statutes' Domains*, *supra* note 119, at 544 ("Unless the party relying on the statute could establish either express resolution or creation of the common law power of revision, the court would hold the matter . . . outside the statute's domain. The statute would become irrelevant, the parties . . . remitted to whatever sources of law might be applicable."); *see also* Karkkainen, *supra* note 124, at 474 (concluding, with regard to gap-filling, that "[f]or Justice Scalia . . . it is illegitimate for a court to legislate by extending a statute's domain beyond what is clearly stated in the statutory text").

[136] Easterbrook, *Text and History*, *supra* note 119, at 68.

[137] *See supra* notes 88-89 and accompanying text. Indeed, Professor Daniel Farber prefers to address new textualism under the label "new formalism." *See* Farber, *supra* note 100, at 522.

[138] *See* West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991) (Scalia, J.) ("'To supply omissions [in a statute] transcends the judicial function.'" (quoting Iselin v. United States, 270 U.S. 245, 250-51 (1926))); Easterbrook, *Text and History*, *supra*

utilitarian benefit in this approach: Limiting interpretation solely to text, they urge, creates an incentive for Congress to draft statutes carefully (thus avoiding gaps in the first place), and thereafter to be diligent in amending them as they become outdated.[139]

It is perhaps in this respect that textualism has most influenced conventional approaches to statutory interpretation. References to the traditional rule of strict construction of statutes in derogation of the common law continue to abound in federal-court opinions.[140] The Supreme Court itself has often looked to common law rules as guidance for the development of the law under federal statutes.[141] In fact, even proponents of dynamic approaches to statutory interpretation do not challenge the continuing vitality of the preexisting common law in filling some statutory gaps.[142]

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note 119, at 69 ("Only living Congresses, and not homunculi sitting in the minds of judges, are authorized to make law."); *see also* SCALIA, *supra* note 129, at 13-14 (questioning the "*attitude* of the common law judge" in our "age of legislation," in particular in federal courts, "where, with a qualification so small it does not bear mentioning, there is no such thing as common law"); Eskridge, *supra* note 105, at 1497-501 (analyzing "[t]he formalist argument . . . that the creation of law by federal judges is beyond the authority given them in the Constitution, for it trenches upon the lawmaking power given to Congress").

[139] *See* United States v. Taylor, 487 U.S. 326, 345-46 (1988) (Scalia, J., concurring in part and dissenting in part) (arguing that recourse to legislative history subverts the democratic process and the role of Congress as lawmaker); *see also* Farber, *supra* note 100, at 524 (summarizing the textualists' utilitarian argument that "[i]f Congress dislikes the results [of a textualist approach], it is always free to legislate again"). For a comprehensive review of congressional action in response to interpretive decisions by the Supreme Court, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

[140] *See, e.g.*, May-Som Gulf, Inc. v. Chevron U.S.A., Inc., 869 F.2d 917, 921 (6th Cir. 1989) ("'Strict construction is particularly appropriate where, as here, the statute in question is in derogation of common law rights.'" (quoting Checkrite Petroleum, Inc. v. Amoco Oil Co., 678 F.2d 5, 8 (2d Cir. 1982))); Railway Labor Executives' Ass'n v. Consolidated Rail Corp., 666 F. Supp. 1573, 1581 n.6 (Regional Rail Reorg. Ct. 1987) (citing *Checkrite* for the same proposition). This applies in particular when federal legislation encroaches on a field of law traditionally reserved to the states. *See, e.g.*, BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) (Scalia, J.) ("To displace traditional state regulation . . . the federal statutory purpose must be 'clear and manifest.'" (quoting English v. General Elec. Co., 496 U.S. 72, 79 (1990))).

[141] *See, e.g.*, Staples v. United States, 511 U.S. 600, 605 (1994) (construing a statute "in light of the background rules of the common law"); Molzof v. United States, 502 U.S. 301, 306 (1992) (invoking the common law definition of "punitive damages" to determine the term's statutory meaning); *cf.* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) (utilizing the common law to demonstrate the dynamic nature of the term "restraint of trade" in the Sherman Act).

[142] Eskridge, *supra* note 112, at 1051 (arguing that an "updated version" of the old strict construction rule "is that the common law can be used to fill in statutory gaps, unless it is inconsistent with the overall statutory policy").

What is more significant for present purposes, however, is that this new strain of formalism has even influenced the Supreme Court's approach to the construction of treaties.[143] For an illustration of this point, let us return to the Court's opinion in *Chan v. Korean Air Lines, Ltd.* with which this Article began.[144] At issue in that case was the application of the Warsaw Convention on international air travel to the shooting down of an airliner by the Soviet Union in 1983.[145] The specific issue was whether the liability limitation defined in that Convention should be lifted if an airline fails to give adequate notice of the limitation to its passengers.[146]

Finding no express provision to that effect in the Convention, the Court quickly concluded that the interpretive inquiry was at an end. Although the issue of airline liability clearly fell within the Warsaw Convention's scope, the Court found that it had no authority to craft a substantive solution to fill the gap.[147] The pure formalist spirit embraced in the penultimate paragraph of Justice Scalia's opinion for the Court on this score is worthy of reemphasis here: "'[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.'"[148]

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[143] *See* Bederman, *supra* note 69, at 978-86 (discussing the impact of Justice Scalia's "pure textualism" on treaty interpretation); Michael S. Straubel, *Textualism, Contextualism, and the Scientific Method in Treaty Interpretation: How Do We Find the Shared Intent of the Parties?*, 40 WAYNE L. REV. 1191, 1191 (1994) (describing Justice Scalia's approach to treaty interpretation as textualist); *cf.* Bederman, *supra* note 69, at 1022-24 (lamenting that "[m]any of the treaty cases before the Rehnquist Court have been litigated and decided as if they presented merely a slight variant on the problem of statutory construction").

[144] 490 U.S. 122 (1989).

[145] *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 3145, *reprinted in* 49 U.S.C. § 40105 note (1994).

[146] *See Chan*, 490 U.S. at 125-26 (observing that the Convention specifies no penalty for inadequate notice).

[147] *See id.* at 134-35.

[148] *Id.* at 135 (alteration in original) (quoting The Amiable Isabella, 19 U.S. 1, 32, 6 Wheat. 1, 71 (1821)). In language strikingly similar to the "plain meaning rule" of classical formalism, the Court observed that "where the text is clear, as it is here, we have no power to insert an amendment." *Id.* at 134. For a discussion of the "plain meaning rule," see *supra* notes 85-86 and accompanying text. *See also* United States v. Stuart, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (arguing with regard to a tax treaty that "[g]iven that the Treaty's language resolves the issue presented, there is no necessity of looking further to discover 'the intent of the Treaty parties'" (quoting the majority opinion, *id.* at 366)); Bederman, *supra* note 69, at 979 (arguing that in *Stuart*,

Chan is not an anomaly. For more than a decade, the Court has consistently applied a restrictive approach to the construction of international conventions. In opinions such as *Société Nationale Industrielle Aérospatiale v. United States District Court*,[149] *Volkswagenwerk Aktiengesellschaft v. Schlunk*,[150] and *Zicherman v. Korean Air Lines, Co.*,[151] the Supreme Court has consistently refused to engage in an active interpretive process to construct internal solutions for gaps in a convention's regulatory scheme. The implicit premise of this refusal is that an international convention merely represents a limited skeleton of rules. The consequence has been that the Court has resorted to otherwise applicable domestic law even for questions clearly within an international convention's sphere of application.[152] In short, although

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"Justice Scalia was intent on extending his jurisprudence of statutory construction to the treaty area"). Justice Blackmun expressed similar sentiments in a later case. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 194 (Blackmun, J., dissenting) ("[A] treaty's plain language must control absent 'extraordinarily strong contrary evidence.'" (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982))). In the same vein, see also Maximov v. United States, 373 U.S. 49, 54 (1963) (noting that the text of a treaty controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories").

[149] 482 U.S. 522, 534 & nn.15-16 (1987) (construing the Hague Evidence Convention, *supra* note 35, as not precluding resort to discovery under domestic law). This opinion of the Court, in particular, has sparked intense scholarly objection. *See, e.g.*, James G. Dwyer & Lois A. Yurow, *Taking Evidence and Breaking Treaties:* Aérospatiale *and the Need for Common Sense*, 21 GEO. WASH. J. INT'L L. & ECON. 439, 460-72 (1988) (criticizing the majority opinion as "both analytically and practically unsound"); Russell J. Weintraub, *The Need for Awareness of International Standards When Construing Multilateral Conventions: The Arbitration, Evidence, and Service Conventions*, 28 TEX. INT'L L.J. 441, 456-61 (1993) (criticizing the opinion as "unconvincing" and "problematic").

[150] 486 U.S. 694, 700 (1988) (construing the Hague Service Convention, *supra* note 35, as not precluding service of a corporate subsidiary under state law).

[151] 516 U.S. 217, 229 (1996) (construing the Warsaw Convention as authorizing resort to domestic law to determine the cognizable harm under the Convention and holding that "the Convention itself contains no rule of law governing the present question; nor does it empower us to develop some common law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition").

[152] The same conclusion obtains for the interpretation of treaties defining the public international law obligations of the United States. In opinions such as the now-infamous international abduction case of *United States v. Alvarez-Machain*, the Court has consistently refused to search actively for the principles embodied in a treaty in the absence of unambiguous direction by the treaty itself. *See* 504 U.S. 655, 663-70 (1992) (construing an extradition treaty between the United States and Mexico as not prohibiting the trial of a Mexican national who had been forcibly kidnapped and brought to the United States). For a criticism of this "parochial reading" of the Extradition Treaty, see Bederman, *supra* note 69, at 1014 (arguing that the approach of the Court in *Alvarez-Machain* "was in defiance of the first principle of the liberal interpretation

sometimes liberal in rhetoric,[153] the common practical outcome of treaty interpretation by the Supreme Court has been distinctly conservative and formalist.[154]

To be sure, most proponents of textualism are not absolutists. Even Justice Scalia has acknowledged the importance of reading statutory text in its linguistic and structural context.[155] Nonetheless, in language reminiscent of the strict formalism of nearly one hundred years ago, Judge Easterbrook has summarized textualism as a "relatively unimaginative, mechanical process of interpretation."[156]

In domestic statutory interpretation, this "new textualism" apparently has not found unquestioning converts in a majority of the pres-

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canon: that the words and meanings of treaties should be understood against the background of international, not domestic, law"). For an opinion in the same vein, see *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 170-88 (1993) (restrictively interpreting the United Nations Convention Relating to the Status of Refugees, and its 1967 Protocol, as not prohibiting the United States from interdicting and forcibly repatriating Haitian refugees).

[153] At times, the Supreme Court has stated that treaties should be interpreted more "liberally" than "private agreements." *See* Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 535 (1991); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1987). This language traces its modern foundation to a 1943 opinion in which the Court rejected the restrictive approach of classical formalism in the interpretation of a treaty with a Native American tribe. *See* Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943) (stating that treaties are construed more liberally than private agreements). Although the Supreme Court has since repeated this language on occasion, it is difficult to determine its precise effect in modern treaty jurisprudence. *See* Bederman, *supra* note 69, at 967 (suggesting that the "liberal interpretation" canon merely seeks "to protect treaties from parochial readings that will result in interpretations not consonant with international expectations"); *see also* Wolf, *supra* note 69, at 1068 (stating that the norm that treaties should be interpreted "liberally and in good faith . . . may never have been the actual basis of a Supreme Court holding"). In any event, as noted in the text, the practical outcome of treaty interpretation in the Supreme Court has been distinctly restrictive in nature.

[154] *See* Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y 559, 561 (1996) (concluding that the Supreme Court has "consistently applied" a "restrictive method" for "the interpretation of international agreements for the past decade").

[155] *See* Eskridge, *supra* note 85, at 660-63 (analyzing Justice Scalia's "structural" interpretive arguments); Karkkainen, *supra* note 124, at 445-50 (same). Consistent with his strict formalism, Justice Scalia has also employed the traditional "canons of statutory construction" to resolve textual ambiguities. *See id.* at 450-56 (discussing Justice Scalia's reliance on clear statement principles, a set of traditional canons of statutory interpretation). *See generally* Eskridge, *supra* note 85, at 663-66, 663, 663 (discussing the "[r]evival of ([s]ome) [c]anons of [s]tatutory [i]nterpretation").

[156] Easterbrook, *Text and History*, *supra* note 119, at 67; *see also supra* notes 90-91 and accompanying text (discussing the "mechanical jurisprudence" around the turn of the century).

ent Supreme Court.[157] As *Chan* illustrates in the context of an international convention, however, new textualism remains one of the most potent jurisprudential forces in the contemporary debate over the role of the judiciary in developing the law created by its coequal branches of government.[158] It is in this atmosphere that we turn in Part II below to the interpretation of "legislative" treaties in the form of a new generation of international commercial law conventions.

II. INTERPRETING THE NEW GENERATION OF INTERNATIONAL CONVENTIONS: THE ANIMATING PHILOSOPHY

A. *Textual Considerations*

Although in varying proportions, the entry into force of any comprehensive body of international legal norms creates a fundamental tension with the prior legal order. This tension finds practical expression in two significant interpretive problems. The first is determining the extent to which the international convention should preempt the various national legal regimes in the first place. The second involves a concern that, however expansive the agreed preemption, the national adjudicators charged with applying the new international standards will nonetheless dilute their force through a covert reliance on the preexisting domestic norms in "interpretive" inquiries.

Given the background of these significant challenges, the subject of interpretation attracted intense interest as the law unification movement took root after the upheavals of the Second World War. The first ambitious effort in this direction, the ill-fated Hague Uniform Law in International Sales (ULIS),[159] aspired to a fully preemp-

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[157] Only Justices Thomas and Kennedy (though with less enthusiasm) appear to embrace Justice Scalia's strict textualism. *See* Karkkainen, *supra* note 124, at 401-02 ("Only Justices Anthony Kennedy and Clarence Thomas can be called adherents of Justice Scalia's plain meaning approach."); Merrill, *supra* note 118, at 363-65 (stating that "some of the more recently appointed (Republican) Justices have been receptive to [Scalia's textualist] views, especially Justice Thomas and to a lesser degree Justice Kennedy"). For an insight into the views of the most recent addition to the Supreme Court, Justice Stephen Breyer, see Breyer, *supra* note 128, at 861-69.

[158] Indeed, the potential force of new textualism led even one of its principal critics to observe that "the traditional [flexible] approach is in trouble." Eskridge, *supra* note 85, at 641.

[159] *See supra* notes 22-26 and accompanying text (describing the undertaking, drafting, and ultimate failure of ULIS).

tive and comprehensive model.[160] Article 17 of the Hague ULIS provided that all questions left unsettled in its express provisions were to be resolved internally, specifically "in conformity with the general principles on which [it was] based."[161]

In the charged political climate of the 1970s, this comprehensive displacement of national law quickly became a focus of controversy in the subsequent drafting of the U.N. Sales Convention. The deliberations over this issue coalesced around two fundamentally opposing views. One group of delegates rejected altogether the notion of a self-contained code of international legal standards; this nationalist camp instead advocated a model of a limited skeleton of rules devoid of unifying principles or values.[162] Others held higher aspirations. These delegates conceived of the U.N. Sales Convention as a comprehensive body of integrated norms that would both entirely preempt national law and be independent of its influence. Supporters of this view thus advocated a retention of the pure "general principles" approach of the Hague ULIS.[163]

In the early drafting stages, the Working Group adopted a compromise that appeared to evade the issue entirely. The resulting draft provision on interpretation stated simply: "In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity."[164] Upon consoli-

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[160] *See* Michael Joachim Bonell, *Interpretation of Convention, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 65, 66 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987) [hereinafter Bianca & Bonell] ("ULIS was intended to constitute a self-contained law of sales, to be construed and applied . . . without any reference to or interference from the different national laws.").

[161] ULIS, *supra* note 23, art. 17. To bolster this policy, ULIS article 2 precluded resort to conflict-of-laws principles (known by their civil law label, "private international law") to fill gaps in the Convention. *See id.* art. 2 ("Rules of private international law shall be excluded for the purpose of the application of the present Law, subject to any provision to the contrary in the said Law."). The Hague Convention on Formation (ULF), interestingly, contained no such provisions. *See* ULF, *supra* note 24.

[162] *See Report on First Session, supra* note 60, para. 57, *reprinted in* [1968-1970] 1 Y.B Comm'n Int'l Trade L. 182. Adherents to this view sought to replace article 17 of ULIS with a straightforward rule that "[p]rivate international law shall apply to questions not settled by [the present Law]." *Id.* para. 66.

[163] *See id.* para. 59 (noting that "these [general] principles can be gathered from the provisions of the Uniform Law, from the legislative history of the 1964 Hague Convention and from commentary of the Uniform Law"). A similar proposal would have required that the Convention be "interpreted and applied so as to further its underlying principles and purposes." *Id.* para. 63.

[164] The Working Group initially tentatively recommended this compromise in its second session in 1970. *See Report of the Working Group on the International Sale of Goods*

dation of the sales draft with the formation draft in 1978, the Working Group extended this provision to the formation provisions[165]—and incorporated language (of separate significance) that required consideration of "good faith" in interpretive inquiries[166]—but otherwise left the primary issue unresolved. The resulting ambiguity over the preemptive effect of the Convention left room for advocates of both the restrictive "nationalist" view[167] and the ambitious "intern-

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on the Work of Its Second Session, UNCITRAL Working Group on the International Sale of Goods, 2d Sess., paras. 127, 137, U.N. Doc. A/CN.9/52 (1970) [hereinafter *Report on Second Session*], *reprinted in* [1971] 2 Y.B. Comm'n Int'l Trade L. 62, U.N. Doc. A/CN.9/SER.A/1971 (discussing compromise recommendation). It then formally adopted this lone provision in its sixth session in 1975 and confirmed the decision in its seventh session in 1976. *See Report of the Working Group on the International Sale of Goods on the Work of Its Sixth Session*, UNCITRAL Working Group on the International Sale of Goods, 6th Sess., para. 54, U.N. Doc. A/CN.9/100 [hereinafter *Report on Sixth Session*], *reprinted in* [1975] 6 Y.B. Comm'n Int'l Trade L. 54, U.N. Doc. A/CN.9/SER.A/1975 (deciding to use the text of article 7); *Draft Convention on the International Sale of Goods*, art. 13, U.N. Doc. A/CN.9/116, Annex I, UNCITRAL Working Group on the International Sale of Goods, *reprinted in* [1976] 7 Y.B. Comm'n Int'l Trade L. 90, U.N. Doc. A/CN.9/SER.A/1978 (drafting this language into article 13).

[165] *See Report of the United Nations Commission on International Trade Law on the Work of Its Eleventh Session*, UNCITRAL Working Group on the International Sale of Goods, 11th Sess., paras. 20-22, 41 U.N. Doc. A/33/17 (1978) hereinafter *Report on Eleventh Session*], *reprinted in* [1978] 9 Y.B. Comm'n Int'l Trade L. 13-14, 34-35, U.N. Doc. A/CN.9/SER.A/1978 (integrating the provision on interpretation into the formation draft); *see also Report of the Secretary-General: Incorporation of the Provisions of the Draft Convention on the Formation of Contracts for the International Sale of Goods into the Draft Convention on the International Sale of Goods*, UNCITRAL Working Group on the International Sale of Goods, paras. 58-59, U.N. Doc. A/CN.9/145 (1978), *reprinted in* [1978] 9 Y.B. Comm'n Int'l Trade L. 125, U.N. Doc. A/CN.9/SER.A/1978 (citing the Secretary-General's observation that "there do not appear to be any reasons of policy" why the requirement of international uniformity in interpretation should not apply to the formation provisions).

[166] *See Report on Eleventh Session, supra* note 165, art. 6, para. 28, *reprinted in* [1978] 9 Y.B. Comm'n Int'l Trade L. 14-15. The role of "good faith" was among the most controversial issues in the drafting of the U.N. Sales Convention. As we shall see below, the compromise adopted on the role of "good faith" will, contrary to the contention of some scholars, play a significant role in the future development of international law. *See infra* notes 376-95 and accompanying text.

[167] *See Report of the First Committee*, U.N. Doc. A/CONF.97/11 (1981), *in* Official Records, *supra* note 7, at 83, 87 (proposals for a gap-filling regime based on national law); *see also Summary Records of the First Committee, 5th Meeting*, U.N. Doc. A/CONF.97/C.1/SR.5 (1980) [hereinafter *First Committee Deliberations*], *in* Official Records, *supra* note 7, at 255 para. 8 (describing the argument by the Bulgarian delegate that "it was a costly illusion to imagine that all gaps in an international legal instrument could be filled solely by means of the interpretation of its own provisions"); *id.* para. 28 (describing the argument by the Argentinean delegate that a resort to "the general principles of the Convention might lead in practice to excessive freedom on the part of national courts in interpreting what those principles were"); *id.* para. 12 (describing similar comments by the Czechoslovakian representative).

ationalist" view[168] to press their cases at the Vienna Conference in 1980.

The position of the internationalists substantially prevailed in the final draft of the Convention. The delegates to the Vienna Conference first determined to retain the draft provision on the interpretation of the Convention. That provision, which now appears as article 7(1) of the Convention, establishes the promotion of international uniformity and the observance of good faith as the core policies of interpretation: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[169]

But the delegates also decided to supplement these standards with an express provision for filling in gaps in the Convention's regulatory scheme. It is here that those with higher aspirations for the Convention as "a step towards the creation of a new *jus commune*"[170] substantially triumphed. That new provision, now embodied in article 7(2), mandates as a prime policy that unsettled questions are to be resolved on the basis of the principles reflected in the Convention itself; it is only when those principles fail to provide guidance that resort may be had to national law:

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled *in conformity with the general principles on which it is based* or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[171]

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[168] *See First Committee Deliberations, supra* note 167, *in* Official Records, *supra* note 7, at 255 para. 16 (describing arguments of Professor Michael Bonell of Italy that gaps in the Convention "should be filled not on the basis of the rules taken from a particular national law, but on the basis of those principles and criteria which reflected the letter and spirit of the Convention itself"). For an analysis of these comments of Professor Bonell in the context of the "rhetorical aspirations" of the U.N. Sales Convention, see Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT'L L. & BUS. 574, 606-07 (1988).

[169] CISG, *supra* note 7, art. 7(1).

[170] *First Committee Deliberations, supra* note 167, *in* Official Records, *supra* note 7, at 255 para. 16 (comment by Professor Bonell, the delegate from Italy). For the proposal by Professor Bonell on which article 7(2) is based, see *Documents Submitted During the Conference to the First Committee*, U.N. Doc. A/CONF.97/C.1/L.59 (1980), *in* Official Records, *supra* note 7, at 255.

[171] CISG, *supra* note 7, art. 7(2) (emphasis added). At first glance, this compromise position appears to leave a noteworthy route for escape to national law. As we shall see below, however, the confluence of the prime role of the Convention's general principles and the core policy of international uniformity will leave little room for

The consensus achieved in the drafting of the U.N. Sales Convention has also had more fundamental implications. Subsequent international commercial law conventions have seized upon the approach of CISG article 7 as the paradigm for the interpretation and supplementation of the law within their scope. The UNIDROIT Conventions on International Financial Leasing,[172] International Factoring,[173] and Agency in the International Sale of Goods[174] all incorporate language on interpretation and gap-filling that is effectively identical to that in CISG article 7.[175]

Drafting work on the next generation of unification efforts is proceeding on the same basis: Article 7 of the UNIDROIT Draft Convention on International Interests in Mobile Equipment[176] incorporates the substance of CISG article 7, as does article 8 in the UNCITRAL Draft Convention on International Receivables Financing.[177] These subsequent unification efforts, in short, not only have embraced the principle of CISG article 7; most of them have adopted the provision effectively verbatim.

The result that emerges from this commonality is what might be termed "horizontal uniformity" in the commercial law unification movement.[178] That is, these international conventions have estab-

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this escape for matters within the Convention's scope. *See infra* notes 427-28 and accompanying text.

[172] Convention on Financial Leasing, *supra* note 37, art. 6.

[173] Convention on Factoring, *supra* note 38, art. 4.

[174] Convention on Agency, *supra* note 36, art. 6.

[175] The first two of these Conventions (as well as the Draft Convention on Security Interests) also add an instruction, which is implicit in the approach of the U.N. Sales Convention, that in the interpretation of each, "regard is to be had to its object and purpose as set forth in the preamble." Convention on Factoring, *supra* note 38, art. 4(1); Convention on Financial Leasing, *supra* note 37, art. 6(1); *see also* Draft Convention on Security Interests, *supra* note 42, art. 7(1).

[176] Draft Convention on Security Interests, *supra* note 42, art. 7. Significantly, the most recent draft of this article deletes the reference to "good faith" in interpretation.

[177] Draft Convention on Receivables Financing, *supra* note 43, art. 8. The UNCITRAL Model Law on Electronic Commerce has taken the approach of the U.N. Sales Convention one step further. *See* UNCITRAL Model Law on Electronic Commerce, *supra* note 45, art. 3 (requiring resort to internal general principles in resolving unsettled questions).

[178] There are two noteworthy exceptions to this uniformity. The UNCITRAL Convention on International Bills of Exchange and Promissory Notes, as well as the Convention on Independent Guarantees and Standby Letters of Credit, lacks a provision on gap-filling similar to CISG article 7(2). Both, however, have embraced the standards of interpretation defined in CISG article 7(1). *See* Convention on Bills of Exchange, *supra* note 40, art. 4; Convention on Guarantees, *supra* note 41, art. 5. The latter convention also expressly adopts a less ambitious approach to the goal of inter-

lished uniformity among themselves on the standards for their interpretation and supplementation. What is significant from this is that the interpretive philosophy embraced in the drafting of the U.N. Sales Convention also carries an impact for the future development of international private law in general. Before examining the substantial experience gained in the judicial elaboration of that Convention, I will turn first to an analysis of this underlying interpretive philosophy.

B. *The Animating Philosophy and the Influence of Civil Code Methodology*

There is a deceptive simplicity in the interpretive standards set forth in the paradigm of CISG article 7. At first glance, notions of international uniformity and interpretation based on underlying principles would appear to be simple truisms: The very purpose of the commercial law conventions, after all, is to develop and bring uniformity to the law governing international transactions. Examination with a more powerful lens reveals a deeper message. That message is nothing less than a fundamental policy for the development of a truly transnational, substantively independent body of law.

Dissection of the interpretive standards in our paradigm reveals three separate elements. First, interpretation of a private law convention must proceed on the basis of its "international character."[179] This directive serves a separating and elevating function. That is, it sug-

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national uniformity in commercial law. Instead of the internal "general principles" approach examined in the text, this convention contains express conflicts-of-law rules that seek to determine the appropriate *domestic* law to resolve gaps in its provisions. *See id.* arts. 26-27. As I argue in Part II.C-D below, such a retreat to domestic law is ultimately destructive of the promise of the international law unification movement. Another exception is the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods (as amended), which the United States ratified in 1994 as a complement to the U.N. Sales Convention. *See* Convention on the Limitation Period in the International Sale of Goods, U.N. Conference on Prescription in the International Sale of Goods, U.N. Doc. A/Conf./63/15, *reprinted in* 13 I.L.M. 952 (1974) [hereinafter Limitation Convention]; Protocol Amending the Convention, Annex II, U.N. Doc. A/Conf/97/18, *reprinted in* 19 I.L.M. 696 (1980). Because of its technical nature, the Limitation Convention, not surprisingly, has neither a "good faith interpretation" provision nor a gap-filling provision similar to CISG article 7(2). *See* Limitation Convention, *supra*, art. 7.

[179] *See, e.g.*, CISG, *supra* note 7, art. 7(1); Convention on Factoring, *supra* note 38, art. 4(1); Draft Convention on Receivables Financing, *supra* note 43, art. 8(1); Draft Convention on Security Interests, *supra* note 42, art. 7(1). CISG article 7(1) also requires that interpretation of a convention have regard for the needs of "good faith" in international trade. For a detailed analysis of this requirement, see *infra* notes 377-96 and accompanying text.

gests an "autonomous" interpretation[180] free from the influence of national legal concepts and terminology,[181] and even from the domestic interpretive techniques themselves.[182] In doing so, this mandate amounts to an express direction to interpreters to view a convention as occupying an entirely different, elevated international dimension.

The second element requires that the interpretation of a convention have regard for "the need to promote uniformity in its application."[183] The focus of this standard, interestingly, is not the substantive provisions of the conventions, but rather the interpreters themselves. Implicit in the required deference to uniformity is an instruction to adjudicators to give mutual deference to prior interpretive decisions by courts of other member states, a point I will explore in greater detail below.[184] At its core, this directive thus reflects a recognition that interpretation is a social process and that effective unification of the law on an international level will require cooperation among the formally independent national courts.

Viewed in this light, the second element of our paradigm operates in a symbiotic relationship with the first. It bolsters the international character of a convention by requiring cooperation among

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[180] This "autonomous" interpretation is a well-recognized requirement of the interpretive regime embraced in CISG article 7. *See, e.g.*, Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L COMP. L. 183, 200 (1994) (noting that the commission opted for an autonomous interpretation); Honnold, *supra* note 62, at 208 (same).

[181] *See* Bonell, *supra* note 160, at 72-73 (arguing against reliance "on the rules and techniques traditionally followed in interpreting ordinary domestic legislation"); Ferrari, *supra* note 180, at 200-02 (noting that proper regard for a convention's international character precludes "recourse to interpretive techniques employed under domestic law"); *see also* HONNOLD, *supra* note 23, at 136 ("To read the words of the [U.N. Sales] Convention with regard for their 'international character' requires that they be projected against an international background."); Honnold, *supra* note 62, at 208 (warning against the tendency to view international conventions "through the lenses of domestic law"). An "autonomous" interpretation of international provisions implies disregarding accepted domestic law interpretations even, indeed particularly, where the terminology in the two systems overlaps in capturing the same concepts (for terms such as "reasonable," "good faith," and the like). *See* Bonell, *supra* note 160, at 74 ("[I]t is very likely that [these] terms . . . , no longer expressed in their original version, fail to evoke any traditional meaning.").

[182] Properly appreciated, this implicit instruction to avoid domestic interpretive techniques amounts to a delegation of authority to participate in the creation of an international common law of "convention interpretation." I develop this point more fully in Part III.A.1 *infra*.

[183] *See, e.g.*, CISG, *supra* note 7, art. 7(1); Convention on Factoring, *supra* note 38, art. 6(1); Draft Convention on Receivables Financing, *supra* note 43, art. 8(1); Draft Convention on Security Interests, *supra* note 42, art. 7(1).

[184] *See infra* notes 410-28 and accompanying text.

domestic courts on an international level. At the same time, the required regard for a convention's international character promotes uniformity by precluding recourse to nonuniform domestic norms in the interpretation of its substantive provisions.

The final element of CISG article 7 is perhaps the most significant. The second paragraph of that paradigm directs that, as a primary matter, questions left unresolved in a convention's express provisions must "be settled in conformity with the general principles on which it is based."[185] The function of this element is to complete the interpretive system. That is, even where the inevitable substantive gaps appear, article 7(2) directs an adjudicator to seek answers on an international level, specifically in the values reflected in the convention itself. Implicit in this approach is thus a conception of a convention as an integrated system whose cohesion arises from a set of unifying principles.[186]

Each of these three elements of CISG article 7 carries an important message on its own plane. But it is in their interaction with the broader preemptive effect of an international convention that the animating spirit of that interpretive paradigm fully emerges. The very purpose of a true international convention (as opposed to a simple model law that operates as a mere guideline for domestic legislation)[187] is to supersede national legal norms within its defined scope. The interpretive standards of CISG article 7 give full force to this preemptive effect. Beyond the displacement of domestic law, that provision establishes a means for interpreters to develop the law under an international convention in a manner entirely free from the influence of domestic legal norms.

This goal of creating a truly independent body of law has a prominent historical antecedent: the adoption of comprehensive civil codes by the new nation-states of continental Europe in the nine-

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[185] CISG, *supra* note 7, art. 7(2); *see also* Convention on Factoring, *supra* note 38, art. 4(2); Convention on Financial Leasing, *supra* note 37, art. 6(2); Convention on Agency, *supra* note 36, art. 6(2); Draft Convention on Security Interests, *supra* note 42, art. 7(2); Draft Convention on Receivables Financing, *supra* note 43, art. 8(2).

[186] Admittedly, the final clause of the paradigm of CISG article 7(2) permits resort to domestic law if this active search for relevant general principles yields no results. As I will explain in detail below, however, this possibility exists under the more powerful influence of the needs for international uniformity. *See also infra* notes 427-28 and accompanying text.

[187] *See supra* note 45 (discussing international model laws).

teenth century.[188] Though different in their drafting styles and the historical context of their enactment, these codes shared the prime purpose of displacing all prior law within their scope.[189] A corollary to preemption was a claim to comprehensive coverage. Concurrent with the abolishment of all relevant prior law, the civil codes established a new and authoritative foundation for all legal standards governing the private legal relations within their scope.[190]

Even a code, however, cannot escape the affliction of indeterminacy. As with other forms of legislation, circumstances will arise for which the articulated standards are ambiguous, or for which no provision exists at all.[191] Civil codes thus share a final characteristic: a system or method governing the interaction and supplementation of their component parts.[192] To fulfill the aspiration of a self-contained, comprehensive body of law, in other words, the civil codes expressly or impliedly define an internal methodology for the future expansion of the law within their scope.[193]

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[188] "Codification" refers to an attempt to establish through legislative enactment an exclusive and definitive source of legal norms for an entire field of law. A "true code," Professor William Hawkland has observed, "is a pre-emptive, systematic, and comprehensive enactment of a whole field of law." William D. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 292.

[189] The French *Code civil* of 1804 is illustrative. In the spirit of the revolution in the last decade of the 18th century, Article 7 of the Law of the 30th of Ventose, year XII (1804), the act which consolidated the various parts of the new code, provided that "[a]s of the day when these laws shall become effective," all prior laws, ordinances, usages, and regulations "shall cease to have the force and effect of general or particular laws with regard to the topics which are the object of. . . the present code." *See* Angelo Piero Serini, *The Code and the Case Law, in* THE CODE NAPOLEON AND THE COMMON-LAW WORLD 55, 76 n.2 (Bernard Schwartz ed., 1956) (translating and quoting this provision). For a history of the promulgation of the *Code civil*, see John H. Crabb, *Introduction* to CODE CIVIL at xx-xxv (John H. Crabb trans., 1995).

[190] Some commentators have distilled this characteristic into two separate elements: (1) comprehensiveness, which means that the code "states all of the leading rules" on the subject; and (2) "unifi[cation]," implying that it "speaks completely on a given subject." John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 355 (1988) (citing 1 STATE OF NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 37, 81 (1955)).

[191] *See supra* notes 57-62 and accompanying text.

[192] Commentators have variously described codes in this sense as being "systematic," *see* Hawkland, *supra* note 188, at 292, or "orderly," *see* Gedid, *supra* note 190, at 355.

[193] This goal can be achieved in one or both of two principal ways. The first is by implication from the consistency and coherence of a code's provisions. Although widely different in their respective drafting styles, the prime examples of this approach are the French *Code civil* and the German *Bürgerliches Gesetzbuch*. Their skilled arrangement and coordination of provisions, as well as their consistent concepts and terminology, reflect an integrated whole and thus impliedly sanction an internal

It is no coincidence that the codification movement first arose as modern nation-states coalesced in the nineteenth century. The leaders of that age of statism and positivism realized that the process of nation-building would require a common legal culture. The new states, such as France, Germany, and Italy, that arose out of the convulsions of the period did not, however, have the luxury of the slow accretion of private law norms that characterized the formation of a shared legal culture in England (and in its progeny, such as the United States).[194] One of the first projects undertaken in these newly unified nations, therefore, was the establishment of a commission of legal experts to draft a civil code to govern the private relations among their citizens.[195] The unmistakable goal of this process was to displace the old order with a new foundation for the development of a new system of shared legal values.[196]

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method of interpretation and gap-filling. As an alternative or complement, a code can incorporate an express instruction to the same effect. In this vein, a code will set forth in a special provision a requirement that unsettled matters be resolved on the basis of analogous provisions or the "general principles" of the law. Although precise methodologies vary, examples of this approach abound. *See, e.g.*, CÓDIGO CIVIL [CÓD. CIV.] art. 16 (Arg.); ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] art. 7 (Aus.); CODICE CIVILE [C.C.] art. 1.4 (Italy); CÓDIGO CIVIL [C.C.] art. 4 (Spain). For a full quotation of these provisions, see *infra* note 202.

[194] Although Germany lacked a central political authority at the time, the need for a uniform regime for commercial relations led to the preparation of a "German General Commercial Code" as early as 1871. In a process similar to that in the United States, all of the various states of Germany adopted this code as a type of Uniform Commercial Code. Upon the political unification of the country, the central government amended and repromulgated the code; it was later superseded entirely by the entry into effect of the comprehensive German Civil Code in 1900. *See* Ruggero J. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 951 (1982) (comparing the German and American legal systems and giving the history of the Commercial Code in Germany).

[195] These attempts to break with the legal order of the past did not, of course, occur in a vacuum free of legal culture and tradition. The accumulated legal wisdom of the time, as reflected in the extant principles, notions, and norms, significantly influenced the substance of the resulting legislative product. Indeed, under the influence of the "historical school" led by Karl von Savigny, the 30-year process leading to the creation of the German *Bürgerliches Gesetzbuch* of 1900 principally involved an analysis and distillation of the accepted legal principles of the past. *See* William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 2043 (1995) (discussing the influence of the historical school in the German codification movement). But this fact only serves to bring into focus the essential point here. Notwithstanding their similarity to the codified principles, the legal norms of the past derived their authority not from their prior acceptance, "but from their incorporation and reenactment in the codified form." JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 27 (2d ed. 1985); *see also* Serini, *supra* note 189, at 55, 57 (noting the same).

[196] *See* MERRYMAN, *supra* note 195, at 26-30; *see also* Crabb, *supra* note 189, at xx-xxv (discussing the history of the preparation of the *Code civil* in France); FRANZ WIEACKER,

The defining characteristic of these comprehensive civil codes is their internal development methodology. When faced with gaps and ambiguities, a true code approach requires interpreters to seek the answers within the codes themselves; the specific targets for exclusion in this approach are the norms of the preexisting legal order.[197] This does not mean that the civil codes necessarily define all answers to all questions in a strict formalist sense.[198] Rather, as we shall later see in more detail,[199] modern civil law courts have seized upon certain abstract values reflected in the codes as delegations of broad authority to develop the law within their scope and to adapt the codes to accommodate changes in the regulated field of human activity.[200]

Indeed, the inherent indeterminacy of law will mean that the questions left unsettled—ambiguities about scope and effect, the unforeseen cases—will often take on a greater practical significance than the express code provisions themselves. The corrosive effect of time will also cause the express code rules to wane in relevance as social and technological changes in the regulated field of human activity reveal unresolved questions with greater frequency. The fissures in the law, in other words, will gradually become chasms. The civil code solution to this problem was to establish a common source not only for

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PRIVATRECHTSGESCHICHTE DER NEUZEIT 458-62 (2d ed. 1967) (examining the history of the preparation of the Civil Code in Germany).

[197] Professor Grant Gilmore distilled this basic code proposition in this way:

> A "code" . . . is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law; the pre-Code common law is no longer available as an authoritative source.

Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1043 (1961). The suggestion that a code contains "all" the answers may overstate the proposition. As shown in Part III.C.2 *infra*, the interpretive process embraced in CISG article 7 also permits the dynamic growth of the law based on values that may not have been directly contemplated by its drafters.

[198] For a time, a strict positivism animated the codification movement. Modern civil law courts, however, have adopted a substantially more dynamic approach to the interpretation of the civil codes. *See infra* notes 315-16 and accompanying text.

[199] *See infra* notes 315-24 and accompanying text.

[200] For a broader examination of this "true code" methodology, see Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1079 (1988) ("[A] codification has for its object the creation of a permanent framework and direction of the evolution of the law."); Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2202 (1991) (stating that judges have seized upon general morals presented in codes to achieve judicial legislation); and Steve H. Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part I: The Methodological Problem and the Civil Law Approach*, 31 ARK. L. REV. 1 (1977) (investigating methods for resolving borderline cases under codes).

the legal rules to resolve known problems, but also for the broader, foundational values that would guide the future development of the law.

The paradigm established in CISG article 7 for the unification of the law on an international level proceeds on the same fundamental course.[201] Indeed, many civil codes contain an express requirement that an interpreter resort to internal "general principles" for the resolution of ambiguities in their express provisions.[202] It should thus not surprise that the analytical journey arrives at the same destination: The paradigm of CISG article 7, in particular its second paragraph, endorses a code-like interpretive methodology.[203]

Part III will examine the implications of this implicit endorsement of a civil code interpretive methodology. The practices established under any one civil code will not, to be sure, control the interpretation of an international convention, nor will even their collective experiences necessarily be dispositive. Nonetheless, as we shall see below, the dynamic jurisprudence that has animated much of modern interpretation of the European civil codes will provide inspiration for the parallel interpretive philosophy embraced in the new generation of international commercial law conventions.

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[201] Even on an international level one can expect a process of gradual approximation of values among the different legal systems. Increased communication and cross-fertilization of ideas will undoubtedly spawn increased similarity in the principles relevant to a particular field of law. Like the 19th-century codifiers, however, those who will benefit from uniformity in international transactions cannot await the results of this gradual equalization process.

[202] *See* Bonell, *supra* note 160, at 76 ("Referring to general principles of law as a means for gap-filling is a well-known technique in civil law systems."); *see also, e.g.*, ABGB art. 7 (Aus.) ("Where a case cannot be decided either according to the literal text or the plain meaning of a statute, regard shall be had to the statutory provisions concerning similar cases and to the principles that underlie other laws governing similar matters."); C.C. art. 12 (Italy) ("If a controversy cannot be decided by a precise provision [i.e., a law precisely in point], consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it will be decided according to the general principles of the legal order of the state."); C.C. art. 1(1) (Spain) ("The sources of the Spanish legal order are legislation, custom and the general principles of law."); *id.* art. 4(1) ("Norms [in the code] may be applied by analogy when they do not regulate a specific situation but do regulate a similar one, and there is an identity of reason between the two.").

[203] *See* HONNOLD, *supra* note 23, at 149 ("[Article 7(2)] reflects the approach established for civil law codes."); Bonell, *supra* note 160, at 78 ("Article 7(2) . . . is clearly modelled on similar provisions in the Codes of the civil law systems.").

III. THE MANDATE FOR A DYNAMIC JURISPRUDENCE IN AN AGE OF TRANSNATIONAL STATUTES

Courts in the United States do not have extensive experience with the interpretation of true codes.[204] While the term abounds in our legal lexicon,[205] legislative enactments in this country[206] have traditionally not aspired to the preemptive, comprehensive, and systematic nature of the civil codes common in Europe and South America.[207] Instead, even comprehensive enactments styled as "codes" typically have adhered to a less ambitious "perpetual index" model, which organizes and adjusts the preexisting legal order, typically state common law, but nonetheless remains under its influence.[208]

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[204] Dean Roscoe Pound observed this problem in the early stages of the drafting of the Uniform Commercial Code. *See* Roscoe Pound, *Sources and Forms of Law*, 22 NOTRE DAME LAW. 1, 76 (1946) ("The most serious objection to a code in a common law jurisdiction is that we have no well developed common law technique of developing legislative texts. Our technique of statutory interpretation is not adequate to the application of a code.").

[205] Consider, for example, the "Model Penal Code," the "Bankruptcy Code," and the "Uniform Probate Code." For an analysis of the "code-like" nature of the Uniform Commercial Code, see *infra* Part III.B.2.

[206] The one qualified exception to this rule may be the civil code of Louisiana. For an explanation of this codification effort, see Julio C. Cueto-Rua, *The Civil Code of Louisiana Is Alive and Well*, 64 TUL. L. REV. 147, 152 (1989), and James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 16 (1993).

[207] As early as 1811, in a letter to President James Madison, the famous English scholar Jeremy Bentham offered to draft a comprehensive code for the United States. *See* Letter from Jeremy Bentham to James Madison (Oct. 1811), *in* PAPERS RELATIVE TO CODIFICATION AND PUBLIC INSTRUCTION 1, 30-33 (London, Jeremy Bentham 1817). A later codification movement in the latter half of the 19th century (propelled principally by New York jurist David Dudley Field) failed to find broad acceptance. For an introduction to the contentious debates over the codification issue at the time, compare 3 DAVID DUDLEY FIELD, *Codification*, *in* SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 258 (Titus Munson Coan ed., 1890), with the opposing arguments of James Carter (then President of the American Bar Association) in James Carter, *The Proposed Codification of Our Common Law*, EVENING POST 1-91 (1884), *reprinted in* THE LIFE OF THE LAW 115 (John Honnold ed., 1964). The movement took hold only in a few states. *See* Edgar Bodenheimer, *Is Codification an Outmoded Form of Legislation?*, 30 AM. J. COMP. L. 15, 16 (Supp. 1982) (discussing the codification movements in California, Montana, Georgia, Idaho, New York, and the Dakota Territory). Even these "codes" have not sought to foreclose the development of the law on the basis of the preexisting common law. *See, e.g.*, CAL. CIV. CODE § 5 (West 1982) ("The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.").

[208] For a comprehensive analysis of the impact of codification efforts in the United States, see Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*,

Most federal legislative enactments do not employ the "code" label, and it is likely that Congress pays little heed to the nominal distinction. But it is precisely because of their diversity in substance that doubt arises about the nature and scope of any particular congressional enactment. The problem inherent in developing a model of interpretation, in other words, is that not all legislative enactments are the same. Some are more complex than others. Some reflect a comprehensive solution to the whole complex of social ills within a field of human activity. Others pursue less ambitious goals.

The resultant ambiguity has served as the principal fuel for the controversy between textualists and dynamicists over the role of the judiciary in the interpretation of statutes. At the risk of oversimplification, this controversy can be distilled into two main dimensions, which for ease of reference might be termed "procedural" and "substantive." The procedural dimension relates to the appropriate techniques (or "evidence") an adjudicator may use in interpretive inquiries. The substantive dimension, on the other hand, addresses how courts should proceed where this "procedural" interpretation reveals that the legislative standards do not provide definitive guidance on the particular question presented.[209]

This Part will argue that the code-like methodology embraced in the paradigm of CISG article 7 for international conventions rejects the restrictive textualist approach on both levels. Part III.A will first demonstrate that CISG article 7 endorses an expansive view of the permissible repertoire of interpretive techniques. The impact of code methodology, as Part III.B explains, will be most profound in the substantive dimension of interpretation—the role of adjudicators in filling normative gaps. I argue there that the internal development approach of CISG article 7(2) amounts to a delegation of lawmaking authority to the judiciary when confronted with such gaps in a convention's regulatory scheme. Part III.C–D will then explore the full implications of this delegation for the development of the law within the scope of an international commercial law convention.

1994 WIS. L. REV. 1119, 1199-252 (reviewing primarily the Federal Rules of Evidence, the Uniform Commercial Code, and the Model Penal Code).

[209] In the actual process of interpretation, the line between these two dimensions may be blurred substantially. In particular, an interpreter who turns to notions of legislative intent and purpose may find it difficult to determine where the interpretation of individual provisions leaves off and gap-filling begins.

A. *Rejection of Textualism (I): Expansion of the Repertoire of Interpretive Techniques*

1. The Search for the Elusive "Plain Meaning"

"Throughout the work on uniform laws realists have told us: Even if you get uniform laws you won't get uniform results."[210] With these brief words, Professor John Honnold captured the fundamental challenge facing the transnational unification of the law. Whatever rules are chosen, uniform words risk remaining empty shells without a uniform methodology for their interpretation. The first element of the interpretive paradigm of CISG article 7 is directed to this challenge: Recall that the required regard for a convention's "international character" precludes resort to purely domestic techniques of statutory interpretation.[211] Properly appreciated, then, the interpretive paradigm of CISG article 7 requires the creation of a form of an international common law of "convention interpretation."

Unfortunately, the three elements of our paradigm largely define only the goals, and not the specific standards, to be applied in interpretive inquiries. Nonetheless, CISG article 7 did not arise in a vacuum, nor does it mandate some magical new formula.[212] Indeed, we have already seen that this paradigm was born under the influence of civil code methodology.[213] Moreover, substantial agreement already exists among domestic systems on the core elements of an interpretive process.[214] Admittedly, this domestic harmony may not be dispositive on an international level. It nonetheless confirms the intui-

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[210] Honnold, *supra* note 62, at 207.

[211] *See supra* notes 179-82 and accompanying text.

[212] For general reviews of the interpretive approach of the U.N. Sales Convention, see Ferrari, *supra* note 180; Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105 (1997); Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-filling—An Analysis and Application*, 20 AUSTL. BUS. L. REV. 442 (1992); and V. Susanne Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197 (1988).

[213] *See supra* notes 188-203 and accompanying text.

[214] A recent comprehensive study of statutory interpretation in nine separate countries reveals a noteworthy degree of uniformity in the accepted interpretive techniques. *See* INTERPRETING STATUTES, *supra* note 114; *see also* Farber, *supra* note 100, at 516 (concluding in a review of *Interpreting Statutes* that the "common core" of interpretive techniques in these countries "is an indication . . . that there really is some similar activity called statutory interpretation that is taking place in all of these systems").

tion that certain justificatory arguments are inherent in any rational attempt to determine the meaning of legal texts.

For instance, even in the transnational context there can be little disagreement on where the interpretive process should begin. Not surprisingly, recent comparative reviews across a number of jurisdictions have revealed that the ordinary meaning of statutory language is the prime source of interpretive argumentation.[215] Even the most devout adherents to dynamic interpretation in this country acknowledge the primary authoritative force of statutory text.[216] Textualists, of course, would quickly join in the chorus.[217]

There is also little potential for disagreement over the role of context. Comparative studies have revealed a near-universal acceptance of linguistic and systemic context as a means to ascertain a technical or specialized meaning of an ambiguous statutory provision.[218] No objection on this score is likely from new textualists either. Justice Scalia himself would apparently consider "structural arguments" such as how an ambiguous statutory term "is used elsewhere in the same statute, or . . . in other statutes," and how "the possible meanings fit in the statute as a whole."[219]

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[215] *See* D. Neil MacCormick & Robert S. Summers, *Interpretation and Justification, in* INTERPRETING STATUTES, *supra* note 114, at 511, 533 (surveying nine countries and concluding that in all of the legal systems under study "the linguistic aspect of interpretative justification has greatest prominence in the sense of nearly always coming first in order of consideration").

[216] *See* Eskridge, *supra* note 105, at 1483-84 ("When the statutory text clearly answers the interpretive question . . . it normally will be the most important consideration."); Eskridge & Frickey, *supra* note 4, at 354-56 (noting that "textual arguments carry the greatest argumentative weight").

[217] *See supra* Part I.B.3.a.

[218] *See* MacCormick & Summers, *supra* note 215, at 513 (observing acceptance in all nine countries surveyed of arguments from "contextual-harmonization"); Honnold, *supra* note 79, at 131-34 (explaining that many countries look to the legislative history to determine the purpose and object underlying a statute). This seemingly universal consensus on the value of context is hardly surprising. Just as words in general take on meaning only in context, so do legal expressions in the environment of their use. Standard rules of grammar, logic, and consistency thus have force in legal interpretation as well. In the absence of limiting language, for instance, a term used in two separate provisions is likely to have the same meaning in both.

[219] *See* Eskridge, *supra* note 85, at 661 (discussing Justice Scalia's opinions in *Pierce v. Underwood*, 487 U.S. 552, 564-68 (1988), *Kungys v. United States*, 485 U.S. 759, 770 (1988), and *United States v. Fausto*, 484 U.S. 439, 449-51 (1988)); *see also* O'Connor v. United States, 479 U.S. 27, 31 (1986) (Scalia, J.) (relying on the "overwhelmingly convincing . . . contextual case" for resolving a textual ambiguity in an international treaty). Justice Scalia also has indicated a willingness to consider the interaction of different statutory schemes in resolving statutory ambiguities. *See* Eskridge, *supra* note

Even on this basic textual level, however, one confronts the necessity for a more active interpretive process in an international context. This necessity emerges for two principal reasons. First, international conventions appear in not only one, but typically several, authoritative languages.[220] In what might seem an oxymoron, therefore, there are several potential "plain meanings." Reference to these other languages may thus reveal an ambiguity otherwise hidden behind an apparent "plain meaning" in any single text. The ambiguity in the English language text of the "good faith" provision in the U.N. Sales Convention offers a prime example of this.[221]

The role of a convention's broader "general principles" presents a second argument for a more active interpretive process even for apparently clear text. CISG article 7(2) requires reference to such principles for all "questions" not "expressly settled" in a convention's provisions.[222] The reasoned view of this directive holds that resort to such principles can uncover an ambiguity or gap even where an express provision appears to cover the matter in dispute.[223] The scope of the (apparently unqualified) provisions of the U.N. Sales Convention governing contract formation and notice requirements, for instance, will be limited by an application of the Convention's foundation "general principles."[224]

The message here is that even with this most basic of interpretive tools, interpreters must hold themselves out to a more active search for meaning. Beyond even the doubts about a "plain meaning" of words in any one language alone, therefore, the international dimension of a private law convention mandates a healthy skepticism about

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85, at 662; *see also supra* note 155 and accompanying text (discussing Scalia's interpretive arguments).

[220] Conventions developed under the auspices of UNCITRAL have fully six official language texts: English, French, Spanish, Chinese, Russian, and Arabic. *See* Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 570 (1996) (noting the use of six official languages); Courtney Parrish Smart, Comment, *Formation of Contracts in Louisiana Under the United Nations Convention for the International Sale of Goods*, 53 LA. L. REV. 1339, 1343 (1993) (same). For a more detailed analysis of the interpretive difficulties posed by multilingual treaties, see Dinah Shelton, *Reconciliable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L & COMP. L. REV. 611 (1997).

[221] *See infra* notes 393-95 and accompanying text (discussing the good faith provision).

[222] CISG, *supra* note 7, art. 7(2).

[223] *See infra* Part III.C.1 (examining these functions of general principles in detail).

[224] *See infra* notes 345-53, 356-61 and accompanying text.

the textualists' celebration of the value of objectively determinable meaning.

2. The Important Role of Drafting History

One of the most controversial issues in the debate over statutory interpretation in recent years has been the role of legislative history. Proponents of this source for interpretation argue that the drafting records of a statute may reveal an underlying legislative intent (so-called historical justifications)[225] or legislative purpose (teleological justifications).[226] These sources can then illuminate the meaning of, or give positive life to, the text of a statute. New textualists attack the very foundation of these arguments. Recall that adherents to new textualism argue that notions of legislative intent and purpose are incoherent, unhelpful, or downright misleading, and that the use of legislative history raises constitutional concerns in any event.[227]

This dispute over the role of drafting records (*travaux préparatoires*) has also played itself out in the practice of the Supreme Court in the construction of treaties. At times, the Court has relied expressly on such records on difficult issues of treaty interpretation.[228] Unfortunately, it is difficult to discern any coherence in the Court's approach on this score.[229] Indeed, in *Chan*, for example, the Court, in an overtly textualist manner, concluded that it was inappropriate to resort to treaty drafting records where "the text is clear."[230]

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[225] For an analysis of "intentionalism" as a unified theory of statutory interpretation, see *supra* notes 93-95 and accompanying text.

[226] For an analysis of "purposivism" as a unified theory of statutory interpretation, see *supra* notes 96-97 and accompanying text.

[227] *See supra* notes 124-33 and accompanying text.

[228] *See* Zicherman v. Korean Air Lines Co., 516 U.S. 217, 224-27 (1996) (stating that resort to the *travaux préparatoires* is appropriate in treaty interpretation); Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 535 (1991) (same); United States v. Stuart, 489 U.S. 353, 366-68 (1989) (same); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700-02 (1987) (stating that it is appropriate to consider the drafting history of a convention); Air France v. Saks, 470 U.S. 392, 400 (1985) (same).

[229] *See* Bederman, *supra* note 69, at 996 (concluding that "[r]eferences to *travaux préparatoires* in the Rehnquist Court cases do not appear to follow any predictable pattern").

[230] Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989). In an accompanying footnote, the *Chan* majority also castigated the concurrence for "performing the examination [of the drafting history] that we consider inappropriate." *Id.* at 134 n.5. For a more detailed analysis of the use of *travaux préparatoires* by the Rehnquist Court, see Bederman, *supra* note 69, at 992-96.

The interpretive provisions of the Vienna Convention on Treaties likewise embrace a distinctly textualist approach.[231] Under those standards, resort to such extrinsic interpretive evidence "is meant to be only an exceptional occurrence."[232]

The arguments advanced by textualists against the use of drafting records hold little force in the active interpretive process contemplated by CISG article 7. At least four separate reasons support this conclusion. The first emerges from the very purpose of the enterprise: achievement of international uniformity. On a domestic level, and in particular in civil law countries, recourse to drafting records in resolving statutory ambiguities is a well-accepted practice.[233] It is not surprising, then, that civil law scholars,[234] as well as courts and arbitral

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[231] *See* Vienna Convention on Treaties, *supra* note 70, art. 32 (permitting resort to drafting records only if the text "[l]eaves the meaning ambiguous or obscure; or . . . [l]eads to a result which is manifestly absurd or unreasonable").

[232] Bederman, *supra* note 69, at 973; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 325 cmt. e, *supra* note 13 ("Article 32 of the Vienna Convention [on Treaties] reflects reluctance to permit the use of materials constituting the development and negotiation of an agreement (*travaux préparatoires*) as a guide to the interpretation of the agreement."); Bederman, *supra* note 69, at 973-75 (discussing the "higher threshold of ambiguity" necessary for resort to drafting records under the Vienna Convention on Treaties); Frankowska, *supra* note 71, at 331 (observing as to the interpretive provisions of the Vienna Convention on Treaties that "[n]o one seems to question that the provisions favor the textual approach"). This textualist bias was adopted over the strenuous objections of supporters of the flexible "New Haven School" of treaty interpretation (most notably, Professors Myres McDougal and Harold Lasswell). For an elaboration on this approach, see MYRES S. MCDOUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER *passim*, 40-41 (1967) (advocating a "policy oriented and configurative approach" in which interpretive decisions are affected not only by the "genuine shared expectations of the parties," but also by "deliberate efforts to further the realization of the basic pattern of value distribution and the fundamental institutions that are compatible with the preferred system of public order"). *See also* Richard A. Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, 8 VA. J. INT'L L. 323, 330-54 (1968) (analyzing the "New Haven Approach" to treaty interpretation).

[233] *See* Ferrari, *supra* note 180, at 207 ("In *civil law* countries the possibility of resolving an interpretive problem by making reference to the legislative history has never been doubted . . . ."); Honnold, *supra* note 79, at 133 (noting the use of *travaux préparatoires* in civil law countries); *see also* Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, *in* INTERPRETING STATUTES, *supra* note 114, at 461, 476-78 (observing widespread acceptance in nine countries of the use of legislative history). Since this report, even the United Kingdom has joined the consensus in favor of the use of drafting history. *See* Pepper v. Hart, 3 W.L.R. 1032 (H.L. 1992) (relaxing the rule that excluded reference to parliamentary material as an aid to statutory construction).

[234] *See* Bonell, *supra* note 160, at 90 ("Possible doubts about the precise meaning and effect of a single provision may well be resolved by reference to the *travaux préparatoires* . . . ."); Ferrari, *supra* note 180, at 206-10 (arguing that the *travaux prépara-*

tribunals,[235] quickly embraced the same standard for the U.N. Sales Convention. In its practical effect, therefore, the mandated deference to the needs of international uniformity amounts to a direction to courts in the United States to be open to a similar interpretive approach.

The adoption process of an international private law convention likewise dilutes constitutional concerns about the use of drafting history.[236] Like all formal international treaties, such conventions are negotiated by representatives of the Executive Branch.[237] Concerns about unconstitutional "self-delegation" by Congress thus simply do not arise.[238] Moreover, the official drafting records of the conventions become publicly available long before the Senate is able to take up the issue of ratification.[239] This fact, together with the express direc-

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toires is an appropriate source for interpreting the U.N. Sales Convention); Herber, *supra* note 72, at 91-92 (same). Some U.S.-American scholars have come to the same conclusion. *See* HONNOLD, *supra* note 23, at 136-42 (noting the relevance of legislative history to interpretation of the 1980 U.N. Sales Convention); Hartnell, *supra* note 72, at 22-25 (discussing the use of *travaux préparatoires* in treaty interpretation).

[235] *See, e.g.*, Oberlandesgericht [OLG] [Court of Appeals] Frankfurt am Main, Case No. 13 U 51/93 (F.R.G.), *reprinted in* 2 UNILEX, Int'l Caselaw & Bibliography on UN Convention on Cont. for the Int'l Sale of Goods (Transnational Publishers, Inc.) (Michael Joachim Bonell ed., 1996), E.1994-10, at 317 (Apr. 20, 1994) [hereinafter UNILEX].

[236] The argument of textualists here would presumably be the "presentment" argument in reverse. *See supra* notes 132-33 and accompanying text. Instead of doubt about whether the President "signed" the legislative history along with the statute, the concern would be whether the Senate gave its "advice and consent" to the drafting records when it ratified a private international law convention. *See* U.S. CONST. art. II, § 2, cl. 2.

[237] The specific delegates are attorneys with the Office of Legal Advisor of the U.S. Department of State and their appointees. For a comprehensive analysis of the work of this Office in the area of private international law, see Pfund, *supra* note 44, at 51-75.

[238] *See* Manning, *supra* note 133, at 706-31 (arguing that the use of legislative history sanctions a "self-delegation" of lawmaking authority by Congress in violation of notions of separation of powers and the requirements of bicameralism and presentment).

[239] In the course of the drafting efforts, UNCITRAL prepares and publishes—in the form of annual yearbooks—extensive materials documenting the drafting history of the conventions prepared under its auspices. The records of the ratification of the U.N. Sales Convention, for instance, reveal that the Senate was well aware of the potential use of such drafting records in interpretive inquiries. *See* Message from the President of the United States to the Senate Transmitting the United Nations Convention on Contracts for the International Sale of Goods, Sept. 21, 1983, S. TREATY DOC. NO. 98-9 (1983) (noting in recommending that the Senate give its advice and consent to the U.N. Sales Convention that "[t]he legislative history of the Convention is readily available in English").

tion given by the conventions themselves to courts to defer to the interests of uniformity, disperses substantially the constitutional anxieties about the imprimatur of the Senate on the use of drafting history in interpretive inquiries.[240]

The utilitarian arguments of textualists against the use of drafting records are likewise unconvincing in this context. Recall that some proponents have argued that textualism enhances democracy by disciplining Congress to draft more carefully and to be more diligent in amending outdated legislation.[241] This argument simply holds no water for international conventions. First, the heterogeneity of the participants in the drafting of such conventions makes increased indeterminacy unavoidable.[242] More important, after broad international acceptance, corrective amendment to a convention is effectively impossible,[243] and unilateral amendatory action is also fore-

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[240] There is a substantial dispute about whether the "legislative history" of the ratification process *by the Senate itself* is relevant in interpretive inquiries. *See* Bederman, *supra* note 69, at 997-1002 (noting the debate among Supreme Court Justices on the weight of legislative history in treaty interpretation); Wolf, *supra* note 69, at 1034 (arguing that the intent of the Senate upon the ratification of a treaty "normally should not be substituted for [the] negotiators' purpose"); *see also* United States v. Stuart, 489 U.S. 353, 373 (1989) (Scalia, J., concurring) (stating that the majority's use of Senate ratification records in interpreting a treaty was "unprecedented"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 314 & cmts. b, d, *supra* note 13 (stating that the Senate's statement of understanding of a treaty upon ratification is binding on courts); Detlev F. Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INT'L L. 546, 546-50 (1989) (disagreeing with Justice Scalia's statement in *Stuart*). Whatever their force in the public international law context, the use of Senate ratification records is particularly problematic for the interpretation of the private law conventions under consideration here. These conventions preclude reservations by a contracting state other than those expressly permitted. *See, e.g.*, CISG, *supra* note 7, art. 98 ("No reservations are permitted except those expressly authorized in this Convention."); Convention on Financial Leasing, *supra* note 37, art. 22 (same); Convention on Factoring, *supra* note 38, art. 20 (same).

[241] *See supra* note 139 and accompanying text.

[242] *See supra* notes 60-62 and accompanying text.

[243] *See* J.S. Hobhouse, Note, *International Conventions and Commercial Law: The Pursuit of Uniformity*, 106 LAW Q. REV. 530, 534 (1990) ("[International] conventions also suffer in an aggravated form from one of the main problems of all codes—how to amend and update them. This is difficult enough to achieve with municipal legislation; in the international field the problems are formidable and most unlikely to be satisfactorily overcome."). Indeed, the extant conventions do not even define a mechanism for their formal amendment. With regard to the U.N. Sales Convention, see Arthur Rosett, *Critical Reflections on the United Nations Conventions on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 294-96 (1984) (noting Congress's inability to change any provision of the Convention), and Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF

closed.[244] Precluding resort to drafting history notwithstanding inequitable or unjust results is thus unlikely in the extreme to achieve the utilitarian goals advanced by textualists.

A final argument for the use of drafting records flows from the consequences of the previous one. In light of the increased indeterminacy of international legal standards, as well as the improbability of a legislative rescue in the form of corrective amendment, drafting records simply are more important to an effective interpretation and application of international conventions.[245] In addition, more than is the case with domestic legislation, international unification efforts are characterized by a variety of necessary, if sometimes illusory, compromises.[246] The written product thus reflects, at best, an odd amalgam of legal philosophies and systems.

An active resort to drafting records increases the font of available interpretive material on these foreign concepts, as well as on the meaning of the related compromises among the drafters.[247] In this way, paradoxically, an active interpretive process promotes uniformity. It does so by diminishing the risk that domestic interpreters will

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GOODS 1-1, 1-49 (Nina M. Galston & Hans Smit eds., 1984) [hereinafter INTERNATIONAL SALES] (noting this deficiency in the U.N. Sales Convention).

[244] *See, e.g.*, CISG, *supra* note 7, art. 98 (precluding reservations by ratifying states); Convention on Financial Leasing, *supra* note 37, art. 22 (same); Convention on Factoring, *supra* note 38, art. 20 (same). The U.N. Sales Convention and its progeny also do not provide for a body, similar to the Permanent Editorial Board for the Uniform Commercial Code in the United States, that is charged with responsibility to review international conventions for necessary correction or clarification.

[245] *See* JOHN O. HONNOLD, DOCUMENTARY HISTORY FOR THE UNIFORM LAW ON SALES at vii (1988) ("A 'plain meaning' theory that rejects legislative history (whatever its justification when judges and parliamentary drafters share the same legal and linguistic conventions) becomes absurd in handling legislation prepared by an international multi-cultural body and finalized in six authentic languages.").

[246] For a discussion of the number and degree of necessary compromises in the drafting of the U.N. Sales Convention, see Eörsi, *supra* note 61, at 346, 353-56, and Garro, *supra* note 61, at 468-80. *See also* Gabrielle S. Brussel, Comment, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: A Legislative Study of the North-South Debates*, 6 N.Y. INT'L L. REV. 53 (1993).

[247] In this respect, the *travaux préparatoires* fulfill (albeit imperfectly) the function of the official comments appended to the provisions of the Uniform Commercial Code. *See* Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597 (analyzing the role of the official comments to the U.C.C.). For a discussion of similarities between uniform international law and the Uniform Commercial Code in this regard, see *infra* Part III.B.2.

fail to appreciate ambiguities or even affirmatively misunderstand the international nature of the conventions.[248]

Drafting records, of course, are not dispositive in interpretive inquiries. The realist skepticism about collective intent[249] retains validity in the international context as well. Even when interpreting the drafting records of an international commercial law convention, therefore, adjudicators should proceed with caution in weighing the value of a statement by any particular delegate reproduced there.[250] The proper role of the drafting records is, rather, as one consideration in a broader weighing of all relevant evidence, as interpretive adjectives in a field of substantive nouns.[251] Within their limited field of operation, however, the records can be a valuable source for uncovering the motivations behind a solution to a particular normative problem; and in some cases a clear intent or purpose can even give substance to the determinative "general principles" under the inter pretive paradigm of CISG article 7.[252]

In short, there are compelling grounds to support the growing consensus on the use of *travaux préparatoires* in the interpretation of international private law conventions. The arguments of new textualists against this source of interpretive material in domestic statutory interpretation provide no convincing reason to deviate from this course.[253]

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[248] As Professor John Honnold has aptly described it, the use of the *travaux préparatoires* thus serves as an "antidote" to a bias toward divergent domestic interpretations of uniform international law. Honnold, *supra* note 62, at 208-09.

[249] *See supra* notes 125-27 and accompanying text.

[250] For critical views on this subject, see Arthur Rosett, *The International Sales Convention: A Dissenting View*, 18 INT'L LAW. 445, 446-47 (1985) (criticizing the U.N. Sales Convention for the frequency of ambiguous compromises in its drafting), and Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984, 1986-95 (1984) (suggesting that the consensus reflected in the drafting of certain provisions of CISG "may be misleading"). *See also* Ferrari, *supra* note 180, at 206-07 (arguing that "recourse to [the *travaux préparatoires*] must not be overestimated in interpreting the Vienna Sales Convention (or any other convention)").

[251] The order of discussion of interpretive techniques in the text—text, context, drafting history—thus also suggests a relative hierarchy. A clear meaning in linguistic context may be more persuasive than a legislative intent that can be constructed only from drafting reports. The process suggested here, in other words, is an active and flexible one in which the interpreter weighs an interpretive technique's relative clarity against the others' persuasiveness. For a more detailed analysis of this hierarchy in the context of a dynamic interpretation, see *infra* notes 397-400 and accompanying text.

[252] For an analysis of the implications of this contention, see *infra* Part III.C.1.

[253] Similarly, no compelling ground necessitates adopting the more restrictive approach of the Vienna Convention on the Law of Treaties in this regard. *See* Bederman,

3. Expansion of the Interpretive Process

Often, interpretation of the express provisions of a convention will fail to supply the answer for the specific issue in need of judicial resolution.[254] However liberal an interpreter is in her search for relevant evidence (even after employing historical and teleological justificatory methods), the process will frequently reveal that the drafters were unable to agree on the appropriate resolution of the issue, or that the issue escaped their attention entirely.[255]

Here we depart the realm of interpretation in the narrow sense of meaning and enter under the influence of the broader philosophy for the development of the law. Here, too, the internal "general principles" methodology assumes its full significance.

On a small scale, the process of identifying principles of a more general character implies resolution of unsettled questions by use of analogies.[256] This interpretive method involves discerning the values reflected in the resolution of one normative problem and applying those values to a separate, but analogous, situation. A provision requiring payment of the purchase price at the seller's place of business, for example, can be applied analogically to the place for the payment of damages for breach of contract.[257] This method may be of limited value, however, for the result is only a specific solution to a

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supra note 69, at 972-75, 1024-26 (discussing the higher threshold of ambiguity necessary for a resort to drafting records under the interpretive standards of that Convention, but ultimately supporting—incorrectly in my view—the adoption of the Vienna Convention approach, apparently without regard to the substantive nature of the treaty at issue); Frankowska, *supra* note 71, at 326-52 (discussing the impact of the interpretive provisions of the Vienna Convention on decisions by courts in the United States). Even apart from its limitation to the public international law obligations of the United States, *see supra* notes 70-72 and accompanying text, this restrictive approach is inappropriate for conventions that regulate purely commercial law relations. *See also* Honnold, *supra* note 79, at 139 (arguing that "public law conventions restricting the sovereign power of States call for stricter construction than conventions articulating the obligations of parties to a commercial contract").

[254] The potency of the various interpretive techniques is inversely proportional to the likelihood that the participants in a corresponding controversy will resort to *judicial* assistance. That is, as the clarity of a particular statutory provision increases, the need for judicial interpretation in an actual controversy will decrease.

[255] *See supra* notes 57-62 and accompanying text.

[256] *See* Bonell, *supra* note 160, at 78 ("In the case of a gap in the [U.N. Sales] Convention the first attempt to be made is to settle the unsolved question by means of an analogical application of specific provisions."); Ferrari, *supra* note 180, at 221-22 (stating that interpreters should first seek to resolve gaps by the use of analogies).

[257] *See* OLG Düsseldorf, Case No. 17 U 73/93, *reprinted in* 2 UNILEX, *supra* note 235, E.1993-21, at 261-62 (July 2, 1993) (concluding as a result that the court had jurisdiction to hear the claim under German law).

specific problem. Although important in its limited sphere, an analogy provides no broader basis for developing substantive standards to accommodate new social and technological trends.[258]

The more significant implication of the active interpretive process mandated by CISG article 7 is that it sanctions judicial recognition of entirely new substantive principles of general application. In rare cases, such principles may emerge from the distillation of a single provision. That is, a specific provision may reflect a value of such a force and breadth as to permit recognition of a "general principle" on that basis alone. Let us refer to these as "deductive general principles."

Consider, for example, the principle of "party autonomy" defined by CISG article 6.[259] That provision broadly elevates the agreement of the parties over even the express provisions of the Convention itself.[260] The potency of this provision alone gives rise to a "deductive general principle" of party autonomy that may be applied to formulate substantive solutions to questions left unresolved elsewhere in the Convention.[261] Other examples of such deductive general principles under the U.N. Sales Convention might include the required consideration of international trade usages,[262] the absence of form requirements,[263] and (more controversially) the principle of "good faith."[264]

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[258] Even this country's Uniform Commercial Code appears to support this limited form of resolving substantive statutory gaps. *See* U.C.C. § 1-102 official cmt. 1 (1972); *see also infra* Part III.B.2 (comparing the interpretive methodology under the U.C.C. with that under CISG article 7).

[259] *See* CISG, *supra* note 7, art. 6 ("The parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions.").

[260] For a detailed examination of the drafting history and significance of the principle of party autonomy under the U.N. Sales Convention, see Michael P. Van Alstine, *Consensus, Dissensus and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT'L L. 1, 36-42 (1996).

[261] Part III.C.1.b *infra* examines the role of the general principle of party autonomy for one such unresolved question under the U.N. Sales Convention, contract formation in the case of conflicting standard forms. *See infra* notes 344-51 and accompanying text.

[262] *See* CISG, *supra* note 7, art. 9 (stating that parties' agreements are subject to international trade usages, unless otherwise agreed); *see also* Ferrari, *supra* note 180, at 224 (noting the principle set out in article 9).

[263] *See* CISG, *supra* note 7, art. 11 (stating that no form requirements govern the formation of international sale of goods contracts); *id.* art. 29(1) (stating that no form is required to modify or terminate such a contract); *see also* Bonell, *supra* note 160, at 80 (noting the lack of formal requirements); Ferrari, *supra* note 180, at 224 (same).

[264] *See* CISG, *supra* note 7, art. 7(1) (requiring that in the interpretation of the U.N. Sales Convention, regard is to be had to good faith in international trade). Part

Most often, the identification of the determinative general principles will require a more searching analysis. On a structural level, this analysis involves discerning the general from the shared values of the specifics. As commonalities emerge, these shared values may then be applied to solve unsettled matters falling within their logical range of effect. What is at work here is a form of inductive reasoning. A German legal scholar long ago described the foundation for this reasoning in this way:

> A rule of law may be worked out either by developing the consequences which it involves, or by developing the wider principles which it presupposes. . . . The more important of these two methods of procedure is the second, i.e. the method by which, from given rules of law, we ascertain the major premisses [sic] which they presuppose. For having ascertained such major premisses [sic], we shall find that they involve, in their logical consequences, a series of other legal rules not directly contained in the sources from which we obtained our rule.[265]

Implicit in the "general principles" approach is thus a requirement that an interpreter look beyond the face of the relevant convention's narrow constitutive provisions. Each such provision reflects a value judgment, a resolution or balancing of the interests of the parties in a particular way. Inductive reasoning requires an adjudicator to probe these value judgments and seek out common threads of principle. In doing so, broader policies and purposes may emerge. These "inductive general principles" can then provide guidance on the resolution of interpretive issues, and even in filling gaps within the convention's regulatory scheme.

Take, for example, the concept of "reasonableness" under the U.N. Sales Convention. The Convention nowhere imposes on the parties a general requirement of reasonable action.[266] In a number of individual provisions, the Convention nonetheless variously measures the parties' conduct from the perspective of a "reasonable person,"[267] defines rights or obligations with reference to what is "reasonable" or

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III.C.2 *infra* will examine the evolution of "good faith" into a general principle, even though article 7(1) appears to limit its role to interpreting the convention alone.

[265] RUDOLPH SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 30 (photo. reprint 1994) (James Crawford Ledlie trans., 3d ed. 1907), *quoted in* Frier, *supra* note 200, at 2210.

[266] This example of an inductive general principle is also discussed by Professor Michael Bonell in Bonell, *supra* note 160, at 80-81 (interpreting the Convention as imposing a requirement that parties act reasonably).

[267] CISG, *supra* note 7, arts. 8(2), 8(3), 25.

"unreasonable,"[268] and requires certain actions or notices within a "reasonable" time.[269] Although the Convention imposes no such express requirement, the frequency and breadth of this substantive value of "reasonableness" permits the extraction of a principle of broader application.[270] The result is that an adjudicator may in an appropriate case impose a more general obligation of reasonable conduct on the parties to discipline an inequitable exercise of a right or performance of an obligation.

Applying this form of reasoning, scholars and adjudicators have suggested other examples of what are referred to here as "inductive general principles" under the U.N. Sales Convention. These include a duty to communicate relevant information,[271] a principle of full compensation in the event of breach,[272] a form of traditional estoppel,[273] and a duty to take reasonable measures to mitigate losses.[274]

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[268] *Id.* arts. 34, 35(2)(b), 37, 48(1), 60(a), 75, 77, 79(1), 79(4), 85, 86(1), 86(2), 87, 88(2), 88(3).

[269] *Id.* arts. 18(2), 33(c), 39(1), 43(1), 47(1), 49(2)(a), 49(2)(b), 63(1), 64(2)(b), 65(1), 72(2), 73(2), 88(1).

[270] *See, e.g.*, Bonell, *supra* note 160, at 80-81 (discussing a general principle of reasonableness); Ferrari, *supra* note 180, at 225 (arguing that reasonableness is a general principle of the Convention); Kastely, *supra* note 168, at 595-97 (arguing that reasonableness must be read into the Convention to protect the expectations of the parties, an important goal of the Convention).

[271] *See* HONNOLD, *supra* note 23, at 155 (noting the "general principle calling for communication of information"); Herber, *supra* note 72, at 94 (same); Kastely, *supra* note 168, at 595-97 (discussing the requirement of "honest communication between the parties"); *see also* Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1240 (S.D.N.Y. 1992) (recognizing a duty of adequate communication under CISG).

[272] *See* Arbitral Award of the Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft (No. SCH-4366), *reprinted in* 2 UNILEX, *supra* note 235, E.1994-14, at 331, 333 (June 15, 1994) (referring to the values underlying CISG articles 74 and 78); Arbitral Award of the Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft (No. SCH-4318) (same), *reprinted in* 2 UNILEX, *supra* note 235, E.1994-13, at 327, 330 (June 15, 1994).

[273] This concept is commonly known in the civil law world under the Latin label *venire contra factum proprium*. *See* HONNOLD, *supra* note 23, at 153-54 (noting the possibility of a general principle of estoppel); Bonell, *supra* note 160, at 81 (referring to CISG articles 16(2)(b) and 29(2)); Ferrari, *supra* note 180, at 225 (noting the similarity to estoppel); Herber, *supra* note 72, at 84.

[274] *See* HONNOLD, *supra* note 23, at 155 (referring to CISG articles 77, 85, and 86); Bonell, *supra* note 160, at 81 (noting the general principle of mitigation). For a more comprehensive identification of the general principles of the U.N. Sales Convention, see Ferrari, *supra* note 180, at 225-26, and Ulrich Magnus, *Die allgemeinen Grundsätze im UN-Kaufrecht*, 59 RABELSZ 469 (1995).

Use of this type of reasoning is a common feature of civil code interpretive methodology.[275] Similar to these civil codes, CISG article 7 calls upon interpreters to conceive of an international convention as reflective of an overall design. In contrast to the inevitable doubt on this score regarding legislation in the United States, in other words, interpreters are to begin with a presumption of consistency and coherence.[276] As uncovered issues emerge, one must look through the superstructure for the supporting principles below, and, failing these, to the very values that animated the structure's original design.[277] Upon completion of this process, the interpreter can then apply these underlying principles to correct unforeseen defects in the construction of a particular convention, and even to fashion additions to accommodate the unexpected needs of its inhabitants.

One should note here, however, that it would be error to view the paradigm of CISG article 7 as merely embracing a narrow strain of formalism. As Part III.C will demonstrate in greater detail, developing a convention's general principles does not involve solely "uncovering" any specific intent the drafters "embedded" in the convention.[278] What is at work here, rather, is a holistic form of reasoning in which text, context, and drafting history all provide the guideposts for a casuistic development of the law by domestic courts on an international level.[279]

B. *Rejection of Textualism (II): Delegation of Lawmaking Power*

1. The Delegation of Authority to Participate in International "Common Lawmaking"

The examination of the expansive interpretive techniques contemplated by the paradigm of CISG article 7 leads the analysis directly to the second, "substantive," dimension of the controversy between

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[275] *See* Frier, *supra* note 200, at 2210 (noting that codes lend themselves to the inductive process); Summers & Taruffo, *supra* note 233, at 471 (summarizing the reports of scholars from seven civil law countries); *see also* KARL LARENZ & CLAUS-WIHELM CANARIS, METHODENLEHRE DER RECHTSWISSENSCHAFT 366-75 (3d ed. 1995) (discussing the inductive process in the interpretation of the German Civil Code in terms of a "comprehensive analogy" ("*Gesamtanalogie*")).

[276] *See generally* Sunstein, *supra* note 98, at 425-26 (criticizing structural approaches to statutory interpretation because they are based on the questionable assumption "that statutes are in fact internally consistent and coherent").

[277] I discuss these functions of general principles *infra* Part III.C.1.

[278] *See infra* notes 376-97 and accompanying text.

[279] For a discussion of this process, see *infra* Part III.D.

textualists and dynamicists. At issue in this dimension is the appropriate role of courts in supplementing and adapting a statute where interpretation in the narrow sense reveals a substantive gap.[280]

Recall that textualists advocate a restrictive view on this score: Because federal courts have no independent lawmaking power, the textualist argument runs, a judge faced with a statutory gap lacks a constitutional foundation on which to craft a substantive solution.[281] Instead, she has no choice but to apply the value system of the preexisting legal order (often state law) to fill the gap in the federal legislation.[282] This view thus carries forward the traditional judicial hostility to the preemptive scope of statutes, in particular where they encroach on an area of well-developed common law.[283]

It is in this dimension that the endorsement of a code-like methodology in CISG article 7 has its most potent impact. Arguments based on internal general principles have been "developed to a high art" in civil law countries as a foundation for developing statutory law.[284] Indeed, this remains perhaps the principal difference between the civil law and common law approaches to statutory interpretation.[285] Consonant with the civil code methodology, the paradigm of CISG article 7 instructs interpreters to seek the values for the development of law on an international level, specifically in the "general principles" on which the relevant convention is based. The paradigm

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[280] *See supra* notes 137-38 and accompanying text.

[281] *See supra* notes 134-36 and accompanying text.

[282] Grant Gilmore described this standard characteristic of a "statute" as follows:

> [W]hen a case arises [that] is not within the precise statutory language, which reveals a gap in the statutory scheme or a situation not foreseen by the draft[ers] (even though the situation is within the general area covered by the statute), then the court should put the statute out of mind and reason its way to decision according to the basic principles of the common law.

Gilmore, *supra* note 197, at 1043.

[283] *See supra* notes 87-89 and accompanying text.

[284] Summers & Taruffo, *supra* note 233, at 471 (summarizing the reports of scholars from seven civil law countries).

[285] *See id.* (observing, after a review of statutory interpretation in seven civil law and two common law countries, that "systemic arguments based on general legal principles . . . are deployed very extensively and, indeed, developed to a high art in all countries except for the UK and the USA," and noting the traditional tendency of courts in the latter two countries to fall back on the preexisting common law to fill statutory gaps); *see also* Eskridge, *supra* note 112, at 1011-12 (contrasting the traditional approach in this country with the civil law tradition of "draw[ing] principles and public values from the statutes themselves"). For an analysis of the historical antecedents of this divergence between civil and common law systems, see Hans W. Baade, *The* Casus Omissus*: A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INT'L L. & COM. 45 (1994).

thus directly rejects the new textualists' restrictive approach to the role of courts in filling substantive statutory gaps.[286]

This express instruction to courts to develop the law addresses the constitutional concerns of textualist and intentionalist commentators alike. Recall that the principal—and highly controversial[287]—argument of these commentators is that federal courts have no independent lawmaking authority.[288] The interpretive methodology of CISG article 7 dilutes these arguments entirely. It does so by delegating authority to federal courts to engage in what is, in effect, international common law-making on the basis of a convention's "general principles."[289]

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[286] *See* Bonell, *supra* note 160, at 73 (arguing that CISG article 7 rejects the traditional narrow interpretive approach of common law courts); Ferrari, *supra* note 180, at 202 & n.103 (concurring with Bonell).

[287] The subject of the common law powers of federal courts has itself been one of the most animated themes of modern legal scholarship. For an introduction to this highly charged debate, see Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1247 (1996) ("In this century . . . federal courts have found it increasingly appropriate in many areas to disregard state law in favor of so-called federal common law."); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 883 (1986) ("When an issue of law is not governed by a federal enactment—constitutional or statutory—there is always a potential question whether the state law will govern or whether federal common law will be developed to displace state law."); Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 899 (1996) ("This Article addresses another way in which the Supreme Court has altered dramatically the balance between state and federal power during the 1990s: by restricting the federal common law making powers of the federal courts."); Merrill, *supra* note 95, at 2 ("Writing about federal common law has slowed to a mere trickle. . . . [T]here is a tendency to dismiss questions about the legitimacy of federal common law as inconsequential." (footnote omitted)). For a comprehensive review of the common law powers of federal courts in the international arena, with special reference to the enforcement of foreign judgments, see Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 257 (1991).

[288] *See supra* notes 94-95 and accompanying text (arguments of intentionalists); *supra* notes 136-38 and accompanying text (arguments of new textualists).

[289] *See* Merrill, *supra* note 95, at 40-46 (describing congressional authorization to courts to develop substantive law as "delegated lawmaking"); *see also* Sunstein, *supra* note 98, at 421-22 (criticizing textualism for failing to accommodate such instances of delegated lawmaking authority). The Supreme Court has itself often concluded that, absent congressional authorization, the common law powers of federal courts are limited to the narrow cases in which there is a "significant conflict between some federal policy or interest and the use of state law." O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994); *see also* Atherton v. FDIC, 117 S. Ct. 666, 670-74 (1997) (canvassing Supreme Court precedent on federal common law); Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (noting that federal common law is limited to a "few and restricted instances"); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("[A]bsent some congressional authorization to formulate substantive rules of decision, federal com-

The significance of this delegation only increases when one considers that such "general principles" are nowhere expressly identified in the extant international conventions, and that many of those principles whose existence may be more evident ("good faith," "reasonableness," and the like) have neither a predetermined nor an immutable content in any event. CISG article 7 thus contemplates an active role for courts in seeking out and giving content to the substantive principles that will guide the future development of the law.

Properly appreciated, then, the "general principles" methodology reflects an instance in which "Congress has given the courts the power to develop substantive law."[290] In this respect, the paradigm of CISG article 7 can be likened to the Sherman Antitrust Act,[291] section 301(a) of the Labor Management Relations Act,[292] or (more controversially) Title VII of the Civil Rights Act of 1964.[293] In each of these

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mon law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." (citations omitted)).

[290] *Texas Indus.*, 451 U.S. at 640.

[291] *See* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (concluding that the Sherman Act delegates authority to federal courts to develop substantive federal law); *see also* Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 385 n.1 (1991) (Stevens, J., dissenting) (citing *National Society* and noting that "[c]onstruing the statute in light of the common law concerning contracts in restraint of trade, we have concluded that only unreasonable restraints are prohibited"). Even Justice Scalia acknowledges that the Sherman Act authorizes the courts to develop the law to reflect changed circumstances. *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) (Scalia, J., concurring) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.").

[292] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957) (holding that section 301(a) of the Labor Management Relations Act "authorizes federal courts to fashion a body of federal law for the enforcement of... collective bargaining agreements"); *see also* International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 855 (1987) (same).

[293] *See* Sunstein, *supra* note 98, at 421-22 (arguing that "the Sherman Act and Title VII are closely analogous"); J. Hoult Verkerke, Note, *Compensating Victims of Preferential Employment Discrimination Remedies*, 98 YALE L.J. 1479, 1491 (1989) (stating that "Congress affirmatively delegated to federal courts the task of developing an equitable system of remedies" under Title VII); *see also* Holder v. Hall, 512 U.S. 874, 966 (1994) (Stevens, J., concurring) (arguing that in both Title VII and the Sherman Act "Congress has legislated in general terms," and that both Acts thus require the courts to formulate their own theories of implementation). Similar arguments have been advanced with regard to the remedial goals of 42 U.S.C. § 1983. *See* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 88 & n.197 (1989) (arguing that Congress has delegated to the federal courts "broad discretion in interpretation" under § 1983); Kit Kinports, *The Buck Does Not Stop*

cases, examination of the statute at issue reveals that, implicitly or explicitly, Congress has delegated to the federal courts the power to engage in the kind of substantive lawmaking traditionally reserved to common law courts.

The authority delegated by CISG article 7 is, admittedly, more circumscribed than the power transferred by these domestic statutes. In contrast to these open-ended delegations,[294] the text, context, and drafting history of the new generation of international conventions will provide substantial guidance to courts on many issues within their scope. The important point is one of principle: Courts have authority on the basis of CISG article 7 to construct substantive solutions for gaps that emerge in a convention's regulatory scheme.[295] The significance of this authority will only increase as the corrosive effect of time reveals such gaps with greater frequency.[296]

CISG article 7 thus rejects the restrictive approach that is evident in much of the recent Supreme Court treaty jurisprudence. In contrast to the Court's approach in cases such as *Chan*, *Zicherman*, and *Aérospatiale Nationale*,[297] the interpretive paradigm of CISG article 7 empowers courts to construct substantive solutions to unresolved questions within the scope of an international commercial law convention. This alone is a noteworthy development. But as I will examine in greater detail below, the special significance of the methodology of CISG article 7 is that it contemplates the development of an

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Here: Supervisory Liability in Section 1983 Cases, 1997 U. ILL. L. REV. 147, 157 (arguing that "Congress delegated to the federal courts the task of developing the law" under § 1983).

[294] *See National Soc'y*, 435 U.S. at 688 (finding a delegation of lawmaking power in the area of antitrust law based on the broad, indefinite nature of the Sherman Act); *Lincoln Mills*, 353 U.S. at 451 (finding an implied delegation of lawmaking power from the open-ended nature of a single provision, section 301(a), in the Labor Management Relations Act).

[295] *See* Rosett, *supra* note 243, at 299 (stating that "[a]rticle 7 seems to express the wish that the broad terms of the Convention be filled in over time by a world common law, a shared body of interpretation that would supply a gloss on the text," but objecting to the lack of textual guidance for the process). In the case of CISG article 7, this authority comes with important strings attached. I examine these "strings"—in the form of deference to the needs of international uniformity—*infra* Part III.D.

[296] For a discussion of a "dynamic" interpretation of an international commercial law convention, see *infra* Part III.C.2.

[297] *See supra* notes 144-54 and accompanying text. The contrast with the reasoning of the Court in *Zicherman v. Korean Air Lines Co.* is particularly striking. There, Justice Scalia refused to craft a solution to an unresolved issue in the Warsaw Convention because "[t]he Convention neither adopted any uniform rule of its own nor authorized national courts to pursue uniformity in derogation of otherwise applicable law." 516 U.S. 217, 230-31 (1996).

"international common law" through the cooperation of the formally independent national courts and arbitral tribunals.[298]

2. Contrast with the Uniform Commercial Code

The impact of the methodology contemplated by CISG article 7 is also illustrated by a contrast with what can best be described as the schizophrenic approach of the Uniform Commercial Code. At one location, the U.C.C. suggests that it adopts a civil code-like approach to the supplementation and elaboration of its provisions. Section 1-102 instructs that the U.C.C. "shall be liberally construed and applied to promote its underlying purposes and policies."[299] In language that should be reminiscent of the above discussion of civil code methodology, the comments to that section then proceed to propose something very much like an inductive method to fill gaps in the U.C.C.'s provisions:

> This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.
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> The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.[300]

Unfortunately, the very next section dilutes this apparent clarity of purpose. Contrary to section 1-102's suggested "internal" development, section 1-103 provides that supplementation of the U.C.C. should proceed on the basis of external sources of law, specifically the preexisting common law: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake,

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[298] *See infra* Part III.D.

[299] U.C.C. § 1-102(1) (1994).

[300] *Id.* § 1-102 official cmt. 1. The comment to U.C.C. section 1-104 then appears to state expressly what section 1-102 suggests: "This Act [is] carefully integrated and intended as a uniform codification of permanent character covering an entire 'field' of law." *Id.* § 1-104 official cmt.

bankruptcy, or other validating or invalidating cause shall supplement its provisions."[301]

The comments to this section then affirmatively state that section 1-103 "indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced" by the U.C.C.[302]

This internal conflict on supplementation of the U.C.C. has produced no small amount of ambiguity. Some commentators have seized on the language of section 1-102 to argue that the U.C.C. adopts a "true code" methodology.[303] Others have emphasized that section 1-103 expressly endorses the continued vitality of the external common law principles, except where displaced by the "particular provisions" of the U.C.C.[304] Some have even argued that the equitable principles of the common law can "carve exceptions from or otherwise modify" the express provisions of the U.C.C.[305]

On the whole, courts have been open to a flexible approach to the interpretation and supplementation of the U.C.C., including

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[301] *Id.* § 1-103. Many of the express matters contained in this list would also fall within the clause excluding issues of "validity" from the scope of the U.N. Sales Convention. *See* CISG, *supra* note 7, art. 4; *infra* note 327. The basic notion of U.C.C. section 1-103 goes much further, however. The section itself makes clear that all "principles of law and equity" continue to apply under the U.C.C. Moreover, the comments to the section also provide that the required reference to the external common law for principles of "validity" broadly "extends to cover any factor which at any time or in any manner renders or helps to render valid any right or transaction." U.C.C. § 1-103 official cmt. 1.

[302] U.C.C. § 1-103 official cmt. 1.

[303] *See* Gedid, *supra* note 190, at 354-59, 376-83 (noting that "[t]he Code," and in particular section 1-102, contain "statements about the use of purpose and policy in interpretation and application"); Hawkland, *supra* note 188, at 302-05, 313-20 (concluding that the U.C.C. is a "true code" which "states its own aims"); *see also* McDonnell, *supra* note 97 (emphasizing the "purposive" aspect of interpretation under the U.C.C.).

[304] *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 19 (3d ed. 1988) (arguing that preexisting "general equitable principles remain largely intact" under the U.C.C.); Robert S. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U. L. REV. 906, 908-13 (1978) (discussing the continuing significance of common law principles under the U.C.C.); *see also* Steve H. Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part II: The English Approach and a Solution to the Methodological Problem*, 31 ARK. L. REV. 171, 227-30 (1977) (arguing that the principles of law and equity should supplement provisions of the Code "in any case where their application more definitely will promote the orderly conduct of commercial affairs and transactions regulated by the Code").

[305] WHITE & SUMMERS, *supra* note 304, at 19; *see also* Summers, *supra* note 304, at 908-13 (analyzing the appropriate circumstances for application of such a standard).

through the use of internal statutory analogies.[306] Nonetheless, cases continue to abound in which courts have looked to external sources to resolve questions clearly within the scope of the U.C.C.[307] The short of the matter is that a fair amount of confusion remains in reconciling the role of preexisting common law principles with the preemptive effect of the U.C.C. provisions.

The code methodology embraced in principle in CISG article 7 proceeds on a different course. As we have seen, that paradigm requires as a primary matter an internal search for the principles necessary to resolve interpretive inquiries within the scope of the relevant international convention.[308] A clear implication of this approach is a broader displacement of preexisting law than is suggested by U.C.C. section 1-103. In contrast with that national law unification effort, the paradigm of CISG article 7 reflects a fundamental policy goal to replace the prior legal order with a new foundation of shared international values, both legal and equitable.[309]

To be sure, CISG article 7(2), like U.C.C. section 1-103, permits resort to otherwise applicable law in some circumstances.[310] But, significantly, article 7(2) inverts the priority of its domestic counterpart. Under section 1-103, common law legal and equitable principles con-

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[306] For examples of the use of analogies under the U.C.C., see WHITE & SUMMERS, *supra* note 304, at 18 n.88 (citing, inter alia, *Irving Leasing Corp. v. M & H Tire Co.*, 475 N.E.2d 127 (Ohio Ct. App. 1984), as an example of a court analogizing U.C.C. section 2-302 to a lease); Frier, *supra* note 200, at 2211-14 (describing the case of *County Fire Door Corp. v. C.F. Wooding Co.*, 520 A.2d 1028 (Conn. 1987), as an example of inductive reasoning under the U.C.C.); and Donald J. Rapson, *A "Home Run" Application of Established Principles of Statutory Construction: U.C.C. Analogies*, 5 CARDOZO L. REV. 441, 445 (1984) (discussing the use of analogies under the U.C.C.)).

[307] Indeed, Professors Hillman, McDonnell, and Nickels devote an entire book of nearly a thousand pages (as well as a supplement) to the continuing influence of "common law and equity" under the U.C.C. *See* ROBERT A. HILLMAN ET AL., COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE (1985 & Supp. 1991); *see also* Rosen, *supra* note 208, at 1182-84 (citing cases in which courts have filled gaps in the U.C.C. by reference to the common law). Professors Hillman, McDonnell, and Nickels ultimately argue, however, that the issue of displacement of the common law should "initially be stated in terms of whether the pre-Code doctrine has been expressly or *impliedly* overturned by the Code, bearing in mind the purposive reading of the Code invited by Section 1-102." HILLMAN ET AL., *supra*, at 1-7.

[308] *See supra* notes 170-71, 185-86 and accompanying text.

[309] *See* WHITE & SUMMERS, *supra* note 304, at 19 (arguing that while section 1-103 of the U.C.C. may "displace prior legal principles," "general equitable principles remain largely intact"); Summers, *supra* note 304, at 936-37 (same).

[310] *See* CISG, *supra* note 7, art. 7(2) (stating that in the absence of governing "general principles," unsettled questions are to be settled "in conformity with the law applicable by virtue of the rules of private international law").

tinue to apply unless displaced by "particular" U.C.C. provisions. The paradigm of CISG article 7(2), in contrast, suffers a retreat to domestic law only after an active search for relevant values within the international convention itself.[311]

This more preemptive approach of CISG article 7 should not come as a surprise.[312] The variety of legal and cultural traditions governed by an international convention must be contrasted with the relative harmony in the common law of the various states of the United States.[313] Resort to the common law by state courts thus does not greatly imperil the goal of uniformity. Retreat to the preexisting national law, in contrast, may be fatal to an international law unification effort. The risks of destructive nonuniformity are apparent in the very statement that recourse to national law would mean application of legal standards of countries as diverse as the United States, Singapore, Jordan, and Ghana. It is precisely this need for detachment from the preexisting legal order(s) that animates the internal, "general principles" methodology of CISG article 7.

C. *Dynamic Jurisprudence in the Development of an International Common Law*

At its heart, the interpretive paradigm of CISG article 7 reflects a single unifying aspiration: to initiate a process for the development of a truly independent, international body of law. If a specific convention's express provisions are the corporal frame, then its "general principles" represent the moral values that will guide this new entity's growth to maturity. And to ensure the true independence of this process, the paradigm mandates that these values be fashioned free from the influence of the convention's numerous and disparate domestic parents.

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[311] *See infra* notes 427-28 and accompanying text (discussing the interaction between the general principles methodology and the needs of uniformity).

[312] This preemptive effect is particularly clear with the U.N. Sales Convention. *See* Gyula Eörsi, *General Provisions, in* INTERNATIONAL SALES, *supra* note 243, at 2-1, 2-5, 2-6 ("CISG is not a law complementary to national laws but is meant to be an exhaustive regulation." (footnote omitted)); Rosett, *supra* note 243, at 294-95 ("Subject to the limited exceptions of the first five articles, the [U.N.] Convention fully occupies the field, excluding all national law in [international sales] transactions.").

[313] *See* E. Allan Farnsworth, *A General Survey of Article 3 and an Examination of Two Aspects of Codification*, 44 TEX. L. REV. 645, 656 (1966) (citing U.C.C. section 1-103 and observing that "the [Uniform Commercial] Code recognizes that there may be instances when it is not all inclusive .... Unlike a code in a civil law country, the Code is not written on a *tabula rasa* but rather against the background of prior case law.").

In these general principles, therefore, we find the foundation for the development of the law under an international commercial law convention. On the basis of the impressive body of interpretive case law that already exists under the U.N. Sales Convention, this section will demonstrate how the general principles fulfill that function. It will show that such principles can provide the conceptual tools to fill substantive gaps in a convention, coordinate the interaction of its constitutive parts, and even ameliorate the rigidity in its express provisions.

1. The Function of General Principles

The model for the aspirations of CISG article 7, as we have seen, was the adoption of comprehensive civil codes by the new nation-states of continental Europe in the nineteenth century.[314] It should thus not come as a surprise that much of the vitality of these civil codes has derived from an expansive interpretation of their foundation values. A common feature of civil codes is the so-called "general clause," a broad, abstract provision of an undefined moral or equitable content. After an early phase of extreme formalism,[315] modern civil law courts and scholars have seized on these general clauses as

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[314] *See supra* notes 188-203 and accompanying text.

[315] Ironically, the codification movement, as originally conceived, sought to prohibit an active jurisprudence in the development of the law. The positivist ideology that animated the civil codification process was premised to a large extent on a distrust of the judiciary as a source of lawmaking. The drafting of the codes thus proceeded with the goal of defining legal standards so clear, concise, and coherent that a judge would be relegated to a mere mechanical role. In the words of Montesquieu, one of the foremost proponents of this view, "[j]udges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor." CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 159 (Thomas Nugent trans., 1949) (1748); *see also* EUGEN EHRLICH, FREIE RECHTSFINDUNG UND FREIE RECHTSWISSENSCHAFT 2 (1903) (criticizing the traditional view that "[a] jurist does not create law, he has to find it" (translation by author)). Frederick the Great of Prussia took this point to the extreme. In an effort to make legislation "judge-proof," the Prussian General State Code, *Allgemeines Landesrecht*, contained in excess of 17,000 provisions designed to prescribe the solution to all conceivable factual disputes. The code then forbade judges, under threat of punishment, even to "interpret" its provisions. *See* MERRYMAN, *supra* note 195, at 39 ("[T]he doctrine of separation of powers, when carried to an extreme, led to the conclusion that courts should be denied any interpretive function . . . ."); Douglas Lind, *Free Legal Decision and the Interpretive Return in Modern Legal Theory*, 38 AM. J. JURIS. 159, 163 (1993) ("[The Prussian State code] included express language directing judges to follow the solutions and to not independently interpret the code provisions.").

expansive delegations of authority to develop the law within the scope of the civil codes.[316]

There is perhaps no better example of this than the standard provision in civil codes requiring the performance of legal obligations in "good faith," or, more broadly, in "equity."[317] These clauses do not have a defined target or content; they are, rather, "super control norm[s]"[318] that pervade all legal relationships within the scope of the civil codes. In the poetics of John Dawson, such general clauses "could be described as roving search lights, supplied with beams that could penetrate anywhere in private law."[319]

The courts of Germany have been at the forefront of the dynamic jurisprudence licensed by the moral force of general clauses. Seizing on such abstract clauses as a "good faith" requirement ("Treu und Glauben")[320] in legal relations and a nullification of contracts contrary to "good morals" ("die guten Sitten"),[321] together with principles de-

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[316] *See* WIEACKER, *supra* note 196, at 377 (explaining that general clauses are "guidelines in the form of maxims addressed to the judge, designed both to control and to liberate him" (translation by author)); Frier, *supra* note 200, at 2202 ("In the present century, European judges have seized upon . . . general clauses as a legislative derogation to them of a general 'moral' authority and supervision in administering the codes . . . .").

[317] *See, e.g.*, CODE CIVIL [C. CIV.] art. 1134 (John H. Crabb trans., 1977) (Fr.) (declaring that agreements legally made "must be executed in good faith"); BÜRGERLICHES GESETZBUCH [BGB] art. 242 (F.R.G.) ("The obligor is bound to effect performance according to the requirements of good faith . . . ." (translation by author)); C.C. art. 1375 (Italy) ("The contract shall be performed according to good faith."); NIEUW BURGERLIJK WETBOEK [NBW] bk. 6, tit. 1, art. 2(1) (Peter Haanappel & Ejan MacKaay trans., 1990) (Neth.) ("A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and equity."); SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL SUISSE [CC], CODICE CIVILE SVIZZERO [CC] art. 2(1) (Switz.) ("Every person is bound to exercise his rights and fulfill his obligations according to the principles of good faith." (translation by author)). On the application of these provisions in general, see Arthur Hartkamp, *The Concept of Good Faith in the UNIDROIT Principles for International Commercial Contracts*, 3 TUL. J. INT'L & COMP. L. 65, 67 (1994).

[318] NORBERT HORN ET AL., GERMAN PRIVATE AND COMMERCIAL LAW 135 (Tony Weir trans., 1982); *see also* RENE DAVID & JOHN E.C. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 150-54 (3d ed. 1985) (discussing the role of "super-eminent principles" under civil codes).

[319] John P. Dawson, *The General Clauses, Viewed from a Distance*, 41 RABELSZ 441, 442 (1977).

[320] *See* BGB art. 242. For a detailed analysis of the growth of this provision into the "sovereign paragraph" of the German Civil Code, see Ralph Weber, *Entwicklung und Ausdehnung des § 242 BGB zum "königlichen Paragraphen"*, 1992 JURISTISCHEN SCHRIFT 631.

[321] *See* BGB art. 138(1) ("A legal transaction that violates good morals is void." (translation by author)).

rived from inductive reasoning, modern German courts have developed a whole variety of legal institutions that are nowhere to be found in the civil code's more detailed provisions. For example, courts have in this manner restricted the misuse of legal rights, recognized a power to adjust legal relations to changed social or economic circumstances,[322] and created entirely new forms of liability.[323] Even the French judiciary (although in form continuing to adhere to a formalist approach) has developed in this manner vast areas of substantive law free from an express foundation in the *Code civil*.[324]

The drafters of CISG article 7 gained their insights from these developments. The gap-filling regime of CISG article 7(2) establishes a core aspiration that the unsettled questions in a convention should be resolved in conformity with the general principles on which it is based.[325] The only serious limitation on this goal is that the unresolved question must fall within the "matters governed by" the convention.[326] This limitation refers to issues that are otherwise logically

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[322] *See* ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] [Supreme Court] 47, 48 (51-52) (F.R.G.) (granting the right to terminate a construction contract based on a form of frustration of purpose ("*Wegfall der Geschäftsgrundlage*") where an expected building permit was denied).

[323] Prominent examples of this active jurisprudence by German courts include the creation of new legal institutions, such as: liability for precontractual conduct ("*culpa in contrahendo*," which is an analog for promissory estoppel in this country), *see, e.g.*, BGHZ 71, 386 (392-400) (holding a municipality liable for failing to discuss essential information in negotiations over a hauling contract); BGHZ 60, 221 (224-25) (discussing the doctrine of *culpa in contrahendo*), and liability for an "impermissible" exercise of a right ("*unzulässige Rechtsausübung*"), *see* BGHZ 44, 367 (371-72) (applying this doctrine to preclude a party from challenging the validity of a contract that the party knew was void when it was concluded). A summary of the active jurisprudence of German courts based on "good faith" alone runs to almost 200 pages. *See* Günter H. Roth, *Article 242, in* 2 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 95-290 (Helmut Heinrich ed., 3d. ed. 1994).

[324] *See* Farber, *supra* note 100, at 525-28 (discussing the substantive activism of French courts); Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 99-100 (1994) (arguing that "'it would be hard to find a single article of the [French] Civil Code to which there have not been added depths of meaning and major restrictions and extensions that could not have been foreseen in 1804'" (quoting JOHN P. DAWSON, THE ORACLES OF THE LAW 401 (1968))); *see also* RENÉ DAVID & HENRY P. DE VRIES, THE FRENCH LEGAL SYSTEM 15 (1958) (noting that as a consequence of social and economic forces in France at the end of the 19th century, "the legislative positivist view began to wane, opening the way to the increasingly dominant role of the courts"); Michel Troper et al., *Statutory Interpretation in France, in* MacCormick & Summers, *supra* note 214, at 171, 177 (arguing that "French judges tend to disguise the filling of gaps [in statutes] as interpretation").

[325] *See supra* notes 185-86 and accompanying text.

[326] CISG, *supra* note 7, art. 7(2). In order for the gap-filling regime of CISG article 7(2) to apply, a transaction must, of course, also fall within the relevant convention's

within a convention's regulated field of activity, but are nonetheless expressly excluded from its scope. The most common example of these so-called "gaps *intra legem*" is the exclusion of transactions with consumers.[327]

Apart from this (obvious) condition, the interpretive process founded on general principles is expansive indeed. "Unsettled questions" can arise in different substantive contexts and even at different times in the life of a convention.[328] In the substantive dimension, gaps may appear either when no express provision governs a particular issue (let us call these "true" gaps) or, if a relevant provision exists, when its precise scope and appropriate application are in doubt (let us refer to these as "hidden" gaps).[329] In the temporal dimension, unsettled questions may be present from a convention's very adoption,

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general international sphere of application. *See, e.g.*, Convention on Factoring, *supra* note 38, art. 2 (stating the scope of the Convention); Convention on Financial Leasing, *supra* note 37, art. 3 (same); CISG, *supra* note 7, art. 1(1) (describing CISG's sphere of application).

[327] *See, e.g.*, CISG, *supra* note 7, art. 2(a) (excluding "goods bought for personal, family, or household use"); Convention on Financial Leasing, *supra* note 37, art. 1(4) (excluding personal transactions); Draft Convention on Receivables Financing, *supra* note 43, art. 4(a) (same). For political or policy reasons, international private law conventions likewise commonly exclude from their scope specific types of substantive transactions (such as sales of ships and aircraft under the U.N. Sales Convention). *See, e.g.*, CISG, *supra* note 7, art. 2(b)-(f) (excluding enumerated types of sales); Convention on Agency, *supra* note 36, art. 3 (excluding certain types of agency); Draft Convention on Receivables Financing, *supra* note 43, art. 4(c) (excluding certain assignments). The U.N. Sales Convention also contains an expansive exclusion of issues relating to the "validity" of a sales contract or any of its provisions. CISG, *supra* note 7, art. 4(a) (explaining that the Convention is not concerned with "the validity of the contract"). For a detailed analysis of CISG article 4(a), see Hartnell, *supra* note 72. *See also* Peter Winship, *Commentary on Professor Kastely's* Rhetorical Analysis, 8 NW. J. INT'L L. & BUS. 623, 636 (1988) (describing CISG article 4's validity exception as a potential "black hole" for the Convention). Similarly, a particular provision of a convention may expressly refer to the continued applicability of domestic law for the matter within its scope. *See, e.g.*, CISG, *supra* note 7, art. 28 (providing that a court is not bound to order specific performance of a contract under the U.N. Sales Convention "unless the court would do so under its own law in respect of similar contracts of sale not governed by [CISG]").

[328] These types of unresolved questions within a convention's scope are commonly referred to as gaps *praeter legem*. *See* Ferrari, *supra* note 180, at 217 (explaining that the rule that questions concerning matters governed by the Vienna Sales Convention that are not expressly settled in it must be settled "in conformity with its general principles" applies to gaps *praeter legem*).

[329] A form of this typology for statutory gaps appears in LARENZ & CANARIS, *supra* note 275, at 362-66 (referring to "open" and "hidden" gaps—"'offene' [und] 'verdeckte' Regelungslücken").

or may first emerge in light of later developments in the field of regulated activity.[330]

a. *General Principles and "True Gaps"*

General principles perform their most patent function in resolving true gaps. Behind such gaps lies a failure of the drafters either to foresee an issue at all or to achieve a consensus on its resolution (or, occasionally, an affirmative decision that the matter is best left to a casuistic development by the courts). Because the issue nonetheless falls within a convention's scope, a substantive rule must be constructed to fulfill the convention's regulatory scheme.

As an illustration of this function of general principles, consider the practically significant issue of the appropriate interest rate for amounts due under the U.N. Sales Convention. CISG article 78 provides a right to interest for any sum in arrears.[331] But no provision defines the rate at which the interest is to be calculated.[332] This issue is significant precisely because it arises in every disputed case, and because the wide substantive divergence in domestic solutions often elevates the interest rate issue to equal prominence with the underlying claim itself. Indeed, the interest rate issue alone has already generated well over one hundred reported decisions.[333]

Unfortunately, this "true gap" also provides an example of a failure of some interpreters to appreciate fully the unifying function of general principles. Finding no express "general principle" on the subject, a number of courts and arbitral tribunals have disregarded the Convention entirely; instead, they have retreated to the vagaries of conflict-of-law rules to identify domestic law solutions to the is-

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[330] I examine the role of a dynamic interpretation of an international private law convention in Part III.C.2.

[331] CISG, *supra* note 7, art. 78 ("If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it . . . .").

[332] The issue of the proper interest rate for sums in arrears was among the most controversial issues in the drafting of the Convention. Because of the significant differences of opinion on the issue, the best the drafters were able to achieve was the statement of principle in CISG article 78 which leaves the interest *rate* issue unresolved. *See* HONNOLD, *supra* note 23, at 523-24 (discussing the drafting history of CISG article 78); Barry Nicholas, *Interest*, *in* Bianca & Bonell, *supra* note 160, at 568, 568-70 (same).

[333] These decisions are listed at *CISG W3 Database, Pace University School of Law* (last updated Feb. 9, 1998) <http://www.cisg.law.pace.edu/> [hereinafter *CISG Database*], as well as at 1 UNILEX, *supra* note 235, art. 78, at 160-61.

sue.[334] The consequence has been an application of divergent substantive norms precisely in the manner the adoption of the Convention was designed to prevent.

Other adjudicators, in contrast, have appreciated the significance of the issue. These tribunals have seized upon the general principle of "full compensation"[335] as the basis for applying a uniform rule of the bank credit rate applicable at the injured party's place of business.[336] Such is the proper function of the interpretive paradigm of CISG article 7. By applying an internal solution, these interpreters have given effect to the potential of general principles to unify the law, even on matters left altogether unsettled in the Convention's express provisions.[337]

Not all instances of silence necessarily reflect a "true gap," however. Examination of related provisions in a convention in light of

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[334] *See, e.g.*, OLG Hamm, Case No. 11 U 206/93 (F.R.G.), *reprinted in* 2 UNILEX, *supra* note 235, E.1995-2, at 411-12 (Feb. 8, 1995); OLG Munich, Case No. 7 U 4419/93 (F.R.G.), *reprinted in* 2 UNILEX, *supra* note 235, E.1994-7, at 309 (Mar. 2, 1994); Landsgericht [LG] [Trial Court] Aachen, Case No. 41 O 111/95 (F.R.G), *reprinted in* 2 UNILEX, *supra* note 235, E.1995-18, at 482 (July 20, 1995); *cf.* Delchi Carrier SpA v. Rotorex, 1994 WL 495787, at *7 (N.D.N.Y. Sept. 9, 1994) (applying, without analysis, the statutory interest rate set forth in 28 U.S.C. § 1961(a) in a case governed by the U.N. Sales Convention), *aff'd in part and rev'd in part*, 71 F.3d 1024 (2d Cir. 1995).

[335] *See supra* note 272 and accompanying text (discussing the full-compensation principle).

[336] *See, e.g.*, Arbitral Award of the ICC Court of Arbitration-Paris (No. 7660/JK), *reprinted in* 2 UNILEX, *supra* note 235, E.1994-20, at 351, 353 (Aug. 23, 1994) (citing CISG article 74); Arbitral Award of the Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft-Wien (No. SCH-4366), *reprinted in* 2 UNILEX, *supra* note 235, E.1994-14, at 331, 333 (June 15, 1994) (citing CISG article 78); Arbitral Award of the Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft-Wien [Arbitral Centre of the Austrian Federal Economic Chamber] (No. SCH-4318), *reprinted in* 2 UNILEX, *supra* note 235, E.1994-13, at 327, 330 (June 15, 1994) (explaining that the "full compensation" principle underlies the CISG). A more refined approach would interpret the principle of "full compensation" to require application of the bank lending rate in effect for the currency of payment at the place of payment. For an elaboration on this approach, see *infra* note 405.

[337] For a similar conclusion, see HONNOLD, *supra* note 23, at 525-26 (arguing that the general principles of the Convention require application of the current price of credit); Koneru, *supra* note 212, at 123, 125-26 (arguing for a similar result on the basis of the general principle of full compensation under CISG). Admittedly, a clear majority of commentators support a retreat to otherwise-applicable domestic law on this issue. *See, e.g.*, ENDERLEIN & MASKOW, *supra* note 72, at 313 (arguing that an internal resolution of the interest rate issue improperly meshes "interest" with "damages"); Franco Ferrari, *Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention*, 24 GA. J. INT'L & COMP. L. 467, 476-77 (1995) (concluding that the tendency of courts is to apply domestic law to resolve this issue); Nicholas, *supra* note 332, at 570 ("The rate to be applied is . . . a matter . . . for the domestic law.").

their drafting history may reveal an affirmative decision by the drafters to reject a particular normative solution to a disputed issue. Consider, for example, the case of the effect of a written "confirmation" of contract negotiations under the U.N. Sales Convention. The well-established rule in one domestic legal system (Germany) holds that a merchant's failure to reply to such a confirmation amounts to assent to the contract terms set forth therein (whatever the actual results of the negotiations).[338] The Convention has no provision that addresses this issue. Examination of its drafting history nonetheless makes clear that the drafters expressly refused to grant effectiveness to such confirmations without some affirmative act indicating assent on the part of the recipient.[339]

b. *General Principles and "Hidden Gaps"*

The role of general principles in resolving "hidden" gaps presents a more delicate problem. Textualists might emphasize that the gap-filling regime of CISG article 7(2) only becomes relevant for questions that are "not expressly settled" in a convention.[340] From this, one might conclude that if a provision on its face provides an answer for a disputed issue, there is no relevant breach in the regulatory scheme. The convention's general principles thus never come into play.

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[338] As a result of the insistence of the German delegation, the Hague Convention on Formation gave effect to such confirmations, in principle, through the recognition of a corresponding normative trade usage. *See* PETER SCHLECHTRIEM, EINHEITLICHES UN-KAUFRECHT 44 (1981); Ernst von Caemmerer, *Die Haager Konferenz über die Internationale Vereinheitlichung des Kaufrechts*, 29 RABELSZ 101, 125-26 (1965).

[339] The Convention contains an express provision that "[s]ilence or inactivity does not in itself amount to acceptance." CISG, *supra* note 7, art. 18(1). Moreover, a significant limitation on the scope of trade usages in CISG article 9 clearly amounted to a refusal to give effect to written confirmations. *See* Peter Schlechtriem, *Vorbemerkungen zu Artt. 14-24*, *in* KOMMENTAR, *supra* note 72, at 121, 124; *see also Report of the Working Group on the International Sale of Goods on the Work of its Eighth Session*, [1977] 8 Y.B. Comm'n Int'l Trade L. 82, U.N. Doc. A/CN.9/SER.A/1977 [hereinafter *Report on Eighth Session*] (setting aside for later consideration a proposal by the UNCITRAL Secretariat to give automatic effect to nonmaterial terms in such confirmations); *Report of the Working Group on the International Sale of Goods on the Work of its Ninth Session*, [1978] 9 Y.B. Comm'n Int'l Trade L. 78, U.N. Doc. A/CN.9/SER.A/1978 (deleting a corresponding provision, proposed article 7(3), because "it was generally considered that any modifications to the contract after its conclusion should require agreement of the parties in accordance with the provisions of [what is now article 29]").

[340] *See* CISG, *supra* note 7, art. 7(2) (permitting resort to general principles for "[q]uestions . . . not expressly settled" in the Convention).

A more principled analysis reveals the flaws in this type of formalism. On a simple textual level, the "general principles" methodology defined by CISG article 7(2) broadly applies to all "questions" left unsettled by a convention's express provisions. Since the application of article 7(2) is not limited to unintentionally omitted substantive rules, an unresolved "question" can arise from uncertainty about the appropriate application of a general norm in a specific factual circumstance. Moreover, as we have seen, the dynamic approach embraced in the paradigm of CISG article 7 rejects the formalism of traditional common law statutory interpretation; instead, it instructs interpreters to probe not only the intent and purpose behind express provisions, but also their role in a convention's broader regulatory scheme.[341]

"General principles" can take on relevance, therefore, even where an express standard purports to provide a definitive answer to a disputed issue. Such "hidden" gaps can arise in three main situations. The first involves the preemptive scope of an express standard or set of standards. Suppose a provision defines specific rights or specific obligations in a given circumstance. In the absence of language of exclusivity, the hidden, "unsettled" question is whether the express standards preclude recognition of more expansive rights or obligations or different means by which to achieve the defined end.[342]

Consider, for example, the significant matter of contract formation under the U.N. Sales Convention.[343] The Convention's express

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[341] *See supra* Part III.A.

[342] An examination of express provisions in light of their drafting history may of course lead to the opposite conclusion. *See* HONNOLD, *supra* note 23, at 156-57 (distinguishing, with regard to gap-filling, between cases in which the drafters "deliberately rejected the extension of [a] specific provision[]" and cases which the drafters failed to "anticipate and resolve"). Take the case of a buyer's declaration of avoidance of a contract under CISG article 49(1)(b). That provision identifies only one situation (nondelivery) in which the buyer may exercise such a right in absence of a "fundamental breach" by the seller. The question that arises is whether other forms of breach (a defect in the goods, for example) may form the basis of a right to declare avoidance. Examination of the language of the provision in light of an unequivocal rejection of suggestions to expand the list in the drafting stage reveals that no corresponding "hidden" gap exists in this provision. *See* Ulrich Huber, *Article 49, in* KOMMENTAR, *supra* note 72, at 477, 491; Michael Will, *Right to Avoid Contract, in* Bianca & Bonell, *supra* note 160, at 359, 363-64 (discussing CISG article 49). For a similar conclusion in the case of a potential "true gap" in a convention, see *supra* notes 338-39 and accompanying text. Even in cases in which the drafters expressly rejected a particular normative resolution of an issue, however, the effects of future social and technological change may reveal a gap that did not originally exist. *See infra* Part III.C.2 (discussing dynamic interpretation).

[343] Formation principles are of particular significance because the Convention permits the parties to exclude its application. *See* CISG, *supra* note 7, art. 6 ("The par-

provisions adhere to the traditional notion that contractual obligations arise through a formal acceptance of a formal offer.[344] No mention is made of any other formation processes. What remains unclear is whether the defined traditional method precludes the recognition of contractual relations formed by other means.

This issue becomes particularly significant when the parties proceed to perform in the face of an obvious conflict between their standard business terms.[345] Some commentators fail to recognize a "gap" in this instance at all. In their view, the Convention leaves no option but to apply the traditional rigid notions of "mirror image" and "last shot" to impose a formal agreement on the parties.[346] Others suggest that the Convention entirely lacks guiding principles on this score. Because the matter is insoluble within the Convention, they argue, courts must retreat to nonuniform national law as the rule of decision.[347]

Both of these schools fail to see the full potential of the "general principles" methodology. Neither the Convention's express provisions nor the required analyses of their drafting history reveal a man-

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ties may exclude the application of this Convention . . . ."). The plural form of this provision makes clear that one party cannot, through clever drafting of standard business terms or otherwise, exclude application of the Convention. Within its sphere of application, in other words, the Convention's formation principles will apply as an initial matter, and there is little that one party can do, by unilateral action, to avoid that result. For an analysis of this issue, see Van Alstine, *supra* note 260, at 11-13.

[344] *See* CISG, *supra* note 7, arts. 14-24 (governing the formation of the contract).

[345] CISG article 19 addresses the treatment of a purported acceptance that deviates from the terms of the offer. *See* CISG, *supra* note 7, art. 19. In its practical effect, this provision adopts the outmoded "mirror image rule" familiar to common law jurists. It does not, however, adequately address the common case in which the parties proceed to perform in the face of an express objection by *both* to the effectiveness of the standard terms of the other. For an analysis of this issue, see Van Alstine, *supra* note 260, at 28-33 (discussing this issue in terms of a "partial dissensus" between the parties).

[346] *See* E. Allan Farnsworth, *Modified Acceptance, in* Bianca & Bonell, *supra* note 160, at 175, 179 (arguing that performance of the contract operates as an acceptance of the "last shot" proposed before such performance); Burt Leete, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary*, 6 TEMP. INT'L & COMP. L.J. 193, 214 (1992) (same); J. Clark Kelso, Note, *The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of Forms*, 21 COLUM. J. TRANS. L. 529, 554 (1983) (same).

[347] *See* Huber, *supra* note 26, at 444-45; François Vergne, *The "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 33 AM. J. COMP. L. 233, 256-57 (1985) (noting that the failure of the Convention to address "'contracts by conduct'" may leave courts with "no alternative other than to refer to a domestic solution").

date of exclusivity for the defined traditional method of formation.[348] It is precisely in such situations that the Convention's "general principles" fulfill their essential function.

I have argued elsewhere that the principle of party autonomy permits adjudicators to accommodate the reasonable expectations of both parties in the case of conflicting standard business terms.[349] In this way, the "general principles" methodology mitigates the rigidity of a formation scheme that would otherwise impose an arbitrary fiction of assent to the standard terms of one party in disregard of the other party's express intent to the contrary.[350] At the same time, the use of internal principles to resolve such a "hidden gap" precludes a destructive retreat to domestic law on an issue central to the fulfillment of the Convention's goal of international uniformity.

A "hidden" gap also may be present in a second, more direct form: conflict between two provisions on the same subject matter. This type of indeterminacy in legal standards results when the drafters either fail to recognize the significance of the conflict or are unable to agree on how to resolve it. The conflict between the price provisions of the U.N. Sales Convention illustrates this unfortunate phenomenon. In order for an offer to be valid, article 14(1) requires,

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[348] UNCITRAL formed a special working group to address this issue in the drafting of the U.N. Sales Convention. The group proposed a provision that would have recognized a contract based on "the mutual assent of the parties to form it, even though it is not possible to establish an offer and an acceptance." *Summary of Deliberations of the Commission on the Draft Convention on the Formation of Contracts for the International Sale of Goods*, 33d Sess., para. 100, Annex I, U.N. Doc. A/33/17 [hereinafter *Formation Deliberations*], *reprinted in* [1978] 9 Y.B. Comm'n Int'l Trade L. 39, U.N. Doc. A/CN.9/SER.A/1978. The Commission discussed this proposal and subsequent revisions in its 192nd, 193rd, 195th, and 200th meetings between June 1 and June 7, 1978. *See Summary Records*, U.N. Docs. A/CN.9/SR.192, 193, 195, and 200. The records of the deliberations reveal that the delegates were simply unable to agree so late in the drafting process on the proper wording of a corresponding provision. *See Summary Records of the 200th Meeting*, U.N. Doc. A/CN.9/SR.200, at 5 (noting the announcement of the United Kingdom representative "that his delegation was withdrawing its request for the inclusion of the additional article in order to spare the Commission further time and trouble"); *Formation Deliberations*, *supra*, para. 104, *reprinted in* [1978] 9 Y.B. Comm'n Int'l Trade L. 39 ("The proposals were withdrawn because of the extreme difficulties of formulating an acceptable text.").

[349] *See* Van Alstine, *supra* note 260, at 84-92.

[350] One German court has already recognized the potential of this general principle of party autonomy. *See* Local Court of Kehl, Neue Juristische Wochenschrift-RR [NJW-RR] No. C 925/93 (1996) 565, 565 (F.R.G.) (holding, in the alternative, that performance by the parties operated as an implied mutual assent only to the terms on which their standard forms agreed).

at a minimum, an "implicitly" determinable price;[351] article 55, however, provides a standard for determining the price for a "validly concluded" contract that does not "expressly or implicitly" include a provision for determining the price.[352]

"General principles" methodology also resolves this type of hidden flaw. The principles of party autonomy and reasonableness permit a court to recognize an enforceable contract, even without an implicitly determinable price, when it appears from the perspective of a reasonable person[353] that the parties intended to establish binding obligations.[354] In this way, general principles can operate to coordinate the interaction between a convention's express constituent elements.

The final principal form of a "hidden" gap is the most challenging. In this form, there is no doubt that an express provision purports to define the solution for the legal issue in dispute. The friction arises when the application of the standard in the specific factual circumstance runs contrary to broader notions of equity and fairness. Consider, for example, a statutory provision that requires a buyer of goods to give timely notice of a breach of contract.[355] Then suppose

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[351] CISG, *supra* note 7, art. 14(1) (requiring that an offer must, at a minimum, "make[] provision for determining . . . the price").

[352] *Id.* art. 55 (providing for the price "generally charged" under comparable circumstances at the time of conclusion of the contract). Not surprisingly, scholars disagree over how to reconcile these two conflicting provisions. *Compare* HONNOLD, *supra* note 23, at 199-203 (arguing that article 55 permits the recognition of a contract without an implicit identification of the price), *and* Schlechtriem, *supra* note 339, at 132-33 (same), *with* E. Allan Farnsworth, *Formation of Contract, in* INTERNATIONAL SALES, *supra* note 243, at 3-1, 3-8 to 3-10 (arguing that article 55 becomes applicable only if the parties have first made an implicit identification of the price), Barry Nicholas, *The Vienna Convention on International Sales Law*, 105 L.Q.R. 201, 213 (1989) (same), *and* Kelso, *supra* note 346, at 537-38 (same).

[353] *See supra* notes 266-70 and accompanying text. See in particular CISG, *supra* note 7, art. 8(2), which requires interpretation of party statements and conduct according to the understanding of a "reasonable person" in the position of the other party.

[354] *See* John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11, 17 (1988) (concluding that "[i]f a reasonable person would regard the deal as binding, the interpretation of the parties' manifestations requires recognition of that agreement"); *cf.* Oberster Gerichtshof [OGH] [Supreme Court], No. 2 Ob 547/93 (Aus.) (finding an enforceable contract where a reasonable person would have been able to determine the price under the given circumstances, although avoiding the specific interaction of articles 14(1) and 55), *reprinted in* 2 UNILEX, *supra* note 235, E.1994-29, at 387-90 (Nov. 10, 1994).

[355] *See* CISG, *supra* note 7, art. 39(1) ("The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to

that in a particular case notice of a breach is not timely forthcoming, but the seller either caused the delay herself or later induced detrimental reliance by the buyer through a failure to assert the defense of lack of notice. If mechanically applied, the notice provision would preclude recovery of damages. An unsettled question nonetheless exists regarding the extent to which equitable values can ameliorate the rigidity in the specific notice rule.

A recent opinion of an international court of commercial arbitration in Vienna illuminates how "general principles" can function as an equitable modulation of rights and obligations in such circumstances.[356] In that arbitration, a buyer's notice of defects in the goods failed to comply with an express time requirement in the parties' contract.[357] In subsequent dealings between the parties, however, the seller for a significant period did not assert his contractual rights.[358] Finding no express provision on the subject, the arbitral tribunal correctly probed the general principles of the U.N. Sales Convention for guidance. The tribunal concluded that the general notions of estoppel and "good faith" implicit in the Convention's provisions precluded the seller from asserting even the rights expressly defined in the parties' contract.[359]

Similar concepts operate in many legal systems.[360] But it is pre-

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have discovered it."); *cf.* U.C.C. § 2-607(3)(a) (1991) (requiring notice of breach within a reasonable time).

[356] Arbitral Award of the Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft-Wien [Arbitral Centre of the Austrian Federal Economic Chamber] (No. SCH-4366), *reprinted in* 2 UNILEX, *supra* note 235, E.1994-14, at 331, 333 (June 15, 1994).

[357] *See id.* at 328.

[358] *See id.* at 329.

[359] *See id.* at 329-30; *see also* OLG Karlsruhe, Case No. 1 U 280/96 (June 25, 1997) (F.R.G.), *available in CISG Online* (last modified Feb. 20, 1998) <http://www.jura.uni-Freiburg.de/iprl/cisg/>, at 4 [hereinafter *CISG Online*] (concluding that the principle of *Treu und Glauben* [good faith] operates as a limitation on the exercise of contractual rights in a transaction governed by the U.N. Sales Convention).

[360] *See, e.g., supra* note 317 and accompanying text (citing and discussing the notion of "good faith" in a variety of civil law systems). The Uniform Commercial Code in this country contains an express provision on good faith. *See* U.C.C. § 1-203 (1994) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). As we have seen, however, the U.C.C. directs that most such equitable principles are to be found in external sources, namely in the preexisting common law. *See id.* § 1-103 ("Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."). For a detailed examination of the role of equitable principles under the U.C.C., see Summers, *supra* note 304.

cisely because of the variety of domestic approaches[361] that the general principles methodology holds a particular significance for an international law unification effort. By rejecting a restrictive textualist approach and sanctioning an active use of equitable principles, CISG article 7 empowers adjudicators to do overtly what they are likely to do covertly anyway. In the international context, the almost unavoidable consequence of such a covert application of equitable values is a reliance on potentially idiosyncratic domestic notions of fairness and justice.

The dynamic jurisprudence advocated here attacks this hidden strain of homesickness by promoting transparency. That is, it licenses an open articulation and elaboration of equitable principles on an internal, and thus an international, level. Consonant with the primary goal of international uniformity, this dynamic jurisprudence will thus initiate the necessary casuistic process of consensus formation on the appropriate circumstances for the application of equitable principles.[362] As a result, the implicit adoption of the internal development methodology of the civil codes will secure in a particular way the long-term success of an international law unification effort.[363]

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[361] Consider, for example, the divergence on the role of "good faith" between two western legal systems. German courts, as we have seen above, have expanded the notion of *Treu und Glauben* into a "super control norm" for the German Civil Code. *See supra* notes 317-23 and accompanying text. The corresponding provision in the U.C.C. in the United States (section 1-203), in contrast, is expressly limited to the "performance or enforcement" of extant obligations. Moreover, within the U.C.C., the contours of the good faith obligation are defined differently in the various constituent articles. *Compare* U.C.C. § 1-203, *with id.* § 2-103(1)(b) (defining good faith for merchants as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"), *id.* § 3-103(a)(4) (defining good faith with respect to negotiable instruments as "honesty in fact and the observance of reasonable commercial standards and fair dealing"), *id.* § 5-102(a)(7) (defining good faith with respect to letters of credit as "honesty in fact in the conduct or transaction concerned"), *and id.* § 8-102(a)(10) (defining good faith with respect to investment securities as "honesty in fact and the observance of reasonable commercial standards of fair dealing").

[362] The equitable function of general principles does not vest unfettered discretion in adjudicators. Examination of the text, context, and drafting history of a provision may reveal an express determination not to permit a particular normative resolution. *See supra* notes 339-40, 343 and accompanying text. For instance, the express rejection of automatic effectiveness for "letters of confirmation" should preclude recognition of a broad substantive principle to the contrary. *See supra* note 340 and accompanying text (discussing the relevance of CISG article 7(2) to questions "not expressly settled" in a convention).

[363] Another notable means of flexibility under the U.N. Sales Convention is found in trade usages. CISG article 9 expressly gives effect to international trade usages that are "widely known to, and regularly observed" by parties "in the particular trade concerned." CISG, *supra* note 7, art. 9(2). For an analysis of this issue, see Garro, *supra*

Admittedly, the extant international commercial law conventions may not reflect the level of comprehensiveness and systematization of a civil code.[364] The implicit adoption of code methodology in the paradigm of CISG article 7 nonetheless requires adjudicators to undertake an active search for applicable general principles to fill the inevitable gaps in a convention's express provisions. To be sure, CISG article 7 permits a retreat to national law where this active search fails to yield relevant general principles. As I will explain in greater detail in Part III.D, however, the mandatory deference to the needs of international uniformity will mean that this route of escape to domestic law should be a narrow one indeed.[365]

2. Dynamic Interpretation in the International Context

When examined carefully, the expansive interpretive function of "general principles" advocated above creates a potential tension in the paradigm of CISG article 7. As we have seen, that paradigm contemplates an interpretive process founded on both textual analysis and an active probe for intent and meaning in a convention's drafting history.[366] In Part III.C.1, however, I argued that general principles can become relevant in interpretive inquiries even when a provision purports to define the rights or obligations in dispute (that is, in the case of a "hidden" gap).

This potential for a disconnect between an express general norm and its application in a particular factual circumstance will grow with the passage of time. Even comprehensive efforts such as the U.N. Sales Convention will show increasing signs of age under the effect of changes in the regulated field of activity. The unresolved tension, therefore, is the extent to which the actual expectations of the drafters operate to constrain the future development of the law under an international convention.

Recall that this tension is among the principal subjects of dispute in the debate over statutory interpretation in the United States. True formalists argue that the substantive content of a statute—as deter-

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note 61, at 476-80 (discussing the role of trade usages under the Convention); Van Alstine, *supra* note 260, at 46-49 (same).

[364] Indeed, as we have seen, the extant conventions commonly exclude from their scope certain matters (such as transactions with consumers) that affect core public policy concerns of member states. *See supra* note 327 and accompanying text (discussing such "gaps *intra legem*" in a Convention).

[365] *See infra* notes 427-28 and accompanying text.

[366] *See supra* Part III.A.1-2.

mined by its text or the original legislative intent, depending on the particular strain of formalism[367]—is fixed as of the date of enactment.[368] If a statute becomes outdated, it is argued, the responsibility for needed corrections falls to the legislature.[369]

In contrast, proponents of dynamic statutory interpretation argue that "interpretation" should also include consideration of changes in societal values and in a statute's legal context subsequent to its adoption. The metaphor for this view, once again, is a nautical one in which the legislature "builds a ship and charts its initial course," but the "current course" is set primarily by judicial interpreters—"the crew on board" a statutory vessel.[370]

The paradigm of CISG article 7, in my view, embraces this latter, dynamic approach to interpretation. The animating philosophy of the "general principles" methodology, as we have seen in Part III.C.1, is that interpreters must play an active role in filling substantive gaps and ameliorating the rigidity in an international commercial law convention.

For three principal reasons, the course of this dynamic jurisprudence is not rigidly anchored to the specific expectations of the original designers. The first reason flows from the very nature of "general principles." Notions such as "reasonableness," "cooperation," and "good faith" mean little in isolation. They take on substantive meaning only through a consensus in the relevant interpretive community on the appropriate context for their application. Even if it were possible to reconstruct the drafters' original suppositions, there is little to suggest that the drafters intended the "meaning" of "good faith" and its conceptual cousins to be frozen as of their adoption.

The content of these concepts is fluid and mutable, their meaning subject to change with evolution in the consensus. Nevertheless, CISG article 7 instructs adjudicators to employ such principles to re-

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[367] *See supra* notes 93-95 and accompanying text (discussing "intentionalism"); *supra* notes 134-39 and accompanying text (discussing "textualism"); *see also* Eskridge, *supra* note 105, at 1480-81 (describing these approaches as "originalist").

[368] *See supra* notes 134-39 and accompanying text. See in particular Easterbrook, *Text and History*, *supra* note 119, at 69 (arguing that "[l]aws . . . do not change unless the legislature affirmatively enacts something new"). Supporters of a "purposivist" approach similarly would "use[] the original purpose of the statute as a surrogate for original intent." Eskridge, *supra* note 105, at 1480.

[369] *See supra* note 139 and accompanying text (describing the textualist argument that Congress should be the body that updates outdated legislation).

[370] Aleinikoff, *supra* note 111, at 21.

solve "unsettled" questions that emerge in the future. As the aging of a convention reveals such questions with greater frequency, these fluid values will increase in prominence. It would be pure fiction to suggest that their future content could be controlled by the "original intent" of the drafters.

The second reason emerges from the implicit endorsement of a code-like interpretive methodology in CISG article 7. We have seen that civil law courts have developed the codes' general clauses into "super control norms" far beyond anything contemplated by their drafters.[371] These norms have operated to give the codes the flexibility necessary to adapt to circumstances unforeseen at the time of their adoption. The experiences of the various codes have differed, of course, and nothing requires that an international convention steer the same course as any one of them. The "general principles" methodology nonetheless makes clear that the flexible navigational philosophy of the civil codes animates the interpretive paradigm of CISG article 7 as well.

Finally, a dynamic interpretation of an international convention is, perhaps paradoxically, also compelled by the needs of international uniformity. Without a means for adaptation, the inevitable social and technological changes in the relevant field of commerce will make any formal unification of legal standards fleeting. In addition, legal and practical obstacles effectively make a formal amendment of an international commercial law convention impossible.[372]

To paraphrase Judge Friendly's coincidental use of a similar nautical metaphor thirty years ago, therefore, only an active judicial interpretation of a convention can "keep the ship afloat," because there is little hope "that [legislative] rescue will arrive."[373] The long-term consequence of a rigid formalist approach, in contrast, would be an inevitable increase in reliance on nonuniform national legal concepts

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[371] *See supra* notes 315-23 and accompanying text (discussing the use of general principles in the courts of Germany and elsewhere).

[372] *See supra* note 243 and accompanying text (discussing the difficulty of amending an international convention).

[373] Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 799 (1963) (lamenting the failure of Congress to amend outdated statutes and arguing that "generally, the best the judge can do is to keep the ship afloat, in better shape or worse, in the hope that rescue will arrive"). For a skeptical spin on the nautical metaphor in the context of the U.N. Sales Convention, see Rosett, *supra* note 243, at 270-71 (arguing that "the interpreter of the Convention is left at sea without an anchor of a coherent conceptual framework in which to understand specific provisions of the Convention").

to resolve the increasing indeterminacy in a convention's provisions. Such a result would run directly contrary to the primary goal of establishing and maintaining uniformity in the relevant field of international private law.[374]

The initial identification of the general principles themselves, to be sure, must proceed on the basis of the values reflected in the relevant convention. The interpretive paradigm of CISG article 7 speaks of the principles on which a particular convention is "based." Such considerations surely inspired the comment of Professor John Honnold that the recognition of a particular general principle must be "moored to premises that underlie specific provisions of the [U.N. Sales] Convention."[375]

One should not read too much into this observation, however. The "internal" development methodology described in CISG article 7 does not imply that all general principles are "embedded" by the drafters "in" each convention in some collective, if unconscious, process. Instead, the recognition of a particular general principle requires the holistic form of inductive reasoning discussed above.[376] Under this interpretive process, text, context, and legislative history serve as mere evidence in the primary inquiry into the values reflected by a particular convention. There is no formal requirement that all general principles find a foundation in any specific intent of the drafters.

Indeed, even the consensus understanding of the values reflected in a convention's express provisions may evolve over time. Consider the controversial issue of the role of "good faith" under the U.N. Sales

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[374] *See* Honnold, *supra* note 79, at 138 (summarizing the German and Dutch reports to the 12th International Congress of Comparative Law of 1986 to the effect that "failure to make full use of the reference in Art. 7(2) to the 'general principles' on which the [U.N. Sales] Convention is based would undermine the Convention's provision (Art. 7(1)) calling for 'uniformity in . . . application'").

[375] HONNOLD, *supra* note 23, at 155.

[376] *See supra* notes 265-79 and accompanying text (discussing academic approaches to general principles and inductive reasoning). Professor Honnold himself later advocated a "generous response to the invitation of Article 7(2) to develop the [U.N. Sales] Convention through the 'general principles on which it is based'" in order to promote the needs of uniformity. HONNOLD, *supra* note 23, at 157; *see also id.* at 60-61 ("The Sales Convention must be read and applied in a manner that permits it to grow and adapt to novel circumstances and changing times."). The French text of the paradigm of CISG article 7(1) supports this more flexible approach. That version suggests that the relevant general principles are not merely those on which a convention "is based," but rather those which "inspired" a convention. *See* CISG art. 7(1) (Fr.), *reprinted in* Bianca & Bonell, *supra* note 160, at 749-50 ("les principes généraux dont elle s'inspire ou").

Convention. This issue was controversial precisely because of the widely divergent views on the force of "good faith" under national law.[377] It should not surprise, therefore, that opponents of a corresponding provision in the Convention, which included, significantly, delegates from the United States,[378] argued that the differing domestic social and legal traditions would preclude uniformity in the application of such an abstract concept.[379]

The best the drafters could achieve on this contentious issue was described, perhaps sardonically, by Professor Farnsworth as "a statesmanlike compromise."[380] The compromise amended CISG article 7(1) to read: "In the interpretation of this Convention, regard is to be had . . . to the need to promote uniformity in its application and the observance of good faith in international trade."[381] The precise effect of this curious arrangement was unclear from its inception.[382] Viewed in isolation, it at a minimum reflects an inability of the drafters to agree on a broader role for good faith than an instrument of

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[377] *See supra* note 361 and accompanying text (contrasting the approach of the German courts with that of the U.C.C. in the United States); *see also* Ferrari, *supra* note 180, at 212-13 (discussing domestic systems' differing conceptions of "good faith").

[378] *See* Eörsi, *supra* note 61, at 348 (noting the opposition of delegates from the United States to a broad good faith provision); E. Allan Farnsworth, *Problems of Unification of the Law of Sales from the Standpoint of the Common Law Countries, in* PROBLEMS OF UNIFICATION OF INTERNATIONAL SALES LAW 1, 11-13 (1980) (noting the United States' hesitancy in endorsing the CISG provision on good faith). Interestingly, the principal supporters of a good faith provision were the (then) socialist countries. *See* Eörsi, *supra* note 61, at 348 ("[T]he Hungarian delegation submitted a proposal for the adoption of the principles of fair dealing and good faith . . . .").

[379] *See Formation Deliberations, supra* note 348, para. 44, *reprinted in* [1978] 9 Y.B. Comm'n Int'l Trade L. 39 U.N. Doc. A/CN.9/SER.A/1978 (noting arguments of opponents that "the development of a coherent body of case law was unlikely to take place, since national courts would be influenced by their own legal and social traditions in applying the [principle] to individual cases"); *First Committee Deliberations, supra* note 167, *in* Official Records, *supra* note 7, at 258 para. 50 (noting the comments of Professor Farnsworth that "he felt that a [good faith] provision such as the one proposed would be uncertain and dangerous in practice"). For a more detailed analysis of the debate over the good faith provision, see HONNOLD, *supra* note 23, at 146-47; Bonell, *supra* note 160, at 68-69, 71; and Winship, *supra* note 327, at 630-32.

[380] Farnsworth, *supra* note 378, at 19.

[381] CISG, *supra* note 7, art. 7(1). For the drafting history of this compromise, see *Formation Deliberations, supra* note 348, paras. 55-60. Various delegations made attempts at the 1980 Vienna Conference to alter this limited compromise, all of which were unsuccessful. *See First Committee Deliberations, supra* note 167, *in* Official Records, *supra* note 7, at 257-59 paras. 40-57 (noting support for retention of the existing reference to good faith).

[382] *See, e.g.*, Bonell, *supra* note 160, at 83 (referring to the good faith clause as a "rather peculiar provision"); Eörsi, *supra* note 61, at 354 (describing the good faith provision as a "strange arrangement").

interpretation of the provisions of the Convention.[383] A number of commentators have thus concluded that the Convention imposes no obligations of good faith on the parties to an international sales contract.[384]

Scholarly analysis subsequent to the adoption of the Convention, however, has led to an emerging consensus on a much more expansive role for good faith.[385] Whatever the drafters' actual intent, this new consensus recognizes "good faith" as one of the "general principles" of the Convention.[386] Adjudicators have also begun to join the chorus.[387] As a result, the principle of good faith can also serve the

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[383] *See* HONNOLD, *supra* note 23, at 146 (noting that the drafters decided that a "good faith" provision "should not be imposed loosely and at large, but should be restricted to a principle for interpreting the provisions of the Convention. This compromise was generally accepted and was embodied in the concluding words of Article 7(1)."); Eörsi, *supra* note 61, at 349 ("[A]lmost everybody thought [article 7(1) was] a strange compromise, in fact burying the principle of good faith and thus covering up the lack of compromise."); Eörsi, *supra* note 312, at 2-7 (observing that the compromise on good faith "consign[ed] it to a ghetto and g[ave] it an honorable burial").

[384] *See* E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions and National Laws*, 3 TUL. J. INT'L & COMP. L. 47, 55 (1995) (arguing that "Article 7.1 falls short of imposing a duty of good faith on the parties"); Winship, *supra* note 327, at 631 (observing that "the reference to 'good faith' is limited to interpreting the Convention"); *see also* HONNOLD, *supra* note 23, at 146-48 (arguing that "the Convention rejects 'good faith' as a general requirement and uses 'good faith' solely as a principle for interpreting the . . . Convention," but later examining the broad role of that principle under specific Convention provisions).

[385] It is an accepted canon that public international law treaties are to be interpreted in a spirit of good faith. *See* Vienna Convention on Treaties, *supra* note 70, art. 31(1) ("A treaty shall be interpreted in good faith . . . ."); Bederman, *supra* note 69, at 968 (arguing that the principle of good faith is designed to promote a friendly spirit between countries). Even under the limited view of its effect, the "good faith" provision of CISG article 7 plays a broader role than this accepted canon. The subject of the presumption of "good faith" under this interpretive paradigm is not merely the contracting states; rather, CISG article 7 instructs interpreters to "to promote . . . the observance of good faith *in international trade*." CISG, *supra* note 7, art. 7(1) (emphasis added).

[386] *See* Bonell, *supra* note 160, at 84-85 (discussing various meanings of good faith); Herber, *supra* note 72, at 94; Magnus, *supra* note 274, at 114 ("[T]he overwhelming majority of commentators views the principle of good faith [in CISG article 7(1)] also as a standard . . . for the entire relationship between the parties." (translation by author)); *cf.* Isaak I. Dore & James E. Defranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L.J. 49, 61 (1982) (stating that good faith "appears to be a pervasive norm analogous to the good faith obligation of the U.C.C."); Kastely, *supra* note 168, at 597-98 (arguing that the "fundamental value of good faith . . . is implied throughout the Convention's detailed provisions").

[387] *See supra* note 359 and accompanying text (noting a German court's recognition of the "controlling principle of *Treu und Glauben* [good faith]" under article 7(1)

broader "gap-filling" functions contemplated in CISG article 7(2),[388] and thus is relevant in disciplining the behavior of the parties as well.[389]

This expansive role of good faith is founded on an evolution in the understanding of the values reflected in the Convention's regulatory scheme as a whole.[390] In light of the Convention's comprehensive definition of the rights and obligations of the parties, this wider perspective reveals that the purported limitation to interpretation is a semantic distinction without a substantive difference.[391] The curious

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of CISG (translation by author)); OLG Celle, Case No. 20 U 76/94 (May 24, 1995) (F.R.G.), *available in CISG Database, supra* note 333, at 6 (same); OLG Munich, Case No. 7 U 1720/94 (Feb. 8, 1995) (F.R.G.), *available in CISG Database, supra* note 333, at 12 (concluding that the principle of *Treu und Glauben* under CISG precluded a seller from asserting certain claims for damages); Arbitral Award of the Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft No. SCH-4318, *reprinted in* 2 UNILEX, *supra* note 235, E.1994-13, at 327 (June 15, 1994) (suggesting that good faith is one of the general principles of the U.N. Sales Convention).

[388] For an analysis of these functions, see *supra* Part III.C.1. Tellingly, the obligation of good faith already had been recognized as a "general principle" under the Hague ULIS, although that Convention contained no express reference similar to that in CISG article 7(1). *See* OLG Düsseldorf, Case No. 6 U 206/77 (Jan. 20, 1983) (F.R.G.), *reprinted in* INTERNATIONALE RECHTSPRECHUNG ZU EKG UND EAG, art. 17, No. 7, at 186 (Peter Schlechtriem & Ulrich Magnus eds., 1987); *cf.* Eduard Wahl, *Article 17, in* KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT 121, 135-36 (Hans Dolle ed., 1976) (discussing the "worldwide meaning" of good faith).

[389] *See* ENDERLEIN & MASKOW, *supra* note 72, at 54 (discussing the notion "that the principle of good faith also addresses the parties and their conduct"); Bonell, *supra* note 160, at 84 (stating that good faith is "also necessarily directed to the parties to each individual contract of sale"); Schlechtriem, *supra* note 339, at 25. *But see* Ferrari, *supra* note 180, at 214-15 (rejecting the argument that the principle of good faith can impose additional obligations on the parties).

[390] *See* ENDERLEIN & MASKOW, *supra* note 72, at 54 (arguing that even though the more limited role of good faith "might have been the intention of some delegations, the final Convention has to be interpreted as a whole and in such a way that each and every [one] of its provisions acquires a meaning"); Eörsi, *supra* note 61, at 348 (discussing how individual delegations' positions played out in the Convention's larger groups). Even commentators who see greater potential force in the original limitation to "interpretation" have acknowledged that good faith will, in the course of time, extend to the parties as well. *See* ENDERLEIN & MASKOW, *supra* note 72, at 54-55 (concurring with Professor Winship that the criticism of good faith will "lead to the recognition of a general obligation of the parties to behave accordingly"); Winship, *supra* note 327, at 635 (acknowledging the likelihood that "over time a general obligation on contracting parties to act in good faith will be accepted").

[391] Through the interpretation mandated by article 7(1), these comprehensive substantive provisions include an obligation to exercise the defined rights and perform the defined obligations in good faith. *See Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, UNCITRAL Working Group on the International Sale of Goods, U.N. GAOR, U.N. Doc. A/CONF.97/5 (Mar. 14, 1979), *in* Official Records, *supra* note 7, at 18 (identifying the variety of

compromise of article 7(1) may require consideration of good faith only in the interpretation of a convention. It does not, however, preclude the recognition of good faith as a "general principle" of broader application.[392]

Support for this conclusion is also found in a subtlety that is only ambiguously reflected in the English language version of CISG article 7(1). Only by carefully reading this version does one find that the word "promote" applies not only to "uniformity," but to "the observance of good faith in international trade" as well.[393] That provision thus instructs adjudicators to include a prospective calculus in their interpretation of an international convention. In fixing the contours of the rights and obligations defined in the Convention, article 7(1) calls upon adjudicators to consider how their decisions will promote the observance of good faith by other transactors in the future. As a result, the mandated consideration of good faith is also directed to the conduct of the parties to international transactions.[394]

The message here is that the limited expectations of the drafters do not operate as an absolute constraint on the dynamic development of the law. As the case of "good faith" reveals, evolutions in the consensus on the values reflected in a convention can result in an inter-

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"manifestations of the requirement of the observation of good faith" in the Convention, but observing that "[t]he principle of good faith is . . . broader than these examples and applies to all aspects of the interpretation and application of the Convention").

[392] An interesting question in this regard is whether the principle of good faith can "piggyback" on other, less controversial, general principles. Recall, for instance, the general principle of "reasonableness." *See supra* notes 268-70 and accompanying text. One could argue that through its role in "interpretation" of the Convention, "good faith" is an implicit component of the general obligation of reasonableness. I see no obstacle to this reasoning, but, as I argue in the text above, find it unnecessary to the ultimate conclusion that good faith is a general principle of the Convention in its own right.

[393] CISG, *supra* note 7, art. 7(1). Recall that, taken as a whole, article 7(1) reads: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." *Id.*

[394] This conclusion may even extend to article 6's definition of the contours of party autonomy. *See* Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria, in* LEX MERCATORIA AND ARBITRATION 139, 153 (Thomas E. Carbonneau ed., 1990) (arguing that under the U.N. Sales Convention contractual provisions must be interpreted in accordance with good faith). *But see* Ferrari, *supra* note 180, at 224 (asserting that party autonomy prevails over all other general principles). As noted above, some adjudicators—without addressing the substance of this controversy—have used general principles such as good faith and estoppel to limit even the exercise of express contractual rights. *See, e.g., supra* notes 356-59 and accompanying text.

pretation that matures beyond the actual contemplation of the drafters. An international convention in this sense is a living, maturing body of law, founded on certain fundamental values but capable of adapting new interpretations for changed environments.[395] The intent of the drafters is but one of the relevant considerations in this dynamic process of growth and development.[396]

Even under such dynamic considerations, the text, context, and drafting history of a specific provision will of course remain the primary interpretive materials. This conclusion will apply with particular force if such materials are clear and still relevant at the interpretive moment. The friction will arise, however, when a specific provision conflicts with the temporally fluid values reflected in a "general principle."

This suggests a form of interpretive continuum influenced by the dual considerations of clarity and temporal proximity.[397] An explicit textual provision supported by a clearly articulated intent or purpose in the drafting history, and in relative temporal proximity to the interpretive moment, should only rarely yield to the influence of a "general principle." The effect of a letter of confirmation under the U.N. Sales Convention provides a good example here.[398] A provision of ambiguous content and intended application, in contrast, should not enjoy this presumption, especially when interpreted long after its

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[395] This concept carries implications for the international commercial law unification movement as a whole. Subsequent conventions have adopted the interpretive paradigm of CISG article 7—including its good faith provision—verbatim. *See supra* notes 172-78 and accompanying text.

[396] *See* Bonell, *supra* note 160, at 90 (observing correctly that "[o]nce adopted the Convention, like any other law, has a life of its own, and its meaning can change with time so that the intention of the drafters is only one of the elements to be taken into account for the purpose of its interpretation"); *see also* Audit, *supra* note 394, at 153 (noting that the "Convention is meant to adapt to changing circumstances"); Kastely, *supra* note 168, at 607 (arguing that article 7(1) "will allow discovery of principles beyond those elaborated in the text itself").

[397] Professor William Eskridge identified and elaborated on this concept of an interpretive continuum in advocating a dynamic interpretation of domestic statutes. *See* Eskridge, *supra* note 105, at 1496-97 (constructing a model for reading statutes dynamically); *see also supra* notes 110-13 and accompanying text (discussing the dynamic element of the "practical reasoning" approach advocated principally by Professors Eskridge, Frickey, and Farber). For a similar approach, see MacCormick & Summers, *supra* note 215, at 530-31 (suggesting a relative interpretive hierarchy beginning with "linguistic arguments," then "systemic arguments," and then "teleological-evaluative arguments," all of which are informed by "transcategorical arguments" founded on intent).

[398] *See supra* notes 338-39 and accompanying text (discussing different approaches as to the effect of letters of confirmation).

adoption. The evolution in the understanding of the principle of good faith may illustrate this type of dynamic interpretation.[399]

International conventions will be particularly susceptible to the indeterminacy that arises from age.[400] As a result, contemporary values in the form of the flexible general principles of a particular convention will take on increasing significance over time. There are important limitations here, however: The only "contemporary values" of relevance in this dynamic interpretive process will be those of a clearly international character.[401] Moreover, even those international values that satisfy this requirement—such as the most prominent candidate in this respect, the UNIDROIT Principles for International Commercial Contracts[402]—will not exert influence of their own force.[403] Rather, such values will take on relevance only to the extent that they can inform the contemporary understanding of general principles (good faith, reasonable conduct, adequate cooperation,

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[399] *See supra* notes 378-95 and accompanying text (discussing various approaches to understanding the dynamic nature of the rule of good faith).

[400] *See supra* note 243 and accompanying text (discussing the difficulty in updating international conventions).

[401] *See supra* notes 179-82 and accompanying text (discussing the requirement of CISG article 7(1) that an interpreter have regard for a convention's "international character").

[402] Many of the scholars involved in the drafting of the U.N. Sales Convention subsequently participated in the preparation, under the auspices of UNIDROIT, of a form of a "Restatement" of international contract law. *See* MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) (restating the content of the UNIDROIT Principles); Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 282 (1994) (analyzing the UNIDROIT Principles).

[403] *See* Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG—Alternatives or Complementary Instruments?*, 1 UNIF. L. REV. 26, 36 (1996); Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TUL. L. REV. 1149, 1153 (1995) (arguing that "UNIDROIT priniciples offer the judge or the arbitrator a rule that is likely to be more suitable to an international commercial contract than a domestic rule of contract law"); *see also* Magnus, *supra* note 274, at 493 (arguing, too broadly in my view, that the UNIDROIT Principles can be used to fill gaps in CISG even if "they formulate general principles that cannot be derived directly from CISG" (translation by author)).

and the like)[404] first articulated through an analysis of the relevant convention itself.[405]

D. *Building an International Common Law in an Expanded Interpretive Community*

Viewed from a distance, the notion of dynamic jurisprudence in the development of the law would appear contrary to a goal of international uniformity. Encouraging reliance on undefined and fluid "general principles," it would seem, sanctions a kind of interpretive ad hocism, the very antithesis of uniformity in application. A number of scholars have echoed this precise sentiment in reviewing the interpretive methodology of CISG article 7.[406] Some commentators even have seized upon the abstract nature of concepts such as "good faith"

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[404] *See supra* Part III.A.3, B.1 (discussing the internal development methodology embraced in the paradigm of CISG article 7). International values such as the UNIDROIT Principles become relevant in this context precisely because the substantive content of a "general principle" is not frozen as of its adoption in a particular convention. By their very nature, notions such as "good faith" have meaning only with reference to the contemporary context of their application. For a discussion of "good faith" under the UNIDROIT Principles, see Michael Joachim Bonell, *Policing the International Commercial Contract Against Fairness Under the UNIDROIT Principles*, 3 TUL. J. INT'L & COMP. L. 73, 75 (1995); Hartkamp, *supra* note 317, at 65 (discussing the various roles good faith plays in doctrine); and Mary E. Hiscock, *The Keeper of the Flame: Good Faith and Fair Dealing in International Trade*, 29 LOY. L.A. L. REV. 1059, 1059 (1996) (considering the concept of good faith "in nondomestic, nonconsumer transactions in common law systems").

[405] A prime example of this function of the UNIDROIT Principles is on the vexing problem of the interest rate on sums in arrears under the U.N. Sales Convention. For an analysis of this issue, see *supra* notes 331-37 and accompanying text. The UNIDROIT Principles expressly define a method for calculating the appropriate interest rate. *See* UNIDROIT PRINCIPLES OF INTERNATIONAL CONTRACTS princ. 7.4.9(2) (1990) (defining the rate as "the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment"). This rule can be used to give substance to the general principle of "full compensation" under CISG with regard to the proper interest rate on sums in arrears. *See* Bonell, *supra* note 403, at 37; Garro, *supra* note 403, at 1156-57 (arguing that "if an issue were to arise cocerning the proper rate of interest to be applied to a monetary obligation due under a contract of sale governed by the CISG, one may properly resort to the UNIDROIT Principles for the purpose of determining such a rate").

[406] *See* Dore & Defranco, *supra* note 386, at 63 (arguing that the concept of good faith is so vague that "courts will be unable to develop a common definition"); Eörsi, *supra* note 312, at 2-12 (arguing that "the real danger to unification is that in the search for general principles it is unlikely that the tribunals and parties would find the same 'general principles'"); Note, *supra* note 250, at 1992 ("[B]ecause the term 'general principles' is indeterminate, disputants will ultimately argue over what *other* law applies. It is precisely this conflict that unification is intended to avoid.").

as an argument for a reserved approach by courts in the recognition of a convention's "general principles."[407]

There is indeed a superficial appeal to such arguments. As Kent Greenawalt noted on the "elusive quest" for limits on judicial discretion over twenty years ago, "our capacity for self-deception increases as the level of abstraction gets higher."[408] In the international context, this risk of self-deception takes the form of the attraction of familiar domestic legal norms when national adjudicators give content to abstract concepts in an international convention. Moreover, these national adjudicators will themselves inevitably be influenced by their divergent legal, political, and cultural traditions. From this, skeptics argue that the goal of bringing certainty to international transactions through international uniformity in the law is a costly illusion.[409]

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[407] *See* Farnsworth, *supra* note 384, at 55-56 (opposing "any reference to good faith"); E. Allan Farnsworth, *The Convention on the International Sale of Goods from the Perspective of the Common Law Countries, in* LA VENDITA INTERNAZIONALE 1, 18 (Dott A. Giuffre ed., 1981) (arguing against the recognition of a general principle of "good faith" and "fair dealing" under the U.N. Sales Convention because they "are [so] vague that their meaning cannot help but vary widely from one legal system to another [and that t]heir use on operative provision . . . of the CISG would surely lead to confusion and non-conformity"); Note, *A Practitioner's Guide to the United Nations Convention on Contracts for the International Sale of Goods*, 16 N.Y.U. J. INT'L L. & POL. 81, 89 (1983) (suggesting that "[t]he vagueness of a good faith provision may create problems for courts trying to decide when and how to apply it; in addition, overuse or underuse of the principle may lead to inconsistent results or to outright abuse"); Note, *supra* note 250, at 1991-92 (arguing that, because of the uncertainty of the compromise on good faith, courts remain free to apply corresponding domestic law).

[408] Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 397 (1975). For an application of this concern to "general clauses" under a civil code, see Dawson, *supra* note 319, at 444-45, 445 (noting the temptation to view such clauses as "express licenses to judges to go out hunting anywhere and bring back their trophies, to be hung then in the living room").

[409] *See, e.g.*, Peter Behrens, *Voraussetzungen und Grenzen der Rechtsfortbildung durch Rechtsvereinheitlichung*, 50 RABELSZ 19, 27 (1986) (arguing that to expect uniform interpretation of international legal standards "would demand from national judges a level of comparative law education and an appreciation of foreign legal systems that is simply unrealistic" (translation by author)); Hein Kötz, *Rechtsvereinheitlichung—Nutzen, Kosten, Methoden, Ziele*, 50 RABELSZ 1, 7 (1986) (expressing the fear that the permitted resort to abstract general principles by national judges will destroy the very uniformity the U.N. Sales Convention was designed to create); Hobhouse, *supra* note 243, at 533 ("[T]o contemplate that conventions for world-wide adoption will actually produce a uniformity of decision and approach in all countries . . . is illusory. The courts of each country will approach the resolution of any dispute from a view point of its own legal and commercial culture and the divergent influences will be far stronger than the influence of any convention."); *see also* Malcolm Evans, *Uniform Law: A Bridge Too Far?*, 3 TUL. J. INT'L & COMP. L. 145, 153 (1995) (analyzing the arguments by skeptics of the promise of international private law).

A careful consideration of the interpretive paradigm of CISG article 7 reveals, however, certain procedural antidotes to this potential homesickness of national adjudicators.[410] The first of these antidotes relates to what might be termed a "backward-looking" component of uniformity. Fidelity to this directive requires that an interpreter give deference to prior decisions by adjudicators of other countries on the same or similar issues.[411] At its core, this mandate seeks to bridge the formal independence of national courts. It does so by directing them to view their own interpretive discretion as constrained by the decisions of courts in other contracting states.[412]

The second unifying force arises from a "forward-looking" component of the mandate of uniformity. Implicit in the need to promote uniformity[413] is an instruction that an adjudicator consider the likelihood that a particular interpretation will find international ac-

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[410] On the use of the term "antidotes" in this context, see Honnold, *supra* note 62, at 208.

[411] This is now a well-accepted requirement of the interpretive paradigm of CISG article 7. *See, e.g.*, HONNOLD, *supra* note 23, at 142-43 (noting that the Convention requires consideration of interpretations formed in other countries); Bonell, *supra* note 160, at 91 ("A judge or arbitrator faced with the same issue should in any event take into consideration the solutions so far elaborated in other Contracting States."); Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1027 (1996) (arguing that in interpreting the U.N. Sales Convention adjudicators "must take CISG decisions rendered by judicial bodies of other contracting states into account"); Herber, *supra* note 72, at 89 (noting that uniform interpretation and application of the UN Sales Convention can only be achieved "if the courts in the CISG member states applying [the Convention] take into account the decisions of courts in other member states" (translation by author)); Kastely, *supra* note 168, at 601 ("Article 7 envisions deliberation in which courts will treat the decisions of other national courts as significant to their own interpretation . . . ."); Cook, *supra* note 212, at 199 (contending that the United States courts should "grant[] considerable weight to foreign decisions" in interpreting the terms of the Convention).

[412] Indeed, the Supreme Court has observed, in interpreting an international convention without a corresponding express legislative direction, that "'the opinions of our sister signatories [are] entitled to considerable weight.'" Air France v. Saks, 470 U.S. 392, 404 (1985) (quoting Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978)). To support this process, UNCITRAL has established a system, known by the acronym "CLOUT" (for "case law on UNCITRAL texts"), in which national correspondents collect the decisions that interpret the private law conventions negotiated under its auspices. The Secretariat of UNCITRAL then arranges for the translation of abstracts of these decisions and for their dissemination to all contracting states. The information collected under the CLOUT system can also be found in *UNCITRAL Homepage*, *supra* note 33.

[413] Recall that CISG article 7(1) requires that an interpreter of a convention have regard for the "need to *promote* uniformity in its application." CISG, *supra* note 7, art. 7(1) (emphasis added).

ceptance. One German scholar has aptly termed this the "consensus capacity" of an interpretation.[414]

In one sense, this observation merely confirms that courts should not fall back on national concepts as interpretive aids for an international convention.[415] The notion of "consensus capacity" also suggests, however, a more subtle consideration. The interpretation of an international convention is relegated to formally independent national adjudicators proceeding on the basis of different, but equally authentic, texts. The inference that emerges almost from the statement of this fact is that there are no a priori correct interpretations, only ones that have more compelling justifications than the competing alternatives. Moreover, as an interpretive inquiry falls under the influence of abstract concepts (such as a convention's "general principles"), the importance of justification becomes even more pronounced.

Viewed in this light, the need to promote international uniformity takes on a particular meaning: In its practical effect, it calls upon courts to explain in detail the justifications for their interpretive decisions.[416] This may require, for example, formal citations to a provision's drafting history when there is any degree of doubt as to the provision's intended meaning and scope.

A final antidote for the homeward tendency of national adjudicators is found in an expanded view of the relevant interpretive community. To ensure consideration of the broader, including prospective, implications of an interpretive decision, the needs of uniformity will require adjudicators to rely more extensively on scholarly writings. The use of scholars' more detached views, often known collectively as "doctrine,"[417] is a common practice in the elaboration of civil codes as a means of building consensus on difficult issues.[418] Re-

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[414] *See* Huber, *supra* note 26, at 432 (referring to the "*Konsensfähigkeit*" of an interpretation).

[415] *See supra* notes 180-82 and accompanying text (discussing the importance of an international perspective).

[416] *See supra* Part III.B (examining courts' role in interpretation).

[417] *See* Edgar Bodenheimer, *Doctrine as a Source of the International Unification of Law*, 34 AM. J. COMP. L. 67, 71 (Supp. 1986); Frier, *supra* note 200, at 2205 (discussing the interaction "between 'case law' (*jurisprudence*) and academic writing (*doctrine*)" in the interpretation of the French Civil Code).

[418] *See* Summers & Taruffo, *supra* note 233, at 474 (comparing the influence of scholars on various nations' codes); Frier, *supra* note 200, at 2205-09 (discussing the development of European codes).

course to doctrine in the interpretation of international conventions should serve the same function.[419]

Taken together, these considerations suggest a dynamic process of interaction among national courts on an international level. The absence of an international commercial tribunal of last resort means that a true unification of the law can be achieved only through discussion and deliberation among the formally independent national adjudicators.[420] The model for this process is thus not one of "discovering" the preordained answers for the difficult interpretive issues, but rather one of international consensus-building on their appropriate resolution.[421]

In the early stages of this process, the force of the justificatory arguments in individual decisions will play the significant unifying role. Purists will counter here that however compelling in reasoning, a single decision by a foreign tribunal cannot acquire formal precedential

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[419] *See* HONNOLD, *supra* note 23, at 144; Ferrari, *supra* note 180, at 208 (discussing ways to limit the danger of differing interpretations of a uniform law); Honnold, *supra* note 79, at 127. For a broader analysis of this issue, see Bodenheimer, *supra* note 417. In the same vein, the importance of arbitration for international transactions will elevate the persuasiveness of the interpretive decisions of arbitrators. The needs of uniformity will require that these, too, be consulted as a part of the relevant interpretive community for international private law conventions.

[420] A possible solution to this problem would be to create an international "permanent editorial board," similar to that for the Uniform Commercial Code in this country. For a suggestion in this direction, see Michael Joachim Bonell, *A Proposal for the Establishment of a Permanent Editorial Board for the Vienna Sales Convention*, *in* INTERNATIONAL UNIFORM LAW IN PRACTICE 241 (1988) [hereinafter UNIFORM LAW IN PRACTICE]. Unfortunately, efforts to found such a board as the final arbiter on the interpretation of private law conventions have not been successful. Indeed, in 1988 the delegates to UNCITRAL specifically rejected such a proposal. *See Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-First Session* 43 U.N. GAOR Supp. (No. 17), U.N. Doc. A/43/17 (1988), *reprinted in* [1988] 19 Y.B. Comm'n Int'l Trade L. 16, U.N. Doc. A/CN.9/SER.A/1988.

[421] For an analysis of this process in terms of a "rhetorical community," see Kastely, *supra* note 168, *passim*, but in particular at 593-94 (observing that the choice of "informally defined words" in the U.N. Sales Convention "may initiate discussion of what ideas are held in common and what are not, a discovery process that might otherwise be foreclosed. The international trade community will grow and shape itself in such conversations."); *see also* Antonio Boggiano, *The Experience of Latin American States*, *in* UNIFORM LAW IN PRACTICE, *supra* note 420, at 28, 47 ("Uniform law requires uniform caselaw, a new common law. . . . Foreign precedents would not be precedents of a *foreign* law but of *uniform* law."); Honnold, *supra* note 62, at 212 ("[I]nternational acceptance of the same rules gives us a common medium for communication—a *lingua franca*—for the international exchange of experience and ideas.").

status.[422] On its surface, this observation is certainly correct. For good reason, the drafters of CISG article 7(1) did not mandate immediate and absolute uniformity. The consequence would have been that the first judicial interpretation on a given issue, whatever the force of its reasoning, would bind the courts of all contracting states in subsequent decisions. Such a result would ossify the law precisely in the manner CISG article 7(1)'s dynamic interpretive approach was designed to prevent.

Yet the required regard for the needs of international uniformity is more potent than mere persuasion. As the case law on an issue grows in mass, so too in the course of time will its gravitational force.[423] And as an international consensus emerges on a given issue, the express legislative direction in CISG article 7(1) that courts defer to the needs of international uniformity will give that gravitational force all of the practical effect of precedent.[424]

The diversity of legal and cultural traditions among the various domestic interpreters of an international convention admittedly may cause difficulties in the development of international uniformity. Over time, however, the attractive power of the international consensus on the unresolved issues in a convention will dissipate the centrifugal force of domestic social and legal traditions.[425] The essential

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[422] *Cf.* Farnsworth, *supra* note 384, at 55 ("Taken literally, [article 7(1)] does no more than instruct a court interpreting the Convention's provision to *consider* the importance of the listed factors.").

[423] This metaphor of "[t]he gravitational force of a precedent" derives from Ronald Dworkin. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 113 (1978).

[424] The Supreme Court has come to a similar conclusion in interpreting a set of uniform international rules governing bills of lading (the so-called "Hague Rules") which do not even contain an express direction to consider the needs of international uniformity. *See* Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995). There, the Court "decline[d] to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed" the issue in dispute. *Id.* at 537. For more information regarding the Hague Rules, see *supra* note 50.

[425] *See* Kastely, *supra* note 168, at 607 ("As courts and others engage in . . . discourse [over general principles], the need to resort to national law will be less and less felt."). This "gravitational force" of uniformity under the U.N. Sales Convention and its progeny is even greater than in the case of the Uniform Commercial Code. Although its goal is to bring uniformity to the law, the U.C.C. is structured as purely local legislation which is subject to local modification—both in connection with original adoption and thereafter—by the individual states of the United States. The U.N. Sales Convention and its progeny, in contrast, are "self-executing" in nature and do not permit adjustments by their member nations. *See supra* notes 50, 244 and accompanying text (observing that the international commercial law conventions under consideration here do not permit reservations by ratifying states other than those reservations expressly authorized). Moreover, the paradigm of CISG article 7 contains an express

purpose of the general principles methodology in this process is to require discussion on an international level toward the development of such a consensus.

This suggests a final point about the required deference to the needs of uniformity. Admittedly, the last clause of CISG article 7—in contrast to its predecessor, the Hague ULIS[426]—permits resort to national law when a convention's general principles fail to provide guidance.[427] This option operates, however, subject to the magnetic influence of the needs of uniformity. Implicit in the uniformity directive of CISG article 7 is thus a requirement that an interpreter exhaust all possible grounds for decision on an international level—analogy as well as deductive and inductive general principles[428]—before retreating to nonuniform domestic law.

As we have seen, courts in some civil law countries have based the development of much of the private law on the principle of "good faith" alone.[429] This experience is not, of course, dispositive in the international context. But given the delegation of authority to develop the law on the basis of a convention's general principles, it strongly suggests that fidelity to the needs of international uniformity should make the path of escape for homeward-minded national judges a narrow one indeed.

CONCLUSION

"When we speak of a body of law," Frederic Maitland observed over one hundred years ago, "we use a metaphor so apt that it is hardly a metaphor. We picture to ourselves a being that lives and grows, that preserves its identity while every atom of which it is com-

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direction that interpreters view a commercial law convention as international in character. *See* CISG, *supra* note 7, art. 7(1) (mandating regard for a convention's "international character"); *see also supra* notes 180-83 and accompanying text (analyzing this element of CISG article 7).

[426] *See supra* notes 160-61 and accompanying text (discussing the requirement of the Hague ULIS that all unsettled questions be resolved in conformity with its internal general principles).

[427] *See* Bonell, *supra* note 160, at 82-83 (observing that article 7 allows recourse to domestic law in the absence of governing "general principles"); Ferrari, *supra* note 180, at 228 (same).

[428] *See supra* Part III.A.3 (discussing various interpretive methods).

[429] *See supra* notes 318-24 and accompanying text (explaining several applications of the concept of "good faith").

posed is subject to a ceaseless process of change, decay, and renewal."[430]

At heart, the interpretive paradigm embraced in the U.N. Sales Convention and its progeny conceives of an international convention in the same terms. Recognizing the practical impossibility of legislative rejuvenation, that paradigm suggests an image of a living, maturing body of law, founded on certain fundamental values, but capable of adapting to new environments. Implicit in this philosophy is an active developmental and remedial role for the judiciary in ensuring the long-term vitality of an international law unification effort.

The consequence is a rejection of the restrictive formalism that is evident in much of the recent Supreme Court treaty jurisprudence. Although occasionally liberal in rhetoric, the common practical outcome of treaty interpretation in recent years has been distinctly conservative. The Court has consistently refused to view a treaty as a body of integrated norms that would be capable of generating internal solutions for gaps in its provisions. The image of a treaty suggested by this approach is thus one of a mere skeleton of rules. It is in this respect, in particular, that Supreme Court treaty jurisprudence has paralleled the "new textualism" that has gained recent prominence in domestic statutory interpretation.

The role of the judiciary in the interpretation of the new generation of international commercial law conventions is of a decidedly more dynamic nature. The "general principles" methodology embraced there empowers courts to fashion substantive solutions for gaps in a convention's regulatory scheme. Properly appreciated, this approach amounts to a delegation of lawmaking authority to the courts. But the unique element is the international dimension. Bolstered by a mandated deference to the needs of uniformity, the "general principles" methodology sanctions participation by courts in this country in the fashioning of an international common law around the frame of an international convention.

The success of the U.N. Sales Convention has demonstrated the power of this dynamic interpretive process. Although still in its infancy, national adjudicators have already begun to seize upon the Convention's "general principles" as a means to develop new substantive solutions for gaps in its provisions. In the process, they have ad-

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[430] 2 FREDERIC WILLIAM MAITLAND, *Outlines of English Legal History, 560-1600, in* THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 417, 417 (H.A.L. Fisher ed., 1911).

vanced the core mandate of promoting international uniformity in the body of law within its scope. This experience reveals compelling grounds for further emulation as the law continues to mature into the next significant stage in its development, unification on a transnational level.

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