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THE UNITED NATIONS CHARTER AS A CONSTITUTION†

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I. Introductory Remarks

To state the obvious, the Charter of the United Nations is a multilateral convention to which all members of the Organization are parties. In other words, the Charter is a treaty and consequently one will look to the Law of Treaties for guidance in its interpretation.[1]

But the Charter is also a Constitution. The late Sir Humphrey Waldock, at one time President of the International Court of Justice, and incidentally the Rapporteur of the Interna-

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[1] *See infra* text accompanying notes 254-62.

tional Law Commission who brought the Commission's work on the Law of Treaties to fruition, stated in his Hague Lectures in 1962: "The Charter, like the Covenant [of the League of Nations], is technically a multilateral treaty between States. But the Charter proclaims itself, more openly than the Covenant, to be the Constitution of an Organization and not merely a treaty."[2]

In a strict sense, the Charter is the Constitution of the Organization. It sets forth the powers and functions of the organs and the rights and duties of members. But it is more than that. As Sir Humphrey indicates, in a larger sense it provides "the constitutional framework of international law today."[3] It proclaims fundamental principles of law for the world community.[4] So when we face the question of applying and interpreting the Charter we must look not only to the Law of Treaties but also to the particular character of the Charter as a Constitution. We will recall Chief Justice John Marshall's reminder in *M'Culloch v. Maryland*[5] that "we must never forget, that it is *a constitution* we are expounding;"[6] and Justice Oliver Wendell Holmes in *Missouri v. Holland*[7] one hundred years later: " . . . when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."[8]

Compare this with the statement of Judge Charles de Visscher in the first *South West Africa* (now *Namibia*) case:[9] ". . . one must bear in mind that in the interpretation of a great international constitutional instrument, like the United Nations

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[2] Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 20 (II 1962).

[3] *Id.* The chapter is entitled "The Constitutional Framework of International Law Today."

[4] U.N. CHARTER, art. 2. *See Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625(XXV) (1970).

[5] 17 U.S. (4 Wheat.) 316 (1819).

[6] *Id.* at 407 (original emphasis).

[7] 252 U.S. 416 (1920).

[8] *Id.* at 433.

[9] International Status of South West Africa, 1950 I.C.J. 128 (Advisory Opinion).

Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties, do not suffice."[10]

Before going further I should note that I fully appreciate the dangers inherent in analogy and in particular, the risk in drawing too close a parallel between the Constitution of the United States, which established a Nation, and the Charter of the United Nations which set up an International Organization. Only the first is for a government. The United Nations is not yet a government and, while it performs some governmental functions, the raw power that goes with government remains with the member States. The effort in Chapter VII of the Charter to transfer a modicum of that power to the Security Council has thus far, and for the most part, remained a dead letter. Nevertheless, while noting that differences may exceed similarities, there are comparisons which can be made between the U.S. Constitution and the U.N. Charter and there are lessons which can be learned.

We might look first at early constitutional history and two famous opinions of Chief Justice Marshall: *M'Culloch v. Maryland* and *Marbury v. Madison.* I would also refer to two cases, with which incidentally I was closely connected, before the International Court of Justice. These were the Advisory Opinions in the *Reparation* and *Namibia* cases.

In *M'Culloch*, Chief Justice Marshall stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[11]

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[10] *International Status of South West Africa*, 150 I.C.J. at 189; Judge Philip C. Jessup, after quoting the above passage from Judge de Visscher, added:

> It may be agreed that there are dangers in dealing with multipartite treaties as 'international legislation,' but if municipal law precedents are invoked in the interpretative process, those precedents dealing with constitutional or statutory construction are more likely to be in point than ones dealing with the interpretation of contracts.

1966 South West Africa cases, 1966 I.C.J. 6, 352-53 (Judgment)(Jessup, J., dissenting opinion). *See also* South West Africa Voting Procedure case, 1955 I.C.J. 67, 106 (Advisory Opinion)(Lauterpacht, J., separate opinion)[hereinafter *Africa Voting case*]; Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 at 18, 23 (Advisory Opinion)(Alvarez, J. & Azevedo, J., dissenting).

[11] 17 U.S. at 421. In quoting this passage B. COHEN, THE UNITED NATIONS, CONSTITUTIONAL DEVELOPMENTS, GROWTH AND POSSIBILITIES 6 (1961), comments:

In the *Reparation* case, the International Court of Justice in holding that the United Nations had the capacity in international law to bring claims against a State for injury to its agents declared: "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[12] Here, in this enunciation of the doctrine of implied powers, is surely a *M'Culloch v. Maryland.*

Is the *Namibia* case a *Marbury v. Madison*?[13] Not quite. In fact the Court specifically disclaimed a right of judicial review in the absence of a request from the organ or organs concerned. But having said that it did not possess powers of judicial review or appeal in respect to decisions of other U.N. organs, and having noted that the question of the validity or conformity with the Charter of General Assembly or Security Council resolutions did not form the subject of the request for the advisory opinion, it continued: "However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences from those resolutions."[14]

The Court then proceeded to examine in detail and pronounce on the validity of the General Assembly and Security Council decisions concerned. In this case it determined that they

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> I know no better canon of construction to be used in determining charter power than that laid down by Chief Justice Marshall in *McCulloch v. Maryland* for determining constitutional power: . . . Member States have the right and responsibility to find means which are appropriate, which are not prohibited but consist with the letter and spirit of the Charter to carry out the purposes of the Charter.

Id. at 6. *See also id.* at 5, 15, 18.

[12] Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 182 (Advisory Opinion) [hereinafter *Reparation case*]. The Court adds:

> Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.

Id. at 184.

[13] 5 U.S. (1 Cranch) 137 (1803).

[14] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 45 (Advisory Opinion) [hereinafter *Namibia*].

were valid.[15] Now do we take this case for what the Court said or for what the Court did? At least it has left the door wide open for judicial review.

II. Some Reflections on the *M'Culloch* and *Reparation* Cases

The theory of constitutional interpretation and the doctrine of implied powers set forth by Chief Justice Marshall in *M'Culloch v. Maryland* and the enunciation of the implied powers doctrine by the International Court of Justice in the *Reparation* case deserve closer attention. The comparison has been noted by a number of writers.[16] The cases of course involved different issues. In *M'Culloch*, the point for decision was whether the State of Maryland could tax an instrumentality of the federal government; the Bank of the United States. In the *Reparation* case, the question was whether the United Nations, an international organization, could bring a claim against a State under international law for injuries suffered by its agents in the performance of their duties. In each case the Court had to first determine a preliminary issue; in *M'Culloch*, the constitutionality of the Bank; in *Reparation*, whether the United Nations had an international legal personality.

Neither of these points was expressly covered in the Constitution or Charter. Chief Justice Marshall noted that "[a]mong the enumerated powers, we do not find that of establishing a bank or creating a corporation."[17] The International Court observed that the question of personality "is not settled by the actual terms of the Charter."[18] Each Court, however, was able to give an affirmative answer to its preliminary question by, in Marshall's words, "a fair construction of the whole instrument,"[19] and with a reference to practice.[20] The Bank was held constitutional [21] and the United Nations was found to be an in-

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[15] *Id.* at 45-54.

[16] *See* C.W. JENKS, A NEW WORLD OF LAW? A STUDY OF THE CREATIVE IMAGINATION IN INTERNATIONAL LAW, 231 (1969); EICHELBERGER, UN-THE FIRST TWENTY-FIVE YEARS 130-1 (1970)(citing Abraham Feller).

[17] *M'Culloch*, 17 U.S. at 406.

[18] *Reparation case*, 1949 I.C.J. at 178.

[19] *M'Culloch*, 17 U.S. at 406.

[20] *Id.* at 401; *Reparation case*, 1949 I.C.J. at 179.

[21] *Id.* at 424.

ternational person possessing international rights and duties and having the capacity to bring international claims.[22]

The International Court of Justice also reached affirmative decisions on the question of whether the U.N. could bring the kind of claims envisaged in the request for the advisory opinion. It had no difficulty in reaching a unanimous finding upholding the right of the U.N. to bring an international claim against a State for damage caused to the Organization itself.[23] It also concluded, by eleven votes to four, that the U.N. could bring a claim for damages suffered by its agents.[24] It was with respect to this last point that the International Court enunciated the doctrine of implied powers quoted previously.[25]

On the question whether a state could tax an instrumentality of the federal government, the Supreme Court, noting that the power to tax is the power to destroy,[26] held the act of the Legislature of Maryland "contrary to the Constitution of the United States, and void."[27] Professor Paul Brest observed that this second part of the opinion in *M'Culloch* rested exclusively on inferences from the structure of the federal system and not at all on the text of the Constitution.[28] While the question of the power of States to tax the United Nations and its instrumentalities has not come before the International Court of Justice, such taxation is precluded by Article 105 of the Charter and its implementing Convention on the Privileges and Immunities of the United Nations.[29]

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[22] *Reparation case*, 1949 I.C.J. at 179.

[23] *Id.* at 180-81, 187.

[24] *Id.* at 181-84, 187.

[25] *See infra* text accompanying note 12.

[26] *M'Culloch*, 17 U.S. at 431.

[27] *Id.* at 437.

[28] Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 217 (1980), (referring to Professor Charles Black's structural interpretation). *See infra* text accompanying note 170.

[29] *See*, in particular, sec. 7 of the Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S 15. In the *Reparation case*, 1949 I.C.J. 174, the International Court of Justice, in considering the question of the Organization's international personality, stated: "The 'Convention on the Privileges and Immunities of the United Nations' of 1946 creates rights and duties between each of the signatories and the Organization." *Id.* at 179. Under sec. 30 of the Convention, the I.C.J. may decide disputes between member States and the United Nations. Consequently issues of taxation could be taken to the Court.

While the actual questions before the U.S. Supreme Court in *M'Culloch* and the International Court in *Reparation* were thus quite different, the overriding importance of each is their similar approach to constitutional interpretation and development.

We know the significance that *M'Culloch* has had in American constitutional history. Even as staunch a practioner of judicial restraint as Justice Frankfurter has hailed Marshall's achievement. Referring to his reminder that "it is *a constitution* we are expounding"[30] as being the core of his constitutional philosophy, Justice Frankfurter said: "It bears repeating because it is, I believe, the single most important utterance in the literature of constitutional law - most important because most comprehensive and comprehending."[31] Justice Frankfurter added:

> One can, I believe, say with assurance that a failure to conceive the Constitution as Marshall conceived it in *M'Culloch v. Maryland*, to draw from it the national powers which have since been exercised and to exact deference to such powers from the states would have been reflected by a very different United States than history knows.[32]

In the one hundred and seventy years since it was decided, *M'Culloch*, and particularly its admonition, has been frequently cited by successive Courts. In the *Legal Tender* case, decided on March 3, 1884, the Court stated: "No question of the scope and extent of the implied powers of Congress under the Constitution can be satisfactorily discussed without repeating much of the reasoning of Chief Justice Marshall in the great judgment in *McCulloch v. Maryland*."[33]

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[30] *M'Culloch*, 17 U.S. at 407 (original emphasis).

[31] Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 218-19 (1955). *See* STONE, SEIDMAN, SUNSTEIN & TUSHNET, CONSTITUTIONAL LAW 59 (1986).

[32] Frankfurter, *supra* note 31, at 219. Justice Frankfurter also pointed out that Marshall "has afforded this guidance not only for his own country. In the federalisms that have evolved out of the British Empire, Marshall's outlook in constitutional adjudications has been the lodestar." *Id.* at 218. *See also* C. ANTIEAU, CONSTITUTIONAL CONSTRUCTION 6, 223-50 (1982); E. MCWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW 97 (1986). Professor Antieau records that: "In 1964 the entire Australian High Court stated: 'We must remember that it is a *constitution* we are construing and it should be construed with all the generality which the words admit.' " *Id.* at 6, 226 (original emphasis).

[33] Juilliard v. Greenman, 110 U.S. 421, 438 (1884). The Court continued:

And in *Home Building and Loan Association v. Blaisdell*, fifty years later, Chief Justice Hughes declared: "It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning - 'We must never forget that it is *a constitution* we are expounding' . . . ."[34]

Of course Marshall's reminder is not always quoted with the same appreciation or to the same end. In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[35] Justice Jackson in an opinion announcing the judgment of the Court said:

> In mere mechanics of government and administration we should, so far as the language of the great Charter fairly will permit, give Congress freedom to adapt its machinery to the needs of

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> A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the National Legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution. *Chief Justice* Marshall, after dwelling upon this view, added these emphatic words: 'In considering this question, then, we must never forget, that it is *a constitution* we are expounding.'

Id. at 438-39 (original emphasis).

[34] Home Building and Loan Assoc. v. Blaisdell, 290 U.S. 398, 443 (1934)(original emphasis). For a sampling of other cases citing Marshall's admonition see Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601, 617 (1895); United States v. Classic, 313 U.S. 299, 316 (1941); Daniels v. Williams, 474 U.S. 327, 332 (1986); Hirabayashi v. United States. 320 U.S. 81, 100-01 (1943). The *Hirabayashi* case is part of the war time treatment of Japanese Americans that our country has grown to regret. It illustrates that as the devil may quote Scriptures, a misguided Court can quote John Marshall. Chief Justice Marshall's admonition is also quoted in concurring opinions in School District of Abington Township v. Schempp, 374 U.S. 203, 230 (1963)(Brennan, J., concurring); Wright v. United States, 302 U.S. 583, 606-07 (1938)(Stone, J., concurring); and in dissenting opinions in Louisville Chief of Police v. Davis, 424 U.S. 693, 732 (1976)(Brennan J., Marshall, J., & White, J., dissenting); Regents of the University of California v. Bakke, 438 U.S. 265, 407-08 (1978)(Blackman, J., dissenting); Nevada v. Hall, 440 U.S. 410, 433 n.1 (1979)(Rehnquist, J., dissenting); Engle v. Isaac, 456 U.S. 107, 148 (1982)(Brennan, J., & Marshall, J., dissenting); Oliver v. United States, 466 U.S. 170, 187 n.4 (1984)(Brennan, J., Marshall, J., & Stevens, J., dissenting). For other cases on implied powers see United States v. Oregon, 366 U.S. 643, 649 (1961); Case v. Bowles, 327 U.S. 92, 102 (1946); Oklahoma ex rel Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941); United States v. Darby, 312 U.S. 100, 123-24 (1941). *See also* Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137 at 140-50, 160 (1919).

[35] National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

changing times. In no case could the admonition of the great Chief Justice be more appropriately heeded - ' . . . we must never forget, that it is *a constitution* we are expounding.'[36]

To which Justice Frankfurter replied in his dissent: "Precisely because 'it is a *constitution* we are expounding' . . . , we ought not to take liberties with it."[37]

Similarly, Justice Goldberg concurring in *Bell v. Maryland*:[38] "It was to guard against narrow conceptions that Chief Justice Marshall admonished the Court never to forget 'that it is *a constituton* we are expounding . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.' "[39]

And Justice Black (dissenting) responded: "We conclude as we do because we remember that it is a constitution and that it is our duty 'to bow with respectful submission to its provisions.' "[40]

The quotation from Justice Goldberg above directs attention to another famous line from Chief Justice Marshall's opinion - "a constitution intended to endure for ages to come."[41] This was foreshadowed by Justice Story in *Martin v. Hunter's Lessee*[42] and is a forerunner of Justice Holmes' living constitution.[43]

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[36] *Id.* at 585-86 (original emphasis).

[37] *Id.* at 647 (original emphasis). *See* STONE, SEIDMAN, SUNSTEIN & TUSHNET, CONSTITUTIONAL LAW 59 (1984).

[38] Bell v. Maryland, 378 U.S. 226, 315 (1964).

[39] *Id.* at 315 (original emphasis).

[40] Justice Black continued:

> And in recalling that it is a Constitution 'intended to endure for ages to come,' we also remember that the Founders wisely provided the means for that endurance: changes in the Constitution, when thought necessary, are to be proposed by Congress or conventions and ratified by the States. The Founders gave no such amending power to this Court.

Id. at 342.

[41] *M'Culloch*, 17 U.S. at 415.

[42] 14 U.S. (1 Wheat.) 304, 326 (1816).

[43] *Missouri v. Holland*, 252 U.S at 433. *See infra* text accompanying notes 5 and 6 and *infra* text accompanying notes 142-46, 154-63. Less respectfully, Professor Philip B. Kurland considers that ". . . whenever an opinion quotes Marshall"s dictum in *M'Culloch v. Maryland* . . . you can be sure that the Court will be throwing the constitutional text, its history and its structure to the winds in reaching its conclusion." The same, in his opinion, goes for a citation of Holmes dictum in Missouri v. Holland: "Once more this means the Constitution is out the window." Kurland, *Curia Regis: Some Com-*

The *Reparation* case is now only forty years old and it would be presumptuous to claim for it an impact anything like that of *M'Culloch*. But it has had an effect and may well have planted seeds for the future. The international personality of the United Nations and other international organizations is now well established[44] and the principle of implied powers has been followed in subsequent cases by the International Court.[45] In the *Administrative Tribunal Awards* case[46], the Court quoted from *Reparation* and found the power of the General Assembly to create a tribunal implied in its authority to establish staff regulations under Article 101 of the Charter.[47] In the *Certain Expenses* case[48], the Court employed a broader concept of implied powers based on the general purposes and objectives of the Organization in the field of peace and security. The authority of the General Assembly to establish a peace-keeping force was rested on the purpose of the U.N. to maintain international peace and security.[49]

Before leaving for the moment *M'Culloch* and *Reparation*, one should take a quick look at Judge Hackworth's opinion in *Reparation* since it is reminiscent of the criticism levied at Chief Justice Marshall's opinion in *M'Culloch*. Judge Hackworth, in disputing the power of the Organization to "sponsor private claims" said:

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ments on the Divine Right of Kings and Courts "to say what the law is," 23 ARIZ. L. REV. 581, 591 (1981); *See* STONE & TUSHNET, *supra note* 37.

[44] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 73, 89-90 (Advisory Opinion). *See* Jiménez de Aréchaga, *The Work and the Jurisprudence of the International Court of Justice 1947-1986*, 58 B.Y.I.L. 2 (1987).

[45] *International Status of South West Africa*, 1950 I.C.J. at 128; Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 56 (Advisory Opinion) [hereinafter *Administrative Tribunal Awards case*] Certain Expenses of the United Nations (art. 17, para. 2, of the Charter), 1962 I.C.J. 151 (Advisory Opinion) [hereinafter *Certain Expenses*]; *Namibia*, 1971 I.C.J. at 16. *See also* advisory opinions of the P.C.I.J., Competence of the ILO to Regulate Incidentally the Personal Work of the Employer 1926 P.C.I.J. (ser. B) No. 13, at 18; 1 HUDSON, WORLD COURT REPORTS 754-55; Jurisdiction of the European Commission of the Danube, 1927 P.C.I.J. (ser. B) No. 14, p.43; 2 HUDSON, WORLD COURT REPORTS 167-8 (1927-32). *See* H.G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW 208-211 (1980).

[46] *Administrative Tribunal Awards case*, 1954 I.C.J. 39.

[47] *Id.* at 56-58.

[48] *See Certain Expenses*, 1962 I.C.J. 151.

[49] *Id. See* Jiménez de Aréchaga, *supra* note 44 at 3.

> There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers . . . Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted. No necessity for the exercise of the power here in question has been shown to exist.[50]

Chief Justice Marshall's opinion in *M'Culloch* had been venomously attacked in letters to the *Richmond Enquirer* on, among other grounds, that "necessary" in the Necessary and Proper Clause of the Constitution meant absolute necessity.[51] Marshall had already anticipated this argument in the opinion itself and had pointed out "that no word conveys to the mind, in all situations, one single definite idea . . . ."[52] In rejecting the idea of absolute necessity, he referred to "a constitution intended to endure for ages to come" and continued: "It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."[53]

III. A Look at Judicial Review

I will not pretend that there are the close parallels between *Marbury* and *Namibia* that one finds between *M'Culloch* and *Reparation.* Professor Jeffrey M. Shaman has said that *Marbury v. Madison* "because it establishes the power of judicial review, is generally agreed to be the most important decision ever rendered by the Supreme Court."[54] *Namibia* too is a very important constitutional decision, but for other reasons.

Neither the United States Constitution nor the United Nations Charter expressly provides for judicial review. Opinions

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[50] *Reparation case*, 1949 I.C.J. at 198. *See* E. Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RECUEIL DES COURS, 377, 430-32 (IV 1976).

[51] *See* G. GUNTHER, JOHN MARSHALL'S DEFENCE OF MCCULLOCH V. MARYLAND 64 (1969).

[52] *M'Culloch*, 17 U.S. at 414. *See* Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L.Q. 257, 266 (1982); BREST, *supra* note 28, 206-07.

[53] *M'Culloch*, 17 U.S. at 415. *See also*, G. GUNTHER, *supra* note 51, at 103, 166-67. (Marshall's replies to letters in the *Richmond Enquirer*).

[54] Shaman, *supra* note 52, at 262. *But compare* Frankfurter, *supra* note 31, at 219.

differ on whether it is implicit in the Constitution or a judicial creation of Chief Justice Marshall and the Supreme Court.[55] In either case it rests on the simple proposition that the Constitution is the supreme law and the Supreme Court, the highest judicial body in the United States, has not only the jurisdiction, but the duty to apply the law. Much the same argument could be made for the Charter. The Charter is the supreme or "higher law"[56] and the International Court of Justice is "the principal judicial organ of the United Nations."[57] Where the Court has jurisdiction it is its duty to apply the law - "ay, there's the rub."

There are two obstacles as far as judicial review under the Charter is concerned. The first, and most serious, is the lack of compulsory jurisdiction for the Court, and the second is the San Francisco Conference Statement on interpretation.[58]

The lack of compulsory jurisdiction is the most important obstacle to judicial review by the International Court of Justice. Where the Court has jurisdiction, it does not hesitate to interpret and apply relevant provisions of the Charter. The Committee of Jurists, set up by the Council of the League of Nations to prepare a statute for the Permanent Court of International Justice, provided for compulsory jurisdiction in its draft. This provision, however, was deleted following discussion in the League Council and Assembly.[59] The Optional Clause of the present Statute was substituted for a general compulsory jurisdiction clause. The Optional Clause[60] worked well in the inter-war period when a substantial majority of the League Members deposited relatively unrestricted declarations accepting the jurisdic-

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[55] Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defence of an Imperfect Muddle*, 94 YALE L. J. 821, 852 n.122 (1985); E. CHEMERINSKY, INTERPRETING THE CONSTITUTION 18, 64 n.116 (1987); M. EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION 23 (1984); Nagel, *Interpretation and Importance in Constitutional Law: A Re-Assessment of Judicial Restraint*, 25 NOMOS: LIBERAL DEMOCRACY 181 (1983); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS, AN INQUIRY INTO LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 12-16 (1982); Shaman, *supra* note 52, at 262.

[56] U.N. CHARTER art. 103.

[57] *Id.* at art. 92.

[58] *Report of the Rapporteur of Committee IV/2*, Doc. 933, IV/2/42(2), 13 U.N.C.I.O. Docs. 703, 709 (1945) [hereinafter *Report of the Rapporteur*].

[59] Schwebel, *Reflections on the Role of the International Court of Justice*, 61 WASH. L. REV. 1061, 1065 (1986).

[60] Statute of the Permanent Court of International Justice, art. 36, para. 2.

tion of the Court. Unfortunately, this favorable trend was not continued and the "decline of the optional clause" has been a cause for lament.[61] Today, less than one third of the parties to the Statute of the International Court of Justice are bound by declarations accepting compulsory jurisdiction under the Optional Clause and many of these, like the U.S. declaration before its withdrawal, had crippling reservations.[62]

A further limitation on the jurisdiction of the Court is found in Article 34 of the Statute which provides that "[o]nly states may be parties in cases before the Court."[63] Leaving aside the even more problematic question of access by individuals, this provision is considered to exclude international organizations, including the United Nations itself, from being a party in a contentious proceeding.[64]

In the absence of universal compulsory jurisdiction over State members, and in the absence of the U.N. as a potential party, it is difficult for the International Court to exercise a judicial review comparable to that established by *Marbury v. Madison*.

The second obstacle to judicial review is the San Francisco Statement on interpretation, included in the final report of Committee IV/2 to the Conference which drafted the Charter.[65] Suggestions had been made in the Committee that the International Court, as the principal judicial organ, or the General Assembly, as the organ in which all members are represented, should be the competent organ to interpret the Charter; but

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[61] Waldock, *Decline of the Optional Clause*, 32 B.Y.I.L. 244 (1955-56); Schwebel, *supra* note 59, at 1066.

[62] *See* YEARBOOKS OF THE INTERNATIONAL COURT OF JUSTICE. The most debilitating of these limitations was the so-called Connally Amendment to the U.S. Declaration which excluded "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." Since reservations are reciprocal, any State could invoke this reservation against the United States. *See* Case of Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9 (Judgment); Aerial Incident of 27 July 1955 (U.S. v. Bulgaria) 1960 I.C.J. 146, 147 (Order) (in which Bulgaria invoked the Connally Amendment and the U.S. withdrew its application).

[63] Statute of the Permanent Court of International Justice, art. 36, para. 2.

[64] During the drafting of the Statute of the Permanent Court of International Justice it was suggested that Art. 34 would permit an International Organization, as an association of States, to be a party. However, the assumption today is to the contrary.

[65] *Report of the Rapporteur, supra*, note 58.

these suggestions were not adopted.[66] The San Francisco Statement explained:

> Under unitary forms of national government the determination of such a [constiutional disputes] question may be vested in the highest court or in some other national authority. However, the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature.[67]

The Statement does not, however, completely close the door to judicial review. In the first place, it is after all only *travaux preparatoires* and, therefore, subject to the normal limitations on its use.[68] But, more important, the Statement itself suggests uses of the Court in interpreting the Charter. It begins by pointing out that in the course of day to day operations, each organ, such as the General Assembly, the Security Council and the International Court of Justice, will interpret such parts of the Charter as are applicable to its particular functions. It notes that "[t]his process is inherent in the functioning of any body which operates under an instrument defining its functions and powers."[69]

In the United States, constitutional interpretation is not limited to the Courts. Much of the development of the structure and functions of government has evolved through interpretations and practices of Congress and the President, and from interactions between the legislative and executive departments.[70]

Likewise, in the United Nations, during the nearly four and

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[66] *Summary Report of 12th Meeting of Committee IV/2,* IV/2/33, 13 U.N.C.I.O Docs. 664, 633-35 (1945); *Revised Summary Report of the 14th meeting of Committee IV/2* 873, IV/2/37(1). 13 U.N.C.I.O. Doc. 633-34, 653-54 (1945). *Report of the Rapporteur of Committee* IV/2/33, Doc. 664, 13 U.N.C.I.O. Doc. 633-34. 1-2 (1942); *Report of the Rapporteur of Committee IV/2/37(1),* Doc. 873, 13 U.N.C.I.O. Doc. 653-54 (1945). *See also* excerpts in L. SOHN, CASES ON UNITED NATIONS LAW 2-3 (1967).

[67] *Report of the Rapporteur, supra* note 58, at 709, 7. While neither the U.S. Constitution nor the U.N. Charter has an express provision for settlement of constitutional issues, the constitutions of some European countries and a number of Specialized Agencies in the U.N. family of International Organizations do specifically provide for such settlement.

[68] *See infra* text accompanying notes 201-04.

[69] *Report of the Rapporteur, supra* note 58, at 709, 7.

[70] Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885, 913 (1985); E. CHEMERINSKY, *supra* note 55, at 22, 81, 97.

one-half decades of its existence, interpretation of the Charter through the practice of the General Assembly and the Security Council has played a major role in the development of the Organization.[71]

The Statement goes on to indicate that if there is a difference between two member States concerning an interpretation of the Charter, they are free to submit the dispute to the International Court as in the case of any other treaty. It also notes that the General Assembly or the Security Council may ask the Court for an advisory opinion concerning the meaning of a provision of the Charter. Alternatively, the Statement suggests other courses such as reference to an ad hoc committee of jurists or to a joint conference.

The General Assembly in 1947, at its Second Session, adopted a resolution recommending that organs of the United Nations should refer to the International Court of Justice for advisory opinion, questions of principle which are desirable to have settled, including points of law relating to the interpretation of the Charter.[72]

There was objection to this provision by the Eastern European countries which argued that it would turn a permissive provision into an obligatory one, that interpretation of the Char-

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[71] *See* ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963).

[72] G.A. Res. 171(A)(II). The operative paragraph of the Resolution is as follows:

> *Recommends* that organs of the United Nations and the specialized agencies should, from time to time, review the difficult and important points of law within the jurisdiction of the International Court of Justice which have arisen in the course of their activities and involve questions of principle which it is desirable to have settled, *including points of law relating to the interpretation of the Charter of the United Nations* or the constitutions of the specialized agencies, and, if duly authorized according to Article 96, paragraph 2, of the Charter, should refer them to the International Court of Justice for an advisory opinion.

Id. (original & added emphasis). Resolution 3232(XXIX), on the same subject, adopted at the 29th Session of the General Assembly in 1974, unfortunately, reflecting the trend of the times, was considerably diluted. The relevant paragraph read:

> *Recommends* that United Nations organs and the specialized agencies should, from time to time, review legal questions within the competence of the International Court of Justice that have arisen or will arise during their activities and should study the advisability of referring them to the Court for an advisory opinion, provided that they are duly authorized to do so; . . . .

G.A. Res. 3232(XXIX)(original emphasis). The specific reference to the Charter was not included in the latter resolution.

ter was a political question which should be left to the political organs, and that it was doubtful if the phrase "any legal question" in Article 96 of the Charter included interpretations of the Charter.[73] Mr. Vyshinsky, speaking for the Soviet Union, insisted that adoption of the provision in question "would really mean that, whenever a question regarding the interpretation of a particular paragraph of the Charter arises in the General Assembly or the Security Council, the International Court will, in fact, be placed above the General Assembly and the Security Council."[74] The Assembly nevertheless approved the resolution by a vote of forty-five to six, with three abstentions.[75]

Similar objections were raised with respect to the first request for an advisory opinion, but were given short shrift by the International Court. The Court stated:

> Lastly, it has been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, 'the principal judicial organ of the United Nations' to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.[76]

In fact, most of the requests for advisory opinions of the International Court of Justice have involved interpretations of the Charter. The first two expressly requested interpretations of Article 4 on admission of new members.[77] Others, while not containing express requests concerning the meaning of the Charter, required interpretations in order to give a decision on the question put to the Court.[78] The significance in this regard of

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[73] *See* discussions in the Sixth (Legal) Committee of the General Assembly, U.N. GAOR at 96-97 (2d session), and in Plenary at 859-95 (1947). *See* L. SOHN, *supra* note 66, at 4-17.

[74] L. SOHN, *supra* note 66, at 11.

[75] *Id.* at 17.

[76] Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), 1947-48 I.C.J. 57, 61. (Advisory Opinion).

[77] *Id.*; Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 (Advisory Opinion) [hereinafter *Competence for Admission*].

[78] *Reparation case*, 1949 I.C.J. at 174; *International Status of South West Africa*, 1950 I.C.J. at 128; *Administrative Tribunal Awards case*, 1954 I.C.J. at 47; *African Voting case*, 1955 I.C.J. at 67; 1956 I.C.J. 23 67; Admissibility of Hearings of Petitioners by

Namibia is that the Court, despite its disclaimer, did review, in detail, the validity and operative effect under the Charter of resolutions of the General Assembly and the Security Council.[79] In doing so, it upheld the validity and operative effect of General Assembly Resolution 2145(XXI) terminating South Africa's mandate over Namibia (formerly South West Africa),[80] and the validity and binding effect of Security Council resolutions taken pursuant to its residual powers under Article 24 of the Charter.[81] This may not be judicial review in the sense of *Marbury*, but judicial review none the less.

The obstacle is not a lack of authority in the Court to interpret the Charter, or to pronounce on the validity under the Charter of an act of another organ in a case properly before it. The problem is in the limited jurisdiction of the Court and in the difficulty of getting a case involving a Charter issue properly before it.

IV. Similarities and Differences in Fundamental Issues

Continuing our analogy, but with all due caveats, some of the most fundamental constitutional issues, such as separation of powers and federalism, find their counterparts in the United Nations. These are problems for which there is no permanent answer, but rather an ongoing struggle in which one, and then another protagonist, may gain an advantage.

Considering first the separation of powers, take, for example, the foreign affairs power under the U.S. Constitution. Professor Louis Henkin has sketched the controversy that has existed from the time of Hamilton and Madison.[82] The

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the Committee on South West Africa, 1956 I.C.J. 23 (Advisory Opinion) [hereinafter *SWA Hearings of Petitioners*]; *Certain Expenses*, 1962 I.C.J. at 151; *Namibia*, 1971 I.C.J. at 16; Western Sahara, 1975 I.C.J. 12 (Advisory Opinion).

[79] The Court also reviewed the validity of General Assembly Resolutions in the *Certain Expenses* case, *supra* note 45. The Court said: ". . . when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the organization." *Id.* at 168.

[80] *Namibia*, 1962 I.C.J. at 45-50.

[81] *Id.* at 51-4.

[82] Henkin, *The Constitution and Foreign Affairs*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 113, 118, 182 n.15 (Harmon 1978). *See also* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS, A FUNCTIONAL RECONSIDERATION OF THE

Constitution itself lists certain powers of the President and certain powers of Congress in the field of foreign relations, but it contains no general delegation of the foreign affairs power to either the executive or legislative branch. Hamilton argued that it was part of the executive function as understood at the time and, therefore, residual powers in foreign affairs were vested in the President. Madison said the conduct of foreign relations had belonged to the Continental Congress and, therefore, all powers not specifically delegated to the President remained with Congress. The debate is still with us. For a time it seemed that an "Imperial Presidency" had won the battle, but with Vietnam, Watergate, and most recently the Iran-Contra affair, Congress has reasserted its claims. A special prosecutor seems even to return to the position of Madison.

In the U.N., the General Assembly and the Security Council have been the rival claimants, although the political powers of the Secretary General have also been an issue.[83] While the Assembly and Council of the League of Nations had been given concurrent powers by the Covenant, "separation of powers" was a leading concept of the Charter.[84] The U.N. General Assembly was to be a "creative body" establishing principles while the Security Council was to be an organ of action carrying out those principles.[85]

However, with the veto induced paralysis of the Security

ROLE OF THE SUPREME COURT 261-62 (1980); M. PERRY, *supra* note 55, at 56; E. CHEMERINSKY, *supra* note 55, at 99-100; Nagel, *supra* note 55, at 198. *See also Congress and the Presidency: Invitation to Struggle*, 499 ANNALS (Davidson 1988).

[83] S. SCHWEBEL, THE SECRETARY GENERAL OF THE UNITED NATIONS (1952); I. CLAUDE, SWORDS INTO PLOW SHARES, THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 206-12 (1971).

[84] I. CLAUDE, *supra* note 83, at 175.

[85] The Chairman of the responsible committee at the San Francisco Conference described the respective functions of the General Assembly and the Security Council as follows:

> The Assembly, as the supreme representative body of the world, is to establish principles on which world peace and the ideal of solidarity must rest; and, on the other hand, the Security Council is to act in accordance with those principles and with the speed necessary to prevent any attempted breach of international peace and security. In other words, the former is a creative body and the latter an organ of action.

Report of Committee II/2, Doc. 1151, II/17, 8 U.N.I.C.O. Docs. 190, 196 (1945), *quoted in* I. CLAUDE, *supra* note 83, at 176.

Council during the early years of the cold war, the General Assembly successfully asserted, through Uniting for Peace,[86] its right to act when the Security Council was unable to do so. It was the Assembly which created the first United Nations peace-keeping force (UNEF I) and established the structure and procedures for peace-keeping forces later utilized by the Security Council.[87] The International Court of Justice has given its imprimatur to this action by the Assembly in the following terms:

> . . . the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with *decisions* of the General Assembly 'on important questions.' These 'decisions' do indeed include certain recommendations, but others have dispositive force and effect.[88]

For a while the Assembly assumed a dominant position, but this dominance was short lived. As the United States reassessed its voting position, a new, but uneasy balance emerged.

Going next to aspects of federalism, we have under the U.S. Constitution the question of states' rights[89] and under the U.N. Charter the problem of domestic jurisdiction[90]. Again, there is no fixed resolution of these issues. Professor Inis Claude has written: "The international battle over domestic jurisdiction bids fair to be as permanent a feature of the constitutional history of the United Nations as the domestic battle over states' rights has been in American history."[91]

At the level of constitutional theory and judicial action in the United States, the issue was early joined on the basic character of the Constitution.[92] Counsel for Maryland, and those who

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[86] G.A. Res. 377(V) of 3 Nov. 1950.

[87] Resolutions of the First Emergency Special Session of the General Assembly, U.N. GAOR Supp. (No. 1), U.N. Doc. A/3354 (1956).

[88] *Certain Expenses*, 1962 I.C.J. at 163 (emphasis added). *See also Namibia*, 1971 I.C.J. at 50.

[89] U.S. CONST. amend. X.

[90] U.N. CHARTER art. 2, para. 7.

[91] I. CLAUDE, *supra* note 83, at 188. *See* B. COHEN, *supra* note 11, at 21-22.

[92] Powell, *supra* note 70, at 887, 907, 924-35, 944-46; Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CALIF. L. REV. 1480, 1496 (1985). *See also* Murphy, *The Art of Constitutional Interpretation, A Preliminary Showing*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 132 (Har-

attacked Chief Justice Marshall's opinion in letters to the *Richmond Enquirer*, asserted that the Constitution was a compact among sovereign states; in other words, a contract or treaty. Marshall maintained that it was not a compact but an instrument - a super-statute, emanating directly from the true sovereign, the People of the United States, as declared in the opening line of the Preamble.

The political battle was waged through the Virginia and Kentucky Resolutions of 1798, the Hartford Convention of 1815, the nullification crisis of 1828 to 1832, and eventually the secession of South Carolina and her sister states of the Confederacy in 1861. It thus took better than Lincoln's four-score and seven years and a civil war to settle the most basic conflict. While the predominant position of the Federal Government and Marshall's view of the Constitution are now secure, various federalism and states' rights issues continue to assert themselves in political and judicial arenas.[93]

The United Nations Charter, on the other hand, is of course a treaty among sovereign States[94] and it is not seriously contended otherwise. Although the Preamble of the Charter opens with the phrase "We the peoples of the United Nations," proposed by the United States delegation and inspired by our Constitution, little use has thus far been made of these words in constitutional interpretation and development of the United Nations Charter.[95] But, while the Charter is universally recognized

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mon, 1978). Opsahl, *An "International Constitutional Law"?* 10 INT'L. & COMP. L.Q. 760, 771 (1961)(Opsahl considered that the United States Constitution was a treaty which became something else).

[93] *See*, Brest, *supra* note 28, at 233.

[94] Article 2, paragraph 1 of the Charter states as a first Principle: "The Organization is based on the principle of the sovereign equality of all its Members." U.N. CHARTER art. 2, para. 1.

[95] GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS 20, 89 (2d ed. 1949). Macdonald, *The United Nations Charter: Constitution or Contract?*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 889 (Macdonald & Johnston 1983). Referring to the views of L. Ehrich, a Polish writer, he states:

> . . . he comes to the conclusion that the main purpose of this expression ['We the Peoples of the United Nations'] is to give the Charter a solemn form and to indicate that the Charter adopted a democratic principle according to which, during its interpretation, the will of the peoples living in the member states of the United Nations must be taken into account.

as a treaty, it is also recognized as a treaty having a very special character.[96] So the issue joined is not compact versus super-statute, but the effect of the special nature of the Charter on its interpretation and development.[97]

While nullification was resoundingly rejected in the federal-states controversy in the United States, it appears in various forms and under different names in the relations of the United Nations and its members. The most well known example is the refusal of a number of U.N. members, including the United States, to pay their legally binding assessments with the consequent financial crises of the Organization.[98] Another example in the United States has been the refusal of lower courts to enforce Charter obligations on the pretext of either non-self-executing provisions or the rule of *Whitney v. Robertson* - treaties and acts of Congress are on an equal footing and the last in point of time prevails.[99]

In *Diggs v. Schultz*, before the Court of Appeals for the District of Columbia, Judge McGowan, in declining injunctive relief to plaintiff-appellants who sought compliance with Security Council sanctions against Southern Rhodesia, deplored the situation, but found no alternative. He said:

Id. at 890.

[96] The International Court of Justice in the *Certain Expenses* case, referred to the Charter as "a multilateral treaty, albeit a treaty having certain special characteristics." *Certain Expenses*, 1962 I.C.J. at 157. Even Eastern European writers who prefer not to refer to the Charter as a constitution recognize that it is a special treaty *sui generis*. For a summary of views, see Macdonald, *supra* note 95, at 889-92.

[97] *See infra* text accompanying notes 254-63.

[98] *See* Zoller, *The "Corporate Will" of the United Nations and the Rights of the Minority*, 81 A.J.I.L. 610-34 (1987). Professor Zoller in her prize winning article, after demonstrating that treaty law can not justify the withholding of contributions, puts forward a very dangerous theory of an inherent right of nullification in member States based on the horizontal nature of the international legal order. *Id.* at 630-34. But the purpose of the Charter was to introduce a vertical element, however minimal, in the traditional legal order. Professor Zoller's thesis would be as destructive to the United Nations as nullification would have been destructive of the United States.

[99] Whitney v. Robertson, 124 U.S. 190 (1888). For an example of a court refusing to apply the human rights provisions of the Charter on the grounds that they were non-self executing see Fujii v. California, 38 Cal. 2d. 718; 242 P.2d 617 (Cal. 1952). However, the Court by applying the Fourteenth Amendment, reached the same result as the lower court had reached by applying the Charter. *See* Sei Fujii v. California, 217 P.2d 481 (Cal. Dist. Ct. App. 1950). *See* Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VANDERBILT L. REV. 643-59 (1951).

> We think that there can be no blinking the purpose and effect of the Byrd Amendment. It was to detach this country from the U.N. boycott of Southern Rhodesia in blatant disregard of our treaty undertakings. The legislative record shows that no member of Congress voting on the measure was under any doubt about what was involved then; and no amount of statutory interpretation now can make the Byrd Amendment other than what it was when presented to the Congress, namely, a measure which would make, and was intended to make, the United States a certain treaty violator.[100]

Several European countries now recognize that treaty obligations prevail over their national laws and even over their constitution. Suggestions have been made that it is time that the U.S. Supreme Court took a new look at the rule of *Whitney v. Robertson*.[101] It has been argued, correctly in my view, that the Constitution does not require the result reached in that case. A reworking of the rule would enable the United States to function more responsibly in our modern interdependent world. If the Court is not yet prepared to overrule *Whitney*, it might at least make an exception for the United Nations Charter.[102]

Before the International Court of Justice, of course, national laws and constitutional provisions would be no excuse for the violation of international obligations.[103] The Court, like Chief Justice Marshall in the second part of *M'Culloch*, would

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[100] Diggs v. Schultz, 470 F.2d 461 at 465 (D.C. Cir. 1972).

[101] *See* Sohn, *Panel: New Departures in the Law of Sovereign Immunity*, 63 PROC. AM. SOC. INT'L L. 180 (1969); HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 163-64 (1972); HENKIN, PUGH, SCHACHTER & SMIT, INTERNATIONAL LAW, CASES AND MATERIALS 207 (1987). Stein, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case*, 63 MICH. L. REV. 491 (1965): "Theoretically, if the concept of 'higher law' [with respect to treaties] were to prevail completely, this treaty supremacy should extend not only to preexisting but also to subsequent federal law. Both Jefferson and Jay assumed this to be the case." *Id.* at 505. Robert B. Rosenstock, in his lecture, raised the question whether it was not time to take a fresh look at the question, Lecture by Robert B. Rosenstock, Blaine Sloan Lecture in International Law, Pace University School of Law, White Plains, N.Y. (Apr. 14, 1988).

[102] However, this point was raised in *Diggs v. Schultz* and rejected by the Court of Appeals, *Diggs, supra* note 100, 465 n.4.

[103] Art. 27 of the Vienna Convention on the Law of Treaties provides that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . . ." This is a statement of general international law on the subject. *See* statement of Charles Evans Hughes, then Secretary of State and about to become Chief Justice, 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 324-25.

not hesitate to review the effects of such legislation against Charter obligations in a case where it had jurisdiction and the issue was properly joined.[104] But, the result would be a finding that the State had violated its obligations under the Charter, not that the national law was void.[105]

With respect to secession, the ultimate and most drastic of states' rights claims, neither the U.S. Constitution nor the U.N. Charter provide for withdrawal. For the United States, the question was decided on the field of battle. For the United Nations, there is the declaration adopted by the San Francisco Conference which disclaims any "purpose of the Organization to compel [a] Member to continue its cooperation in the Organization."[106] The declaration indicates certain exceptional circumstances in which withdrawal might be envisaged,[107] but also "deems that the highest duty of the nations which will become Members is to continue their cooperation within the Organization for the preservation of international peace and security."[108] It concludes that "[i]t is for these considerations that the Committee has decided to abstain from recommending insertion in the Charter of a formal clause specifically forbidding or per-

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[104] In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 32-35, 92-97, 146 (Merits), the Court lacked jurisdiction to consider the Charter obligations because of the multilateral treaty reservation made by the United States in its acceptance of the Optional Clause. However, the Court considered the nearly parallel, but not identical, obligations under general international law.

[105] Virally, *The Sources of International Law* in MANUAL OF PUBLIC INTERNATIONAL LAW 116 at 170-71 (Sorensen 1968). *See* Stein, *supra* note 101, at 509-13. Professor Stein notes that the position is different in the European Court of Justice where a national law in conflict with Community law is invalid. He comments that:

> . . . it is perhaps the first time in history that a court established by an international treaty has asserted its power to determine, with effect not only in the 'international' (or Community) legal order but also in national law, the hierarchical value of the very norm to which it owes its existence.

Id. at 513.

[106] *Report of the Rapporteur of Committee I/2 on Chapter III (Membership)*, Doc. 1178, I/2/76(2), 7 U.N.C.I.O Docs. 324 at 328, 5 (1945) [hereinafter *Report of Committee I/2*].

[107] These circumstances are: 1) if the Organization was unable to maintain peace or could do so only at the expense of law and justice; 2) if the rights and obligations of a member are changed by an amendment in which it had not concurred and which it was unable to accept; or 3) if an amendment accepted by the Assembly or a general conference failed to secure the necessary ratifications.

[108] *Report of Committee I/2, supra* note 106 at 328, 5.

mitting withdrawal."[109]

Some have interpreted this declaration as establishing an absolute right of withdrawal, but this is not supported by either the text or, fortunately, the very limited practice. In the case of Indonesia's purported withdrawal in 1965, the Secretary- General was careful only to note Indonesia's letter and to express "the earnest hope that in due time it will resume full cooperation with the United Nations."[110] When, in the following year, after a change in government, Indonesia expressed the intention "to resume full cooperation with the United Nations," it was welcomed back without going through the admission process.[111] The conclusion that should be drawn is that while the United Nations would not, and in fact in current circumstances could not, use force to compel continued cooperation, a right of withdrawal exists, if at all, only in the exceptional circumstances set forth in the San Francisco Declaration.[112]

With respect to the subject of federalism, similarities thus far have related more to the issues than to their resolution. However, reverting to Article 2, paragraph 7, of the Charter, the claim of domestic jurisdiction has not proved a serious impediment to discussion and even action by United Nations organs. In fact, enforcement action is expressly excluded from its application. Building on the Advisory Opinion of the Permanent Court of International Justice in the *Nationality Decrees* case,[113] to the effect that domestic jurisdiction is a relative term, the United Nations has overridden objections of colonial powers in order to deal decisively with the matter of non-self-governing territories and has established, beyond effective dispute, that

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[109] *Id.* at 392, 6.

[110] U.N. Doc. S/6202 (1965). The right of Indonesia to withdraw was questioned by a few members. *See* letter from the U.K., U.N. Doc. S/6229 (1965).

[111] U.N. Doc. A/6419 (1966); U.N. Doc. S/7498 (1966); U.N. Doc. A/PV/1420 at 2 (1966)(I wrote the scenario reflecting the consensus of the members for Indonesia's return to full cooperation).

[112] *See* Schwelb, *Withdrawal from the United Nations: the Indonesia Intermezzo*, 61 A.J.I.L. 661, 671-72 (1967). Even if a State were to withdraw from the U.N. it would still be subject to action under Art. 2(6) which provides: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." U.N. CHARTER art. 2, para. 6.

[113] Nationality Decrees Issued in Tunis and Morocco, 1923 P.C.I.J. (ser. B) No. 4, 23-24 (Advisory Opinion); 1 HUDSON, WORLD COURT REPORTS 143-62.

human rights are a subject of international concern.[114] Thus, Article 2(7) has not been a serious obstacle to United Nations action in these fields. Predominant power, however, remains with the member States.

V. Approaches to Interpretation

It is now time to look at theories of, and approaches to interpretation as they apply first, to the U.S. Constitution and second, to treaties. After that we will see how these theories and approaches may be applicable to the U.N. Charter. There is a vast sum of literature relating to constitutional interpretation[115]

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[114] Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania, First Phase, 1950 I.C.J. 65 (Advisory Opinion) [hereinafter *Peace Treaties*]. *See* Jiménez de Aréchaga, *supra* note 44, at 3-6.

[115] *See* C. ANTIEAU, CONSTITUTIONAL CONSTRUCTION (1982); S. BARBER, ON WHAT THE CONSTITUTION MEANS (1984); *Interpretation Symposium*, 58 S. CAL. L. REV. 277-398, 551-700 (1985); R. BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 1-65 (1955); Bork, *Neutral Principles and some First Amendment Problems*, 47 IND. L.J. 1 (1971); Brest, *supra* note 28; Carter, *supra* note 55; E. CHEMERINSKY, *supra* note 55; J. CHOPER, *supra* note 82; Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society*, 67 IOWA L. REV. 711 (1982); E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY (1920); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Edelman, *supra* note 55; P. EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION (1986); J. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW (1980); Epstein, Lopez, Pitkin, Tribe, Van Alstyne & Kaufman, *The Idea of the Constitution*, 37 J. LEGAL EDUC. 153 (1987); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); FRIED, *Sonnet LXV and the "Black Ink" of the Framers Intention*, 100 HARV. L. REV. 751, 760 (1987); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 718 (1975); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES (Harmon 1978); H. HORWILL, THE USAGES OF THE AMERICAN CONSTITUTION (1925); Koffler, Book Review, 1 PACE L. REV. 403 (1980)(reviewing J. ELY, DEMOCRACY AND DISTRUST (1980)); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972); LLewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934); L. LUSKY, BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION (1975); Lynch, Book Review, 84 COLUM. L. REV. 537 (1984)(reviewing M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982)); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); W. MURPHY, J. FLEMING & W. HARRIS, II, AMERICAN CONSTITUTIONAL INTERPRETATION (1986); Munzer & Nickel, *Does the Constitution Mean what it always Meant?*, 77 COLUM. L. REV. 1029 (1977); Nagel, *supra* note 55; M. PERRY, *supra* note 55; Powell, *supra* note 70; Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Shaman, *supra* note 52; Simon, *supra* note 92; L. TRIBE, CONSTITUTIONAL CHOICES (1985); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

and very extensive material on treaty interpretation.[116] The treaty material in the more recent past has been directed towards formulating principles of interpretation, while current constitutional debate concerns as much the legitimacy of judicial

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[116] *See* Berglin, *Treaty Interpretation and the Impact of Contractual Choice of Forum Clauses on the Jurisdiction of International Tribunals: The Iranian Forum Clause Decisions of the Iran-United States Claims Tribunal*, 21 TEX. INT'L L.J. 39 (1985); YI-TING CHANG, THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNALS (1933); Degan, *Attempts to Codify Principles of Treaty Interpretation and the South-West Africa Case*, 8 IND. INT'L L.J. 9 (1968); Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 B.Y.I.L. 1 (1951); Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 B.Y.I.L. 203 (1957); Fitzmaurice, *Vae Victis or Woe to the Negotiators Your Treaty or our "Interpretation" of it?*, 65 A.J.I.L. 358 (1971); *Judicial Innovation - Its Uses and Its Perils - As exemplified in some of the Work of the International Court of Justice during Lord McNair's Period of Office*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW 24-47 (1965); Gross, *Treaty Interpretation: The Proper Role of an International Tribunal*, 63 PROC. AM. SOC. INT'L L. 1, 118-22 (1969); Gottlieb, *The Interpretation of Treaties by Tribunals*, 63 PROC. AM. SOC. INT'L L. 1, 122-31; HUDSON, PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942 551-73 (1943); Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318 (1969); Kearney & Dalton, *The Treaty on Treaties*, 64 A.J.I.L. 495, 518-21 (1970); H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 B.Y.I.L. 48 (1949), M. MCDOUGAL, H. LASSWELL, & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER, PRINCIPLES OF CONTENT AND PROCEDURE (1967); LORD MCNAIR, THE LAW OF TREATIES 364-489 (1961); Pratap, *Interpretation of Treaties - Use of Intrinsic and Extrinsic Materials*, in ESSAYS ON THE LAW OF TREATIES 55-69 (Agrawala 1972); Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, in ESSAYS ON THE LAW OF TREATIES 95-137 (Agrawala 1972); Jagota, *Vienna Convention on the Law of Treaties, 1969*, in ESSAYS ON THE LAW OF TREATIES 179-96 (Agrawala 1972); Schwarzenberger, *Myths and Realities of Treaty Interpretation, Articles 31-33 of the Vienna Convention on the Law of Treaties*, in ESSAYS ON THE LAW OF TREATIES 71-94 (Agrawala 1972); *see also* 22 CURRENT LEGAL PROBLEMS 205-27 (KEETON & SCWARZENBERGER 1969); ROSENNE, *Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison*, 5 COLUM. J. TRANSNAT'L L. 205 (1966); SHARMA, *The ILC Draft and Treaty Interpretation with Special Reference to Preparatory Works*, 8 IND. INT'L L.J. 367 (1968); SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2d ed 1984); *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L.Q. 47 (1970); SORENSEN, LES SOURCES DU DROIT INTERNATIONAL (1946); Stone, *Fictional Elements in Treaty Interpretation - A Study in the International Judicial Process*, 1 SYDNEY L. REV. 344 (1955); Vierdag, *The Law Governing Treaty Relations between Parties to the Vienna Convention on the Law of Treaties and States not Party to the Convention*, 76 A.J.I.L. 779 (1982); Wright, *The Interpretation of Multilateral Treaties*, 23 A.J.I.L. 94 (1929); TSUNE-CHI YU, THE INTERPRETATION OF TREATIES (1927). For some other early writings on treaty interpretation see Pollux (Hambro), *The Interpretation of the Charter*, 23 B.Y.I.L. 54, 55 n.3 (1946).

review in relation to majoritarian democracy as it does methods of constitutional interpretation. This concentration on the proper judicial role has its disadvantages in difining methods of constitutional construction since interpretation is not confined to courts but is a normal function of all branches of government.[117] The material relating to treaty interpretation is not so limited. Only the 1956 Resolution of the *Institut de Droit International* makes a distinction between interpretation by judicial bodies and by other decision makers.[118]

A. *Constitutional Construction*

Various classifications have been offered in analyzing approaches to constitutional interpretation.[119] Professor Erwin Chemerinsky in his recent book on *Interpreting the Constitution* lists literalism or textualism,[120] originalism,[121] conceptualism (moderate originalism),[122] culture values theories,[123] process-based modernism,[124] and his own theory of open-ended

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[117] E. CHEMERINSKY, *supra* note 55, at 22. Professor Chemerinsky points out that this concentration on the proper judicial function at the very least "is undesirable because regardless of the judicial role, there is a need to determine the proper method for Congress, the president, and state governments to use in interpreting the Constitution." *Id.* at 22. *See also* Simon, *The Authority of the Constitution and its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 619 (1985).

[118] *See infra* text accompanying note 191.

[119] *See* S. BARBER, *supra* note 115, at 9-10 (textual, intentions of framers, present or emergent consensus, ideas of social progress, naturally right, *etc.* and his own "aspirational" combination of other approaches); Brest, *supra* note 28, at 204-05 (originalism including strict textualism and strict intentionalism, moderate originalism, and no-noriginalism); E. CHEMERINSKY, *supra* note 55, at 108-09.

I am using the term *interpretation* broadly although I am aware that there are various narrower uses of the word. For example, Nagel, *supra* note 55, distinguishes practice from interpretation. He writes: "Much of the Constitution draws its meaning from practice rather than from interpretation." *Id.* at 187. Michaels gives an even narrower definition: *interpretation* means considering the original intentions. Michaels, *Response to Perry and Simon*, 58 S. CAL. L. REV. 673 (1985). *See* Simon, *supra* note 117, at 620 n.16, 622 n.18; E. CHEMERINSKY, *supra* note 55, at 60-61.

[120] Chemerinsky gives Justice Hugo Black as an example. *See* E. CHEMERINSKY, *supra* note 55, at 108.

[121] *Id.* at 178 (referring to Raoul Berger and Chief Justice Rehnquist). Others, such as Judge Bork and Monaghan, could be added.

[122] *Id.* at 178-79 nn.14 & 15 (citing to Dworkin).

[123] *Id.* at 179 nn.17-20 (citing to Conkle, Lupu, Moore, Perry, Simon, Wellington & White).

[124] *Id.* at 109 n.21 (citing to Ely).

modernism.[125]

Professor Chemerinsky defines literalism as "the view that all constitutional interpretation must be based solely on the constitutional text."[126] Since literalism carries a connotation of strict adherence to the plain meaning rule, textualism is perhaps a preferable term emphasizing reliance on the text but being less confining than a strict literalism.

Originalism is defined as a theory which "accords binding authority to the text or the intention of its adopters."[127] It thus combines textualism with intentionalism and does not directly address the issue which has been foremost in the debates over treaty interpretation between adherents to the text and adherents to actual intent.[128]

Conceptualism, otherwise termed moderate originalism, "requires the Court to determine the underlying purpose of a constitutional provision and to apply this purpose in developing modern governing principles."[129] Professor Dworkin's distinction between broad concepts of the framers and more specific conceptions of present day interpreters is a leading example.[130] To the extent that emphasis is placed on purpose, there is a teleological aspect to conceptualism.[131]

Under the culture values theories, the Court uses basic social values not expressed in the text as a basis for constitutional decision making.[132] Such values are variously derived from tradi-

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[125] *Id.* at 109.

[126] *Id.* at 108.

[127] *Id. See also* Brest's discussion of originalism, Brest *supra* note 28, at 205-09, 222-23.

[128] *See infra* text accompanying notes 190-91, 194-204. Monaghan, *supra* note 115, says that "A distinction is sometimes posited between textual analysis and original intent inquiry such that only the constitutional text and not 'parol evidence' can be examined to ascertain constitutional meaning. But any such distinction seems entirely wrong." *Id.* at 374 (citing Brest, *supra* note 28, at 205-13). *See* Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), to the effect that the text is the best evidence of intent "must be understood to have employed words in their natural sense, and to have intended what they said." *Id.* at 188. However, where the actual intent of the framers can be ascertained it would seem that for most originalists intent would control.

[129] E. CHEMERINSKY, *supra* note 55, at 108.

[130] R. DWORKIN, *supra* note 115, at 134-36.

[131] *See infra* text accompanying note 178.

[132] E. CHEMERINSKY, *supra* note 55, at 109.

tion, moral consensus, natural law and similar extrinsic sources.[133]

Process based modernism, as formulated by Dean Ely, "permits the Court to decide cases based on contemporary values but limits such discretion to improving the process of government by ensuring fair representation or adjudication."[134]

And finally, Professor Chemerinsky's own open-ended modernism is "an approach that permits the Court to give meaning to all constitutional provisions on the basis of contemporary values that the justices regard as worthy of constitutional protection."[135]

While in the past, discussion has often been in terms of strict and liberal construction, expansive and restrictive interpretation, and judicial activism and restraint, the current lines are between originalist and non-originalist, interpretivists and non-interpretivists, and constructionists and non or deconstructionists.[136]

For an originalist, such as Judge Robert Bork, constitutional interpretation should rest on the intent of the framers and ratifiers which is to be discerned from text, history, structure and precedent.[137] In order to ensure the application of neutral principles "[t]he judge must stick close to the text and the history, and their fair implications, and not construct new rights."[138]

Non-originalists doubt both the practicality and desirability of relying on original intent. They first ask whose intent is relevant, the drafters (framers), the ratifiers in the various state conventions and legislatures, the states or ultimately the people? Secondly, does one look for a specific or a general intent, or for a

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[133] *Id.* at 179 nn.18-20 (citing Lupu, White, Moore & Wellington).

[134] E. CHEMERINSKY, *supra* note 55, at 109.

[135] Professor Chemerinsky adds: "Under open-ended modernism, the Constitution is viewed as outlining basic concerns - separation of powers, freedom of speech, protection of criminal defendants - and the Court in each generation is entrusted to give content and meaning to them in their application to contemporary situations." *Id.*

[136] *See* Brest, *supra* note 28, at 205; Linde, *supra* note 115, at 254-55; Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279; M. PERRY, *supra* note 55, at 10; Simon, *supra* note 117, at 619.

[137] Speech by Judge Robert H. Bork before the Supreme Court Historical Society, May 6, 1983, *Styles in Constitutional Theory*, 21 (mimeo). *See also* Bork, *supra* note 115, at 17.

[138] Bork, *supra* note 115, at 8.

functional equivalent; or, was there in fact no common intent, or an intent to leave decisions to future interpreters?[139] All the usual difficulties with legislative history are compounded by distance in time. It is suggested that to understand the intentions of people living two hundred years ago, one must transpose the interpreter from his time and circumstances to those of the framers or, conversely, transpose the framers to the time of the interpreter.[140] If all these difficulties are overcome, the non-originalist will still maintain that it is undesirable that present generations should be bound by the "dead hand of the past;" that decisions, rather, should be based on present values, not those of two hundred or even one hundred years ago.[141]

Emphasis of the non-originalist is on the concept of a living constitution and the need for it to evolve with our evolving civilization. But even originalists do not reject altogether the concept of growth. Chief Justice Rehnquist wrote in 1976 that he accepted Justice Holmes' conception of a living constitution. He comments:

> The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasing changing environment in which they would live. Those who framed, adopted, and ratified the Civil War amendments to the Constitution likewise used what have been aptly described as 'majestic generalities.'[142]

What he rejected was the idea that judges may impose their own moral values, going beyond even a generously fair reading of the language and intent of the Constitution.[143]

Judge Bork would save *Brown v. Board of Education* by

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[139] Brest, *supra* note 28, at 214-16; Shaman, *supra* note 52, at 267-68; Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647-59 (1985); E. CHEMERINSKY, *supra* note 55, at 49-50; I. ELY, *supra* note 115, at 17; Simon, *supra* note 117, at 636-45.

[140] *See* Carter, *supra* note 55; Simon, *supra* note 117, at 639; Tushnet, *supra* note 115, at 800-02.

[141] E. CHEMERINSKY *supra* note 55, at 53-54, 122-23; Moore, *supra* note 136, at 352-58; Munzer & Nickel, *supra* note 115, at 1031-33; Shaman, *supra* note 52, at 267-72; Perry, *The Authority of Text, Tradition and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 592. *Compare* Stone, *supra* note 116, at 351 (citing Sir Eric Beckett).

[142] Rehnquist, *supra* note 115, at 694.

[143] *Id.* at 704.

finding a "core meaning" in the equal protection clause of the Fourteenth Amendment.[144] Also, in addition to the "specific values that text and history show the framers actually to have intended," he would derive rights "from governmental processes established by the Constitution."[145]

Moreover, originalists do not deny that value choices must be made, but believe that these should properly be left to the politically responsible departments of government. As Professor Perry points out, they would distinguish the sustaining of electively accountable policy choices, on the one hand, from the striking down of a policy choice made by an electively accountable body on the other.[146]

While originalist and non-originalists agree that many, if not most, of the important constitutional decisions of this century can not be adequately supported on originalist or even on interpretivists terms, the courts speak in constitutional language. Professor Larry Simon has contended that ". . . the language of so many provisions of the Constitution permits such an enormous range of meanings consistent with their language-meanings that an interpreter would rarely, if ever, have to violate the document's language-meaning in order to reach a particular outcome."[147]

An approach utilizing terminology employed by the Court will be found in Professor Charles James Antieau's book on *Constitutional Construction* published in 1982. Professor Antieau has analyzed and classified pronouncements of courts on constitutional issues.[148] In his second chapter, this analysis is organized under fifty Guides or Canons of Construction. These start with the plain meaning rule,[149] run through such well-known maxims as *ejusdem generis*[150] and *expressio unius est exclusio alterius*,[151] various degrees of liberal and restrictive interpreta-

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[144] Bork, *supra* note 115, at 14.

[145] *Id.* at 17.

[146] M. PERRY, *supra* note 55, at 33.

[147] Simon, *supra* note 117, at 620. He adds: "All Supreme Court opinions of which I am aware give meaning to the Constitution and are consistent with its language-meaning, or at least could be rewritten to be 'interpretivist' in these senses." *Id.* at 622.

[148] C. ANTIEAU, *supra* note 115.

[149] *Id.* at 11.

[150] *Id.* at 28.

[151] *Id.* at 29.

tion, including the principle of effectiveness,[152] and conclude with a teleological approach.[153] As is always the case, one can find within this wealth of material a maxim for almost every side and nuance of a question.

I will deal with only three of many possible points; points which are not only closely related to each other, but also to the subject of this paper. The first is the idea already mentioned, that of a living constitution. We have noted that even originalists, such as Chief Justice Rehnquist and Judge Bork, must make some concessions to this principle.[154] Of course, there are contrary views. Chief Justice Taney in *Dred Scott v. Sanford*,[155] referring to the possibility of amending the Constitution, said: ". . . but while it remains unaltered, it must be construed now as it was at the time of its adoption."[156]

And Justice Sutherland, dissenting in *Home Building and Loan Assoc. v. Blaisdell*[157] contended that: "The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it."[158]

Alexander Bickel writing in 1955, after quoting the above, remarked: "Of course, such views, when they prevail, threaten disaster to government under a written constitution."[159]

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[152] *Id.* at 18, 33, 36.

[153] *Id.* at 51. *See also id.* at 23, 26. *See* United States v. Classic, 313 U.S. 299 (1941):

> . . . in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government . . . If we remember that 'it is *a constitution* we are expounding;' we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose.

Id. at 316 (original emphasis).

[154] *See infra* text accompanying notes 142-46.

[155] 60 U.S. (19 How.) 393 (1857).

[156] *Id.* at 426.

[157] 290 U.S. 398 (1934).

[158] *Id.* at 453.

[159] Bickel, *supra* note 115, at 3.

Chief Justice Warren in *Brown v. Board of Education*,[160] said: " . . . we can not turn back the clock to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[161]

And Chief Justice Hughes in *Blaisdell*[162] declared:

> If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.[163]

While cases and learned argument can also be cited against an evolutionary approach, there can be no doubt that the Constitution has evolved and will continue to evolve through judicial interpretation and governmental practice.

Which brings me to my second point, that practice has an important role to play in interpretation. Several of Professor Antieau's Guides or Canons relate to usage or practice in constitu-

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[160] 347 U.S. 483 (1954).

[161] *Id.* at 492. *Compare with* Statement of Monroe Leigh, then Legal Adviser of the State Department, the Sixth (Legal) Committee of the General Assembly on 14 Nov. 1975, 74 DEP'T ST. BULL. 119 (No. 1909 Jan. 26, 1976)("That accomplishment was not simply to provide a charter to deal with the contingencies of 1946; it was farsighted enough to provide our basic guidelines for the future by allowing scope for historical change."). Earlier in the same speech he stated: "The charter was conceived as a document which could stand the test of time by growing with evolving needs. It was conceived not merely as a constitutive treaty, but as a constitutional instrument . . . the language of the charter permits important evolutionary changes without requiring textual changes." *Id.* at 118-19.

[162] *Blainsdell*, 290 U.S. 398 (1934).

[163] *Id.* at 442. Chief Justice Hughes added: "It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning - 'We must never forget, that it is *a constitution* we are expounding.' " *Id.* at 443 (original emphasis). *See also* Weems v. U.S., 217 U.S. 349 (1910); Justice McKenna stated: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." *Id.* at 373. *See also*, B. CORDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921)("The greast generalities of the Constitution have a content and significance that vary from age to age." as quoted by Justice Blackmun in his dissenting opinion in *Bakke*, *supra* note 34). On a living constitution see H. MCBAIN, THE LIVING CONSTITUTION (1927); Llewellyn, *supra* note 115; Reich, *The living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT 133 (Strickland 1967); Miller, *Notes on the Concept of the "Living Constitution"*, 31 GEO. WASH. L. REV. 881 (1963); *but compare* Miller, *Change and The Constitution*, 1970 L. & SOC. ORDER 231-54.

tional construction.[164] While the Supreme Court has never considered itself bound by congressional or executive practice, it has on occasion given considerable weight to such usage. Justice Frankfurter, speaking for the Court in *Inland Waterways Corp. v. Young*[165] said: "Even constitutional power, when the text is doubtful, may be established by usage."[166]

A very interesting non-judicial example relates to our friend from *M'Culloch*, the Bank of the United States. Madison, as a member of the House of Representatives in the first Congress, opposed on constitutional grounds the establishment of the First Bank, but as President, twenty years later, he signed into law the act creating the Second Bank. He defended the seeming inconsistency on the ground that a construction by usage and precedent should override the intellectual scruples of the individual.[167] In a letter to Judge Spencer Roane in 1819, he stated:

> It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them.[168]

My third point relates to structural interpretation. Professor Charles Black, in his book *Structure and Relationship in*

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[164] C. ANTINEAU, *supra* note 115 at 44-8.

[165] 309 U.S. 517 (1940).

[166] *Id.* at 525. *See also* Youngston Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Justice Frankfurter stated:

> It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making it as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II.

Id. at 610-11, *quoted in* C. ANTIEAU, *supra* note 115, at 44, 47. *See also* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803); United States v. Midwest Oil Co., 236 U.S. 459, 472- 73; (1915); Dames v. Regan, 453 U.S. 654, 686 (1981); CORWIN, *supra* note 115, at 93 (1973 ed).

[167] *See* Powell, *supra* note 70, at 939-40. President Andrew Jackson, however, was not impressed by this practice and vetoed, on constitutional grounds, a bill rechartering the Bank. Veto Message of July 10, 1832 in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576, 581-82 (Richardson 1896). *See* Shaman, *supra* note 52, at 276.

[168] 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (1865), *quoted in* Powell, *supra* note 70, at 941.

Constitutional Law, developed the theory that constitutional rules may be inferred from structural relationships established by the Constitution.[169] It is suggested, for example, that at least the second part of *M'Culloch*, holding that Maryland could not tax the Bank, rested on inferences from the structure of the federal system and not at all on the text of the Constitution.[170]

Another example is *Crandall v. Nevada*,[171] striking down a Nevada tax on persons leaving the state. "[R]elying on the structure of the federal system, it developed an account of membership in the national polity which included a right to travel unimpeded from any state to the seat of the national government."[172]

Structural interpretation, of course, permits alternative inferences depending on the outlook of the interpreter.[173] Views of constitutional structure by an advocate of states' rights will produce far different inferences from those drawn by Chief Justice Marshall in *M'Culloch* or by Justice Miller in *Crandall v. Nevada*.

B. *Treaty Interpretation*

The question of the interpretation of treaties was described by the President of the Vienna Conference as "the most controversial and difficult subject in the whole field of the law of treaties."[174] Sir Gerald Fitzmaurice had earlier called it a "subject of

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[169] C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). *See* Brest, *supra* note 28, at 217-18; Munzer & Nickel, *supra* note 115, at 1051-52; Carter, *supra* note 55, at 864, 867; Monaghan, *supra* note 115, at 361; Nagel, *supra* note 55, at 183; Powell, *supra* note 70, at 888. *See also* W. MURPHY & W. HARRIS, *supra* note 115, at 398-401.

[170] Brest, *supra* note 28, at 217.

[171] 73 U.S. (6 Wall.) 35 (1868). *See* Brest, *supra* note 28, at 217-18; Munzer & Nickel, *supra* note 115, at 1051-52.

[172] Munzer & Nickel, *supra* note 115, observe that:

> An advantage to Black's approach over [appeals to the broad intent of the framers] is that it can accommodate shifts in perceptions of the kind of government that we are trying to have - for example, the more democratic idea of government that has emerged in the last century - and hence justify a different set of rights from those that could be based on appeal to the broad intent of the framers.

Id. at 1052.

[173] Brest, *supra* note 28, at 218.

[174] U.N. Conference on the Law of Treaties, Second Session Official Records, Vienna, 9 Apr.-22 May 1969, *Summary Records of Plenary Meetings and Meetings of the*

acute debate and controversy."[175] And Lord McNair opened the pertinent chapter of his book *The Law of Treaties* with the statement: "There is no part of the law of treaties which the text writer approaches with more trepidation than the question of interpretation."[176]

It was therefore with considerable satisfaction that, despite controversy continuing through the discussions in its Committee of the Whole, the Vienna Conference on the Law of Treaties was able in plenary session to adopt unanimously the International Law Commission Articles on interpretation.[177] It may be doubted, however, that controversies are at an end. The question now is - how do you interpret the Articles on interpretation?

Main approaches to treaty interpretation have been classified as (1) textual, (2) subjective (intention of the parties), and (3) teleological.[178] A principal difference between the textual approach, which looks to the text for the intention of the parties, and the subjective approach, in which intent is distinct from the text, is in the role assigned to *travaux preparatoires*. In the teleological approach the emphasis is on the general object and purpose of the treaty.

Committee of the Whole, U.N. Doc. A/Conf.39/11/Add.1, 59 [hereinafter *Plenary Meetings*].

[175] Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-1954: Treaty Interpretation and other Treaty Points*, 33 B.Y.I.L. 203, 204 (1957).

[176] LORD MCNAIR, *supra* note 116, at 364. *But see* SCHWARZENBERGER, *supra* note 116, at 71, 205.

[177] *Plenary Meetings*, *supra* note 174, at 57-9.

[178] The ILC noted these as follows:

> Jurists . . . differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to: (a) The text of the treaty as the authentic expression of the intentions of the parties; (b) The intentions of the parties as a subjective element distinct from the text, and (c) The declared or apparent objects and purposes of the treaty.

See Report of the International Law Commission on the Work of the Second Part of the Seventeenth Session, Monaco, 3-28 January 1966, U.N. Doc. A/6309/Rev.1, 2 Y.B. INT'L L. COMM'N 169, 218 (1966), *reprinted in* 61 A.J.I.L. 248 at 349 (1967) [hereinafter *ILC Report*]. The teleological approach, (c) above, is sometimes also called the functional approach. *See Official Records of the Vienna Conference, First Session* U.N. Doc. A/Conf.39/11 at 173, 179 (1968).

See Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points*, 28 B.Y.I.L. at 1 (1951); Jacobs, *supra* note 116, at 318-20; Pratap, *supra* note 116, at 53.

We should add to these three categories, the contextual or inclusive approach of Professor McDougal and his Yale associates.[179] Also, we should note Professor Schwarzenberger's view that there is only one rule; that treaties should be interpreted in a spirit of equity (*jus aequum*), that is in accordance with good faith, common sense and reasonableness.[180]

Going back to earlier history, scholars and arbitral tribunals developed sets of rules or canons of interpretation. These begin with Vattel's famous maxim that "[i]t is not permissible to interpret what has no need of interpretation."[181] Like Professor Antieau's Guides,[182] they go from the plain meaning rule through familiar maxims of *ejusdem generis*, *expressio unius*, *etc.*, to various canons of restrictive and liberal construction. Perhaps the most important of these are the principle of restrictive interpretation in favor of State sovereignty and the more accepted and acceptable principle of effectiveness.[183] Here again, one can find a maxim for almost every position.[184] While used in argument and cited by courts, they are today, with few exceptions, generally dismissed or reduced to text book headings.[185]

A more useful survey of recent history takes the form of a review of draft articles proposed or adopted on the interpretation of treaties.[186]

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[179] M. McDOUGAL & J. MILLER, *supra* note 116.

[180] SCHWARZENBERGER, *supra* note 116, at 82, 83, 91, 94, 215-16, 225, & 277.

[181] VATTEL, THE LAW OF NATIONS 199 (Fenwick trans. 1916); *see* Sharma, *supra* note 116, at 373; Falk, *supra* note 116, at 108; Lauterpacht, *supra* note 116, at 48.

[182] *See infra* text accompanying notes 148-53. Compare the list in 1 OPPENHEIM, 856-63, sec. 553-54 (8th ed. 1948). *See also* Georges Pinson Case, 5 R.I.A.A. 422, ANN. DIG. PUB. INT'L L. CASES 1927-28, Case No. 292 (Verzijl, J.).

[183] *See* Lauterpacht, *supra* note 116; Degan, *supra* note 116, at 20-34; Jacobs, *supra* note 116, at 334; LORD MCNAIR, *supra* note 116, at 383-92.

[184] *See infra* text accompanying note 153. Sir Hersch Lauterpacht after noting Vattel's maxim, quoted above at *supra* note 181, pointed out that

> . . . it was followed by other general principles, by presumptions, and by elaborate distinctions between things favourable and odious. It is doubtful whether any party to a dispute involving the interpretation of a treaty can fail to derive some advantage from the rich choice of weapons in Vattel's armoury of rules of interpretation.

Lauterpacht, *supra* note 116, at 48.

[185] *See* LORD MCNAIR *supra* note 116, at 366. *Compare* C. ANTIEAU *supra* note 115, at 11.

[186] For some comparative studies of these drafts see Rosenne; Jacobs; Falk; Degan, *supra* note 116.

The first of these texts is from the 1935 Draft Convention on the Law of Treaties prepared by the Harvard Research in International Law at a time when the League of Nations was engaged in abortive codification efforts. Article 19 entitled "Interpretation of Treaties" read as follows:

> (a) A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux preparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.
>
> (b) When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving to corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve.[187]

Since the emphasis here is on "the general purpose," this may be considered a prime example of the teleological approach.[188] However, since "purpose" may also be taken to mean the actual intent of the parties, and since *travaux preparatoires* and circumstances at time of conclusion are given a prominent place among the factors to be considered, it has also been described as an example of the subjective school.[189]

The next text, adopted as a Resolution of the *Institut de Droit International* in 1956, marks a decisive step in the development of the law relating to interpretation.[190] Sir Hersch Lauterpacht, the first Rapporteur, had strongly urged an approach

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[187] *Article 9, Interpretation of Treaties; Draft Convention on the Law of Treaties*, 29 A.J.I.L. 937, 971 (supp. 1935).

[188] Jacobs, *supra* note 116, at 323-24. Jacobs considers that this approach was influenced by "legal realist" jurisprudence. *Id.* at 323 & n.16.

[189] Degan, *supra* note 116, at 11-2. *See also* Pratap, *supra* note 116, at 60-61; Sharma, *supra* note 116, at 382. Dr. Pratap considers that the Harvard Draft has contextual features, stresses the subjective method, emphasizes the rule of effectiveness, and opens the door to teleological interpretation. Surya Sharma refers to contextual features.

[190] Rosenne, *supra* note 116, at 229. *See* THE LAW OF TREATIES, A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 40 (1970).

based on the intention of the parties and stressed the importance of *travaux preparatoires*. This approach came under attack at sessions of the *Institut*, particularly by his fellow countryman Sir Eric Beckett. Sir Hersch was succeeded as Rapporteur by Sir Gerald Fitzmaurice whose draft emphasizing a textual approach was approved by the *Institut*. The Resolution is as follows:

> The Institute of International Law is of the opinion that when it becomes necessary to interpret a treaty, States and international organizations and tribunals may be guided by the following principles:
>
> Article 1
>
> 1. The agreement of the parties having been embodied in the text of the treaty, it is necessary to take the natural and ordinary meaning of the terms of this text as the basis of interpretation. The terms of the provisions of the treaty should be interpreted in their context as a whole, in accordance with good faith and in the light of the principles of international law.
>
> 2. If, however, it is established that the terms used should be understood in another sense, the natural and ordinary meaning of these terms will be displaced.
>
> Article 2
>
> 1. In the case of a dispute brought before an international tribunal it will be for the tribunal, while bearing in mind the provisions of the first article, to consider whether and to what extent there are grounds for making use of other means of interpretation.
>
> 2. Amongst the legitimate means of interpretation are the following:
>
> (a) Recourse to preparatory work;
> (b) The practice followed in the actual application of the treaty;
> (c) The consideration of the objects of the treaty.[191]

The American approach, which is basically contextual, is found in Sections 146 and 147 of the Second Restatement of the Foreign Relations Law of the United States (1965). These Sec-

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[191] 46 ANNUAIRE 358-59, 364-65, english trans. at 2 Y.B. INT'L L. COMM'N 55 (1964). *See* Fitzmaurice, *supra* note 175, at 210 n.3; Pratap, *supra* note 116, at 61-62; Jacobs, *supra* note 116, at 322, 344; Degan, *supra* note 116, at 12-14.

tions provide:

146. Basis of Interpretation

The extent to which an international agreement creates, changes, or defines relationships under international law is determined in case of doubt by the interpretation of the agreement. The primary object of interpretation is to ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made.

This meaning is determined in the light of all relevant factors.

147. Criteria for Interpretation

(l) International law requires that the interpretative process ascertain and give effect to the purpose of the international agreement which, as appears from terms used by the parties, it was intended to serve. The factors to be taken into account by way of guidance in the interpretative process include:

(a) the ordinary meaning of the words of the agreement in the context in which they are used;

(b) the title given the agreement and statements of purpose and scope included in its text;

(c) the circumstances attending the negotiation of agreement;

(d) drafts and other documents submitted for consideration, action taken on them, and the official record of the deliberations during the course of the negotiation;

(e) unilateral statements of understanding made by a signatory before the agreement came into effect, to the extent that they were communicated to, or otherwise known to, the other signatory or signatories;

(f) the subsequent practice of the parties in the performance of the agreement, or the subsequent practice of one party, if the other party or parties knew or had reason to know of it;

(g) change of circumstances, to the extent indicated in § 153; [Rule of *Rebus Sic Stantibus*]

(h) the compatibility of alternative interpretations of the agreement with (i) the obligations of the parties to other states under general international law and other international agreements of the parties, and (ii) the principles of law common to the legal systems of the parties or of all states having reasonably developed legal systems;

(i) comparison of the texts in the different languages in which the agreement was concluded, taking into account any provision in the agreement as to the authoritativeness of the different texts.

(2) The ordinary meaning of the words of an agreement, as indicated in Subsection (1)(a), must always be considered as a factor in the interpretation of the agreement. There is no established priority as between the factors indicated in Subsection (l)(b)-(i) or as between them and additional factors not listed therein.[192]

The final Draft Articles on the Law of Treaties of the International Law Commission were published at almost the same time in 1966. While the ILC also adopted a contextual approach, it was a narrower one favoring text over actual intent. This was accomplished by placing preparatory work in a separate Article on "Supplementary means of interpretation" and narrowly confining the circumstances in which the supplementary means were to be used.

Mention must also be made of the publication in the following year 1967 of the monumental treatise *The Interpretation of Agreements and World Public Order* by McDougal, Lasswell and Miller,[193] which set forth an even broader contextual approach than that of the Restatement.

At the first session of the Vienna Conference on the Law of Treaties in 1968, Professor McDougal, representing the United States, urged a broader contextual approach than that contained in the Commission's text. To accomplish this, he presented a U.S. amendment to combine the ILC Draft Articles, thus giving preparatory work an equal status with other considerations.[194] After a lively discussion, the U.S. Amendment was rejected by sixty-six votes to eight, with ten abstentions,[195] and in the following session, in 1969, the ILC Articles on interpretation, with only minor drafting changes, were adopted unanimously by the Conference.[196] These Articles in the Vienna Convention on the Law of Treaties are as follows:

Article 31
General rule of interpretation

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[192] RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES, 449-60 (Revisions May 20, 1964 & May 20, 1965) (1965).

[193] M. McDOUGAL & J. MILLER, *supra* note 116.

[194] Official Records Vienna Conference, First Session 167-68 (1968). For text of the U.S. draft amendment see U.N. Doc. A/Conf.39/C.1/L.156.

[195] *Id.* at 185.

[196] *Plenary Meetings, supra* note 174, at 57-59.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so

agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[197]

It may be recalled that in preparing the American Law Institute's Third Restatement, it was at first proposed to include the full text of the Vienna Articles in three black letter rules.[198] However, the final text completed in 1986, contains only one section which reads as follows:

325. Interpretation of International Agreement

(1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

(2) Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken into account in its interpretation.[199]

This reproduces, in substance Article 31, paragraphs 1 and 3(a) and, with some modification, 3(b). It will be noted that with respect to 3(b) on subsequent practice, the clause "which establishes the agreement of the parties regarding its interpretation" has been omitted from the Restatement. Other provisions of the Vienna Articles on interpretation are covered in the Comment. The substance of paragraph 2 of Article 31 defining "context" is reproduced.[200] With respect to Article 32 on "Supplementary means," the Comment states:

Article 32 of the Vienna Convention reflects reluctance to permit the use of materials constituting the development and negotiation of an agreement (*travaux preparatoires*) as a guide to

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[197] Vienna Convention on the Law of Treatiese, arts. 31-33.

[198] RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED), Tentative Draft No. 1, Sec. 329, 330, 331, pp. 145-46, 148-49, 150-51 (1980).

[199] RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES, 190, 196 (1987).

[200] *Id.* at 197.

> the interpretation of the agreement. The Convention's inhospitality to *travaux* is not wholly consistent with the attitude of the International Court of Justice and not at all with that of United States courts.[201]

As this Comment may suggest, there is still room for argument concerning the use of *travaux preparatoires*. There is no doubt that the Convention establishes a definite hierarchy between the General Rule of Article 31 and the Supplementary means, including the preparatory work, of Article 32. It was, however, the opponents of the separation who, in arguing for a change in the ILC format, took a very restrictive view of the uses permitted by Article 32, while the supporters of the text as it stood argued that it permitted flexibility. The ILC in its Commentary explained that,

> . . . the provisions of Article 28 [now 32] by no means have the effect of drawing a rigid line between the 'supplementary' means of interpretation and the means included in Article 27 [now 31]. The fact that Article 28 [now 32] admits recourse to supplementary means for the purpose of 'confirming' the meaning resulting from the application of Article 27 [now 31] establishes a general link between the two articles and maintains the unity of the process of interpretation.[202]

The two Articles are not a description of the process of interpretation. Normally, the parties will have brought relevant parts of the *travaux* supporting their respective positions to the attention of the tribunal which will have such material before it when it begins the process of interpretation.[203] The two Articles indicate the relative weight to be given to the various factors, not the processes followed by the interpreter.[204]

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[201] *Id. See also* comment g at 198 and reporters' notes at 198-99.

[202] *ILC Report, supra* note 178, at 220, 354.

[203] Kearney & Dalton, *supra* note 116, at 520; Gross, *supra* note 116, at 117; Fitzmaurice, *supra* note 178, at 13 n.1.

[204] I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 116-17 (2d ed. 1984) writes:

> As Professor Briggs points out [*The travaux preparatoires of the Vienna Convention on the Law Of Treaties*, 65 A.J.I.L. 709 (1971)], no rigid temporal prohibition on resort to *travaux preparatoires* of a treaty was intended by the use of the phrase 'supplementary means of interpretation' in what is now Article 32 of the Vienna Convention. . . [T]he Convention rules on interpretation reflect an attempt to assess the relative value and weight of the elements to be taken into

While there are many points that might be discussed in relation to treaty interpretation, I will deal with the same three points considered with respect to constitutional construction: the idea of evolutionary development, subsequent practice and structural interpretation. In addition, I would add the principle of effectiveness.

Obviously the idea of a living, evolving instrument does not have the same hold in normal treaty interpretation that it does in constitutional construction. However, it is not entirely absent from the law of treaties. Lord McNair, under the heading "Relative Terms" points out that "[e]xpressions such as 'suitable, appropriate, convenient,' occurring in a treaty are not stereotyped as at the date of the treaty but must be understood in the light of the progress of events and changes in habits of life."[205]

Sir Gerald Fitzmaurice concedes: "Yet it is difficult to deny that the meaning of a treaty, or of some part of it (particularly in the case of certain kinds of treaties and conventions), may undergo a process of change or development in the course of time."[206]

The idea of evolutionary development is particularly applicable to treaties of a constitutional character. An outstanding example is the statement of the International Court of Justice in the *Namibia* case:

> . . . the Court is bound to take into account the fact that the concepts embodied in article 22 of the Covenant - 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned - were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust.' The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of the law, through the Charter of the United Nations

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account in the process of interpretation rather than to describe the process of interpretation itself.

Id. at 116-17 (original emphasis).

[205] LORD MCNAIR, *supra* note 116, at 467.

[206] Fitzmaurice, *supra* note 175, at 225. *See also Judicial Innovation, supra* note 116.

and by way of customary law.[207]

It is the teleological approach, and especially its more extreme form of "emergent purpose,"[208] that best lends itself to evolutionary development. The International Law Commission was reluctant to open too wide the door to teleological interpretation, but, nevertheless, open it did. The text as approved by the Commission and adopted in Vienna offers several possibilities for change.

First, there is the phrase "in the light of its object and purpose" in the first paragraph of Article 31. This is the ear mark of the teleological approach.[209]

Second, the Commission's original draft placed the reference to international law in the first paragraph of what is now Article 31 and read "in the light of the general rules of international law *in force at the time of its conclusion.*"[210] Some members of the Commission suggested that this wording "failed to deal with the problem of the effect of an evolution of the law on the interpretation of legal terms in a treaty."[211] The Commission, considering that the formula was unsatisfactory since it covered only partially the question of inter-temporal law, revised the text to read "any relevant rules of international law applicable in the relations between the parties" and transferred it to its present position in paragraph 3.[212] The phrase "in force at the time of its conclusion" was dropped.

Mr. Myslil, representing Czechoslovakia at the Vienna Conference, in commenting on this change, said:

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[207] *Namibia*, 1971 I.C.J. at 31, *quoted in Western Sahara*, 1975 I.C.J. at 32, paras. 56 & 54 (Advisory Opinion). *See also* E. MCWHINNEY, CONFLICT AND COMPROMISE, INTERNATIONAL LAW AND WORLD ORDER IN REVOLUTIONARY AGE 63 (1981). The Court in *Aegean Sea Continental Shelf* (Greece v. Tur.) 1978 I.C.J. 3, also accepted the evolutionary meaning of "territorial status" which it called a generic term. The Court said: " . . . the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time." *Id.* at 32. *See also* Elias, *The Doctrine of Intertemporal Law*, 74 A.J.I.L. 285, 296-302 (1980).

[208] Jacobs, *supra* note 116, at 320, 337; Pratap, *supra* note 116, at 57. *Compare* I. SINCLAIR, *supra* note 204, at 138-40.

[209] Jacobs, *supra* note 116, at 337-38; Gottlieb, *supra* note 116, at 123.

[210] *ILC Report, supra* note 178, at 357 (original emphasis).

[211] *Id.*

[212] *ILC Report, supra* note 178, at 222, 358. *See* Jacobs, *supra* note 116, at 330-31.

> . . . it was in the interests of the international community to take into account the rules of international law in force at the time of application of the treaty. Principles and institutions of law underwent changes in the course of time . . . A static interpretation of the law could lead to misinterpretation.[213]

The third provision that opens the door to development brings us to our second point; subsequent practice. Paragraph 3(b) of Article 31 of the Vienna Convention provides: "There shall be taken into account, together with the context . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[214]

While paragraph 3 deals with factors extrinsic to the text, the ILC Commentary points out that the three elements in this paragraph (subsequent agreements, subsequent practice, and international law) "are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them."[215]

The fact that there is no hierarchical order among the various elements in Article 31 is not only expressly confirmed in the Commentary but can be derived from the text without resort to *travaux preparatoires*. The title of Article 31 "General rule of interpretation" is in the singular, indicating that the Article, taken as a whole, is a single rule,[216] and the introductory words of paragraph 3 - "There shall be taken into account *together with the context*" - incorporates this paragraph into paragraph 1.[217]

The use of subsequent practice in the interpretation of treaties was well established in international law prior to the work of the ILC. All of the drafts, from the Harvard Research through the Resolution of the *Institut de Droit International*, to the American Law Institute's Restatements, recognize subsequent practice as a factor to be taken into account in interpretation.[218]

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[213] *Vienna Conference Official Records*, *supra* note 178, at 182.

[214] Vienna Convention on the Law of Treatise, art. 31, para. 3, pt. b.

[215] *ILC Report*, *supra* note 178, at 220, 353.

[216] *Id.* at 220, 352.

[217] *Id.* at 220, 353 (original emphasis). *See* Jacobs, *supra* note 116, at 327, 329, 332; Pratap, *supra* note 116, at 59-60, 68-69.

[218] *See infra* text accompanying notes 186-201.

Resort to practice is also sanctioned in opinions of the International Court and other tribunals.[219] It is one of the six principles (Major Principle V) distilled by Sir Gerald Fitzmaurice from the jurisprudence of the International Court of Justice.[220]

Lord McNair, having dismissed most rules and canons of interpretation, opened his chapter on subsequent practice with the declaration:

> Here we are on solid ground and are dealing with a judicial practice worthy to be called a rule . . . the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusion.[221]

The concluding words of the foregoing passage from Lord McNair call attention to a view also expressed in some opinions of the International Court that the value of subsequent practice is evidence of the original intention of the parties.[222] Viewed in this light subsequent practice would be a subordinate principle comparable to *travaux preparatoires*.[223] In fact, Sir Humphrey Waldock, following the lead of the *Institut* in his original draft proposals, did include subsequent practice with other materials which were later to be labeled supplementary means of interpretation.[224] The idea that subsequent practice is evidence of original intent is often a legal fiction which becomes more and more so as one is removed from the time of conclusion, and particularly as additional States accede to a multilateral convention.[225]

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[219] *See* Competence of the General Assembly for Admission of a State to the United Nations, 1950 I.C.J. 4, 9 (Advisory Opinion); *SWA Voting Procedures case*, 1955 I.C.J. 67 (Lauterpacht J., separate opinion). *See* Pratap *supra* note 116, at 59 n.14. For an analysis of these and other cases see Engel, *"Living" International Constitutions and The World Court (The Subsequent Practice of International Organs under their Constituent Instruments)*, 16 INT'L & COMP. L. Q. 865 (1967).

[220] Fitzmaurice, *supra* note 178, at 20-22; *supra* note 175 at 223-25.

[221] LORD MCNAIR, *supra* note 116, at 424. Lord McNair adds: " This is both good sense and good law." *Id.* at 424.

[222] Interpretation of Article 3, Para. 2, of the Treaty of Lausanne, 1925 P.C.I.J., Ser. B, No. 12, 24 (Advisory Opinion); Anglo-Iranian Oil Co, 1952 I.C.J. 93, 107 (Judgment). *See* Fitzmaurice, *supra* note 175, at 224; Jacobs, *supra* note 116, at 328-29.

[223] Fitzmaurice, *supra* note 175, at 224.

[224] *Third Report of the Special Rapporteur on the Law of Treaties, Part III, Sec. III*, 2 Y.B. INT'L L. COMM'N 52 (1964), U.N. Doc. A/CN.4/167/Add.3, art. 71 para. 2. *See* Jacobs, *supra* note 116, at 327.

[225] Sharma, *supra* note 116, at 370-71; M. MCDOUGAL & J. MILLER, *supra* note 116,

This semi-fictional approach was rejected by the Commission, and under the Convention it is present agreement, not original intent, indicated by practice that is significant.[226]

Sir Gerald Fitzmaurice, noting that the meaning of a treaty may undergo a process of change or development[227] and taking a very formal view, continued:

> Where this occurs, it is the practice of the parties in relation to the treaty that effects, and indeed *is*, that change or development. In that sense there is no doubt about the standing of the principle, as an independent principle, which, in a proper case, it may be not only legitimate but necessary to make use of; for what is here in question is not so much the meaning of an existing text, as a revision of it, but a *revision* brought about by practice or conduct, rather than effected by and recorded in writing . . . Looked at in this way, a legitimate place can be found for the doctrine of 'emergent purpose' . . . not as a theory of interpretation, but as a substantive rule of treaty law affecting the revision of treaties . . . .[228]

It is, however, difficult and often impossible to draw a line between interpretation and revision. So long as the meaning may be derived from the treaty, even if that meaning has undergone changes and development, it remains interpretation.[229]

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at 98-99; Falk, *supra* note 116, at 132; Gordon, *The World Court and the Interpretation of Constitutive Treaties, Some Observations on the Development of an International Constitutional Law*, 59 A.J.I.L. 794, 827 (1965).

[226] Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 58 B.Y.I.L. 39, 61 (1987); Higgins, *The Development of International Law by the Political Organs of the United Nations*, 59 PROC. AM. SOC. INT'L L. 119 (1965); Schachter, *The Quasi-Judicial Role of the Security Council and the General Assembly*, 58 A.J.I.L. 962 (1964); Sir Ian Sinclair, statement on behalf of the U.K., *Vienna Conference*, *supra* note 178, at 177; Jacobs, *supra* note 116, at 329; Gordon *supra* note 225, at 826-28; E. Lauterpacht, *supra* note 50, at 447, 453-54, 458-59; McGinley, *Practice as a Guide to Treaty Interpretation*, 9 FLETCHER FORUM 211 at 220-22, 227-30 (1985). McGinley states: "The evidentiary value of practice . . . lies not as a manifestation of intent, but rather as an indicator of the soundness of the interpretation. This is because practice represents the common-sense practical interpretation of the treaty under the varied contingencies of its on going operation." *Id* at 227.

[227] *See infra* text accompanying note 206.

[228] Fitzmaurice, *supra* note 175, at 225 (original emphasis). *See also id.* at 210, 222-23.

[229] *See* McGinley, *supra* note 226, at 222-26; I. SINCLAIR, *supra* note 204, at 137-38. The ILC had included an article on Modification of Treaties by subsequent practice (Art. 38), *see ILC Report*, *supra* note 178, at 236, and 354, but this was deleted by the

A final question is whose practice is relevant? As previously noted it is the practice of present parties, not just that of the original parties, that is to be taken into account.[230] In an earlier draft, the ILC referred to the understanding of all the parties. In omitting the word "all," the Commission explains that it did not intend to change the rule. The omission did have a purpose but this was "merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice."[231] Some writers have suggested that in the case of multilateral conventions a "great majority," rather than all, of the parties is required.[232] More significantly, the International Court of Justice has accepted the practice of International Organizations in the interpretation of their constituent instruments.[233] Gerald P. McGinley has noted that:

> Insofar as the court is concerned it has, in general, been prepared to consider the resolutions of international bodies as a major, if not primary source of interpretative practice by those organizations. It has given little weight to the existence of dissenting minorities, abstentions, or qualified assents, as invalidating the interpretive value of the resolution itself.[234]

It has also been pointed out that subsequent practice of only some of the parties which does not qualify for authentic interpretation under Article 31(3)(b) may still have evidentiary value under the blanket reference to supplementary means in

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Vienna Conference *see Vienna Conference, supra* note 178, at 215. This action, while removing an open invitation to amend a treaty by subsequent practice, does not alter the fact that interpretation shades into modification and amendment, nor does an omission from the Convention alter general international law on the subject. *See* Jacobs, *supra* note 116, at 331-32.

[230] *See infra* text accompanying notes 222-26.

[231] *ILC Report, supra* note 178, at 222, 357.

[232] Fitzmaurice, *supra* note 175, at 223; Pratap, *supra* note 116, at 60; *see also* Jacobs, *supra* note 116, at 327.

[233] Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, 1922 P.C.I.J. (ser. B) No.2, at 39-41 (Advisory Opinion); *Namibia*, 1971 I.C.J. at 22; *Certain Expenses*, 1962 I.C.J. at 159-60, 168; *Competence for Admission*, 1950 I.C.J. at 4. *See* McGinley, *supra* note 226, at 215; Engel, *supra* note 219; Rosenne, *Is the Constitution of an International Organization on International Treaty, Reflections on the Codification of the Law of Treaties*, 12 COMUNICAZIONI E STUDI 21 at 48, 74-80.

[234] McGinley, *supra* note 226, at 215-16.

Article 32.[235]

The third point concerns structural interpretation which may be considered a variant of the teleological approach. Neither the Vienna Convention, nor the ILC Commentary develops a theory of structural interpretation, but reference to "context" and "object and purpose" provide elements for such approach.

The jurisprudence of the Court of Justice of the European Communities offers the outstanding example of structural interpretation of treaties. The Treaty of Rome and its companion conventions are not viewed as ordinary international treaties subject to the usual rules of treaty interpretation, but more like a national constitution to be interpreted broadly and dynamically.[236]

Judge Kutcher, President of Chamber at the Court, lists literal, historical, comparative, and schematic and teleological methods of interpretation used by the Court of Justice. He adds that the literal and historical methods recede into the background while the schematic and teleological method is of primary importance.[237] Combining schematic and teleological into a single method produces an approach very close to Professor Charles Black's structural interpretation. Anna Bredimas describes the process as follows: " . . . the Court does not consider the purposes to be achieved by the Communities but rather starts from the fact that the Communities exist and by deduc-

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[235] I. SINCLAIR, *supra* note 204, at 138.

[236] H. KUTCHER, Methods of Interpretation as seen by a Judge at the Court of Justice, Judicial and Academic Conference, I-30-31, I-39 (27-28 September 1976). Judge Kutcher states:

> The special nature of the Community, which must be regarded, not as an association of States subject to international law, but as a community *sui generis* is orientated to the future and designed with a view to the alteration of economic and social relationships and progressive integration, rules out a static and requires dynamic and evolutionary interpretation of Community law.

Id. at I-39 (original emphasis). Judge Kutcher thinks, however, that "the rules of interpretation of the Vienna Convention . . . may lead to standardization and also, to a certain degree, to a modification of the rules of interpretation hitherto applied in public international law. *Id.* at I-31. *See also* Bredimas, *Methods of Interpretation and Community Law*, 6 EUR. STUD. L. (1978); Stein, *supra* note 101, at 491- 518. *But see* P. V. van Themaat, *The Impact of the Case Law of the Court of Justice of the European Communities on the Economic World Order*, 82 MICH. L. REV. 1422, at 1431 (1984).

[237] Kutcher, *supra* note 236, at 15-6.

tion draws the consequences of the established order."[238]

The Court postulates a Community and reaches results necessary to safeguard and develop its capacity to function. Thus, in the *Van Gend and Loos* case,[239] the Court established the direct applicability of Community law in the national legal order of its members; in the case of *Costa v. ENEL*,[240] it established the supremacy of Community law over national law; and in the *ERTA* case,[241] the competence of the Community to conclude international transport agreements.[242]

The final point is the principle of effectiveness. This is expressed in the maxim *ut res magis valeat quam pereat* and, probably next to "clear meaning," is referred to more frequently than any other principle in opinions of international courts and tribunals.[243]

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[238] Bredimas, *supra* note 236, at 79.

[239] 9 Recueil 1, [1963] Common Mrt. Rep. (CCH) ¶8008 (1963), [1963] E.C.R. 1.

[240] 10 Recueil 1141, [1964] Common Mrt. Rep. (CCH) ¶8023, [1963] E.C.R. 1.

[241] Commission v . Council (ERTA), Case 22/70, 17 Recueil 263; [1971] Common Mkt. Rep. (CCH) ¶8134 (1971).

[242] *See* Bredimas, *supra* note 236, at 77-78; Kutcher, *supra* note 236, at 32-33; Stein, *supra* note 101, at 496-505. The European Court of Human Rights has also used a structural approach in some cases. *See* Golder case, 21 Feb. 1975, 57 I.L.R. 201-61 (1980), and criticism of the case in I. SINCLAIR, *supra* note 204, at 128, 131-33. In a somewhat different sense the International Court of Justice has referred to the structure of the Charter and relations of organs. *See Certain Expenses*, 1962 I.C.J. at 157; *Competence for Admission*, 1950 I.C.J. at 9.

[243] Degan, *supra* note 116, at 21. Effectiveness is also a principle applied in constitutional construction. A search of Lexis and Westlaw by Richard Duffee indicates that the Supreme Court has quoted the maxim *ut res magis valeat quam pereat* a number of times (usually in connection with wills, patents or contracts). It has rarely referred to the maxim in a constitutional case; *see* Fort Leavenworth Railroad Co. v. Lowe, 114 U.S. 525 at 534 (1885); (Field, J., quoting Story, J.); United States v. Cornell, 25 Cas. 646, 649 (C.C.D.R.I. 1819)(No. 14,867) nor has it refered to the "principle of effectiveness"or "rule of effectiveness" by name in constitutional cases. Labels aside, however, it has on occasion used the principle. *See* quotation from *United States v. Classic*, *supra* note 153: ". . . we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose." *Id.* at 316; *Case v. Bowles*, 327 U.S. at 92 (1946): "To construe the Constitution as preventing this would be to read it as a self-defeating charter. It has never been so interpreted." *Id.* at 102. *See also* discussion of implied powers in *McCulloch*, *see infra* text accompanying notes 11, 32-43. Chief Justice Marshall clearly enunciated the principle in his defence of *McCulloch v. Maryland*, *see* G. GUNTHER, *supra* note 51, at 166-67. *See also* Justice Brewer who, speaking for the Court in *Fairbank v. United States*, 181 U.S. 283, 290 (1901), and in *Kansas v. Colorado*, 206 U.S. 46, 88 (1907), enunciated the principle but apllied it restrictively. *See* further references cited in C. ANTIEAU, *supra* note 115, at 23, 25-26, 36-38. *See also* Dodd, *supra* note 34.

The principle of effectiveness is not expressly formulated in the Vienna Convention, but there was no intention to exclude it. The Commission considered that insofar as the maxim reflects a true general rule of interpretation, it is embodied in the first paragraph of what is now Article 31, "which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose.*" [244] The Commission considered that "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[245]

The Commission, however, did not wish to encourage an extensive application of the principle and quoted approvingly from the opinion of the International Court of Justice in the *Peace Treaties* case:[246]

> The principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for settlement of disputes in the Peace Treaties a meaning which . . . would be contrary to their letter and spirit.[247]

The Commission also noted that the Court had emphasized that to adopt an interpretation running counter to the clear meaning would not be to interpret, but to revise the treaty.[248]

This same provision was also quoted by the Court in the disastrous 1966 *South West Africa* cases[249] in an opinion one is tempted to compare with that of Chief Justice Taney in *Scott v. Sanford.*[250] The 1966 Court was itself equally divided,[251] and the

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[244] *ILC Report, supra* note 178, at 299, 351 (original emphasis).

[245] *Id.*

[246] 1950 I.C.J. 221.

[247] *ILC Report, supra* note 178, at 352, *quoting Peace Treaties, Second Phase*, 1950 I.C.J. at 229.

[248] *International Status of South West Africa*, 1950 I.C.J. at 229; *ILC Report, supra* note 178, at 219, 352. *But see Peace Treaties, Second Phase*, 1950 I.C.J. at 235-40 (Read, J., dissenting).

[249] South West Africa, Second Phase, 1966 I.C.J. 6, 48 (Judgement).

[250] *See infra* text accompanying note 155. *See also* E. MCWHINNEY, *supra* note 207, at 59-60.

[251] The judges were divided seven to seven. The case was decided by the casting

1950, 1955, 1956, 1962 and 1971 Courts held a quite different view from that expressed by the evenly divided 1966 Court.[252] While it is arguable that a narrow application with respect to ordinary treaties may in some circumstances be preferred, the principle of effectiveness combined with the doctrine of implied powers is a necessary tool in the interpretation of treatise which are constituent instruments of international organizations.[253]

C. *Application to the United Nations Charter*

Respecting the interpretation of the Charter, views have been expressed, on the one hand, that resort should be made to principles derived from national constitutional practice rather than from treaty law, and, on the other hand, that all principles of treaty law are to be strictly applied to the Charter.[254] For reasons which by now should be obvious, this is an artificial issue. The United Nations Charter, as noted at the outset of this pa-

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vote of the President. *See* Statute of the International Court of Justice, art. 55(2).

[252] *See International Status of South West Africa*, 1950 I.C.J. at 128; *Africa Voting case*, 1955 I.C.J. at 67; *SWA Hearings of Petitioners*, 1956 I.C.J. at 23; *Certain Expenses*, 1962 I.C.J. at 319; *Namibia*, 1971 I.C.J. at 16; *South West Africa Cases*, 1966 I.C.J. at 6. *See also* Degan, *supra* note 116, at 22-32.

[253] *See* H. Lauterpacht, *supra* note 116, at 68, 72.

[254] For a review of literature on the subject see Sato, *Constituent Instruments of International Organizations and their Interpretative Framework - Introduction to the Principal Doctrines and Bibliography*, 14 HITOTSUBASHI J. L. & POL. 1, 1-22 (1986). For a review of Eastern European positions see Macdonald, *The United Nations Charter: Constitution or Contract?* in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 889-912 (1983). *See also* Ciobanu, *Impact of the Characteristics of the Charter upon Its Interpretation*, in CURRENT PROBLEMS OF INTERNATIONAL LAW: ESSAYS ON U.N. LAW AND THE LAW OF ARMED CONFLICT 3-79 (Cassese 1975); B. COHEN, *supra* note 11, at 1-30; I. DETTER, LAW MAKING BY INTERNATIONAL ORGANIZATIONS 23-34 (1965); Engel, *"Living" International Constitutions and the World Court, (The Subsequent Practice of International Organs under their Constituent Instruments)*, 16 INT'L & COMP. L.Q. 865 (1967); Gordon, *supra* note 225, at 794-833; Hambro (Pollux). *supra* note 116; Hexner, *Teleological Interpretation of Basic Instruments of Public International Organizations* in LAW, STATE AND INTERNATIONAL ORDER, ESSAYS IN HONOR OF HANS KELSEN 119-38 (Engel 1964); JIMÉNEZ DE ARÉCHAGA, DERECHO CONSTITUCIONAL DE LAS NACIONES UNIDAS (COMENTARIO TEORICO PRACTICO DE LA CARTA) 621-29 (1958); E. Lauterpacht, *supra* note 50, at 414-78; E. MCWHINNEY, CONFLICT AND COMPROMISE: INTERNATIONAL LAW AND WORLD ORDER IN A REVOLUTIONARY AGE (The UN Charter: Treaty or Constitution) 53-70 (1981); Rosenne, *Is the Constitution of an International Organization an International Treaty?, Reflections on the codification of the law of Treaties*, 12 *Comunicazioni e studi* 21-89 (1966); Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 A.J.I.L. 1, 13-14 (1982).

per, is both a multilateral treaty and a constitution of an international organization. Moreover, there is considerable concordance between constitutional and treaty interpretation and a good deal of flexibility within each system.

More progress, however, has been made in reaching a consensus on the formulation of principles of treaty interpretation which are now incorporated in Articles 31 to 33 of the Vienna Convention. The treaty field, at least momentarily and on the surface, seems less chaotic than the constitutional arena. In any event, since the Charter is a treaty, the natural place to start is with the principles of treaty interpretation; but always remembering that it is also a constitution we are interpreting.[255]

Article 5 of the Vienna Convention specifically states that it is applicable to constituent instruments of international organizations. The text of this Article reads as follows: "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."[256]

However, Article 4 provides that the Convention applies only to treaties concluded after its entry into force.[257] It is not immediately clear from the text whether Article 5 is an exception to this non-retroactivity principle or whether, as I would assume from the general context, Article 4 controls. In any event, problems might arise if the Vienna Convention were deemed applicable between members of the U.N. who are parties to the Convention and not between members who are not parties.[258]

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[255] RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 comment d, 197 (1987) ("Agreements creating international organizations have a constitutional quality,and are subject to the observation in *McCulloch v. Maryland* . . . that 'we must never forget, that it is *a constitution* that we are expounding.' ").

[256] Vienna Convention on the Law of Treaties, art. 5.

[257] Art. 4 of the Vienna Convention reads:

> Non-retroactivity of the present Convention
>
> Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Id. art. 4.

[258] *See* Vierdag, *supra* note 116. There is also a question whether Art. 4 is a general

Fortunately, these questions are of only academic interest for our present purpose since the provisions of the Vienna Convention relating to interpretation are, if not a codification, at least a crystallization of custom and, hence, binding as general international law. We will, therefore, look to the Vienna Convention for guidance in the interpretation of the Charter. Before leaving Article 5, however, we must note that the applicability of the Convention is "without prejudice to any relevant rules of the organization." These "rules" include not only formal written rules adopted by the organization but also unwritten rules developed in practice.[259] Thus, even by its terms the Convention opens the door to special treatment for constituent instruments.

Some scholars, particularly those from Eastern European countries, refer to the Charter not as a constitution but as a special treaty *sui generis*.[260] Whether it is called a constitution, a constituent instrument or a special treaty, the Charter has certain basic features which set it apart not only from bilateral treaties, but from other multilateral treaties as well. In the first place, it is a constituent instrument defining the structure of the Organization and setting forth the powers and functions of its organs and the rights and duties of its members. Second, it was intended to endure not just for the present, or for the foreseeable future, but for "succeeding generations."[261] Third, it is su-

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participation clause. Sir Ian Sinclair, correctly in my view, concludes that it is not. I. SINCLAIR, *supra* note 204, at 8.

[259] *See Vienna Conference Official Records, supra* note 178, at 146, 147. See I. SINCLAIR, *supra* note 204, at 95. The ILC did not consider it necessary for the purpose of formulating rules of interpretaion to distinguish between law making and other treaties - *traite-loi* and *traite-contrat*, *ILC Report, supra* note 178, at 219, 351. Nor did it offer special rules for multi-lateral and other classes of treaties, as suggested by McNair, *The Functions and Differing Legal Character of Treaties*, 11 B.Y.I.L. 100 (1930). Lord McNair, considered that "constitutional treaties . . . create a kind of public law transcending in kind and not merely in degree the ordinary agreements between states." *Id.* at 112. This provision in Art. 5 of the Vienna Convention - "without prejudice to any relevant rules of the organization" - is the only general concession made to special types of treaties. Vienna Convention on the Law of Treaties, art. 5.

[260] *See* Macdonald, *supra* note 254, at 891, 896-97 *citing* Tunkin & Haraszti. *See also* Ciobanu, *supra* note 254, at 3, 22-26.

[261] *See* the Preamble to the U.N. Charter: "to save succeeding generations from the scourge of war. . . ." U.N. CHARTER pream. Sir Percy Spender in his separate opinion in the *Certain Expenses* case, said the Charter's "provisions were of necessity expressed in broad and general terms. It attempts to provide against the unknown, the unforeseen and, indeed, the unforeseeable." *Certain Expenses*, 1962 I.C.J. at 185 (Spender, J.,

perior to all other treaties as a "higher law."[262] And fourth, the States that participated in its drafting are today far out numbered by new members. There were only fifty States[263] represented at the San Francisco Conference, while the present membership of one hundred and fifty-nine is over three times that number.

These special features preeminently warrant the application of the points previously discussed relating both to treaty interpretation and to constitutional construction: evolutionary development, subsequent practice, structural interpretation and effectiveness.

With regard to the point of evolutionary development, we can say with Alexander Bickel[264] that the drafters were well aware it was a constitution they were writing. Lord Halifax, speaking at the San Francisco Conference on the Purposes and Principles of the Charter, said:

> I think they introduce a new idea into international relations,

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seperate opinion).

[262] Art. 103 of the Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.

Moreover, Art. 2(6) provides: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." *Id.* art. 2, para. 6.

Professor Sohn, *supra* note 254, writes:

> This constitution of the world, the highest instrument in the intertwined hierarchy of international and domestic documents, prevails expressly over all other treaties, and implicitly over all laws, anywhere in the world. The Charter was not meant to be a temporary document, to be easily and perpetually amended, but, rather, to be a lasting expression of the needs of humanity as a whole. Its basic provisions, constituting the *jus cogens*, the practically immutable law of the international community, are broad in scope and sufficiently flexible to permit their interpretation to be adjusted to the needs of each generation.

Id. at 13-14. *See* Macdonald, *The Charter of the United Nations and the Development of Fundamental Principles of International Law*, in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER ON HIS EIGHTIETH BIRTHDAY 196-215 (Cheng & Brown 1988); Jenks, *The Conflict of Law-Making Treaties*, 30 B.Y.I.L. 401, at 436-42 (1953); and in relation to Art. 20 of the Covenant of the League of Nations see, H. Lauterpacht, *The Covenant as the "Higher Law,"* 17 B.Y.I.L. 54, 54-65 (1936).

[263] There were fifty-one original members, but Poland was not represented at the San Francisco Conference.

[264] Bickel, *supra* note 115, at 63.

> for instead of trying to govern the actions of the Members and the organs of the United Nations by precise and intricate codes of procedure, we have preferred to lay down purposes and principles under which they are to act. And by that means, we hope to insure that they act in conformity with the express desires of the nations assembled here, while at the same time, we give them freedom to accommodate their actions to circumstance which today no man can foresee.[265]

John Foster Dulles, representing the United States at San Francisco, stated with respect to the domestic jurisdiction clause (Article 2 (7)):

> What is needed is a principle that is sufficiently basic to guide the organization through the many years to come, and to permit of evolution according to what may, during those years, be the developing ideas and changing conditions of the world community . . . We in the United States have repeatedly given thanks that the framers of our Constitution did not attempt to be legalistic and to set up rigid lines of demarcation. We here will equally serve the cause of posterity if we adopt for the world organization a principle of simple language which is clear in intent and flexible in its application.[266]

Ambassador Edvard Hambro, the first Registrar of the International Court of Justice and later President of the 25th Session of the General Assembly, writing in the 1946 *British Year Book of International Law*, declared: "The Charter like every written Constitution, will be a living instrument."[267]

And Professor Oscar Schachter, in a book review of Kelsen's *The Law of the United Nations*, writing as early as 1951 stated:

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[265] *Verbatim Minutes of the First Meeting of Commission I*, Doc. 10006, I/6, 6 U.N.C.I.O. Docs. 26 (1945), *quoted in* Robinson, *Metamorphosis of the United Nations*, 94 RECUEIL DES COURS 522 (1958-II).

[266] Statement before Comm. I/1, *verbatim in* N.Y. Times, June 16, 1945, at 9, col. 3. *quoted by* Schachter, *supra* note 99, at 652 n.47. *See* Claude, *supra* note 83, at 166.

[267] Pollux (Hambro), *supra* note 116, at 54. Ambassador Hambro continued:

> It will be applied daily; and every application of the Charter, every use of an Article, implies an interpretation; on each occasion a decision is involved which may change the existing law and start a new constitutional development. A constitutional customary law will grow up and the Charter itself will merely form the framework of the Organization which will be filled in by the practice of the different organs.

Id. at 54.

> The Charter is surely not to be construed like a lease of land or an insurance policy; it is a constitutional instrument whose broad phrases were designed to meet changing circumstances for an undefined future. Any doubt as to the flexibility and adaptability of the Charter must surely have been resolved by recent developments.[268]

Both the U.S. Constitution and the U.N. Charter have proved themselves sufficiently flexible to adapt to new situations. Neither document today is exactly the instrument envisaged by its drafters. Each is a living text capable of dealing with the unforeseen and the unforeseeable.

As noted earlier, one of the doors opened in the Vienna Convention to a teleological approach to interpretation is found in the phrase in Article 31, paragraph 1, "in the light of its object and purpose." It has been questioned whether the object and purpose must be derived from the text of the treaty or whether extrinsic evidence may be used. In the case of the Charter, it is unnecessary to go outside the four corners of the instrument, since the broad and sweeping language of the Preamble and of Article 1 on the Purposes of the United Nations provide all the elements that are necessary for a full implementation of this approach.[269]

With respect to effectiveness, we have already noted that the maxim *ut res magis valeat quam pereat* coupled with the doctrine of implied powers is particularly applicable in the interpretation of constituent instruments, and especially the Charter of the United Nations. It is often stated that the principle of effectiveness may not be used to revise a treaty, but where inter-

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[268] Book Review, 60 YALE L.J. 189, at 193 (1951)(reviewing H. KELSEN, THE LAW OF THE UNITED NATIONS (1966). President George Bush, when he was Ambassador to the United Nations, said in the General Assembly : "We have demonstrated in many other actions here that the Charter is a flexible document. It was written by wise men to cope with the unforeseeable." U.N. Doc. A/PV. 1976 & corr. (1971). *See* Bedjaoui, *A Third World view of International Organizations: Action towards a New International Economic Order*, in THE CONCEPT OF INTERNATIONAL ORGANIZATION 238 (Abi-Saab 1981); Fitzmaurice, *supra* note 116, at 207-08; E. MCWHINNEY, *supra* note 207, at 55-56, quotations from Sohn, *supra* note 262, and Leigh, *supra* note 161, at 118-19; *see also* Robinson, supra note 265, at 558-59.

[269] *See* Haldernman, *Legal Basis for United Nations Forces*, 56 A.J.I.L. 971 (1962). Haldernman looked to the phrase "collective measures" in art. 1, para. 1 (Purposes) of the Charter as a basis for the establishment of U.N. peace keeping forces.

pretation stops and revision begins is a shifting line that imposes few permanent barriers to the necessary growth and development of the Organization.

So far as structural interpretation is concerned, it has not been employed in the teleological sense used by the European Court of Justice, although the International Court, in interpreting the Charter, has referred to "the structure of the Charter" and "the relations established by it between the General Assembly and the Security Council."[270] For the moment, structural interpretation remains in the background waiting to play its role in the proper time and circumstances, as common needs, interests and values build from our international community of States a world community of peoples.

Finally, there is Article 31(3)(b) of the Vienna Convention dealing with subsequent practice. Interpretation through practice is a procedure allowing flexibility and organic growth. It is particularly appropriate for documents like the Charter, whether we call it a constitution, a constituent instrument or a special treaty *sui generis*. Take, for example, Article 22 of the U.N. Charter authorizing the General Assembly to establish such subsidiary organs as it deems necessary for the performance of its functions. This could have been interpreted narrowly to refer only to committees and commissions set up to assist the Assembly through studies and advice. Instead it has been broadly interpreted to permit the establishment of a great variety of operational agencies including peace keeping forces, aid missions, an environmental agency and other organs needed to meet particular exigencies. Compare this with the regulatory agencies established by the United States government which find no express authorization in the Constitution.[271]

As we have seen, interpretation through practice shades imperceptibly into informal amendment. An often cited example concerns the voluntary abstention of the permanent members of the Security Council. Article 27, paragraph 3, requires the affirmative vote of nine members including "the concurring votes

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[270] *Competence for Admission*, 1950 I.C.J. at 8-9; *Certain Expenses*, 1962 I.C.J. at 157.

[271] Epstein, *Self-Interest and the Constitution*, 37 J. LEGAL EDUC. 153, 156 (1987); CARTER, *supra* note 55, at 860-61.

of the permanent members" for decisions on all matters other than procedure.[272] Practice quickly established that abstentions would not be considered vetoes. While not to be considered affirmative votes, they are in effect counted as "concurring votes" allowing a resolution to be adopted. This firmly established practice is variously considered either a broad interpretation or an informal amendment by subsequent practice.[273]

Peace keeping operations, developed by the General Assembly and subsequently followed by the Security Council are another example of interpretation or informal amendment through practice. Peace keeping falls somewhere between peaceful settlement in Chapter VI and Enforcement Action in Chapter VII, but finds no precise authorization in the Charter.

Another important example relates to resolutions of the General Assembly of the United Nations. There is a popular misconception that the Assembly can only make recommendations. Sir Francis Vallat, a former member of the International Law Commission, has pointed out that more than twenty-five of the one hundred and eleven Articles of the Charter "at least to some extent, confer powers of decision as distinct from recommendation, on the General Assembly."[274] These are, of course, for the most part, decisions relating either to the budget or to the internal operations of the Organization.

There is, however, another type of resolution developed through practice. This is the declaratory resolution. Let me quote from my recent article in the 1987 *British Year Book of International Law*:

> Nothing in the Charter authorized [the adoption of such resolutions], but from its very first session the General Assembly ex-

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[272] U.N. CHARTER art. 27, para. 3.

[273] Stavropoulos, *The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27, Paragraph 3, of the Charter of the United Nations*, 61 A.J.I.L. 737 (1967); Yuen-li Liang, *The Settlement of Disputes in the Security Council: The Yalta Voting Formula*, 24 B.Y.I.L. 358 (1947); McDougal & Gardner, *The Veto and the Charter: an Interpretation for Survival*, 60 YALE L. J. 258, 278-82 (1951); JIMÉNEZ DE ARÉCHAGA, VOTING AND THE HANDLING OF DISPUTES IN THE SECURITY COUNCIL 17-25 (1950); Sloan, *supra* note 226, at 98-9. For acceptance of the practice by the International Court of Justice see *Namibia*, 1971 I.C.J. at 22. *See* Hexner, *supra* note 254, at 126-28.

[274] Vallat, *The Competence of the United Nations General Assembly*, 97 RECUEIL DES COURS 225, 229 (1959-II).

> ercised a right to adopt declarations and has continued to exercise this right without objection. This declaratory function of the Assembly, if not inherent, has been established through intepretative practice or amendment and is long beyond any reasonable challenge. As a power not dependent on the text of Chapter IV of the Charter, it is not subject to limitations which may be inferred from the word 'recommend' contained therein. This practice has certainly gone more than half-way toward establishing a new source of law. There may even be indications in the treatment of certain Assembly resolutions that for this particular class of resolutions practice has approached even closer to that goal.[275]

Professor Oscar Schachter has pointed out in this regard:

> In the last few years, we have witnessed an increasing insistence on the authoritative character of General Assembly resolutions on intervention, self-determination, territorial occupation, human rights, sharing of resources and foreign investment. They purport to 'declare the law,' either in general terms or as applied to a particular case. Neither in form nor intent are they recommendatory. Surprizing as it may seem, the authority of the General Assembly to adopt such declaratory resolutions was accepted from the very beginning.[276]

Such resolutions are assertions as to the law either as interpretations of the Charter or declarations of general international law. They cannot be dismissed as "recommendations," which they are not and are not to be evaluated as such. The question of their legal effect or binding force must be examined and decided on other grounds. Some of the more important declarations - The Universal Declaration of Human Rights, The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, and Resolution 1514(XV): Declaration on the Granting of Independence to Colonial Countries

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[275] Sloan, *supra* note 226, at 99-100, 43-45 & n.16. For example see Resolutions 1514(XV) and 1803(XVII). With respect to 1514(XV) on principles of self-determination see *Western Sahara*, 1975 I.C.J. at 31-33, and with respect to 1803(XVII) on permanent sovereignty over natural resources see Professor Rene-Jean Dupuy's award in Texaco Overseas Petroleum v. Libyan Arab Republic, 19 January 1977, 17 I.L.M. 24, 27-30 (1978).

[276] Schachter, *The Crisis of Legitimation in the United Nations*, 50 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET: ACTA SCANDINAVICA JURIS GENTIUM 3, 3-4 (Alf Ross Memorial Lecture 1981).

and Peoples - may be considered today as authentic interpretations of the Charter and, therefore, as a part of the constitutional structure if not of the instrument itself.

One may note a number of examples in the constitutional history of the United States of latent powers which have been recognized only after the passage of many years. I need mention only the Interstate Commerce Clause and the Fourteenth Amendment. The Commerce Clause was certainly not read the same by the court that decided *Schechter*[277] in 1935 and the court that decided *Wickard*[278] in 1942. And it was a different Fourteenth Amendment applied by the Court in *Brown v. Board of Education*[279] from that which guided the determination in *Plessy v. Ferguson.*[280]

It is impossible to predict what latent powers may lie unexplored in the Charter of the United Nations, but there are many possibilities for a time when circumstances are more propitious and the exigencies of an evolving international and world community are more demanding. To take two of the more obvious possibilities, let us look first at potential powers of the General Assembly in economic, social and human rights matters, and second, at the meaning of "action" in Article 2, paragraph 5, of the Charter.

In the early days of the Charter there was considerable controversy whether the pledge in Article 56, that all members take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55, created legal obligations for the States. These Articles read:

> Article 55
>
> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. solutions of international economic, social, health, and re-

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[277] Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[278] Wickard v. Filburn, 317 U.S. 111 (1942).

[279] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[280] Plessy v. Ferguson, 163 U.S. 537 (1896).

lated problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[281]

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.[282]

While it now seems clearly established that there are legal obligations in Article 56,[283] even the strongest supporters of this position assumed that there were no corresponding powers beyond recommendation vested in the General Assembly. But is this necessarily the case?

Considering Article 13, the first paragraph authorizes the Assembly to initiate studies and make recommendations. The second paragraph states that further responsibilities, functions and *powers*, I emphasize *powers*, of the General Assembly with respect to economic, social and human rights matters are set forth in Chapters IX and X. So we go now to Chapter IX and specifically to Articles 55, 56 and 60.[284] It is, therefore, the Assembly with which all member States have pledged to cooperate. In the proper time and circumstances it would not take a John Marshall or even a Warren Court to find more than the power of recommendation in this text.

The foregoing articles relate to the economic, social and human rights fields. In contrast, the first part of Article 2, paragraph 5, concerns all United Nations activities. Paragraph 5, provides: "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state

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[281] U.N. CHARTER art. 55.

[282] *Id.* at art. 56.

[283] *Namibia*, 1971 I.C.J. at 57. *See* Opinion of the United Nations Legal Department of 12 May 1949, U.N. Doc. E/CN.5/126, 3 (presented to the Social Commission). *See also* Schwelb, *The International Court of Justice and Human Rights Clauses of the Charter*, 66 A.J.I.L. 337 (1972); Sloan, *supra* note 226, at 49-50 & n.34.

[284] Art. 60 provides: "Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X." U.N. CHARTER art. 60.

against which the United Nations is taking preventive or enforcement action."[285]

The Report to the President on the San Francisco Conference said that the first part of this paragraph requires members "to give to the Organization any assistance which their obligations under the Charter require of them."[286] Goodrich and Hambro add: "It imposes no obligations not provided for in other parts of the Charter."[287] But that is not what the text says. It is quite unequivocal in requiring the members to give "every assistance in *any* action" the United Nations takes in accordance with the Charter.[288] Unlike the reference to "preventive and enforcement action" in the second part of the paragraph, action in the first part is not limited to a particular kind of action. The qualifying word "any" only emphasizes the generic use of the term. The broad nature of the obligation was recognized by the United States in its reliance on this Article as the basis for the obligation of member States to support the action of the General Assembly in terminating the Mandate of South Africa over South West Africa (now Namibia).[289] The potential in this Arti-

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[285] *Id.* at art. 2, para. 5.

[286] *Charter of the United Nations, Report to the President on the Results of the San Francisco Conference*, State Dept., Pub. 2349, Conference Series 71, at 41 (1945).

[287] CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS 107 (Revised 2d ed. 1949). *But see* GOODRICH, HAMBRO & SIMONS, CHARTER OF THE UNITED NATIONS 56-8 (3d ed. 1969).

[288] The International Court of Justice in the *Reparation case*, said:

> . . . the Court must stress the importance of the duty to render to the Organization 'every assistance' which is accepted by the Members in Article 2, paragraph 5, of the Charter. It must be noted that the effective working of the Organization - the accomplishment of its task, and the independence and effectiveness of the work of its agents - require that these undertakings should be strictly observed.

Reparation case, 1949 I.C.J. at 183. *See also* Sloan, *supra* note 226, at 51.

[289] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1970 I.C.J. Pleadings 883 (Written Statement of the U.S.). *See* letter of George H. Aldrich, Deputy Legal Adviser of the Department of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 89 (McDowell 1975):

> We have accepted this conclusion because we agree that it is a correct and authoritative statement of the existing obligations of U.N. members under international law as a result of the termination by the General Assembly of the South West Africa mandate and the assumption by the U.N. of responsibility and authority over Namibia. We did not consider that binding resolutions were necessary to produce these obligations, for we believed that they flowed directly from the

cle seems easily apparent in its express words without need to refer to open texture or non-interpretive approaches to constitutional development.

VI. Closing Remarks

It is not my purpose to suggest "correct" interpretations of Articles of the Charter. This can better await future developments. Nor at this time am I suggesting the "proper" method of Charter interpretation although I have indicated directions I think appropriate. Approaches to interpretation present a continuum running from original intent to non-interpretivism in constitutional construction and from strict textualism to emergent purpose in treaty law. Courts and other government departments and organs of international institutions have a wide range of choice giving the necessary flexibility to meet the needs of our evolving world community. From time to time they will undoubtedly choose from different points on the continuum.

My present purpose is only to note latent potentialities. The weaknesses of the Organization are to be found, not so much in the Charter as a Constitution, but in the *will* of the member States to use it.

Charter, particularly Article 2, paragraph 5 which requires all members to assist the United Nations in any action it takes in accordance with the Charter.
Id. at 89.