The creation and observance of treaties was extremely important to the generation that met in Philadelphia. The Founders wrote a document that expressly addresses the process by which the United States enters into treaties, the relationship of treaties to state law, and the authority of courts to adjudicate cases involving treaties. Yet, with respect to seemingly fundamental treaty-related questions, the Constitution is silent. Perhaps the most important of these questions is how treaties are to be interpreted.

Beginning in the early years of the Republic, American courts filled this textual vacuum by employing what might be called the “treaty-as-contract” analogy. We begin by examining the decline of the contract metaphor and the rise of competing metaphors: the “treaty-as-statute” and the “treaty-as-executive act.” Next we consider the reasons for these recent developments, which follow so long a period of time in which the contract analogy has predominated. Finally, we consider what all this means for the future of American foreign policy.

Associate Professor Paul R. Dubinsky specializes on questions at the intersection of international law and civil procedure. He is Director of Graduate Studies for Law, Vice President of the American Branch of the International Law Association, and book review editor of the American Journal of Comparative Law. A graduate of Harvard Law School and the Université Katholieke of Leuven, Belgium, Professor Dubinsky teaches courses in international law, international litigation, European Union Law, civil procedure, and national security law.