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007—Licensed to Limit without Notice: The Case of Chan v. Korean Air Lines, Ltd.

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NOTES AND COMMENTS

007—Licensed to Limit Without Notice: The Case of *Chan v. Korean Air Lines, Ltd.*

I. INTRODUCTION

All two hundred sixty-nine persons on board Korean Air Lines flight 007 died on September 1, 1983 when a Soviet aircraft shot down the airliner over the Sea of Japan.¹ The flight departed from New York's Kennedy Airport and was en route to Seoul, South Korea when the airplane veered off course.² When the airplane crew refused to answer Soviet communications, Soviet military aircraft destroyed the commercial airliner.³ The passengers' beneficiaries sued Korean Air Lines ("KAL") under the legal authority of the 1929 Warsaw Convention ("Convention")⁴ and the 1966 Montreal Agreement.⁵ They claimed that KAL's failure to provide adequate notice of the Convention's international limits on personal injury damages thereby deprived the airline of this liability protection.⁶

This Note will examine the United States Supreme Court case of *Chan v. Korean Air Lines, Ltd.*,⁷ which addressed the issue of whether the airline's failure to notify passengers in 10-point type of the \$75,000 personal injury damage limitation, imposed by the Conven-

1. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1172 (D.C. Cir. 1987).

2. *Id.*

3. *Id.*

4. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, *reprinted in* note following 49 U.S.C. app. § 1502, at 1225 (1982) [hereinafter Convention]. The Warsaw Convention established international causes of action and corresponding liability limits for air crash personal injury suits. *Id.*

5. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. app. § 1502 (1982) (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302) [hereinafter Montreal Agreement]. The Montreal Agreement was a private contractual agreement among air carriers and the United States which raised the liability limit to \$75,000 and required written notice of the limitation to passengers in 10-point type print. *Id.*

6. *In re Korean Air Lines*, 829 F.2d at 1172.

7. 109 S. Ct. 1676 (1989).

tion and the Montreal Agreement, deprived the airline of such liability protection.⁸ The Court concluded that neither the Convention nor the Montreal Agreement mandated such a severe sanction when the airline provided passengers with notice in 8-point type.⁹ In order to understand the Convention's importance in modern times, this Note will explore the history behind the Warsaw Convention and its subsequent evolution in the courts. Additionally, this Note will suggest that the Court's new textualist philosophy for treaty interpretation, as applied in *Chan*, counterintuitively encourages further judicial activism and permits the courts to disregard the intent and legislative goals of the original drafters. The viability of the Convention in the next decade can only be assured if the Court reevaluates the antiquated Convention under constitutional scrutiny. Only this broad reading of the 1929 Warsaw Convention can produce equitable results for plaintiffs in the 1990s.

II. STATEMENT OF THE CASE

Initially, many lawsuits on behalf of the KAL victims were filed in multiple federal districts.¹⁰ A Judicial Panel on Multidistrict Litigation then consolidated these actions in the District of Columbia Circuit pursuant to 28 U.S.C. § 1407.¹¹ In the district court, all parties agreed that their rights were governed by the Convention.¹² The plaintiffs then moved for partial summary judgment and a declaration that the lack of 10-point type notice automatically disqualified KAL from the protections of the Convention's liability limitation.¹³ The district court denied their motion, concluding that neither the Convention nor the Montreal Agreement prescribed a sanction of forfeiture of the damage limitation for failure to provide 10-point type

8. *Id.* at 1678.

9. *Id.* at 1684.

10. The cases filed as a result of the KAL air disaster can be grouped into three categories: (1) the Southern and Eastern Districts of New York; (2) the Eastern District of Michigan and the District of Massachusetts; and (3) the District of Columbia. *In re Korean Air Lines*, 829 F.2d at 1173.

11. *Id.* at 1172. "[C]ivil actions involving one or more common questions of fact . . . pending in different districts . . . may be transferred to any district for coordinated or consolidated pretrial proceedings." *Id.* (quoting 28 U.S.C. § 1407).

12. *Chan*, 109 S. Ct. at 1678. Article 1 of the Convention governs these parties and states: "This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire . . ." Convention, *supra* note 4, at 1225.

13. *In re Korean Airlines Disaster* of Sept. 1, 1983, 644 F. Supp. 1463, 1464 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987).

notice.¹⁴

In response, the plaintiffs filed an interlocutory appeal. The appellate court remanded the case to clarify the scope of the district court's order.¹⁵ Following an affirmation by the district court that the order encompassed all the plaintiffs, the appellate court affirmed the lower court's order in full.¹⁶ The United States Supreme Court then granted certiorari to resolve a conflict among the circuit courts regarding whether the Convention or the Montreal Agreement should be interpreted to prescribe sanctions for failure to provide a standardized notice.¹⁷

In the Supreme Court, Petitioners' original appeal consisted of two primary arguments. First, the plaintiffs asserted that under Article 3 of the Convention, the air carrier forfeits its limited liability when it fails to provide adequate notice of the Convention's liability limitation on its passenger tickets.¹⁸ Petitioners reached this conclusion by reading Article 3(1)(e) of the Convention in conjunction with the second sentence of Article 3(2).¹⁹ Second, Petitioners argued that the notice statement on the ticket must be in 10-point type as mandated by the Montreal Agreement²⁰ and a 1963 Civil Aeronautics

14. *Id.*

15. The appellate court remanded to determine which plaintiffs were covered by the district court order and to resolve the issue of the transferee court's authority under 28 U.S.C. § 1407 and *Van Dusen v. Barrack*, 376 U.S. 612 (1964), to independently decide issues of federal law already determined by a circuit court in the transferor forum. *In re Korean Air Lines*, 829 F.2d at 1173.

16. *In re Korean Air Lines*, 829 F.2d at 1176.

17. *Chan v. Korean Air Lines, Ltd.*, 485 U.S. 986 (1988).

18. *Chan*, 109 S. Ct. at 1679.

19. The specifics of this limitation are provided in Article 3:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Convention, *supra* note 4, at 1226.

20. The relevant portion of the Montreal Agreement dictates:

Board ("CAB") regulation.²¹ Thus, KAL's failure to give the plaintiffs adequate, 10-point type notice precluded the airline from invoking the Convention's ceiling on personal injury compensation.

III. HISTORY OF THE WARSAW CONVENTION

The complete chronology of the Warsaw Convention must be clearly understood in order to effectively evaluate the Court's legal analysis of the *Chan* case. The Convention resulted from two conferences, the first in Paris in 1925 and the second in Warsaw in 1929, and the additional, interim drafting expertise of the *Comité International Technique d'Experts Juridique Aériens*, a committee of private experts.²² The treaty became effective on February 13, 1933.²³ Although not an original party to the Convention,²⁴ the United States

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention . . . the following notice, which shall be printed in types at least as large as 10 point and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name the carrier) and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US \$75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US \$8,290 or US \$16,580.

Chan, 109 S. Ct. at 1679 n.1 (quoting Montreal Agreement).

21. 14 C.F.R. §§ 221.174-.175 (1989). The *Chan* majority did not address either the Montreal Agreement or the CAB regulation because it rejected the argument that the Convention penalized inadequate notice by forfeiture of Convention limitations. However, the concurrence, while not necessarily agreeing with the majority's resolution of the first issue, concluded that the 10-point type notice, as dictated by either the Montreal Agreement or the CAB regulation, was not mandated because the KAL passengers received actual notice. Although mere dicta, the concurrence's resolution of the 10-point type notice standard illustrates that even the most liberal members of the Court clearly believe that actual 10-point type notice is not required for an air carrier to be protected by the Convention limitations. See *Chan*, 109 S. Ct. at 1679, 1692-93.

22. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967).

23. *Id.* at 501-02.

24. The original parties were Germany, Austria, Belgium, Brazil, Bulgaria, China, Denmark, Iceland, Egypt, Spain, Estonia, Finland, France, Great Britain, Ireland, India, Greece,

adhered to the Convention in 1934 following Senate approval and a proclamation by President Roosevelt.²⁵ As a self-executing treaty, the Convention did not require domestic legislation to give it the effect of the supreme law of the land in the United States.²⁶

The Convention had two main purposes: to establish uniformity in documentation and legal procedure,²⁷ and more importantly, to limit the potential liability of the fledgling airline industry in order to encourage capital investment in the new industry.²⁸ The Convention established an \$8,300 limit on personal injury awards recoverable from the airlines in exchange for a presumption of liability against them.²⁹ However, within one year of the Convention's implementation, the United States became dissatisfied with the liability limitation.³⁰

It was not until 1955 that the Convention signatories met again to amend the 1929 treaty.³¹ This meeting resulted in the Hague Protocol, which doubled the personal injury limitation to \$16,600 and

Hungary, Italy, Japan, Latvia, Luxembourg, Mexico, Norway, the Netherlands, Poland, Rumania, Sweden, Switzerland, Czechoslovakia, the USSR, Venezuela, and Yugoslavia. Convention, *supra* note 4, at 1225.

25. Lowenfeld & Mendelsohn, *supra* note 22, at 502. The United States joined the Convention through the adherence provision contained in Article 38 of the Convention.

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Convention, *supra* note 4, at 1229.

26. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Although domestic legislation was not required, the United States Senate consented to the Convention through a voice vote without debate, committee hearing, or report. Lowenfeld & Mendelsohn, *supra* note 22, at 502. Treaties are the supreme law of the land under the Constitution. U.S. CONST. art. IV.

27. Lowenfeld & Mendelsohn, *supra* note 22, at 498.

28. *Id.* at 499.

29. *Id.* at 500.

30. *Id.* at 504. There was concern over the general concept of a limitation because some countries preferred to subject the airlines to unlimited liability. Note, *Avoiding the Perils of Judicial Treatywriting: In re Korean Air Lines Disaster*, 62 ST. JOHN'S L. REV. 156, 157 n.6 (1987). Additionally, specific airline accidents in which plaintiffs received inadequate compensation under the \$8,300 limitation contributed to the American disapproval of the Convention. See *Ross v. Pan Am. Airways*, 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied*, 349 U.S. 947 (1955).

31. The United States was not the only country dissatisfied with the low limitations of the Convention. Great Britain also advocated doubling, tripling, or even quadrupling the limitation amount. Cohen, *Montreal Protocol: The Most Recent Attempt to Modify the Warsaw Convention*, 8 AIR L. 146, 151 n.68 (1983).

required adequate notice of the Convention's limitations, which each nation could regulate independently.³² The United States never approved the Hague Protocol, primarily because of the nation's concern over the principle of limited liability, and its desire for a standardized and conspicuous form of notice.³³ Thus, although the United States was dissatisfied with the Convention, its inability to agree on an amendment left the Convention limitations intact.

Reacting to the Hague Protocol, the CAB established a regulation requiring notice of the Convention limitations in 10-point type on all passenger tickets.³⁴ This regulation was a response to a provision of the Protocol which permitted each country to regulate internally, within its own airspace, the required notice of liability.³⁵ To enforce this domestic 10-point type regulation, the CAB required foreign airlines to agree to the rule as a condition precedent to the issuance of a United States landing permit.³⁶ Although the CAB regulation resolved national concerns for flights touching down in the United States, it did nothing to resolve the American concerns regarding the international effects of the Convention. Thus, the United States no longer perceived any diplomatic advantage in maintaining Convention membership.³⁷ On November 15, 1965, the United States filed a Notice of Denunciation of the Warsaw Convention,³⁸ but agreed to withdraw the denunciation if an international conference addressing American concerns would result in an amendment of the Conven-

32. Lowenfeld & Mendelsohn, *supra* note 22, at 507.

33. *Id.* at 511-12. Although the United States delegate to the Hague Conference signed the Protocol on June 28, 1956, the United States Senate never ratified the Protocol because of the bad political climate caused by an abundance of fatal air crashes. Cohen, *supra* note 31, at 153 n.91.

34. 14 C.F.R. § 221.175 (1989).

35. Lowenfeld & Mendelsohn, *supra* note 22, at 514.

36. 14 C.F.R. §§ 203.5, 213.7 (1989).

37. The Convention's previous advantage of a presumption of liability against the air carrier was no longer an important benefit to the United States plaintiffs since the advent of the "res ipsa loquitur" doctrine which provided an inference of negligence by the carrier. Cohen, *supra* note 31, at 154.

38. Lowenfeld & Mendelsohn, *supra* note 22, at 551. The United States denounced the Convention pursuant to Article 39:

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Convention, *supra* note 4, at 1229.

tion.³⁹ This serious threat to international diplomacy created the impetus for the Montreal Agreement.⁴⁰

The Montreal Agreement was intended merely as an interim agreement to avert the United States' Convention denunciation.⁴¹ The Agreement was a special contract between the private airlines⁴² and the United States government, as authorized by Article 22(1) of the Convention.⁴³ The Agreement applied to any flight that originated, ended, or touched down in the United States.⁴⁴ It replaced the \$8,300 Convention limit with a liability ceiling of \$75,000.⁴⁵ Additionally, the Agreement required 10-point type notice of the Convention's liability limitations and waived the airlines' previous liability defense of due care.⁴⁶ Although the United States accepted the Agreement's terms, the nation still viewed the Agreement as a temporary measure and continued to seek a permanent amendment to the Convention.⁴⁷

In 1971, there was another international attempt to amend the Convention.⁴⁸ The Guatemala Protocol established absolute, no-fault liability for the airlines and increased the damage limitation to

39. Lowenfeld & Mendelsohn, *supra* note 22, at 552.

40. *Id.*

41. *Id.* at 563.

42. This agreement was a private, nongovernmental regional plan, independent of the Convention. Matte, *The Warsaw System and the Hesitations of the U.S. Senate*, 8 ANNALS OF AIR & SPACE L. 151, 156 (1983). Other carriers are also bound by similar private agreements which mandate limits equal to or above \$58,000, including: Air Afrique, Austrian Airlines, Sabena, Burma Airways, Scandinavian Airlines Systems, TACA, Finnair, Air France, Air India, UTA, Lufthansa, Condor Fludienst, Irish Government for all Irish carriers, El Al, Alitalia for both domestic and international carriage, Japan Airlines, Alia Royal Jordanian Airlines, Middle East Airlines, Luxair, Malaysian Airlines, KLM, Martinair, Transavia, Air New Zealand, Norwegian Government for all Norwegian airlines, Air Panama, Singapore International Airlines, South African Airways, Iberia, Sweden for all domestic and international flights by Swedish carriers, Switzerland, as a licensing condition, Thai International Airlines, and Tunis Air. Cohen, *supra* note 31, at 157 n.143.

43. Convention, *supra* note 4. Article 22(1) provides that the private parties may contract for a higher level of air carrier liability. "Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability." *Id.* at 1228.

44. Montreal Agreement, *supra* note 5, at 1230.

45. *Id.* It was the \$8,300 Convention limit rather than the Hague Protocol limit of \$16,600 that was upgraded since the higher limit was ineffective due to the United States' failure to approve the Protocol. *Id.* at 1229 n.1.

46. *Id.* at 1230.

47. Matte, *supra* note 42, at 157.

48. *Id.* The conference lasted from February 9 to March 8, 1971 and was attended by delegates from fifty-five countries. Cohen, *supra* note 31, at 158 n.149. Of these delegates, only twenty-one actually signed the Protocol at the conference's conclusion. *Id.*

\$100,000 per passenger.⁴⁹ However, the United States delegates refused to submit this plan to the United States Senate, because Protocol limitation standards were unacceptably expressed in terms of gold.⁵⁰ The United States' failure to seriously consider the proposal rendered the Guatemala Protocol ineffective as an international compromise.⁵¹

The final attempt to amend the Convention was the 1975 Montreal Protocol.⁵² This time, the United States Senate rejected the proposed amendment, refusing to accept any limitation on personal injury liability.⁵³ Thus, these four amendment attempts—the Hague Protocol, the Montreal Agreement, the Guatemala Protocol, and the Montreal Protocol—have all failed to update the 1929 Convention. All four proposals have inadequately addressed the United States concerns—primarily the eradication of the limitation on personal injury recovery.⁵⁴ The resulting irony is that the 1929 Convention, with its \$8,300 limit, remains the controlling law of international airline compensation.

IV. THE SUPREME COURT'S REASONING

A. *The Majority*

According to a majority of the Supreme Court in *Chan*, a carrier is entitled to the protection of the Convention's liability limitations even when the carrier fails to provide a passenger with the 10-point type notice required by the Montreal Agreement.⁵⁵ The majority based its reasoning on the plain meaning of the Convention and disregarded twenty years of United States judicial precedent which broadly interpreted the treaty.⁵⁶ Specifically, after examining language on the face of the treaty and making internal structural comparisons, the ma-

49. Matte, *supra* note 42, at 157.

50. *Id.* at 158. The United States considered liability limits expressed in terms of gold, or even linked to gold standards, to be inappropriate since gold prices had undergone severe fluctuations over the years. *Id.*

51. The Protocol was void, as its acceptance by the United States was a condition to its implementation. Cohen, *supra* note 31, at 158.

52. The key changes proposed in the Montreal Protocol were: 1) designating the monetary limit in terms of a new international standard, the Special Drawing Right ("SDR"), rather than the franc, 2) allowing each nation to determine its own increase in liability limits, and 3) establishing absolute liability for the air carrier. Cohen, *supra* note 31, at 164-67; Podgers, *Aviation Law: Changes in the Wind?*, 11 THE BRIEF 26, 28-30 (1982).

53. Cohen, *supra* note 31, at 147.

54. *Id.*

55. *Chan v. Korean Air Lines, Ltd.*, 109 S. Ct. 1676, 1684 n.5 (1989).

56. *Id.* at 1680. See cases cited *infra* note 68.

jority held that the Convention did not establish a forfeiture sanction for a carrier's failure to provide adequate, 10-point type notice to airline passengers.⁵⁷

In examining the Convention, the Court stated that only a complete failure to deliver a ticket mandated the forfeiture of liability limitations.⁵⁸ Article 3(2) of the Convention establishes the forfeiture sanction for noncompliance with Convention provisions.

The absence, *irregularity*, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.⁵⁹

The majority concluded that the actual text of the treaty was clear, and, on its face, provided for situations such as inadequate notice.⁶⁰ The use of 8-point type rather than 10-point type was a mere "irregularity" that did not activate the unlimited liability sanction.⁶¹

The Court next examined the treaty's internal structure by comparing the text of the Article 3 personal injury provision to the language of the baggage and air freight sanctions contained in Articles 4 and 9.⁶² All three sections require a statement that the transportation is subject to the Convention's liability rules.⁶³ All three sections also mandate the loss of liability protection for failure to deliver a ticket or a bill.⁶⁴ However, only Articles 4 and 9 specifically impose a sanction for failure to include certain particulars, such as adequate 10-point type notice, in the required documents.⁶⁵ Based on this internal structural comparison, the Court concluded that the baggage and freight

57. *Chan*, 109 S. Ct. at 1680-82.

58. *Id.* at 1681. The Court also held that "delivery of a document whose shortcomings are so extensive that it cannot reasonably be described as a 'ticket' (for example, a mistakenly delivered blank form, with no data filled in) . . ." also justified the elimination of the liability limitations. *Id.*

59. Convention, *supra* note 4, at 1226 (emphasis added).

60. *Chan*, 109 S. Ct. at 1680.

61. *Id.* at 1681.

62. *Id.* at 1682; Convention, *supra* note 4, at 1226-27; see *infra* note 65 and accompanying text.

63. *Chan*, 109 S. Ct. at 1682; Convention, *supra* note 4, at 1226-27; see *infra* note 65 and accompanying text.

64. *Chan*, 109 S. Ct. at 1682; Convention, *supra* note 4, at 1226-27; see *infra* note 65 and accompanying text.

65. Convention, *supra* note 4, at 1226-27. Article 4(3)(h) states that the baggage check

sections clearly treat sanctions for inadequate notice as separate from the nondelivery sanctions.⁶⁶ Thus, the Court interpreted the treaty's absence of an inadequate notice sanction for personal injury limitations as a "plain meaning" that did not penalize carriers for failure to provide 10-point type notice.⁶⁷

The Court's "plain meaning" conclusion directly conflicted with federal appellate case law which broadly interpreted the "delivery" requirement of Article 3(2). Those courts held that the language of Article 3(2) included "delivery with proper notice."⁶⁸ Under this interpretation, a failure to provide 10-point type notice would result in the imposition of Convention sanctions.

The trend began in 1965 with the Second Circuit in *Mertens v. Flying Tiger Line, Inc.*⁶⁹ The *Mertens* court held that the required delivery of Article 3(2) mandated a delivery "in such a manner as to afford [passengers] a reasonable opportunity to take measures to pro-

document shall contain, "[a] statement that the transportation is subject to the rules relating to liability established by this convention." *Id.* Article 4(4) goes on to say that

[n]evertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Id. Article 8(q), pertaining to air waybills for freight, requires the same statement of limited liability. *Id.* Article 9 then states,

[i]f the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Id.

66. *Chan*, 109 S. Ct. at 1682-83.

67. *Id.* The concurrence argues that the absence of a specific sanction in Article 3(2) is a mere drafting error. *Id.* at 1689-90. That opinion suggests that it is absurd to eliminate baggage and freight damage limits for inadequate notice, while not eliminating limits for personal injury damage—clearly a more important concern. *Id.* at 1683. However, the majority responds by explaining this distinction. *Id.* For instance, the drafters may have thought that the original personal injury limitation of \$8,300 was more than fair, or that passengers were more likely to take out additional, private insurance to compensate for a damage limitation than would someone for baggage or freight. Thus, according to the majority, the absence of a personal injury sanction was an intentional rather than an accidental omission. *Id.*

68. This line of cases began with *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965). The cases following or expanding this line of reasoning include: *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966), *aff'd by equally divided court*, 390 U.S. 455 (1968); *In re Air Crash Disaster Near New Orleans, La.*, on July 9, 1982, 789 F.2d 1092 (5th Cir. 1986); *In re Air Crash Disaster at Warsaw, Pol.*, on Mar. 14, 1980, 705 F.2d 85 (2d Cir. 1983), *cert. denied*, 464 U.S. 845 (1983); *Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912 (D.C. Cir. 1973); *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 287 N.Y.S.2d 14, 234 N.E.2d 199 (1967), *cert. denied*, 390 U.S. 1039 (1968).

69. 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965).

tect . . . against the limit[ed] liability.”⁷⁰ In *Mertens*, the passenger ticket was delivered to the plaintiff when he was already in the air; thus, the passenger had no opportunity to take precautionary measures against the limitation by purchasing additional insurance or contracting separately with the carrier.⁷¹ According to the appellate court, this delivery did not satisfy the basic requirements of Article 3(2); therefore, the air carrier was not protected by the Convention liability limitations.⁷²

The Ninth Circuit in *Warren v. Flying Tiger Line, Inc.*,⁷³ continued the *Mertens* line of reasoning. In *Warren*, the passenger received his ticket at the foot of the ramp to the plane, which the court found was too late for adequate “delivery.”⁷⁴ The *Warren* court reiterated the Second Circuit’s holding that Article 3(2) implies a requirement that the carrier deliver the ticket sufficiently in advance of the flight to allow the passenger to obtain additional insurance protection.⁷⁵ The Ninth Circuit went even further in dicta, stating that the delivered ticket must also contain all the particulars of Article 3(1)(a)-(e), including a statement warning of the Convention liability limitations, to satisfactorily meet the requirements of Article 3(2) delivery.⁷⁶

Finally, in 1966, the Second Circuit, affirmed by a divided Supreme Court, held in *Lisi v. Alitalia-Linee Aeree Italiane*⁷⁷ that in order to satisfy Article 3(2)’s delivery requirement, the carrier had to provide passengers with tickets containing notice of liability in print size that was “readable.”⁷⁸ The court held that “unreadable” print size would defeat the purpose of the delivery requirement.⁷⁹ In *Lisi*, the air carrier printed the statement of liability in 4-point type notice which the court found to be unreadable because it was “camouflaged

70. *Id.* at 856.

71. *Id.* at 857-58.

72. *Id.* at 858.

73. 352 F.2d 494 (9th Cir. 1965).

74. *Id.* at 498.

75. *Id.*

76. *Id.* at 496. The requirements of Article 3(1) include: (a) the place and date of issue, (b) the place of departure and destination, (c) the agreed stopping places, (d) the name and address of the carrier, and (e) a statement that the transportation is subject to Convention liability limitations. Convention, *supra* note 4, at 1226.

77. 370 F.2d 508 (2d Cir. 1966), *aff’d by an equally divided court*, 390 U.S. 455 (1968).

78. *Id.* at 514.

79. *Id.* The court defined this “readable” standard in the negative. *Id.* Readable is not notice “camouflaged in Lilliputian print in a thicket of ‘Conditions of Contract’” or statements that are “virtually invisible” or “ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else.” *Id.* Therefore, “unreadable” means words that are “so artfully camouflaged that their presence is concealed.” *Id.*

in Lilliputian print" which was not discernible to any reasonable passenger.⁸⁰ The ticket was thus not properly "delivered" as required by Article 3(2) and deprived the airline of its limited liability.⁸¹

Two subsequent appellate decisions further refined the notice requirement: the 1973 case, *Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Board*⁸² and the 1983 decision in *In re Air Crash Disaster at Warsaw, Pol., on March 14, 1980*.⁸³ *Lufthansa* held that the CAB regulation requiring 10-point type notice gave substantive effect to the protections of Article 3(1)(e).⁸⁴ Therefore, a passenger who did not receive 10-point type notice did not receive adequate notice; thus, the carrier was not protected by the Convention's limited liability.⁸⁵ In the *In re Warsaw* case, the passengers received notice in 8.5-point type, but the court found this notice inadequate. The court held that the appropriate notice standard was the 10-point type specified in both the Montreal Agreement and the CAB regulation.⁸⁶ Thus, from 1965 through 1986,⁸⁷ the United States courts interpreted Article 3 of the Warsaw Convention to require adequate notice of the liability limitations. Under this standard, omission of the liability statement triggered the sanction of loss of these protections.

However, the *Chan* majority rejected this line of reasoning under its plain meaning interpretation. First, the Court held that the plain meaning of the treaty did not support the conclusions of the precedent cases.⁸⁸ The majority reasoned that inadequate notice is not a component of delivery, but rather an irregularity which does not affect the application of Convention limitations.⁸⁹ Second, the Court rejected the appellate precedent because the interpretations produced "absurd" results.⁹⁰ The Court reasoned that if the prior appellate interpretations were valid, the limitation sanction would apply to a carrier's failure to include *any* of the particulars listed in Article

80. *Id.*

81. *Id.* at 511.

82. 479 F.2d 912 (D.C. Cir. 1973).

83. 705 F.2d 85 (2d Cir. 1983). Additionally, *In re Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 789 F.2d 1092 (5th Cir. 1986), followed the result of *In re Warsaw* and adopted the Second Circuit's reasoning as its own. *In re New Orleans*, 789 F.2d at 1098.

84. *Lufthansa*, 479 F.2d at 918.

85. *Id.*

86. *In re Warsaw*, 705 F.2d at 89-91.

87. See cases cited *supra* note 68.

88. *Chan*, 109 S. Ct. at 1680.

89. *Id.*

90. *Id.* at 1681.

3(1)(e).⁹¹ Thus, a carrier could lose its liability protection for failure to provide something as minor as the carrier's address.⁹² According to the majority, such a result would be "absurd" and unduly harsh since the plain meaning of the treaty did not articulate such a sanction.⁹³

The majority concluded that because the plain meaning of the Convention text was clear, the Court had no authority to review the legislative history nor any power to insert a requirement of adequate, 10-point type notice.⁹⁴ Therefore, after *Chan*, a carrier may still take advantage of the Convention's protective damage limitations, even when it fails to provide the passenger with adequate, 10-point type notice of these limitations.⁹⁵

B. The Concurrence

Justice Brennan, joined by three other concurring Justices, argued that the Convention's drafting history plausibly supported the petitioner's argument that the Convention denied benefits to a carrier which failed to provide notice of the Convention limitations.⁹⁶ Justice Brennan acknowledged that, "[o]ver the last 25 years petitioners' argument has been accepted, until the present litigation, by virtually every court in this country that has considered it."⁹⁷ However, the concurring Justices agreed with the majority's result because they stated that strict adherence to the 10-point type standard was not required by either the Montreal Agreement or the CAB regulation.⁹⁸

First, Justice Brennan found that the plain language of Article 3 was susceptible to plausible interpretations other than the definition derived by the majority.⁹⁹ One possible interpretation was that the Article 3(2) term "passenger ticket" could be shorthand for the longer phrase, a "ticket with all the particulars required by the convention."¹⁰⁰ A second possibility was that the text of Article 3(2) regarding the "irregularity" of a ticket could still require that the

91. *Id.* at 1681-82.

92. *Id.* at 1682.

93. *Chan*, 109 S. Ct. at 1681-82.

94. *Id.* at 1683-84.

95. *Id.* at 1684.

96. *Id.* at 1685 n.4, 1687, 1693 (Brennan, J., concurring, Marshall, J., Blackmun, J., Stevens, J., joining).

97. *Id.* at 1684.

98. *Chan*, 109 S. Ct. at 1692.

99. *Id.* at 1685.

100. *Id.* at 1685, 1690 n.13.

transportation be governed by the "rules" of the Convention.¹⁰¹ Under such an interpretation, when an "irregularity" occurs, the contract for transportation still exists because the intent of Article 3(2) is to hold the carrier responsible for its obligations, but deny it the benefits of the Convention if it omits any of the enumerated particulars.¹⁰²

The concurrence found both of the above interpretations, as well as the majority's interpretation, to be plausible readings of the plain meaning of the text.¹⁰³ Thus, the only way for Justice Brennan to construe the true meaning of the Convention was to look to other interpretive sources, such as the drafters' intent.¹⁰⁴ The drafting history of the Warsaw Convention illustrates the drafters' intent that sanctions apply to an air carrier which fails to comply with the enumerated particulars of a passenger ticket.¹⁰⁵ The original, final draft of Article 3 read, in pertinent part:

The passenger ticket shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the present Convention.

The absence, irregularity, or loss of this document of carriage shall not prejudice either the existence or the validity of the contract of carriage.

If, for international carriage, the carrier accepts the traveler without having drawn up a passenger ticket, *or if the ticket does not contain the particulars indicated hereabove*, . . . the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability or that derived from the faults of his servants.¹⁰⁶

Additionally, the drafters intended uniform application of sanctions for Article 3 personal injury limitations, Article 4 baggage limitations, and Article 9 air freight limitations.¹⁰⁷ Therefore, the drafters did in-

101. Justice Brennan made this argument to counter the majority's assertion that a ticket with inadequate notice was merely an "irregularity" which did not trigger Convention sanctions. *Id.* at 1680, 1685.

102. *Id.* at 1685.

103. *Chan*, 109 S. Ct. at 1684-85.

104. *Id.* at 1686. The concurrence found that the majority's inability to accept this point "results precisely from the misplaced literalism and disregard of context already evident in [the majority's] approach to this treaty." *Id.* at 1686 n.5.

105. *Id.* at 1686.

106. SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW MINUTES: WARSAW, 1929 258-59 (R. Horner & D. Legrez trans. 1975) [hereinafter Horner & Legrez] (emphasis added).

107. *Chan*, 109 S. Ct. at 1686. The original minutes of the Convention stated:

tend to sanction air carriers for failure to adequately comply with the Convention's notice provisions.¹⁰⁸

However, this original language of the Convention's final draft did not appear in the signed treaty due to two politically-motivated amendments. The first amendment was proposed by the Japanese delegation. The Japanese wanted to physically reorder the liability limitation clause as an enumerated subsection rather than leaving it as a separate, free-standing paragraph at the bottom of Article 3.¹⁰⁹ They felt that this mechanical change would emphasize that the liability clause was obligatory and that omission of the clause would result in loss of the limited liability.¹¹⁰ The Greek delegation proposed a second amendment directed at all of the limitation sanctions in Articles 3, 4, and 9. The Greeks believed that the sanctions were too harsh.¹¹¹ They thought that a mere clerical omission of a date or address should not deprive an airline of the protective limitations.¹¹² The Greek delegates proposed that the particulars which could trigger the sanction be clearly enumerated in order to avoid harsh results.¹¹³ Yet the Greek delegates believed a sanction would be justified in those cases where the omission of a particular would endanger the passenger.¹¹⁴ However, inexplicably, only part of the Greek proposal was integrated into the text of Article 3; thus, their clear intent to sanction

A special document is provided for carriage of passengers. This document is necessarily different from those used for carriage of baggage and the circulation of goods.

This baggage ticket must contain only a minimum of particulars.

Moreover, the sanction provided for for [sic] carriage of passengers without a ticket or with a ticket not conforming to the Convention is identical to that provided for, for [sic] carriage of baggage and goods.

Horner & Legrez, *supra* note 106, at 247.

108. *Chan*, 109 S. Ct. at 1687. The concurrence argues that the imposition of this sanction for inadequate notice is not, as the majority asserts, absurd, because this was the method the drafters chose to compel adherence to the ticket requirements. Other methods of compelling adherence, such as criminal or civil penalties, were rejected by the drafters as too severe. Horner & Legrez, *supra* note 106, at 247. The drafters chose the sanction as a means to enforce the provisions of the Convention and thus accomplish the overall Convention goal of establishing uniformity in international aviation law.

109. Horner & Legrez, *supra* note 106, at 310; compare *supra* note 19 and accompanying text with text accompanying *supra* note 106 (original and final versions of Article 3 of the Convention).

110. *Chan*, 109 S. Ct. at 1689; see also Horner & Legrez, *supra* note 106, at 310.

111. *Chan*, 109 S. Ct. at 1689.

112. Horner & Legrez, *supra* note 106, at 303. The Greeks felt that omissions such as the failure to state the point of departure or the passenger's name or address were unimportant because they were already known or easily known to the passenger. *Id.*

113. *Id.*

114. *Id.*

potentially dangerous omissions failed to appear in the final treaty.¹¹⁵

These two political proposals resulted in an incoherent treaty. The drafters enumerated the liability statement, as suggested by the Japanese, and as requested by the Greeks, replaced the vague sanction language to indicate specified particulars which triggered the sanctions.¹¹⁶ However, the drafters did not adopt the entire Greek proposal and failed to reconcile the gap these two amendments created when merged together in the same document.¹¹⁷ This faulty integration caused the concurrence to conclude that the absence of a specific sanction for inadequate notice of the personal injury limitation was a mere drafting error on the part of the original delegates.¹¹⁸ Since the plain text of the treaty was defective, the drafters' original intentions should be given weight when interpreting the Convention. The legislative history revealed that the drafters intended to sanction the airlines for failure to adequately notify passengers of the Convention's liability limitations.¹¹⁹

After concluding that the legislative history supported a sanction for inadequate notice, the concurrence analyzed whether there actually was adequate notice in this case.¹²⁰ The KAL passengers received notice of the Convention limitations in 8-point type print.¹²¹ The concurrence held that no formal requirement of 10-point type notice existed as long as actual, adequate notice was received by the passengers.¹²² Yet, Justice Brennan acknowledged that some minimum standard of notice was still required: "I think one must agree as well that notice that is not minimally legible, at the least, is not notice at all."¹²³ However, no precise standard or formula for determining minimum standards for adequate notice emerged from the concurring opinion. The concurrence's final holding was that 8-point type notice was not inadequate merely because the Montreal Agreement specified a 10-point type standard; thus, KAL was entitled to the Convention liability protections.¹²⁴

115. *Chan*, 109 S. Ct. at 1689; see *supra* note 19 and accompanying text.

116. *Chan*, 109 S. Ct. at 1689.

117. *Id.*

118. *Id.*

119. *Id.* at 1693.

120. *Id.* at 1691.

121. *Chan*, 109 S. Ct. at 1693.

122. *Id.*

123. *Id.*

124. *Id.*

V. ANALYSIS: TREATY INTERPRETATION AND INVALIDITY

A. Justice Scalia's New Textualism

In construing the treaty for the *Chan* majority, Justice Scalia examined only the plain meaning of the Convention text and refused to consider any other peripheral sources, such as the legislative history.¹²⁵ Justice Scalia's interpretation philosophy departs from traditional statutory and treaty construction which permits consideration of sources outside the text, such as legislative histories, committee reports, and subsequent actions, in order to derive the true meaning of the original text.¹²⁶ Instead, Justice Scalia's New Textualism¹²⁷ looks only to the "plain meaning" of the treaty or statute when construing its language.¹²⁸ For the new textualists, the "plain meaning" consists

125. *Id.* at 1683-84.

126. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990). Under a traditional approach to statutory interpretation, the Court has attempted to implement the original intent or purpose of the enacting Congress. *Id.* at 626. Legislative history is utilized either to supply meaning for an ambiguous statute or to confirm or rebut the plain meaning of a clear statute. *Id.* A variety of relevant legislative history is used, including: committee reports, sponsor statements, rejected proposals, floor and hearing colloquy, views of bureaucrats and law professors, legislative inaction and silence, and subsequent legislative history. *Id.* at 626, 636. The leading case exemplifying this traditional approach is *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). Eskridge, *supra*, at 628. In *Hill*, the Court only briefly discussed the textual arguments, and instead, carefully examined the language, history, and structure of the relevant legislation. Eskridge, *supra*, at 628. The practical effect of the traditional approach is the perpetuation of the "soft plain meaning rule" which suggests that strongly contradictory legislative history can trump the plain meaning of the text. *Id.*

127. The term "New Textualism" was coined by Professor Eskridge. Eskridge, *supra* note 126, at 623. New Textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. *Id.* Legislative history should not be consulted even to confirm the apparent meaning of a statutory text. *Id.* Justice Scalia argues that his interpretation philosophy is merely a return to the Court's traditional, nineteenth century approach to statutory interpretation. *Id.* at 623 n.11, 624 n.12. However, Justice Scalia's philosophy is new because his theory incorporates the intellectual inspirations of public choice theory, strict separation of powers, and ideological conservatism. *Id.* at 623 n.11. Justice Scalia's New Textualism is a radical critique and an analytically bold rethinking of the Court's role in statutory interpretation. *Id.* at 624.

128. *Id.* at 623. For cases in which Justice Scalia has articulated or applied his theory of New Textualism, see *H. J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2907 (1989) (Scalia, J., concurring); *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2724 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Pennsylvania v. Union Gas. Co.*, 109 S. Ct. 2273, 2295-96 (1989) (Scalia, J., concurring in part and dissenting in part); *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994-95 (1989) (Scalia, J., concurring); *United States v. Stuart*, 109 S. Ct. 1183, 1193-95 (1989) (Scalia, J., concurring); *Blanchard v. Bergeron*, 109 S. Ct. 939, 946-47 (1989) (Scalia, J., concurring in part and concurring in the judgment); *United States v. Taylor*, 108 S. Ct. 2413, 2423-24 (1988) (Scalia, J., concurring in part); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 318-29 (1988) (Scalia, J., concurring in part and dissenting in part); *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring); *Edwards v.*

of the text of the treaty on its face, applicable canons of construction,¹²⁹ and structural comparisons of the internal sections of a treaty.¹³⁰ Under this strict philosophy, the Court may use only these three interpretive aids to construe the language of a treaty or statute.

In *Chan*, Justice Scalia rigidly followed his new textualist approach to interpreting treaties. His initial examination of the Convention found that Article 3(2) did not specifically penalize the air carrier for failure to notify the passenger in 10-point type.¹³¹ Justice Scalia then examined other comparable provisions of the Convention relating to air freight and baggage carriage which specifically penalized the failure to include adequate notice on the travel documentation.¹³² From this examination, Justice Scalia concluded that the presence of such a sanction for freight and baggage emphasized the absence of the sanction for personal injury limitations. That absence indicated to Justice Scalia the drafters' intent that no sanction apply to the personal injury limitation.¹³³ Finally, Justice Scalia relied on the canon "*inclusio unius est exclusio alterius*" (the inclusion of one thing implies the exclusion of all others).¹³⁴ This was Justice Scalia's key argument for the *Chan* majority: Because Article 3(2) did not explicitly provide for negation of the liability limits for failure to provide proper notice, and because other sections of the same Convention did provide such an explicit remedy, Justice Scalia inferred that the statute plainly meant to deny a remedy for the right to notice.¹³⁵

Aguillard, 482 U.S. 510, 636-39 (1987) (Scalia, J., dissenting); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 40 (1987) (Scalia, J., concurring); *Rose v. Rose*, 481 U.S. 619, 640-44 (1987) (Scalia, J., concurring); *Johnson v. Transportation Agency*, 480 U.S. 616, 670-72 (1987) (Scalia, J., dissenting); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 452-54 (1987) (Scalia, J., concurring); *California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 295-96 (1987) (Scalia, J., concurring).

129. Eskridge, *supra* note 126, at 662-63. Canons of statutory construction are historical, arbitrary rules of thumb for interpreting statutes. *Id.* The new textualists seek to revive the historic canons that rest upon precepts of grammar and logic, proceduralism, and federalism. *Id.* However, the new textualists reject any of the more modern canons which utilize substantive policy and public values to interpret statutes and treaties. *Id.*

130. Justice Scalia considers arguments based upon textual, or horizontal coherence—showing that the meaning is consistent with other parts of the statute or other terms in similar statutes—but prohibits arguments based on vertical coherence—that the meaning is consistent with the historical expectations of the authors of the statute. *Id.* at 655, 661-63; *see also* *United States v. Taylor*, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring in part) (Justice Scalia's statement of his horizontal coherence approach).

131. *Chan*, 109 S. Ct. at 1680.

132. *Id.* at 1682-83.

133. *Id.*

134. Eskridge, *supra* note 126, at 664.

135. *Chan*, 109 S. Ct. at 1683; Eskridge, *supra* note 126, at 664.

Justice Scalia supports his New Textualism with both realist and formalist theories.¹³⁶ First, he argues that New Textualism is a realistic approach to statutory interpretation which acknowledges that there is no "collective intent" of a legislative body.¹³⁷ Each legislator acts upon his or her own political motivations and intentions; thus, it is a fallacy to believe that "collective intent" can clarify the statutory language.¹³⁸ Only the exact language of a statute is voted on by the legislature; Congress does not vote on the reports or minutes generated by drafting committees.¹³⁹ Furthermore, only the exact language of the statute is subject to the constitutional requirements of bicameralism and presentment.¹⁴⁰ Therefore, the judiciary can use only the plain language of the text, and not the legislative speeches and minutes, to interpret a statute.¹⁴¹

New Textualism is also supported by Justice Scalia on formalistic grounds. According to Justice Scalia, the judiciary usurps legislative and executive power by modifying or abrogating a statute.¹⁴² In *Chan*, Justice Scalia condemned the appellate precedent's broad interpretation of the Convention as judicial activism which exceeded the courts' constitutional power.¹⁴³ According to their critics, the appellate courts did not like the inequitable impact of the \$8,300 personal

136. Eskridge, *supra* note 126, at 642-46.

137. *Id.* at 642-44.

138. *Id.* Max Radin, a Legal Realist, argued that the collective intent of a legislature is a legal fiction, easily subject to any interpretation. *Id.* at 642 (citing Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930)). According to Radin, a legislature has no determinate, collective expectations about many of the concrete issues in its statutes. This lack of coherent expectations is due to the great number of people whose intent must be discovered and the muteness of most of these legislators in the legislative process. *Id.* Radin's analysis demonstrates that an interpreter can deconstruct almost any legislative intent argument through predictable analytical moves. *Id.*

139. *Id.* at 642; Fein, *Scalia's Way*, A.B.A. J. 38 (Feb. 1990).

140. U.S. CONST. art. I, § 7, cl. 2. This constitutional requirement mandates that a bill must be passed in the same form by both chambers of Congress and must then be presented to the President. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983). Legislative history is therefore "[a] frail substitute for bicameral vote upon the text of a law and its presentment to the President. It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions." *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (citing and relying on *Chadha*).

141. Eskridge, *supra* note 126, at 650, 654; Fein, *supra* note 139, at 38.

142. *Chan*, 109 S. Ct. at 1684; Eskridge, *supra* note 126, at 646, 653. For Justice Scalia's views on the formal separation of powers, see *Mistretta v. United States*, 109 S. Ct. 647, 675-82 (1988) (Scalia, J., dissenting); *Morrison v. Olson*, 108 S. Ct. 2597, 2622-41 (1988) (Scalia, J., dissenting); *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986) (per curiam) (three-judge court opinion, including Scalia, J.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

143. *Chan*, 109 S. Ct. at 1684.

injury limitation on American plaintiffs and distorted the terms of the treaty to reach the result they desired.¹⁴⁴ What Justice Scalia labels as judicial activism has traditionally been called "judicial treatywriting."¹⁴⁵

[T]his Court does not possess any treaty-making power. That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.¹⁴⁶

According to Justice Scalia, judicial treatywriting is outside of the Court's power; instead, any desired change in a statute must be instigated through the political process.¹⁴⁷ New Textualism purports to

144. *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508, 515 (2d Cir. 1966) (Moore, J., dissenting). "The majority in their opinion indulge in judicial treaty-making . . . The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it." *Id.*; see also Note, *supra* note 30, at 160-61.

145. Judicial treatywriting is defined as the judicial proclivity to rewrite those troublesome sections of a treaty that the political branches have been unable to change. Note, *supra* note 30, at 160-61. This judicial activism was first condemned by Judge Moore in his dissent in the *Lisi* case. 370 F.2d at 515. Judge Moore criticized,

[t]he original limitations in the Convention may well be outmoded by now. Substantial revisions upward have been made but they have been made, as they should be, by treaty and not by the courts. Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice.

Id. The term "judicial treatywriting" is a term that is often manipulated by one side of a court to criticize the treaty interpretation of the opposing opinion. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 263-64 (1984) (Stevens, J., dissenting). Justice Stevens accused the majority of judicial treatywriting in the *Franklin Mint* case because it upheld a CAB regulation regarding the valuation of air freight damage instead of the standard set out in the Convention itself. *Id.* at 262-63. However, by joining the concurrence in *Chan*, Justice Stevens was accused by the majority of engaging in judicial treatywriting. 109 S. Ct. at 1683-84. Thus, the label "judicial treatywriting" is a manipulable accusation and not an inherently negative action by the Court.

146. *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821).

147. Eskridge, *supra* note 126, at 646, 648. Justice Scalia argues that in a representative democracy, the popularly elected branches of government should make the major policy decisions. *Id.* at 648. Unelected judges should make as few policy choices as possible, especially when interpreting statutes. *Id.* When the judge uses legislative history, especially to alter the

curb judicial discretion and personal activism, thus maintaining a nonpartisan bench.¹⁴⁸ Furthermore, the formalistic philosophy forces Congress to be more careful in drafting legislation because Congress learns that the courts will no longer guess at the meaning of statutory language.¹⁴⁹ Thus, Justice Scalia's philosophy is aimed at reducing politically-motivated judicial activism and strengthening the traditional separation and allocation of constitutional powers.¹⁵⁰

However, Justice Scalia's rationales for New Textualism are not persuasive when applied to international treaties. First, contrary to Justice Scalia's assertion, the plain meaning of the Convention text is not clear. The Convention was originally drafted in French and has undergone many subsequent translations.¹⁵¹ Thus, the technical meaning of many of the original words may have been lost in the translation process. Furthermore, the original drafting of the document was not founded on accepted American judicial assumptions. The international forum is not necessarily familiar with American canons of construction; thus, a court cannot assume that the language is amenable to United States rules of grammar and drafting procedure.¹⁵² Delegates from different legal and social cultures may not all

apparent textual meaning, she has increased her discretion to make illegitimate policy choices. *Id.* This broadening of the judicial inquiry through the use of legislative history, beyond the relatively concrete analysis of what the actual words of the statute mean, permits the Court to justify a broader range of answers and facilitates the Justices writing their own preferences into the statute. *Id.*

148. *Id.* at 654, 656. New Textualism limits the tools available to judges seeking to escape plain statutory meaning, thereby curtailing opportunities for judicial lawmaking. *Id.*

149. *Id.* at 654-55.

[F]or Justice Scalia, . . . the Court not only has a negative duty to police against lawmaking by legislative subgroups, but also has a positive duty to encourage Congress to legislate more carefully, so as to obtain the benefits of the bicameralism and presentment requirements. "It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making that result apparent on the face of the bill which both Houses consider and vote upon, which the President approves, and which, if it becomes law, the people must obey," argues Justice Scalia. "*I think we have an obligation to conduct our exegesis in a fashion which fosters that democratic process.*"

Id. at 655.

150. Justice Scalia argues that a textual focus reduces the possibility of judicial usurpation of Congress' lawmaking responsibilities by curtailing judges' discretion to impose their own values onto the statute itself. *Id.* at 654. Additionally, Justice Scalia emphasizes the functional efficiency advantages of his New Textualism approach. *Id.* at 656. His interpretive theory will eliminate the need for practitioners and judges to engage in the unnecessary and expensive search through legislative history, thus saving the Court and the parties valuable time. *Id.*

151. See Horner & Legrez, *supra* note 106 (1975 translation of original French text).

152. The canons used by the Court are based on notions of American Federalism. Es-
tridge, *supra* note 126, at 665. These domestic rules of construction are based upon the na-

ascribe the same meaning to a treaty.¹⁵³ In order to give substantive meaning to vague terms, many delegate nations rely on their own domestic courts to interpret these treaties according to their domestic laws.¹⁵⁴ Therefore, Justice Scalia's main premise for reliance on New Textualism, the uncontroverted clarity of the text, is not present in an international treaty context.

Second, in the international convention arena, an injured passenger cannot resort to the majoritarian process for relief. Justice Scalia's alternative route of resorting to the political process is impracticable for international treaties, as the international forum does not contain the usual accessible components of a democratic process. Primarily, there is no single, international legislative body that is accessible to all voters. Furthermore, these voters are unable to elect representative members to the international forum because political persons have never been involved in the Convention's history. Traditionally, only appointed executive officers and bureaucrats have been responsible for the implementation and drafting of the treaties and agreements.¹⁵⁵ International travelers are also an ineffective lobbying group because their exposure to the Convention occurs only in the unlikely event of an air crash.¹⁵⁶ Similarly, the general public, unaware of the Convention's existence, is an ineffective lobbying group. Without access to an international legislative body, either through a representative, direct vote, or a lobby group, individuals are unable to resort to the political process to effectuate change in the Convention. In the absence of this political alternative, the courts should not refuse to adjudicate on the merits of the treaty.

Finally, Justice Scalia argues that the Court will exceed its constitutional powers if it looks beyond the plain meaning of the treaty.¹⁵⁷ However, an acceptable, indeed mandatory, power of the

tion's federal system of government, with its division of responsibilities among national, state, and local governments. *Id.* Obviously, such notions of federalism are not common in all nations; thus, these American canons of construction cannot be assumed to operate in the international legislative forum.

153. Lowenfeld & Mendelsohn, *supra* note 22, at 35; Eskridge, *supra* note 126, at 662 n.166 (noting that the relevant intent in *Chan* would be that of several nations, not just the intent of the United States).

154. See *Ludecke v. Canadian Pac. Airlines Ltd.*, 98 D.L.R.3d 52 (Can. 1979); *Coccia v. Turkish Airlines, Co.*, (Italy 1955), excerpted in Guerrerri, *The Warsaw System Italian Style: Convention Without Limits*, 10 AIR L. 294, 297 (1985) [hereinafter Coccia].

155. Horner & Legrez, *supra* note 106, at 5-10.

156. Jeffrey, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805, 833 (1982).

157. Eskridge, *supra* note 126, at 646, 648, 653; see *supra* note 147 and accompanying text.

judiciary is to examine the constitutionality of the acts of the other branches of government.¹⁵⁸ A treaty is one such governmental act which cannot abridge the rights and guarantees of the Constitution.¹⁵⁹ The *Chan* concurrence's approach of examining legislative history in order to determine a treaty's meaning is the traditional method of treaty interpretation.¹⁶⁰ Other legal scholars closely aligned with Justice Scalia¹⁶¹ suggest that treaties should be examined in light of the public choices the drafters would make if they were drafting the same treaty in today's world.¹⁶² This "imaginative reconstruction" requires the judiciary to examine the policy choices made by the original drafters to see if they are viable and constitutional in the modern world.¹⁶³ Under the traditional interpretation and the imaginative reconstruction theories, the Court has the power to review the validity of a treaty and make any necessary modifications.¹⁶⁴ Thus, the Court would not exceed its constitutional powers by closely examining the 1929 Convention.

B. *Alternative Construction Theories*

The majority's use of New Textualism to interpret the Convention is also a rigid departure from the Court's own statements of rules

158. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); see also Jeffrey, *supra* note 156, at 832.

159. *Reid v. Covert*, 354 U.S. 1 (1957).

160. For a description of the traditional approach, see *supra* note 126 and accompanying text; see also *Chan*, 109 S. Ct. at 1685-90 (concurrence's application of the traditional approach).

161. Judges Learned Hand and Richard Posner have advocated this theory of "imaginative reconstruction." Eskridge, *supra* note 126, at 630. Others closely aligned with Justice Scalia's New Textualism, but not joining in the imaginative reconstruction school of thought, include: Justice Anthony Kennedy, Judge Frank Easterbrook of the Seventh Circuit, Judge James Buckley of the District of Columbia Circuit, Judge Alex Kozinski of the Ninth Circuit, and former Judge Kenneth Starr, now Solicitor Counsel of the United States. *Id.* at 647, 657 n.137.

162. *Id.* at 630.

163. *Id.* Under the imaginative reconstruction approach, the Court will trace the evolution of the statute and its debating history, from early legislative proposals to enactment, with a focus on the interpretive issue in the case. *Id.* The goal of the judicial inquiry is to retrieve specific legislative consideration of the issue and more importantly, to recreate the general assumptions, goals, and limitations of the enacting Congress. *Id.*; see *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (Court's application of the imaginative reconstruction theory).

164. Eskridge, *supra* note 126, at 626. "[T]he plain meaning rule has traditionally been a 'soft' rule—the plainest meaning can be trumped by contradictory legislative history. . . ." *Id.* "Through [imaginative reconstruction], the Court seeks to 'reconstruct' the answer the enacting Congress would have given if the interpretive issue had been posed directly." *Id.* at 630.

for treaty interpretation. Those rules support the broad construction of treaties in order to effectuate the international intent of the foreign drafters.¹⁶⁵ In 1989, the Court in *United States v. Stuart*¹⁶⁶ held that treaties should generally be "broadly and reasonably construed to accomplish the obvious purposes of the framers."¹⁶⁷ Additionally, "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred."¹⁶⁸ Thus, in accordance with its own articulated principles of treaty construction in *Stuart*, the Court could have applied a traditional interpretation approach to the Convention, which would have provided for an expansive, liberal reading of the treaty.¹⁶⁹

Before *Stuart*, the Court developed a specific formula to give these general treaty construction principles some practical effect.¹⁷⁰ In *Air France v. Saks*,¹⁷¹ the Court held that a strict, literal reading of a treaty is superficial and therefore, the Court must use additional interpretive aids to determine the meaning of the Convention.¹⁷² According to *Saks*, the significant aids that the Court should refer to include: 1) the language of the treaty itself and its context within the entire treaty,¹⁷³ 2) the legal meaning of the original French text,¹⁷⁴ 3) the preparatory treaty work, including the minutes and debates of the delegates,¹⁷⁵ 4) the case law of sister signatories,¹⁷⁶ and 5) the

165. See *United States v. Stuart*, 109 S. Ct. 1183 (1989); *Air France v. Saks*, 470 U.S. 392 (1985).

166. 109 S. Ct. 1183 (1989).

167. *Id.* at 1192.

168. *Id.*

169. *Id.*

170. See *Air France v. Saks*, 470 U.S. 392 (1985).

171. *Id.* The Court considered a provision of the Warsaw Convention which required that an "accident" cause the passenger's injury in order to excuse the airline of liability. *Id.* at 397. The Court first looked to the plain text and context of the Warsaw Convention to define the term "accident" contained in Article 17 of the Convention. *Id.* at 397, 399. Finding two possible meanings for "accident" in the text, the Court proceeded to consider the French legal meaning of the word. *Id.* at 399. Finally, the Court examined the detailed negotiating history, and the post-ratification conduct and case law of sister signatory countries. *Id.* at 400. Based on this full analysis, the Court concluded that "accident" referred to an injury caused by an unexpected or unusual event or happening external to the passenger. *Id.* at 405.

172. *Id.* at 396.

173. *Id.* at 397.

174. *Id.* at 399.

175. *Saks*, 470 U.S. at 400.

176. *Id.*

post-ratification actions of the signatories.¹⁷⁷ Had the *Chan* Court followed the *Saks* formula, it clearly would have held that the Convention provides sanctions for an airline's failure to give adequate notice.

Arguably, the Court did engage in the first two steps of the formula by looking at the specific wording of Article 3 on its face and in relation to other Convention provisions.¹⁷⁸ Although the Court did not discuss the meaning of the original French words, it did rely on official translations of the French text, which presumably incorporate any additional French legal meaning which could be derived.¹⁷⁹ The majority ended its discussion here, but the concurrence went further and examined in detail the minutes and debates of the Convention drafters.¹⁸⁰ At that point, the majority and the concurrence reached opposite conclusions as to the meaning of the treaty.¹⁸¹ Because of this polarity, both opinions should have applied the *Saks* formula in its entirety to derive the true meaning of Article 3.

Although the majority skipped the third step of the *Saks* formula—examining the framers' intent—it partially followed the fourth step—examining the case law of sister signatories—by looking to a Canadian case, *Ludecke v. Canadian Pacific Airlines Ltd.*¹⁸² The court in *Ludecke* held that the plain meaning of Article 3(2) indicated that the Convention did not mandate sanctions for notice of the liability statement printed in 4.5-point type.¹⁸³ The *Chan* majority used the *Ludecke* case to support its strict, textualist approach to treaty interpretation.¹⁸⁴ However, upon examining its facts, the *Ludecke* reasoning is not persuasive. Although the Canadian court rigidly adhered to the plain language rule in order to uphold a 4.5-

177. *Id.*; see also *Husserl v. Swiss Air Transp. Co. Ltd.*, 351 F. Supp. 702 (1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

178. *Chan*, 109 S. Ct. at 1680, 1682.

179. *Id.* at 1685 n.4.

180. *Id.* at 1685.

181. *Id.* at 1683-84, 1691. The majority concluded that the plain meaning of the text, in context with the rest of the treaty, did not impose the severe sanction of forfeiture of the liability protections for an airline which fails to give a passenger adequate notice of the Convention's liability limitations. *Id.* at 1683-84. The concurrence stated that there were many plausible interpretations of the Convention language, but concluded that the legislative history indicated that the drafters intended to sanction the failure to provide adequate notice with forfeiture of Convention protections. *Id.* at 1691.

182. 98 D.L.R.3d 52 (Can. 1979).

183. *Id.* at 57.

184. *Chan*, 109 S. Ct. at 1684.

point type notice of the Convention's liability statement,¹⁸⁵ the United States courts in *Lisi*¹⁸⁶ had already rejected 4-point type notice as unreadable, inadequate notice.¹⁸⁷ Thus, even though the "plain language" reasoning of the Canadian court persuaded the *Chan* majority, the *Ludecke* result validating 4.5-point type notice may not be acceptable to the Court in light of its rejection of 4-point type notice in *Lisi*.¹⁸⁸ Therefore, the import of the Canadian court's reasoning should not weigh heavily in the Court's interpretation of the Convention.

The majority concluded its examination of other international case law with *Ludecke*.¹⁸⁹ However, in order to effectively utilize the case law of sister signatories, a court should examine the case law of all parallel and participating nations to derive the universally understood "true" meaning of the text.¹⁹⁰ For example, had the *Chan* majority considered Italian case law it would have learned that the Italian courts have taken a completely different approach than the Canadian judiciary.¹⁹¹ In *Coccia v. Turkish Airlines*, the Italian Constitutional Court invalidated the Convention and Hague Protocol limits as unconstitutional.¹⁹² The Italian court found that the liability limits were no longer justified by any need to give special protection to the airlines.¹⁹³ This sister signatory expansively interpreted the Convention language and held that the Convention itself was no longer valid under Italian law.¹⁹⁴

However, the comparison of international case law does not necessarily resolve the conflicting interpretations, as the signatory countries have interpreted the Convention in opposite ways.¹⁹⁵ Therefore, in order to clarify the Convention's meaning, the Court should apply the fifth prong of the *Saks* analysis, examination of the post-ratification actions of the signatories.¹⁹⁶ As illustrated above, Italy has totally denounced both the Convention and the Hague Protocol as

185. *Ludecke*, 98 D.L.R.3d at 56-58.

186. 370 F.2d 508 (2d Cir. 1966), *aff'd by equally divided court*, 390 U.S. 455 (1968).

187. *Id.* at 514.

188. *See id.*; *see also Ludecke*, 98 D.L.R.3d at 58.

189. *Chan*, 109 S. Ct. at 1684.

190. In *Saks*, the Court examined a variety of cases from other countries, even those which were not precisely on point or supportive of the Court's position. 470 U.S. at 404-05.

191. *See Coccia*, *supra* note 154.

192. *Id.* at 294.

193. *Id.* at 302.

194. *Id.* at 305.

195. *See Ludecke*, 98 D.L.R.3d at 56; *Coccia*, *supra* note 154, at 297.

196. *Saks*, 470 U.S. at 403.

unconstitutional.¹⁹⁷ New Zealand, another signatory, has enacted national legislation that requires damages resulting from an international transport with a New Zealand carrier, or involving a New Zealand citizen, to be calculated according to the injured party's economic earning potential.¹⁹⁸ Britain has raised its national liability limit to 100,000 SDR.¹⁹⁹ Even Korea, whose national airline is KAL, raised its liability limit in 1984 to 100,000 SDR for litigation in Korea.²⁰⁰ These changes illustrate that other signatory nations are also dissatisfied with the limits and terms of the Convention.

The United States' dissatisfaction with the Convention has been apparent since 1935.²⁰¹ The Hague Protocol, the Guatemala Protocol, and the recent Montreal Protocol were all rejected by the United States because of their inadequate protections for United States passengers.²⁰² In 1964, the United States announced its intent to denounce the Convention, which was only prevented by the signing of the Montreal Agreement.²⁰³ More specifically, the United States has always been concerned with the Convention's liability limits and its notice provision.²⁰⁴ As early as the first Hague Protocol committee discussions, the United States insisted on the addition of a clause reading "if the passenger is not given a ticket containing the required notice, the carrier loses its right to avail itself of the liability limiting provisions of the Convention."²⁰⁵ The United States and other signatory nations are dissatisfied with the terms of the Convention; some have even invalidated the Convention in its entirety.²⁰⁶ Thus, the fifth

197. Coccia, *supra* note 154, at 305.

198. Vennell, *International and Domestic Carriage by Air: The Effect of the New Zealand Accident Compensation Scheme on Claims for Damages for Personal Injuries*, 13 AIR L. 273 (1988). This economic calculation is determined on the basis of lost wages, number of dependents, etc., the traditional method of computing tort damages. *Id.*

199. Cohen, *supra* note 31, at 157. An SDR ("Special Drawing Right") is a unit of account that is a measure derived from a basket of five national currencies. *Id.* at 156 n.146. The SDR has been proposed as a standard of exchange that would be more beneficial than the current franc or gold standard formulas. *Id.*

200. Lee, *The Current Status of the Warsaw Convention and Subsequent Protocols in Leading Asian Countries*, 11 AIR L. 242 (1986). Most Asian countries were not original signatories to the Convention. *Id.* However, in 1955 Korea signed the Hague Protocol which amended the Convention. *Id.* Most scholars find that a country which has signed the amendment to the Convention has impliedly agreed to the unamended terms of the original Convention. *Id.*

201. Lowenfeld & Mendelsohn, *supra* note 22, at 502.

202. *Id.* at 514-16; Cohen, *supra* note 31, at 147; Matte, *supra* note 42, at 157.

203. Lowenfeld & Mendelsohn, *supra* note 22, at 563.

204. *Id.* at 507.

205. *Id.* at 513-14.

206. Italy has declared the limits of the Warsaw Convention unconstitutional. Coccia, *supra* note 154, at 305.

prong of the *Saks* analysis clarifies the Convention language: a ticket with inadequate notice deprives the carrier of Convention liability protections.

The full *Saks* analysis exposes the clear intent of the delegates and signatories. The original purpose of the Convention was to grant protective limits for the airlines, if the passenger was given adequate notice.²⁰⁷ The two plausible interpretations of the Convention text, derived by the *Chan* majority and the concurrence,²⁰⁸ are clarified by the minutes of the drafters and the post-ratification actions of the signatories.²⁰⁹ The delegates intended that the passengers receive notice of the liability limitations; failure to provide this notice was intended to be penalized with loss of the protective liability limits.²¹⁰

C. *Changed Circumstances and Constitutional Infirmities*

Had the *Chan* Court moved beyond formalistic rules of construction and substantively examined the terms of the Convention, the Court would have found that the Convention is unconstitutional in light of present-day circumstances. In the 1990s, the reasons for the 1929 Convention are no longer justified.²¹¹ Originally, the liability limitations were established to support the fledgling air industry by encouraging business investment and airline entrepreneurs.²¹² The primary goal of the Convention was to create protections for the air carriers so as to insulate them from attack and liability during the industry's initial years.²¹³ The Convention drafters weighed the interests of the air carriers against the international passenger and clearly decided to protect the carrier.²¹⁴

However, in the sixty years since the Convention's origin, there has been a huge shift in that initial calculus. No longer do mammoth businesses like the airlines need legal liability protections.²¹⁵ Air safety has improved through the implementation of new technology;

207. This interpretation is based on the original final draft of Article 3, the subsequent actions of Italy, New Zealand, and Britain, and the post-Convention attempts to amend the inadequacies of the Convention. See text accompanying notes 104-108, 197-206.

208. See *supra* note 181 and accompanying text.

209. See text accompanying notes 104-108, 197-206.

210. Lowenfeld & Mendelsohn, *supra* note 22, at 498.

211. *Id.* at 499.

212. *Id.*

213. *Id.* at 499-500.

214. *Id.*

215. Jeffrey, *supra* note 156, at 830; see also Coccia, *supra* note 154, at 302.

[I]n the 1920's there was a reason for the Warsaw Convention to protect the industry. It needed protection and it deserved it. Now we are in 1982. We have flights to

thus, the risk of carrier liability has substantially decreased.²¹⁶ Furthermore, the availability and affordability of insurance allows the airlines to protect their business interests in the event of a large liability situation.²¹⁷

Instead, it is the individual passenger facing the mammoth airlines who needs the protections of the law. For United States domestic air travel, there are no liability restrictions placed on a passenger's recovery.²¹⁸ Between 1970 and 1984, the average recovery per passenger was \$362,943.²¹⁹ However, huge increases in recovery have occurred with each year; in the 1980s, the average recovery rose to \$500,000.²²⁰ Based on these figures, the Convention limit of \$75,000 is clearly insufficient to protect and compensate the injured passenger. Because the airlines no longer need liability protection, and because the individual traveler has increased need for legal protection, the Court's rigid adherence to an antiquated treaty is both unnecessary and inequitable.²²¹

Eradicating this antiquated treaty without the Court exceeding

the moon. We have 747s. We have Concorde and the airline industry, we all agree, is the safest method of transportation that we know.

Podgers, *supra* note 52, at 30.

216. Jeffrey, *supra* note 156, at 810, 819; see also *In re Aircrash in Bali, Indonesia* on April 22, 1974, 684 F.2d 1301 (9th Cir. 1982); Coccia, *supra* note 154, at 302.

217. See *In re Bali*, 684 F.2d at 1310; see also *Burdell v. Canadian Pac. Airlines*, 10 Av. Cas. (CCH) 18, 158-60 (Cir. Ct. Ill. 1968) (later revised by 11 Av. Cas. 17, (CCH) 351 (1969)). "As a general rule, American tort law does not shield healthy, insurable industries from the duty to compensate persons injured in the course of business." Jeffrey, *supra* note 156, at 832.

218. Jeffrey, *supra* note 156, at 805-06.

219. Blum, *Air Crash Death Average: \$362,943*, 10 NAT'L L.J., May 23, 1988, excerpted in Brief for Petitioners at A-100, *Chan v. Korean Air Lines*, 109 S. Ct. 1676 (1989) (No. 87-1055).

220. *Id.*

221. The Warsaw Convention's limitation on airline liability has outlived its usefulness now that the airline industry has outgrown its infancy to establish itself as a powerful, safe, easily insurable, and stable enterprise. There is no longer any need to provide special protection to an industry which is capable of reimbursing customers for the damages it causes them. The Convention's liability limitations, unaccompanied by any meaningful *quid pro quo* to benefit passengers, is an affront to the American ideal of full and adequate compensation to injured plaintiffs by those responsible for the harm.

Jeffrey, *supra* note 156, at 830; Coccia, *supra* note 154, at 295; see also *Burdell*, 10 Av. Cas. (CCH) at 160-61.

Provisions of the Warsaw Convention . . . that would restrict the damages recoverable in the event of an accident to approximately \$8,300 . . . are arbitrary, irresponsible, capricious and undefensible when they attempt to impose a damage limitation of considerably less than the undisputed pecuniary losses and damages involved, and such unjustifiable [sic] preferential treatment of international air carriers is unconstitutional.

Burdell, 10 Av. Cas. (CCH) at 18, 151.

its constitutional powers remains a legal hurdle.²²² The Supreme Court recognizes that the Convention is outmoded, but has refused to abrogate the treaty, on the ground that treaty modification and abrogation is a sole function of the other branches of government.²²³

If the Convention as drafted is unworkable in today's world, that should not be surprising. . . . [I]t was written for a few years, not for a half century of the most rapid and fundamental changes in the history of the planet. The majority takes the Convention written for a few years in the era of the Spirit of St. Louis, and rewrites it in the hope, I presume, that it will last a few more years into the age of the Space Shuttle. Just why it does so escapes me. The question whether that needs to be done and the question whether that *should* be done are simply not decisions for this Court to make.²²⁴

Thus, the Court has been hesitant to constitutionally analyze a treaty and, indeed, has never held a treaty to be unconstitutional.²²⁵

Yet, contrary to the Court's assertion, treaty abrogation, modification, and condemnation are within the power of the judiciary. An acceptable, mandatory power of the judiciary is to examine the constitutionality of the acts of the other branches of government.²²⁶ A treaty is such a governmental act which must not abridge the rights and guarantees of the Constitution.²²⁷ Therefore, a judicial examination of the constitutionality of treaties would be a valid exercise of the Court's power.²²⁸

A constitutional analysis could potentially reveal that the Con-

222. The Ninth Circuit Court of Appeals noted, "[w]e know of no doctrine that would allow us to examine congressional enactments to see if they still serve the purpose for which they were designed." *In re Bali*, 684 F.2d at 1308.

223. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 280 (1984) (Stevens, J., dissenting).

224. *Id.*

225. Jeffrey, *supra* note 156, at 815-16. The Supreme Court has always shown tremendous deference to the executive and legislative branches' treaty-making power which is allocated to those respective branches through article II of the United States Constitution. *Id.*

226. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The judiciary also has an equitable function to provide full and adequate compensation to injured plaintiffs by imposing the costs of the damages on the parties responsible for the injuries. Jeffrey, *supra* note 156, at 832.

227. *Reid v. Covert*, 354 U.S. 1 (1957).

228. In fact, such an examination may be mandatory to uphold the Constitution's system of checks and balances. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Jeffrey, *supra* note 156, at 815-16; see also *Burdell*, 10 Av. Cas. (CCH) at 156-57. The court of appeals in *In re Bali* noted, "[a]lthough courts are not often called upon to review the constitutionality of treaty provisions, there is no doubt that the power to make treaties is circumscribed by substantive provisions of the Constitution, and that the courts are competent to pass on the consti-

vention and its personal liability limitation constitute either a taking,²²⁹ a substantive due process violation of an individual's fundamental liberty to travel,²³⁰ or an equal protection violation, unconstitutionally discriminating between two similar classes of people.²³¹ The Ninth Circuit Court of Appeals acknowledged these potential constitutional violations in *In re Aircrash in Bali, Indonesia on April 22, 1974*.²³² The *In re Bali* plaintiffs' first assertion was that the Convention violated the due process and equal protection clauses of the fourteenth amendment.²³³ However, the Ninth Circuit dismissed these arguments under the Commerce Clause.²³⁴

The court found that the Warsaw Convention was similar to the Price-Anderson Act,²³⁵ which established liability limits for damage caused by nuclear power plants.²³⁶ The *In re Bali* court thus applied the economic regulation analysis of *Duke Power Co. v. Carolina Environmental Study Group*,²³⁷ which evolved from prior Price-Anderson Act cases.²³⁸ The Ninth Circuit characterized the Convention as an economic regulation which would not be unconstitutional under the fourteenth amendment unless it was arbitrary or unreasonable.²³⁹ The plaintiffs argued that even under the *Duke Power* analogy, the Convention was arbitrary and unreasonable in light of the changed conditions in the airline industry since the 1929 Convention.²⁴⁰ However, the court refused to address this "arbitrary and unreasonable" argument because it found another available remedy for the plain-

tutionality of treaties." *In re Bali*, 684 F.2d at 1308-09 (citing *Reid v. Covert*, 354 U.S. 1 (1957)).

The Italian court, which has similar jurisdictional powers to those of the United States Supreme Court, acknowledged that the judiciary did not have the power to denounce a treaty. Coccia, *supra* note 154, at 296. However, the Italian court was able to examine the constitutionality of the treaty while remaining within the specified powers allocated to the judicial branch. *Id.*

229. *In re Bali*, 684 F.2d at 1309.

230. *Id.*

231. *Id.*; Coccia, *supra* note 154, at 295.

232. 684 F.2d 1301 (9th Cir. 1982).

233. *Id.* at 1309.

234. *Id.*

235. *Id.*

236. 42 U.S.C. § 2210 (1976).

237. 438 U.S. 59 (1978). The Supreme Court held in *Duke Power* that the Price-Anderson Act did not violate the plaintiffs' due process or equal protection rights because there was sufficient need for the limitation of liability. *Id.* at 86-87.

238. *In re Bali*, 684 F.2d at 1309.

239. *Id.*

240. Jeffrey, *supra* note 156, at 822.

tiffs.²⁴¹ The court's failure to address the fourteenth amendment claims left the door open for future plaintiffs to raise this challenge successfully.

The Ninth Circuit also dismissed the plaintiffs' argument that the limitation impermissibly burdened the passengers' fundamental right to travel.²⁴² The court initially held that the right to international travel was a fundamental right and that no rule or legislation could penalize that right unless it was narrowly tailored and served an important governmental interest.²⁴³ However, the court again refused to apply this concept to the plaintiffs' case as the court found that another remedy was available to the plaintiffs.²⁴⁴

Although the court would not decide whether the Convention limit impinged the passengers' fundamental right to travel, the *In re Bali* court developed the basis under which future plaintiffs can claim a fourteenth amendment violation of their fundamental right to travel.²⁴⁵ The court suggested that "[t]here are some Government regulations for which no adequate compensation could be paid, because they deprive persons of some aspect of life or liberty. In these cases, the regulation may be a violation of substantive due process."²⁴⁶ The Ninth Circuit has clearly stated that the right to travel is a fundamental right;²⁴⁷ thus, a reviewing court would strictly scrutinize the impingement of that right. Plaintiffs pursuing the right to travel theory would argue that there was no compelling interest behind the limitation because its justifications had become outmoded by the advances in the airline industry.²⁴⁸ Thus, if the limitation was not narrowly tailored and did not serve a compelling governmental interest, the limitation would be unconstitutional.

An alternative theory which the *In re Bali* court raised *sua sponte* was a claim of an unconstitutional taking asserted under the Tucker Act.²⁴⁹ The Tucker Act provides:

241. *In re Bali*, 684 F.2d at 1309.

242. *Id.*

243. *Id.*

244. *Id.* at 1310.

245. *Id.*

246. *In re Bali*, 684 F.2d at 1310.

247. *Id.* at 1309; see also *Shapiro v. Thompson*, 394 U.S. 618 (1969).

248. See *In re Bali*, 684 F.2d at 1308.

249. 28 U.S.C. § 1491 (1988); Jeffrey, *supra* note 156, at 82 n.144; see generally W. COWLES, TREATIES AND CONSTITUTIONAL LAW, PROPERTY INTERFERENCES AND DUE PROCESS OF LAW (1941). Cases in the Court of Claims are remedial and seek money judgments against the United States. *Id.* at 181. Such judgments by the court do not indicate any

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages or unliquidated damages in cases not sounding in tort.²⁵⁰

One exception to the Tucker Act is that rights "created under or dependent on" treaties are not actionable under the Act.²⁵¹ However, the court evaded the treaty exception in the Tucker Act by relying on *Dames & Moore v. Regan*.²⁵² In that case, the Supreme Court allowed a takings claim to be asserted under an order stemming from an Executive Agreement.²⁵³ The *Dames & Moore* Court stated that "[t]he Government must pay just compensation when it furthers the nation's foreign goals by using as 'bargaining chips' claims lawfully held by relatively few persons and subject to the jurisdiction of our courts."²⁵⁴ Using this reasoning, the *In re Bali* court explicitly held that the Court of Claims had jurisdiction to hear the plaintiffs' legitimate takings claim.²⁵⁵

However, the *In re Bali* court held that an actual takings claim could not yet be established by the plaintiffs.²⁵⁶ To establish such a claim, the plaintiffs must first get a judgment for their damages in excess of the Convention limitation.²⁵⁷ Then, the trial judge would have to reduce the award to stay within the Convention limits.²⁵⁸ The plaintiffs would then have to pursue all avenues of appeal before they would finally be able to bring an action in the Court of Claims.²⁵⁹ The effect of these procedures is to practically bar a takings cause of action even though the *In re Bali* court created a theoretical attack against the Convention. The process required to establish a taking is expensive and lengthy. Thus, the chances of a plaintiff successfully bringing such an action are small. Furthermore, this legal alternative is politi-

limit on the scope of treaty-making power, but rather indicate that the agents of the treaty power have violated the Constitution. *Id.* at 181-82.

250. 28 U.S.C. § 1491; see also DeVivo, *The Warsaw Convention: Judicial Tolling of the Death Knell?*, 49 J. AIR L. & COM. 71, 132 n.318 (1983).

251. 28 U.S.C. § 1491; *In re Bali*, 684 F.2d at 1311.

252. 453 U.S. 654 (1981).

253. *Id.* at 689-90.

254. *Id.* at 691.

255. *In re Bali*, 684 F.2d at 1313.

256. *Id.* at 1312.

257. DeVivo, *supra* note 250, at 135.

258. *Id.*

259. *Id.*

cally and tactically ineffective because the future ramifications could be extremely costly for the United States government. If plaintiffs can successfully sue under the Tucker Act, the United States will have to reimburse all those plaintiffs not compensated by the Convention, thus placing the burden of protection on the United States government.²⁶⁰ Therefore, a constitutional attack under the takings clause, although technically available to international travelers, may not be a viable alternative for either the plaintiffs or the United States government to use as a challenge to the 1929 Convention.²⁶¹

The *In re Bali* court left open the possibility of attacking the Convention as an arbitrary economic regulation, as an impingement of the fundamental right to travel, or as a taking.²⁶² Another potential legal attack that the *In re Bali* court did not discuss is an equal protection argument that the Convention limitation discriminates between groups of similarly situated individuals. Many different classifications of individuals have been created in attempts to assert this equal protection claim.²⁶³ In *Coccia*, the Italian court described the discrimination as either between similarly situated air travelers and other transportation travelers, or as between different socio-economic groups of people who are treated the same by the Convention limitation.²⁶⁴ In *Burdell v. Canadian Pacific Airlines*,²⁶⁵ the court classified

260. Jeffrey, *supra* note 156, at 824.

261. A finding of a "taking" would not automatically render the Convention unconstitutional. If a Court held that the Convention was a taking, the United States government would be required to pay just compensation. U.S. CONST. amend. V. The Convention would still be valid if this just compensation was paid to the Convention plaintiffs. However, in the absence of just compensation, the Convention would be an unconstitutional taking. U.S. CONST. amend. V.

262. *In re Bali*, 684 F.2d at 1309-13.

263. See *Coccia*, *supra* note 154, at 298; *Burdell*, 10 Av. Cas. (CCH) at 151.

264. *Coccia*, *supra* note 154, at 298-99.

265. 10 Av. Cas. (CCH) 18, 161 (Cir. Ct. Ill. 1968), *subsequent opinion*, 11 Av. Cas. (CCH) 17, 353 (1969) (withdrawing ruling on unconstitutionality).

In the original *Burdell* opinion, Judge Bua found for the plaintiffs on three grounds: (1) the inapplicability of the Convention on the grounds that Singapore, the origin and destination of the victim's journey, was not a "High Contracting Party"; (2) insufficiency of the warning contained in the ticket; and (3) unconstitutionality of the damage limitation and restriction of venue clauses of the Convention. *Id.* at 152-53. The judge then granted the defendant airline's motion requesting withdrawal of the ruling on constitutionality as "unnecessary." Comment, *Warsaw Convention Limitations on Aircarrier Liability: A Critical View*, 17 U. MIAMI INTER-AM. L. REV. 577, 605 (1986). In Judge Bua's second opinion, "he stated that although he found plaintiff's argument on the constitutionality issue persuasive, he felt constrained to forgo ruling on that issue, in light of his finding there was no international transportation as defined by the convention." *Id.* at 598-99 (footnotes omitted). However, Judge Bua later stated that, "the court was still persuaded that the venue and damage limitations portions of the treaty were unconstitutional." *Id.* at 599 n.108.

the airlines and other crash defendants, such as manufacturers or the United States government, as similarly situated groups, and considered how the airlines were treated differently.²⁶⁶ Other commentators have proposed classifying as similarly situated, two passengers sitting side by side on a domestic flight, one on an intra-country trip, the other on an international trip.²⁶⁷ Only the international passenger would be limited by the Convention.²⁶⁸ Thus, there are many potential classifications which suggest discrimination by the Convention limitations. The basic equal protection attack could be made by a plaintiff who could describe disparate treatment between individuals using any of these classifications.

Therefore, although the courts have been hesitant to address the constitutionality of the Warsaw Convention, legal avenues are available under which to challenge the treaty's constitutionality. By undertaking such an analysis, a court could address the problems of an outmoded treaty and align it with modern circumstances without going beyond its judicial powers. Only in this manner can a 1929 treaty adequately meet the needs of international travelers in the 1990s.

V. CONCLUSION

The *Chan* holding created legal chaos for the practical and philosophical future of the Court. Justice Scalia's rigid application of his New Textualism indicates that future Courts may continue to examine only the plain meaning of a statute or treaty. While Justice Scalia asserts that this approach discourages judicial activism, New Textualism actually increases the potential for judicial manipulation.²⁶⁹ The use of outmoded, arbitrary grammar and rules of logic can easily be used to defeat even the clearest expression of legislative

266. Jeffrey, *supra* note 156, at 819.

267. Comment, *supra* note 265, at 605.

268. *Id.*

269. For Scalia's arguments that New Textualism limits judicial discretion, see *supra* notes 147-48, 150 and accompanying text. However, the New Textualism approach is just as manipulable as the traditional approach. Justice Scalia's approach requires choices among competing evidence, just as the traditional approach requires discretionary choices. Eskridge, *supra* note 126, at 675. "Furthermore, [Scalia] potentially expands upon the judge's range of discretion by his revival of the notoriously numerous and manipulable canons of construction." *Id.* Critics of Justice Scalia and the new textualists accuse them of having a "hidden agenda": By narrowly construing the liberal laws of the Democrat-controlled Congress, the new textualists (mainly conservative Republicans) seek to reduce the power of government to do good in our society. *Id.* at 668. (However, Professor Eskridge doubts that this hidden agenda dominates the intellectual, new textualist theory, but concedes that the political criticism may be partially true.) *Id.*

intent. Furthermore, every canon of construction has a contrary rule, mandating the opposite interpretation.²⁷⁰ Thus, a judge can muster support for virtually any personal construction she may be inclined to derive, unconstrained by the intent of the statute's drafters. Ironically, Justice Scalia's New Textualism only increases the potential for judicial treatywriting.

Secondly, the Convention guarantees afforded future international passengers are unclear. *Chan* left open the question of what type of notice, if any, the Convention requires.²⁷¹ *Lisi* stated that notice in 4-point type, "camouflaged in Lilliputian print," and "virtually invisible" was inadequate.²⁷² However, *Chan* states that 8-point type provides sufficient notice to the passenger, enabling that person to take additional, precautionary measures.²⁷³ Yet, *Chan* also states that an air carrier cannot be penalized for failure to provide adequate notice.²⁷⁴ Thus, lower courts are interpreting this to mean that notice of the Convention's personal injury damage limitation is no longer required.²⁷⁵

Where the Court will draw the line in the future is uncertain, for it has created a situation in which adequate notice can only be determined on an ad hoc, case-by-case basis. The Court has disregarded

270. The new textualists are reluctant to use those canons which emphasize substantive policy choice and instead rely exclusively on canons which rest upon precepts of grammar, logic, proceduralism, and federalism. Eskridge, *supra* note 126, at 663. "The new textualists are not only selective about which of the canons of construction they will use in any given case, but they are also prone to tinker with some of the canons. As the canons change over time (which is inevitable anyway), the background assumptions change." *Id.* at 677. "So long as the new textualism relies heavily on the canons of construction, its methodology will often be more arbitrary and less constraining than that of the traditional approach." *Id.* at 676.

271. Certainly some type of actual notice of the liability statement is required in order to fulfill the express language of Article 3 and to prevent the ticket from becoming an adhesion contract. Albert, *Limitations on Air Carrier Liability: An Inadvertent Return to Common Law Principles*, 48 J. AIR L. & COM. 111, 138 (1982). "Due to industry wide uniformity, the contract involved (the airline ticket) takes on the attributes of an adhesion contract, where the prospective passenger can either accept the limitations or refrain from using the airlines as a mode of transportation." Comment, *supra* note 265, at 587. In the situation between the passenger and the airline, there is unequal bargaining power. The international passenger has no alternatives other than international airlines; thus, the passenger has no opportunity to personally bargain with the airline. Albert, *supra*, at 145. Therefore, proper notice of the limitation binding the passenger's travel is necessary to create a valid contract. *Id.* at 146.

272. *Lisi*, 370 F.2d at 514.

273. *Chan*, 109 S. Ct. at 1691-93.

274. *Id.* at 1683-85.

275. *In re Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 883 F.2d 17 (5th Cir. 1989) (remand hearing after 821 F.2d 1147 (5th Cir. 1987)).

the 10-point type requirements of the Montreal Agreement²⁷⁶ and the CAB administrative regulation,²⁷⁷ and instead, has substituted its own interpretation—that the Convention mandates no specific type standard.²⁷⁸ The Court used a rigid, philosophical interpretation to defeat the original intent of the Convention drafters. Therefore, the future viability of the Convention, and all international treaties and statutes, are vulnerable to the Court's manipulative, new textualist interpretation.

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276. *Chan*, 109 S. Ct. at 1679, 1692. The majority and the concurrence disregard the Montreal Agreement's requirement of 10-point type notice as not having the effect of supreme law of the land and considered the issues solely under the Convention. *Id.* However, lower courts have treated the Montreal Agreement as an amendment to the Convention. See *In re Air Crash at Warsaw, Pol.* on March 14, 1980, 705 F.2d 85, 89 (2d Cir. 1983). In *In re Warsaw*, the appellate court specifically stated, "[w]hatever merit [the airline's] argument might have were we considering the adequacy of notice solely under the Warsaw Convention, the fact remains that we are not." *Id.* The *In re Warsaw* court found that the Montreal Agreement merited the force of a United States amendment to the Convention because this agreement led to the United States withdrawing its denunciation of the Convention. *Id.* at 90.

Additionally, other courts have utilized the Montreal Agreement to give substantive effect to ambiguous terms in the Convention. The court in *Husserl v. Swiss Air*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973), looked to the Montreal Agreement to find a substantive definition for the Convention's term "accident." *Id.* at 706. Using this reasoning, the *Chan* court could have similarly used the Montreal Agreement to define the Convention's required "liability statement."

277. Prior decisions of the Court have placed great weight on CAB regulations. In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984), the Court accepted an air freight limitation that was privately determined by Trans World Airlines and accepted by the CAB. *Id.* at 261 (Stevens, J., dissenting). This CAB regulation was directly apposite to the original standard in the Convention. *Id.* at 261-62. However, the Court found that the CAB standard furthered the original purposes of the Convention drafters better than the original Convention standard. *Id.* Thus, in the past, the Court has allowed the CAB regulations to define the terms of the Convention, even when such terms were specifically defined by the Convention itself. *Id.* at 261-62.

278. *Chan*, 109 S. Ct. at 1693.

* For Patrick—thank you for your perseverance and humor during my law school years.

