Treaties, Human Rights, and Conditional Consent

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I. INTRODUCTION

Article II of the Constitution grants the President the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”¹ When the President obtains the Senate’s consent and ratifies a treaty, the treaty binds the United States internationally. If the treaty is “self-executing,”² it also becomes part of domestic federal law that supersedes prior inconsistent federal law (treaties and statutes) as well as inconsistent state law.³

This constitutional treatymaking process was designed with a particular type of treaty in mind. In the late eighteenth century, treaties were primarily bilateral agreements that focused on inter-national relations such as trade and peace. Nations entered into reciprocal relationships with other nations to achieve mutual gain. For a variety of reasons, there was a relatively tight fit between the pledges made in traditional treaties and the subsequent behavior of the treaty parties. One reason was that the treaties concerned relatively narrow and discrete matters between just a few countries; another reason was that compliance with treaty language was induced by the reciprocal benefits that the treaties conferred. In a very real sense, traditional treaties were operational, not aspirational.

Many modern treaties are different. The differences are most pronounced with respect to human rights treaties. These treaties regulate not

¹ U.S. Const. art. II, § 2, cl. 2.
³ The Supremacy Clause of the Constitution provides that treaties “shall be the supreme Law of the Land” and that the “Judges in every State shall be bound thereby.” U.S. Const. art. VI, cl. 2. The Supreme Court has long held that treaties supersede inconsistent state law. See, e.g., Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236-37 (1796). It also has held that when there is a conflict between a treaty and a federal statute, the later in time prevails as a matter of U.S. law. See, e.g., Whitney v. Robertson, 124 U.S. 190, 194 (1888).
relations between nations, but rather intra-national relations between a nation and its citizens. They are designed to govern the entire world community rather than two or three nations. The variation in moral, political, and cultural perspectives across nations makes agreement on the content of these treaties difficult to reach. As a result, the language of these treaties is often vague and open-ended. In addition, the treaties are not designed to confer specific reciprocal benefits on the parties, but rather to effectuate forward-looking, large-scale changes in values. It is thus no surprise that there is often a large gap between the pledges made in these treaties and national behavior. These treaties are largely aspirational, not operational.

Modern human rights treaties present several challenges for the U.S. constitutional system. The first challenge concerns substance. Human rights treaty provisions sometimes are in tension with either constitutionally-guaranteed rights (like the First Amendment) or well-settled and democratically popular practices (such as capital punishment for heinous crimes). United States treatymakers find it constitutionally or politically difficult to consent to these treaty norms. The second challenge concerns scope. Human rights treaties touch on almost every aspect of domestic civil, political, and cultural life. The breadth and vagueness of the treaty norms means that, if they are binding and self-executing, they have the potential to upset settled domestic legal expectations. The third challenge concerns structure. Structural constitutional principles relating to separation of powers suggest that domestic federal law with respect to human rights should be made through the lawmaking process that involves the House of Representatives. In addition, constitutional principles of federalism suggest that some matters should be regulated by state rather than federal officials.

For many years, these challenges led U.S. treaty-makers to decline to ratify any of the major post-World War II human rights treaties. Beginning in the 1970s, the treatymakers crafted a way to commit the United States to human rights treaties on the international plane while accommodating domestic constitutional concerns. They achieved these dual aims by ratifying the treaties with a set of conditions. These conditions take the form of reservations, understandings, and declarations – collectively, “RUDs” – to U.S. ratification. The RUDs address each of the problems outlined above. With regard to the problem of substance, the U.S. treatymakers decline to commit the United States to certain substantive provisions in the treaties. With regard to the problems of scope and structure, the treatymakers declare that the treaties are not self-executing and thus not enforceable in U.S. courts until implemented by Congressional legislation. They also express an understanding that some provisions of the treaties may be implemented by state and local governments rather than the federal government.
The dominant view among international law commentators is that the RUDs are legally invalid, bad policy, or both. With respect to legal validity, commentators argue, among other things, that the reservations violate international law restrictions on treaty conditions; that the non-self-execution declarations are inconsistent with the Supremacy Clause of the Constitution; and that the federalism understandings are inconsistent with the national government’s responsibility, under both domestic and international law, for treaty violations. As for the policy desirability of the RUDs, commentators have argued that they show disrespect for international law and, in the words of Professor Louis Henkin, “threaten to undermine a half-century of efforts to establish international human rights standards as international law.”

To date, courts have given effect to the RUDs, but no court has considered their validity in any detail. The practical significance of the issue was illustrated recently in a death penalty case from Nevada. In that case, the state of Nevada sentenced Michael Domingues to death for two murders committed while he was sixteen years of age. The U.S. Supreme Court has held that the Eighth Amendment does not prohibit the execution of sixteen-year-old offenders. Domingues nevertheless challenged his death sentence in Nevada courts on the ground that it was inconsistent with the International Covenant on Civil and Political Rights, a multilateral treaty ratified by the

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5 Henkin, Bricker, supra note 4, at 349.


United States in 1992.\textsuperscript{8} This treaty contains a provision prohibiting the imposition of a death sentence for the commission of a crime under the age of eighteen.\textsuperscript{9} When it ratified the treaty, however, the United States attached a reservation stating that it did not consent to this provision, as well as a declaration stating that the entire treaty was non-self-executing. Domingues’ contention was that these conditions were invalid and thus should be disregarded by U.S. courts. Although the Nevada Supreme Court rejected this argument,\textsuperscript{10} it did so with almost no analysis, and two dissenting opinions took Domingues’ treaty argument seriously.\textsuperscript{11} The U.S. Supreme Court denied Domingues’ petition for review, but only after requesting the views of the Solicitor General.\textsuperscript{12} Arguments similar to those made by Domingues were made recently in connection with executions scheduled in Alabama, Arkansas, Texas and Virginia.\textsuperscript{13}

This Article challenges the conventional academic wisdom concerning both the legality and desirability of RUDs attached to human rights treaties. In our view, the RUDs are a sensible accommodation of competing domestic and international considerations. They serve as a bridge between isolationists who want to preserve the United States’ sovereign prerogatives, and internationalists who want the United States to increase its involvement in international institutions – a political divide that has had a debilitating effect on U.S. participation in international human rights regimes since World War II. More importantly, the RUDs help reconcile fundamental changes in international law with the requirements of the U.S. constitutional system. The RUDs achieve these ends, we argue, in ways that are valid under both international and domestic law.

Our analysis proceeds as follows. Part II describes the historical background of the RUDs and their principal features. Part III shows that the international law objections to the RUDs are questionable and that the conclusion usually drawn from these objections – that the United States is

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\textsuperscript{9} See ICCPR, supra note 8, art. 6, ¶ 5.


\textsuperscript{11} See id. at 1280-81 (dissenting opinions of Justices Springer and Rose).

\textsuperscript{12} The Solicitor General argued that the petition should be denied. See Brief for the United States as Amicus Curiae, Domingues v. Nevada, No. 98-8327 (filed Oct. 4, 1999) [hereinafter “Domingues brief”].

bound by the human rights treaties as if it had never attached the RUDs – is inconsistent with international law principles relating to state consent. Part IV shows that, regardless of the legality of the RUDs under international law, they are valid under domestic constitutional law and thus must be enforced by U.S. courts. Part V discusses a variety of functional benefits – including benefits for international human rights law – associated with the treatymakers’ conditional consent power.

II. HISTORY, PURPOSES, AND CONTENT OF RUDs

This Part sets out the background needed to evaluate the validity of the RUDs. Section A provides a brief history of conditional consent in the United States from the Founding until World War II. Section B then explains how the development of international human rights law after World War II led the U.S. treatymakers to embrace the particular RUDs that are the focus of this Article. Section C describes these RUDs in detail.

A. A Brief History of Conditional Consent

The U.S. treatymaking process operates essentially as follows.14 Representatives of the President negotiate the terms of the treaty with foreign nations, and the President or his representative signs the completed draft. The President then transmits the treaty to the Senate for its consent. If the treaty receives the required two-thirds vote, the Senate sends a resolution to the President authorizing him to ratify the treaty. The President has the discretion at this point to ratify or not ratify the treaty. Ratification is the act by which a nation formally declares its intent to be bound by a treaty. When the President signs the instrument of ratification and the Secretary of State affixes the Seal of the United States, the U.S. ratification process is complete. Even at this point, however, the United States is not bound by the terms of the treaty. The treaty becomes binding on the United States when the instrument of ratification is either exchanged (as is usually the process with respect to bilateral treaties) or deposited at a specified place (as is usually the process with respect to multilateral treaties).

Since the 1790s, the President and Senate have often proposed conditions to U.S. ratification of a treaty during the process of Senate consent. Indeed, approximately 15% of all Article II treaties since the Founding have been ratified subject to conditions that require subsequent assent from other treaty parties.15 The Senate has usually proposed these conditions, but


sometimes the President has as well. The treatymakers have used a variety of labels for these conditions, including “amendment,” “reservation,” “understanding,” “declaration,” and “proviso.”\(^\text{16}\) For purposes of this Article, the three most important forms of conditional consent, whatever their label, have been the power not to consent to particular treaty terms, the power to consent to a treaty on the condition that it has no domestic force in the absence of congressional legislation, and the power to take account of the United States’ federal structure in negotiating and implementing a treaty.

Consider first the treatymakers’ power not to consent to particular treaty terms. The President’s “Power . . . to make Treaties”\(^\text{17}\) clearly entails the power to decline consent to particular treaty terms. Without the power to condition consent on the negotiating partner’s acceptance of proposed terms, the President would lack the power to negotiate. This is why the President has since the beginning exercised the power to refuse to agree to particular treaty terms. The President has always exercised plenary discretion in this regard, and it has always been understood that he can decline to ratify a treaty for any reason, even after the Senate has given its consent.\(^\text{18}\)

The Senate too has always exercised the power not to consent to particular treaty terms, but in a different way and for different reasons. The Senate’s power to “consent” entails the power to block ratification of a treaty by withholding its consent. Since the 1790s, this greater power to withhold consent altogether has been viewed as including the lesser power to consent to some provisions of the treaty but not others.\(^\text{19}\) The Senate’s exercise of this power of conditional consent helps compensate for its loss of any substantial “advice” role in the treaty process. Many of the Founders believed that the advice function required presidential consultation with the Senate prior to his negotiation and signing of a treaty.\(^\text{20}\) During the Washington administration, this process proved unwieldy, and the President began to submit treaties to the

\(^{16}\) Under international law, treaty conditions, regardless of how they are labeled by particular nations, are considered “reservations” if they “purport[] to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, art. 2(1)(d) [hereinafter “Vienna Convention”].

\(^{17}\) U.S. Const. art. II, § 2, cl. 2.


\(^{19}\) See early examples, see infra text accompanying notes 24-41.

Senate without prior consultation. Since then, the Senate has not played a substantial role in advising the President in connection with treaty negotiations. Instead, in order to preserve its ability to influence treaty terms, the Senate has exercised the right to condition its consent on amendments to the negotiated treaty.

The first example of such conditional consent by the Senate occurred in connection with the Jay Treaty with Great Britain – the first treaty negotiated by the United States after ratification of the Constitution. This treaty, negotiated by John Jay in 1794, was designed to resolve a variety of compensation, trade, and boundary disputes between the United States and Great Britain. The treaty was controversial in the United States because of concerns that the Washington administration had made too many concessions to the British. A bare two-thirds of the Senate gave its consent to the treaty in 1795, but only on the condition that an article of the treaty reserving to Great Britain the right to restrict trade between the United States and the British West Indies be suspended. Britain accepted this condition without complaint, and the treaty was ratified.

21 See Hayden, supra note 20, at 11-106.
22 See Restatement (Third) of the Foreign Relations Law of the United States § 303, reporters’ note 3 (1987) [hereinafter “Restatement (Third)”]. Although it generally has not had a significant advice role in the treaty process, the Senate is sometimes involved in the treaty process before and during the negotiation stage. The Senate sometimes proposes subjects for treatymaking and approves treaty negotiators, and sometimes its members are part of the negotiating team. See CRS Study, supra note 14, at 69-81.

23 As Ralston Hayden, an early twentieth century expert on the treaty power, explained: “As the Senate ceased to be consulted as a real ‘council of advice,’ its activities in that part of treaty-making known as the negotiation became less important. . . . The effect of the change in procedure was to leave the President free to negotiate the sort of treaty to which the necessities of the situation demanded and allowed, while the Senate retained a like freedom to accept, to amend, or to reject the result of his efforts.” Hayden, supra note 20, at 104-05 (emphasis added). See also CRS Study, supra note 14, at 79; Samuel B. Crandall, Treaties, Their Making and Enforcement 81 (2d ed. 1916); Henkin, Foreign Affairs, supra note 18, at 177-78.


25 The Senate had stated that it was consenting to the treaty “on condition that there be added to the said treaty an article whereby it shall be agreed to suspend the operation of so much of the 12th article as respects the trade which his said Majesty thereby consents may be carried on between the United States and his islands in West Indies.” S. Res. of June 24, 1795, 1 S. Exec. J. 64.

26 See Hayden, supra note 20, at 87. The Senate also began attaching interpretive conditions to its consent early in U.S. history. For example, in consenting to a 1796 treaty between the United States and the Creek Indians, the Senate stated that articles in the treaty allowing the federal government to establish military and trading posts in the Creeks’ territory should not be construed to preempt rights Georgia had been claiming in this land. See id. at 99.
A few years later, the Senate gave its consent to a treaty with Tunisia on the condition that an article in the treaty be suspended and renegotiated, and the article was in fact renegotiated prior to ratification. The Senate exercised a similar conditional consent power in connection with an 1800 treaty between the United States and France. The United States’ treaty partners did not always respond favorably to the Senate’s conditions. In negotiating an 1803 boundary treaty with the United States, Great Britain would not accept the amendment proposed by the Senate, and the treaty was never ratified. The head of the British Foreign Office at that time criticized the United States’ conditional consent practice, calling it “new, unauthorized and not to be sanctioned.” Great Britain similarly complained about conditions proposed by the Senate in connection with an 1824 treaty concerning the African slave trade. Over time, however, this practice became generally accepted by the international community. The United States engaged in this practice in connection with numerous treaties during the nineteenth and early twentieth centuries, generally without controversy, as did many of its treaty partners.

The second type of conditional consent of importance to this Article is the power to render the treaty without domestic force unless and until Congress enacts implementing federal legislation. Although the particular “non-self-execution” clauses attached to human rights treaties appear to be a modern
phenomenon, there are at least two longstanding precursors to them. First, in a number of instances in the nineteenth and early twentieth centuries, the U.S. treatymakers consented to treaties on the condition that the treaties, or particular articles in the treaties, would take effect only if and when Congress passed legislation implementing them. These conditions were, in essence, international non-self-execution clauses. They differed from the modern non-self-execution clauses in that they prevented the treaty provisions from binding the United States until Congress acted, whereas the modern non-self-execution clauses simply prevent the treaty provisions from being enforced in U.S. courts until Congress acts. Nevertheless, these conditions were designed to accomplish precisely the same goal as the modern non-self-execution clauses – inclusion of the House of Representatives in the domestic implementation of treaties.

Second, in a number of instances dating back at least to the late 1800s, the United States expressly reserved certain treaty implementation issues for Congress. For example, the U.S. treatymakers included the following provision in an 1899 treaty with Spain concerning the acquisition of Puerto Rico and the Philippines: “The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.” Similarly, the Senate consented to a 1920 treaty with Austria with the stipulation that the United States would not be represented in or participate in any international body authorized by the treaty.

34 Many of the following examples can be found in Louis Henkin, The Treaty Makers and the Law Makers: The Niagara Reservation, 56 Colum. L. Rev. 1151 (1956).

35 These conditions were especially common in connection with bilateral trade agreements because of the concern that the Constitution might require that changes in U.S. import duties originate in the House of Representatives. See Crandall, supra note 23, at 183-99; 1 Westel W. Willoughby, The Constitutional Law of the United States 558-60 (2d ed. 1929). For example, an 1854 trade treaty with Great Britain provided that it would not take effect until the U.S. Congress and the British Parliament enacted “laws required to carry it into operation.” Treaty with Great Britain concerning Canada, 10 Stat. 1089, 1092 (1854). Similarly, a provision in an 1875 trade treaty with Hawaii stated that the treaty would not take effect “until a law to carry it into operations shall have been passed by the Congress of the United States of America.” Treaty with Hawaii, 19 Stat. 625, 627 (1875). And, in a 1902 trade treaty with Cuba, the Senate added an amendment stating that the Convention “shall not take effect until the same shall have been approved by the Congress.” Commercial Convention with Cuba, 33 Stat. 2136, 2143 (1903). The Supreme Court subsequently gave effect to the Senate’s amendment of the Cuba treaty. See United States v. American Sugar Co., 202 U.S. 563 (1906).

36 See Willoughby, supra note 35, at 559.

37 30 Stat. 1754, 1759 (1899). Several Supreme Court Justices expressly endorsed the validity of this provision, see Downes v. Bidwell, 182 U.S. 244, 312-13 (1901) (White, J., concurring), and the entire Court referred to it approvingly in dicta, see Dorr v. United States, 195 U.S. 138, 143 (1904); see also Fourteen Diamond Rings v. United States, 183 U.S. 176, 182 (1901) (Brown, J., concurring) (stating that there was “no doubt” that the U.S. treatymakers could provide that customs relations between territories ceded by treaty and the United States “should remain unchanged until legislation had been had upon the subject”).
“unless and until an Act of Congress of the United States shall provide for such representation or participation.” 38

A third type of conditional consent of relevance to this article concerns the United States’ federal structure of government. Throughout U.S. history, the treatymakers have used their conditional consent powers to guard against undue intrusions on state prerogatives. At times, they have limited the substantive terms of treaties to protect state interests. 39 At other times, they have made treaties dependent on state law, 40 or have expressly limited U.S. treaty obligations to matters “within the jurisdiction” of the federal government. 41

In sum, since the beginning of the nation, the President and Senate have attached a variety of conditions to their consent to treaties. No court has ever invalidated these conditions and, in fact, the Supreme Court has referred to the treatymakers’ conditional consent power approvingly in several decisions. 42

38 42 Stat. 1946, 1949 (1921). A similar provision was included in a post-World War I peace treaty with Germany. See 42 Stat. 1939, 1945 (1921). Another example of an early twentieth century condition designed to limit a treaty’s domestic effect was a statement by the Senate in consenting to a 1911 Treaty of Commerce and Navigation with Japan that the treaty “shall not be deemed to repeal or affect any of the provisions” in a specified immigration statute. See Miller, supra note 33, at 60-63.

39 See, e.g., Ralston Hayden, The States’ Rights Doctrine and the Treaty-Making Power, 22 Am. Hist. Rev. 566, 585 (1917) (explaining that, between 1830 and 1860, “the Senate and the executive entertained grave and increasing doubts concerning their authority to make treaties” concerning rights to real property and that “in every particular instance in which conflict arose the treaty in question was amended to bring it more nearly in accord with the states’ rights theory”).

40 See, e.g., Article VII of the Treaty of 1853 with France, 10 Stat. 992, 1 W. Malloy, Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers 1776-1909, S. Doc. No. 357, 61st Cong., 2d Sess. At 528, 531 (1910) (allowing French citizens to possess land equally with U.S. citizens “[i]n all states of the Union whose existing laws permit it, so long at to the same extent as the said laws shall remain in force” and promising that the President would “recommend to [other states] the passage of such laws as may be necessary for conferring the right”).

41 See Henkin, Foreign Affairs, supra note 18, at 192 n.*; Henkin, Bricker, supra note 4, at 345.

42 In addition to the decisions cited supra notes 35, 37, see James v. Dravo Contracting Co., 302 U.S. 134, 148 (1937) (noting that “it is familiar practice for the Senate to accompany [its consent to treaties] with reservations”); Haver v. Yaker, 76 U.S. 32, 35 (1869) (noting that the Senate is “not required to adopt or reject [a treaty] as a whole, but may modify or amend it”); see also Fourteen Diamond Rings v. United States, 183 U.S. 176, 183 (1901) (Brown, J., concurring) (“The Senate . . . may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty.”); United States v. Stuart, 489 U.S. 353, 374-75 (1989) (Scalia, J., concurring) (“[T]he Senate . . . may, in the form of a resolution, give its consent [to a treaty] on the basis of conditions.”). The only judicial decision suggesting limits on the conditional consent power is Power Authority of New York v. Federal Power Commission, 247 F.2d 538 (D.C. Cir. 1957), vacated and remanded with directions to
B. Human Rights Treaties and the Bricker Amendment Debates

Before World War II, international law regulated primarily interactions among nations and did not contain extensive individual rights protections. Soon after the War, with the experience of the Holocaust and other atrocities fresh in mind, the international community began to develop a comprehensive body of international human rights law. The seeds of this human rights law revolution were planted in the 1940s. The United Nations Charter, which came into force in 1945, contained hortatory provisions concerning the protection of human rights. Three years later, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of Genocide and opened it for national ratifications. That same year, the General Assembly issued its officially non-binding but nonetheless influential Universal Declaration of Human Rights. The Universal Declaration, which aspired to be a “common standard of achievement for all peoples and all nations,” contained broadly worded civil, political, economic, social, and cultural rights. Immediately following the passage of the Declaration, the United Nations Commission on Human Rights began drafting a human rights covenant that aimed to convert the non-binding provisions of the Declaration into binding treaty obligations.

United States officials played a prominent role in creating this emerging international human rights law regime. Nonetheless, in the 1950s there was an intense debate in the United States over whether and to what

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44 See United Nations Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 993, art. 1(3) (stating that one of the purposes of the United Nations is to “promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”); id., art. 55 (stating that the United Nations “shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”); id., art. 56 (“All Members pledge themselves to take joint and separate action in cooperation with the [United Nations] Organization for the achievement of the purposes set forth in Article 55.”).


47 Id.

48 This drafting process would eventually lead to the promulgation of two human rights treaties – the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.
extent the nation should participate in this regime.\textsuperscript{49} The main issue in the debates concerned the domestic implications of ratifying the human rights treaties. Many believed that the U.N. Charter’s human rights provisions gave Congress a basis for enacting civil rights legislation otherwise beyond its constitutional powers. This was a plausible belief in light of the Supreme Court’s decision in \textit{Missouri v. Holland}, which held that, when implementing a treaty, Congress is not subject to the federalism limitations applicable to the exercise of its Article I powers.\textsuperscript{50} A related concern was that the Charter would preempt state laws under the Supremacy Clause. This view was endorsed by a California court and four Justices of the Supreme Court in their consideration of the validity of a California alien land ownership statute.\textsuperscript{51} The potentially self-executing nature of the Charter was particularly worrisome to some in this early Cold War, anti-Communist period because the Universal Declaration, including its very progressive provisions concerning economic, social, and cultural rights,\textsuperscript{52} was described by its proponents as giving content to the vague human rights provisions of the U.N. Charter.\textsuperscript{53}


\textsuperscript{50} See \textit{Missouri v. Holland}, 252 U.S. 416, 433 (1920).

\textsuperscript{51} The California statute prohibited certain aliens from acquiring land. In \textit{Oyama v. California}, 332 U.S. 633 (1948), the U.S. Supreme Court held that the statute violated the equal protection clause. In concurrences, four Justices invoked the U.N. Charter in arguing that the Court should have invalidated the statute on its face. Justices Black and Douglas observed that, in light of Articles 55 and 56 of the United Nations Charter, “[t]here are additional reasons now why [the California] law stands as an obstacle to the free accomplishment of our policy in the international field.” Id. at 649 (Black, J., concurring). And Justices Murphy and Rutledge stated that the California statute’s “inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.” Id. at 673 (Murphy, J., concurring). Subsequently, a California District Court did exactly what these four Justices suggested, holding that the human rights provisions of the U.N. Charter were part of the supreme law of the land that preempted the California statute. See \textit{Sei Fujii v. California}, 217 P.2d 481 (Dist. Ct. App. 1950). That aspect of the court’s holding was later reversed by the California Supreme Court, \textit{Sei Fujii v. California}, 38 Cal. 2d 718, 242 P.2d 617 (1952), and all subsequent decisions have held the Charter to be non-self-executing. See, e.g., \textit{Frolova v. Union of Soviet Socialist Republics}, 761 F.2d 370 (7th Cir. 1985); \textit{Spiess v. C. Itoh & Co. (America), Inc.}, 643 F.2d 353, 363 (5th Cir. Unit A Apr. 1981); \textit{Hitai v. INS}, 343 F.2d 466 (2d Cir. 1965). Concerns similar to those generated by \textit{Oyama} reappeared a few years later when the three dissenting justices in \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579 (1952), suggested that the United Nations Charter enhanced the President’s foreign affairs powers. See id. at 668-69; see also \textit{Tananbaum}, supra note 49, at 51-52.

\textsuperscript{52} The Declaration states, among other things, that “[e]veryone” has the right to employment, to receive equal pay for equal work, to form and join trade unions, to have an adequate standard of living, to obtain an education, and to participate in the cultural life of the community.

\textsuperscript{53} For example, the lower court’s decision in \textit{Sei Fujii}, see supra note 51, relied on the Declaration in interpreting the meaning of the United Nations Charter. See 217 P.2d at 487-88.
A related event that triggered concerns in the United States about the emerging international human rights law regime was President Truman’s submission of the Genocide Convention to the Senate in 1948. Although the United States had helped draft the Convention and supported an international prohibition on genocide, many Senators (and others) worried about the domestic consequences of ratifying the treaty. Many of the concerns related to the Convention’s vague definition of “genocide.” For example, the Convention defined it to include certain acts “committed with intent to destroy” covered groups, including the act of causing “mental harm” to members of covered groups. The unease over these provisions related to their possible inconsistency with the First Amendment, their possible use as a basis for prosecuting U.S. military officials abroad, and their possible use in support of a claim that U.S. policies toward African Americans and Native Americans constituted genocide. There was also a more general concern about the erosion of U.S. sovereignty and independence.

These issues provoked debates in the 1950s over whether to amend the Constitution to limit the U.S. treaty power. Along with leaders of the American Bar Association, a key proponent of such an amendment was Senator John Bricker of Ohio, and the various proposed amendments are commonly referred to jointly as the “Bricker Amendment.” In general, the proposed amendments were intended to preclude treaties from being self-executing and to make clear that treaties would not override the reserved powers of the states. Some versions also would have restricted the use of executive agreements. There was substantial consideration of these proposals during the 1950s. One of the proposed amendments fell only one vote short of obtaining the necessary two-thirds vote in the Senate.

To help defeat the Bricker Amendment, the Eisenhower administration made a commitment that it would not seek to become a party to any more human rights treaties. Secretary of State John Foster Dulles announced during the Bricker Amendment hearings in 1953 that the administration had no

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55 For a summary of the lengthy congressional hearings in which these and other concerns were articulated, see Kaufman, supra note 49, at 42-59.

56 See generally Tananbaum, supra note 49.

57 See, e.g., Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary, 83d Cong., 1st Sess. 825 (1953) [hereinafter “1953 Hearings”].

58 See 100 Cong. Rec. 2251 (1954); Tananbaum, supra note 49, at 180.

59 See Kaufman, supra note 49, at 104-05; Tananbaum, supra note 49, at 89, 199.
intention of becoming a party to the then-proposed human rights treaties. In 1955, Dulles reaffirmed that “the United States will not sign or become a party to the covenants on human rights, the convention on the political rights of women, and certain other proposed multilateral agreements.”

In the same year, the State Department published a Circular stating, in obvious reference to the Bricker Amendment debate, that “[t]reaties are not to be used as a device for the purpose of effecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.” For decades thereafter, presidents did not submit major human rights treaties to the Senate (although they did continue to seek ratification of the Genocide Convention).

This reticence changed with the Carter administration, which submitted four major human rights treaties to the Senate in 1978. Since that time, every President has urged the Senate to consent to the ratification of major human rights treaties, and the Senate has in fact ratified four such treaties. With respect to the treaties to which the Senate has given its consent, there has been a remarkable consensus across very different administrations and very different Senates about both the desirability of ratifying these treaties and the need to attach RUDs to the treaties, as a condition of ratification, to protect domestic prerogatives.

As for the desirability of ratifying human rights treaties, presidents and the Senate have agreed that a failure by the United States to ratify the major human rights treaties would result in at least two foreign policy costs. First,

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60 See 1953 Hearings, supra note 57. During these hearings, Executive Branch officials also assured the Senate that it had the power to give its consent to human treaties on the condition that they be non-self-executing. See id. at 922 (testimony of Attorney General Brownell).

61 32 Dep’t of State Bull. 820, 822 (1955).


63 The United States did ratify three less controversial human rights treaties between the time of the Bricker Amendment controversy and the Carter administration: the Supplementary Convention on Slavery, the Inter-American Convention on Granting of Political Rights to Women, and the UN Convention on the Political Rights of Women. See Kaufman, supra note 49, at 119-27; Weissbrodt, supra note 4, at 39 n.45.

64 The four treaties were the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. A year later, in 1980, the Carter Administration transmitted to the Senate the Convention on the Elimination of All Forms of Racial Discrimination.

65 The four ratified treaties are the Genocide Convention, ratified in 1988, the International Covenant on Civil and Political Rights, ratified in 1992, the Convention Against Torture, ratified in 1994, and the Convention on the Elimination of All Forms of Racial Discrimination, ratified in 1994.
non-ratification would preclude the United States from participating in the treaty-related institutions that, in turn, influence the course of international human rights law. Second, non-ratification would create a “troubling complication” in U.S. diplomacy, namely, that the United States could not credibly encourage other nations to embrace human rights norms if it had not itself embraced these norms.

Presidents and the Senate have also agreed, however, that the modern human rights treaties implicate serious countervailing considerations, reminiscent of the Bricker Amendment debates. These concerns are easiest to see with the respect to the most ambitious of these treaties, the ICCPR. The ICCPR contains dozens of vaguely worded rights guarantees that differ in important linguistic details from the analogous guarantees under U.S. domestic law. Some of these provisions arguably conflict with U.S. constitutional guarantees. In addition, the ICCPR, if self-executing, would have the same

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67 See 1979 Hearings, supra note 66, at 21 (testimony of Deputy Secretary of State Warren Christopher).

68 For example, the ICCPR, among other things, bars “arbitrary arrest or detention,” requires that anyone arrested “shall be promptly informed of any charges against him,” protects against “arbitrary interference with . . . privacy, family, home or correspondence,” guarantees that everyone “shall have the right to freedom of thought, conscience and religion,” requires that the law give “effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” guarantees the “equal right of men and women to the enjoyment of all civil and political rights,” guarantees “the inherent right to life,” ensures that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,” guarantees the “right to hold opinions without interference,” secures “the right to freedom of association with others, including the right to form and join trade unions,” prohibits “torture or . . . cruel, inhuman or degrading treatment or punishment,” and guarantees the “right of self-determination, including the right to freely determine one’s political status and freely pursue their economic, social and cultural development.”

69 See 1979 Hearings, supra note 66, at 30 (testimony of President Carter’s State Department Legal Advisor, Roberts Owen); Hearings before the Committee on Foreign Relations, International Covenant on Civil and Political Rights, 102nd Cong., 1st Sess. (Nov. 21, 1991), at 15 [hereinafter “1991 Hearings”] (testimony of President Bush’s Assistant
domestic effect as a congressional statute and thus would supersede inconsistent state law and prior inconsistent federal legislation. Literally hundreds of U.S. federal and state laws – ranging from essential civil rights statutes like Title VII to rules of criminal procedure – would be open to reconsideration and potential modification or invalidation by courts interpreting the vague terms of the ICCPR. Even if courts ultimately decided that each of the differently-worded provisions in the ICCPR did not require a change in domestic law, there was concern that litigation of these issues would be costly and would generate substantial legal uncertainty. These concerns also arose, although on a narrower scale, for the other human rights treaties.

To address these concerns, President Carter and every subsequent President have included proposed RUDs along with their submission of human rights treaties to the Senate. The Senate has consented to, and the United States has ratified, four of these treaties: the Genocide Convention, ratified in 1988; the International Covenant on Civil and Political Rights (“ICCPR”), ratified in 1992; the Convention Against Torture, ratified in 1994; and the Convention on the Elimination of All Forms of Racial Discrimination, also ratified in 1994. The United States included RUDs in the ratification instruments for each of these treaties as a condition of U.S. ratification. The Secretary of State for Human Rights and Humanitarian Affairs, Richard Schifter; International Covenant on Civil and Political Rights, S. Exec. Rep. 102-23, 102nd Cong., 2d Sess., at 4 (March 24, 1992) [hereinafter “ICCPR Report”].

70 See 1979 Hearings, supra note 66, at 40 (testimony of Jack Goldklang, Department of Justice) (“If the treaties were directly enforceable in court, the court would have the difficult job of trying to reconcile how these four treaties fit together with existing” U.S. law); cf. 1991 Hearings, at 15 (testimony of Bush’s Assistant Secretary of State for Human Rights and Humanitarian Affairs, Richard Schifter) (stressing that ratification of treaty should not create domestically enforceable private causes of action); ICCPR Report, supra note 69, at 4 (stressing that changes in U.S. law as a result of the treaty’s obligation should occur only through the “normal legislative process”).

71 President Reagan proposed RUDs in submitting the Torture Convention and in resubmitting the Genocide Convention; President Bush did the same in resubmitting the Torture Convention and the International Covenant on Civil and Political Rights; and President Clinton proposed RUDs when he resubmitted the Race Convention. In addition, presidents have proposed RUDs for several human rights treaties that the United States has signed but not yet ratified, including the American Convention on Human Rights, see Message from the President of the United States, 95th Cong., 2d Sess. (1978), the International Covenant on Economic, Cultural, and Social Rights, see Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, S. Exec. Docs. C, D, E and F, 95-2, at viii-xi (1978), and the Convention on the Elimination of All Forms of Discrimination Against Women, see Convention on the Elimination of All Forms of Discrimination Against Women, S. Exec. Rep. 103-38, 103d Cong., 2d Sess. (1994). President Carter was not the first to propose conditions along with a human rights treaty. As early as 1950, understandings and declarations had been proposed in connection with the Genocide Convention. See Kaufman, supra note 49, at 206; see also id. at 197 (“Reservations have been a key component of human rights treaties from the earliest consideration of the Genocide Convention.”).

Senate usually consented to the RUDs in the form proposed by the President, but sometimes the Senate modified them slightly or requested that the President modify them.\textsuperscript{73}

\textbf{C. An Overview of Modern RUDs}

The RUDs are designed to harmonize the treaties with existing requirements of U.S. law and to leave domestic implementation of the treaties to Congress. They cover a variety of subjects and take a variety of forms. For purposes of analysis, they can be grouped into five categories:

\textit{Substantive Reservations}. Some of the RUDs are reservations pursuant to which the United States declines to consent altogether to certain provisions in the treaties. These reservations are very much the exception to the rule; for each of the four human rights treaties under consideration, the United States consented to a large majority of the provisions. Some of the substantive reservations are based on potential conflicts between the treaty provisions and U.S. constitutional rights. For example, because of First Amendment concerns, the United States declined to agree to restrictions on hate speech in the Race Convention “to the extent that [such speech is] protected by the Constitution and laws of the United States.”\textsuperscript{74} Similarly, the United States attached a reservation to its ratification of the ICCPR, stating that the ICCPR’s restriction on propaganda for war and hate speech “does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.”\textsuperscript{75}

\textsuperscript{73} The Reagan Administration’s proposed RUDs to the Torture Convention were criticized by some Senators and human rights groups as being too restrictive. In light of this criticism, as well as a special request from the Senate Foreign Relations Committee, the Bush Administration submitted a revised and less restrictive set of RUDs. See S. Exec. Rep. No. 101-30, Appendix A (letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to Senator Pell); Convention Against Torture and Other Cruel, Inhuman, or Degrading treatment or Punishment, S. Exec. Rep. 101-30, 101st Cong., 2d Sess., at 4 (August 30, 1990).

\textsuperscript{74} U.S. RUDs to Race Convention, supra note 72, ¶ I(1).

\textsuperscript{75} U.S. RUDs to ICCPR, supra note 72, ¶ I(1). With respect to the Genocide Convention, the United States sought to protect First Amendment interests by attaching a
Some substantive reservations are based not on a constitutional conflict but rather on a policy disagreement with certain provisions of the treaties. For example, the United States attached to its ratification of the ICCPR reservations allowing it to impose criminal punishment consistent with the Fifth, Sixth, and Eighth Amendments, including capital punishment on juvenile offenders, notwithstanding limitations on punishment in the ICCPR. It attached a similar reservation with respect to limitations on punishment in the Torture Convention. It also attached a condition to its ratification of the Race Convention making clear that it was not agreeing to eliminate the public/private distinction in U.S. civil rights law.

Interpretive Conditions. Some of the RUDs set forth the United States’ interpretation of vague treaty terms, thereby clarifying the scope of United States consent. For example, Articles 2(1) and 26 of the ICCPR prohibit discrimination not only on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, [and] birth,” but also on the basis of any “other status.” The United States attached an reservation stating that “[n]othing in this Convention requires or authorizes legislation or other action by the United States of American prohibited by the Constitution of the United States as interpreted by the United States.” U.S. RUDs to the Genocide Convention, supra note 72, ¶ I(2); see also Genocide Convention Report, supra note 66, at 21 (explaining that this reservation was designed primarily to avoid conflict with First Amendment).

Article 6(5) of the ICCPR provides that “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women”; Article 7 provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” ICCPR, supra note 8, arts. 6(5) and 7. The pertinent U.S. RUDs provided that “the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age,” U.S. RUDs to ICCPR, supra note 72, ¶ I(2), and that “the United States considers itself bound by Article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States,” id. at ¶ I(3).

See U.S. RUDs to Torture Convention, supra note 72, at ¶ (1) (“[T]he United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”).

See U.S. RUDs to Race Convention, supra note 72, ¶ I(2) (“To the extent . . . that the Convention calls for a broader regulation of private conduct [than are customarily the subject of governmental regulation], the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1)(c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.”)

ICCPR, supra note 8, arts. 2(1) and 26 (emphasis added).
understanding stating that this open-ended and undefined prohibition on discrimination did not preclude legal distinctions between persons “when such distinctions are, at minimum, rationally related to a legitimate government objective.”

It also attached a reservation to its ratification of the Race Convention stating that it did not interpret the Convention’s prohibition on discrimination as applying to private conduct not customarily subject to governmental regulation.

Similarly, it attached a reservation to both the ICCPR and the Torture Convention stating that the United States considers itself bound by the prohibitions in those treaties on “cruel, inhuman, or degrading treatment or punishment” only to the extent that such treatment or punishment is prohibited by the U.S. Constitution. The United States also attached understandings to its ratification of the Genocide and Torture Conventions clarifying the circumstances under which conduct will fall within the vague terms of these treaties.

Non-self-execution Declarations. The U.S. treatymakers also included in their ratification of human rights treaties a declaration stating that the substantive provisions of the treaties are not self-executing. This declaration

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80 U.S. RUDs to ICCPR, supra note 72, ¶ II(1).

81 U.S. RUDs to Race Convention, supra note 72, ¶ I(2) (“To the extent. . . that the Convention calls for a broader regulation of private conduct [than is customarily the subject of governmental regulation], the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1)(c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.”).

82 U.S. RUDs to ICCPR, supra note 72, ¶ I(3); U.S. RUDs to Torture Convention, supra note 72, ¶ I(1). These reservations were in part a response to the European Court of Human Rights’ 1989 decision in the Soering case, in which the Court held that a long wait on death row would violate the European Convention on Human Rights’ prohibition on “inhuman or degrading treatment or punishment.” See Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989); see also ICCPR Report, supra note 69, at 12; David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DePaul L. Rev. 1183, 1193 (1993).

83 The understanding attached to the Genocide Convention provides that the requirement in the Convention of an “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such” means “the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such.” U.S. RUDs to Genocide Convention, supra note 72, ¶ II(1). The understanding attached to the Torture Convention provides, among other things, that “in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm.” U.S. RUDs to Torture Convention, supra note 72, ¶ II(1)(a).

84 A non-self-execution declaration was not attached to the Genocide Convention, but the Senate did include a declaration stating that the President was not to deposit the U.S. instrument of ratification until after Congress had enacted legislation implementing the treaty. Furthermore, even the implementing legislation for the Convention, which makes genocide a federal criminal offense, states that “[n]othing in this chapter shall be construed as . . . creating any substantive or procedural right enforceable by law by any party in any civil proceeding.” 18 U.S.C. § 1093.
is designed to preclude the treaties from being enforceable in U.S. courts in the absence of implementing legislation. The treatymakers gave several reasons for this declaration. First, they believed that, taking into account the substantive reservations and interpretive conditions, U.S. domestic laws and remedies were adequate to meet U.S. obligations under the treaties. There was thus no additional need for domestic implementation. Second, there was concern that the treaty terms, although similar in substance to United States law, were not identical in wording, and thus might have a destabilizing effect on domestic rights protections if they were self-executing. Third, there was disagreement about which treaty terms, if any, would be self-executing, and the declaration was intended to provide an answer to this question in advance of litigation. Finally, the treatymakers believed that if there was to be a change in the scope of domestic rights protections, it should be done by legislation with the participation of the House of Representatives.


86 An important caveat should be noted here with respect to the Torture and Genocide Conventions. For both Conventions, the Senate insisted that the President not ratify the treaty until Congress enacted legislation to bring United States’ domestic law into compliance with the treaty. See Torture Convention Report, supra note 85, at 20; Genocide Convention Report, supra note 66, at 26.

87 For a representative statement, see 1979 Hearings, supra note 66, at 54-55 (State Department memorandum) (“The Covenants and U.S. statutes, while embodying almost identical rights, are not identical in wording. The purpose of the non-self-executing declaration, therefore, is to prevent the subjection of fundamental rights to differing and possible confusing standards of protection in our courts.”).

88 For example, the executive branch maintained that the ICCPR was in its entirety non-self-executing by virtue of both Article 2(2), which provides that “each State party . . . undertakes to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to the rights in the present Covenant,” and the ICCPR’s official annotation, which provides that “the obligation to give effect to the rights recognized in the covenant would be carried out by States through the adoption of legislative or other measures.” 10 U.N. G.A.O.R. Annexes, Agenda Item 28, pt. 2, UN Doc. A/2929, p. 18 (1955). See 1979 Hearings, supra note 66, at 315 (memorandum of Roberts Owen, Legal Adviser to the State Department). This view was challenged on the basis of other provisions of the ICCPR. See, e.g., id. at 276-77 (statement of Oscar Schacter); id. at 287-88 (statement of Louis Henkin).

89 For example, in defending such a declaration before the ICCPR’s Human Rights Committee, the State Department explained that “the decision to make the treaty ‘non-self-executing’ reflects a strong preference, both within the Administration and in the Senate, not to use the unicameral treaty power of the U.S. Constitution to effect direct changes in the domestic law of the United States.” Statement by Conrad K. Harper, Legal Advisor, U.S.
**Federalism Understandings.** The RUDs typically contain an understanding or other statement relating to federalism. The RUDs to the ICCPR, for example, contain the following understanding:

“That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.” 90

The Bush Administration explained that this understanding “serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments or to use the provisions of the Covenant to ‘federalize’ matters now within the competence of the States.” 91 And the Clinton Administration explained a similar understanding attached to the Race Convention as follows: “There is no disposition to preempt these state and local initiatives or to federalize the entire range of anti-discriminatory actions through the exercise of the constitutional treaty power. . . . In some areas, it would be inappropriate to do so.” 92

**ICJ Reservations.** The RUDs, like the reservations of many other countries, also typically decline to consent to “ICJ Clauses” in the human rights treaties, pursuant to which claims under the treaties could be brought against the United States in the International Court of Justice. 93 The United States attached a reservation to its ratification of the Genocide Convention, for example, stating that “before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under [Article IX of the Convention], the specific consent of the United States is

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90 U.S. RUDs to ICCPR, supra note 72, ¶ II(5).
91 ICCPR Report, supra note 69, at 9.
92 Race Report, supra note 85, at 24.
93 Like many nations, the United States is not currently a party to the general compulsory jurisdiction of the International Court of Justice. It withdrew its consent to that jurisdiction in 1985, after the Court held that it had jurisdiction to adjudicate claims brought by Nicaragua concerning alleged military activities conducted by the United States. See Barry E. Carter & Philip R. Trimble, International Law 326 (3d ed. 1999).
The U.S. treatymakers have explained that the ICJ reservations are designed “to retain the ability of the United States to decline a case which may be brought for frivolous or political reasons.” They also have expressed the view that the reservations will not significantly affect the resolution of disputes under the treaties “because the [ICJ] has not played an important implementation role and because the Convention provides other effective means . . . for dispute settlement.”

These features of the RUDs are now standard practice by the U.S. treatymakers. Their validity has been challenged under both international law and U.S. domestic law. We consider the international law objections first.

III. INTERNATIONAL LAW

Many legal scholars have argued that the RUDs are inconsistent with international law governing treaty-making. In this Part, we explain why these objections are questionable on their own terms. We also explain why the conclusion usually drawn from the objections – that the United States is bound by the human rights treaties as if it had never attached the RUDs – is inconsistent with fundamental international law principles relating to state consent.

We need to say a word at the outset about the sources of international law relevant to this issue. The Vienna Convention on the Law of Treaties is the primary source of the international law objections to the RUDs. Unfortunately, the provisions of the Vienna Convention relating to reservations are vaguely worded and have provoked disagreement among commentators and inconsistent national interpretations.

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94 U.S. RUDs to Genocide Convention, supra note 72, ¶ I(1); see also U.S. RUDs to Torture Convention, supra note 72, ¶ I(2); U.S. RUDs to Race Convention, supra note 72, ¶ I(3). The ICCPR does not contain an ICJ Clause.

95 Race Report, supra note 85, at 8.

96 Id. The International Court of Justice recently gave effect to one of the United States’ ICJ reservations. In dismissing an action brought by Yugoslavia against the United States for alleged genocide in connection with the Kosovo conflict, the Court noted that “the Genocide Convention does not prohibit reservations” and that “Yugoslavia did not object to the United States reservation.” As a result, the Court concluded that “the said reservation had the effect of excluding [the ICJ Clause] from the provisions of the Convention in force between the Parties.” Case Concerning Legality of Use of Force (Yugoslavia v. United States of America), ¶ 24 (June 2, 1999), available at <http://www.icj-cij.org/icjwww/idocket/iyus/iyusframe.htm>.

97 See Vienna Convention, supra note 16.

the United States has not even ratified the Vienna Convention. Many commentators believe that the Convention’s terms are nonetheless fully binding on the United States as customary international law, which is the body of international law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.” While this claim is almost certainly too broad, we will assume for present purposes, as have Executive Branch officials, that the Convention generally reflects customary international law.

We now turn to the specific international law arguments made against the RUDs. Where examples are needed, we will refer to the RUDs attached to the U.S. ratification of the International Covenant on Political and Civil Rights (“ICPPR”), which have received the most attention and criticism.

A. Three Minor Arguments

We begin with three prevalent, but relatively non-serious, international law arguments. The first is that the RUDs are invalid under Article 27 of the Vienna Convention because they, in effect, limit U.S. treaty obligations to the existing requirements of domestic U.S. law. Article 27 provides that a

99 Restatement (Third), supra note 22, § 102(2).

100 Many provisions of the Vienna Convention, including the articles on reservations, did not reflect customary international law when the treaty was drafted. See Ian Sinclair, The Vienna Convention on the Law of Treaties 10-25 (2d ed. 1984). Since that time, state practice with respect to reservations to human rights treaties has been sporadic and inconsistent. See Redgwell, Universality or Integrity?, supra note 98, at 269-78. Moreover, the criteria for inferring customary international law binding on the United States from a non-ratified treaty like the Vienna Convention are contested. See, e.g., Bruno Simma & Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 Austl. Y.B. Int’l L. 82 (1992). In addition, well-settled U.S. practice departs from some provisions of the Vienna Convention, most notably its provisions governing treaty interpretation. See Restatement (Third), supra note 22, § 325, cmt. g and reporters’ note 4; David J. Bederman, Revivalist Canons and Treaty Interpretation, 41 UCLA L. Rev. 953, 972 (1994). Finally, it is unclear whether the customary international law reflected in the Vienna Convention can bind the United States in a way that limits the Senate’s traditional powers with respect to the international effect of U.S. treaties, since this general concern is a key reason that the Senate has declined to consent to the Vienna Convention. See CRS Study, supra note 14, at 22-23; Maria Frankowska, The Vienna Convention on the Law of Treaties Before United States Courts, 28 Va. J. Int’l L. 281, 295-301 (1988). As noted below, a customary international law rule does not bind nations that have opted out of the rule during its formative stage. See infra note 107.

101 The typical Executive Branch formulation, as reflected in the government’s brief in the Domingues case, is that the Vienna Convention “is generally considered to be consistent with current treaty law and practice as recognized in the United States.” Domingues Brief, supra note 12, at 8 n. 3. See also Restatement (Third), supra note 22, Part III, introductory note at 145; Frankowska, supra note 100, at 298-99.

102 See Riesenfeld & Abbott, supra note 4, at 627; Schabas, supra note 4, at 27 & n.35; Weisbrodt supra note 4, at 57. A related argument is that no reservations are allowed with respect to the “non-derogable” provisions in the treaties. This argument is a non sequitur. The
nation cannot “invoke the provisions of its internal law as justification for its failure to perform a treaty.” As this language makes clear, Article 27 prohibits reliance on domestic law as an excuse for nonperformance of a treaty obligation. It says nothing about reliance on domestic law as a justification for not consenting to a treaty obligation in the first place. By its terms, then, Article 27 has no bearing on the validity of the RUDs, which do not claim any right of nonperformance by the United States with respect to treaty provisions that it has ratified.

The second argument is more complicated, but no more persuasive. It relies on two premises: first, that the treaty provisions with respect to which the United States has adopted reservations are already binding on the United States as a matter of customary international law; and, second, that it is not permissible under international law for a nation to agree to a treaty but opt out of provisions that are already binding on that nation under customary international law.103 Neither premise is sound. As an initial matter, it is unlikely that the provisions of the ICCPR with respect to which the United States has attached reservations reflect binding customary international law. To take what is probably the strongest example invoked by academic critics of the RUDs, even if there is sufficient state practice to support a customary international law ban on executing juvenile offenders, the United States has almost certainly opted out of any such customary international law norm.104

More importantly, the argument incorrectly assumes that nations are obligated, when they ratify a treaty, to accept all terms in the treaty that reflect customary international law. There is no basis for such a rule. A reservation

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103 See General Comment 24(52), supra note 102, at ¶ 8; Schabas, supra note 4, at 308.

104 It is well settled that a customary international law rule does not bind a nation that has dissented from the rule during its formative stage. See Restatement (Third), supra note 22, § 102, cmt. d and reporters’ note 2. The United States, in its RUDs, communications with international organizations, and other state practice, has actively dissented from the formation of a customary international law rule outlawing the death penalty for juvenile offenders. See Domingues Brief, supra note 12, at 15-17 (detailing various U.S. objections to such a rule of customary international law). Numerous commentators have nonetheless argued that the execution of juvenile offenders in the United States violates customary international law. See, e.g., Joan F. Hartman, “Unusual” Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. Cin. L. Rev. 655 (1983); Nanda, supra note 4; David Weissbrodt, Execution of Juvenile Offenders by the United States Violates International Human Rights Law, 3 Am. U. J’l L. & Poly. 339 (1988).
to a treaty provision is not itself a violation of the provision. It is simply a
decision by the nation making the reservation not to bind itself to the treaty
regime, and its associated enforcement procedures, with respect to the
provision in question. No one claims that nations have an international law
obligation to bind themselves to such treaty regimes and procedures. It is not
argued, for example, that the United States would have violated customary
international law if it had declined to ratify the ICCPR altogether. Nor is it
argued that the United States is in violation of international law for having
declined to ratify the Vienna Convention, even though there is widespread
agreement that at least some of its terms reflect customary international law.
Since it is clear that nations can refuse to ratify a treaty with terms that are
reflective of customary international law, it is difficult to understand how or
why international law would obligate them, when they do ratify the treaty, to
accept the treaty in its entirety. Finally, given the amorphous nature of
customary international law, it will often be difficult for nations even to know
when they ratify a treaty whether a particular provision is reflective of
customary international law. A rule that outlawed reservations to all treaty
terms reflective of customary international law would thus create substantial
uncertainty about the validity of treaty reservations and, more broadly, about
the status of treaty relationships.

The third argument is that that the RUDs are improper because they are
an attempt by the United States to ratify the treaties without undertaking any
obligations. As Professor Henkin explains, “[b]y adhering to human rights
conventions subject to these reservations, the United States, it is charged, is
pretending to assume international obligations but is in fact undertaking
nothing.” It is not clear exactly what the legal claim is here. The claim
cannot be that the United States has pledged insufficient “consideration” in
entering into these treaty commitments, since it is well settled that, unlike U.S.
contract law, the international law governing treaties does not require
consideration. Perhaps the argument is simply that the RUDs violate a
general duty under international law to act in good faith. There is indeed an
international law principle relating to good faith in the treaty context – pacta
sunt servanda. That principle, however, simply requires that nations act in
good faith in complying with the treaty obligations they have accepted. The *pacta sunt servanda* principle does not address any duty by nations to agree to treaty obligations in the first place.

In any event, whatever its international law basis, the premise of the argument – that the United States has not assumed any international obligations under the human rights treaties – is false. For some of the treaties, most notably the Genocide and Torture Conventions, the United States has expressly changed its domestic law in order to comply with the treaty obligations. For other treaties, such as the ICCPR, the United States has maintained that its current human rights protections satisfy its treaty obligations and has committed itself *not to retreat* from those protections. In so doing, the United States has exposed itself to the argument that its current law does not fully satisfy its treaty obligations, an argument that would not be available if the United States had not made any international commitments. The United States also has committed itself to comply with reporting requirements under the treaties, and it has generally complied with these requirements.

**B. The “Object and Purpose” Argument**

We now turn to an argument that has a more plausible premise but draws a very implausible conclusion from that premise. The premise is that the U.S. reservations to the ICCPR violate the treaty’s “object and purpose”

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108 See Vienna Convention, supra note 16, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”) (emphasis added).


110 Of the four major human rights treaties ratified by the United States, three (the ICCPR, the Torture Convention, and the Race Convention) have reporting requirements. The United States has submitted reports to the monitoring bodies associated with each of these three treaties. See the website for the United Nations Commissioner for Human Rights, <http://www.unhchr.ch/tbs/doc.nsf>. Like many nations, the United States has not submitted every report that has been due and has not always submitted its reports on time. As of March 10, 2000, the United States was overdue on a total of five reports, which was less than the total for many other nations. See id.
and are therefore invalid under Article 19 of the Vienna Convention. As we explain below, this premise is debatable but probably incorrect. The conclusion from the premise is that the appropriate remedy for the Article 19 violation is that the United States is bound by all of the provisions of the ICCPR, including provisions to which the RUDs expressly declined consent. As we explain, there is no basis in international law for this conclusion.

Before proceeding to the analysis, it is worth noting that the ICCPR’s Human Rights Committee has embraced both the above premise and conclusion. The Committee has no official power to resolve disputes or issue binding legal interpretations. It is instead charged with receiving reports submitted by nations under the ICCPR’s self-reporting provisions and issuing any “comments” it deems appropriate. Nevertheless, it has controversially declared itself to be the definitive interpreter of whether or not a reservation satisfies the object and purpose test. And, in two documents, it has directly or indirectly raised questions about the validity of the United States’ RUDs. In 1994, it issued a general comment concerning reservations to the ICCPR, in which it expressed “particular concern” about “widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations.” It also maintained in that comment that reservations incompatible with the object and purpose of the ICCPR should normally be treated as severable, meaning that the treaty “will be operative for the reserving party without the benefit of the reservation.” Then, in 1995, it issued a comment specifically on United States human rights practices, in which it asserted, without analysis, that the United States reservations with respect to the death penalty violated the “object and purpose” of the ICCPR. In short, the Human Rights Committee has effectively taken the position that the United States is bound by the ICCPR’s death penalty provisions even though it specifically declined to consent to them.

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111 See, e.g., Riesenfeld & Abbott, supra note 4, at 599-603; Schabas, supra note 4, at 285; Weissbrodt, supra note 4, at 58; General Comment 24(52), supra note 102. Article 19 of the Vienna Convention states in relevant part that reservations to a treaty are not allowed if they are “incompatible with the object and purpose of the treaty.”

112 See General Comment 24(52), supra note 102, ¶ 18.

113 Id., ¶ 12.

114 Id., ¶ 18.

115 Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee, 53d Sess., 1413th mtg., UN Doc. CCPR/C/79/Add. 50, ¶ 14 (1995). Several U.S. officials defended the U.S. RUDs in hearings before the Committee held in late March 1995. See Human Rights Committee, 53d Sess., Summary Record of the 1401st Meeting, CCPR/C/Sr. 1401 (Apr. 17, 1995) (March 29, 1995 hearings); Human Rights Committee, 53d Sess., Summary Record of the 1405th Meeting, CCPR/C/Sr. 1405 (Apr. 24, 1995) (March 31, 1995 hearings). In the hearings, Conrad Harper, the then-Legal Advisor to the State Department, explained that the death penalty had broad popular support in the United States and that “it was not appropriate in [this] democratic system to dismiss considered public opinion and impose by fiat a different view.”
To analyze this claim, some background is necessary. Nations have made reservations to treaties since the end of the eighteenth century. International law traditionally imposed strict requirements on when a state could make a reservation and still be a party to a treaty. In a bilateral treaty, a reservation was like a counter-offer; both parties to the treaty had to agree to every reservation before the treaty became valid. For multilateral treaties, the traditional rule was that a reserving state was not a party to a treaty unless every other party to the treaty accepted the reservation. This traditional unanimity rule was “based on the concept of the integrity of the terms of the treaty which had been freely negotiated by the prospective parties, and it provided an unambiguous answer to the question whether a State which had submitted an instrument of ratification or accession, accompanied by a reservation, had become a party to the treaty generally.”

With the expansion of multilateral treaty-making after World War II, the unanimity rule came under attack. There were increasing concerns that the unanimity rule was insufficiently flexible and that it thwarted maximum participation in multilateral treaties, especially human rights treaties. Such flexibility was thought to be essential for the making of human rights treaties among an increasingly large number of countries that were politically and culturally diverse. The International Court of Justice (“ICJ”) embraced a

\[\text{\textsuperscript{116}}\text{The Senate’s reservation to the Jay Treaty in 1794 was the first reservation to a bilateral treaty; Sweden-Norway’s reservation to certain parts of the Final Act of the Vienna Congress in 1815 was one of the first reservations to a multilateral treaty. See William W. Bishop, Jr., Reservations to Treaties, II Receuil des Cours at 260-62 (1961). Reservations were sporadic during the nineteenth century, but then picked up significantly at the dawn of the twentieth century, beginning with the many reservations to the 1899 and 1907 Hague Conventions on the laws of war. See Frank Horn, Reservations and Declarations to Multilateral Treaties 7 (1988). For statistics on the use of reservations from 1919 to 1971, see John King Gamble, Jr., Reservations to Multilateral Treaties: A Macroscopic View of State Practice, 74 Am. J. Int’l L. 372 (1980).}\]


\[\text{\textsuperscript{119}}\text{There was some movement away from the unanimity rule prior to World War II. Most notably, a more flexible approach to conditions was adopted in connection with the Pan American Union of the 1930s. See P.K. Menon, An Introduction to the Law of Treaties 34-35 (1992).}\]

\[\text{\textsuperscript{120}}\text{For example, the representative at the Vienna Conference from the United Kingdom, a nation that traditionally supported the unanimity rule, acknowledged that the rule “might in modern times be a counsel of perfection, since it had been rendered less practicable by the great expansion of the membership of the international community in recent years.” United Nations Conference on the Law of Treaties, Official Records, First Session, A/CONF.39/11, at p.114, ¶ 72 (Sinclair).}\]
more flexible approach in its advisory opinion in *Reservations to the Genocide Convention.* The ICJ reasoned that the aim of securing widespread ratification of the Genocide Convention argued for greater flexibility with regard to reservations. It explained that, with respect to such a treaty, “one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties.” The ICJ therefore held that a reserving state could be a party to the Genocide Convention even if some parties to the Convention objected to the reservation. The ICJ made clear, however, that if a State makes a reservation incompatible with the object and purpose of the Genocide Convention, the State “cannot be regarded as being a party to the Convention.”

The Vienna Convention, which was opened for signature in 1969 and entered into force in 1980, embraced a flexible approach to reservations similar to the one outlined in the *Genocide Convention* decision. Article 19 of the Convention allows a party to formulate a reservation to a treaty unless “the reservation is incompatible with the object and purpose of the treaty.” Articles 20 and 21 then establish rules for acceptance or rejection of reservations, and the consequences that follow from acceptance or rejection. When a contracting nation accepts another nation’s reservation, the reserving nation becomes a party to the treaty in relation to the accepting nation. A reservation is deemed accepted by any nation that does not raise an objection to the reservation within twelve months of notification. An objection to a reservation does not preclude entry into force of the treaty between the reserving and objecting nation unless the objecting state says so definitively; rather, the provision to which the reservation relates is simply inapplicable between the two states to the extent of the reservation. This flexible approach, as the United Nations’ International Law Commission has explained, is designed to encourage widespread participation in treaty regimes.

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122 Id. at 23.

123 Id. at 18.

124 For a detailed historical account of the events between the *Genocide Convention* case and the final wording of the Vienna Convention, including the initial criticism of the ICJ decision and the eventual acceptance over the subsequent 20 years that a more flexible approach was appropriate, see Redgwell, *Universality or Integrity,* supra note 98, at 250-62.

125 Vienna Convention, supra note 16, art. 19. Article 19 also states that reservations are permitted unless the treaty prohibits them or only authorizes reservations other than the ones made. See id.

126 See id., art. 20(4)(a).

127 See id., art. 20(5).

128 See id., arts. 20(4)(b), 21(3).

129 The International Law Commission, in commenting on the draft terms of the Vienna Convention, explained that “a power to formulate reservations must in the nature of
Neither the Vienna Convention nor the ICJ opinion in the *Genocide Convention* case provides much guidance about the meaning of the “object and purpose” test. Moreover, there has been little subsequent judicial analysis of the test, and no determination ever that a reservation ran afoul of the test. Nonetheless, it appears unlikely that the U.S. reservations to the ICPPR violate the treaty’s object and purpose. The United States accepted the overwhelming majority of the treaty’s dozens of substantive provisions. It made a handful of reservations, to be sure. But over a third of the parties to the ICPPR made reservations to over a dozen substantive provisions. The United States was the only nation to adhere to a broad reservation to the death penalty provisions, but in other respects its RUDs practice differs little from the practice of many other countries.

Most significantly, like the United States, many countries conditioned their consent to the ICCPR in order to conform the treaty obligations to their domestic laws. France, for example, entered reservations and declarations ensuring that its ICCPR obligations were no more demanding than domestic law with respect to presidential power, military discipline, immigration, appellate criminal review, regulation of war propaganda, and minority rights. Belgium conditioned consent to ensure that the ICCPR did not affect its domestic law with respect to sex discrimination concerning the exercise of royal powers, the protection of juvenile criminal offenders, various criminal procedures, freedom of speech, and marriage. The United Kingdom gave its consent on the condition that its domestic law not be affected with respect to free legal assistance, spousal equality, election law, military discipline, and immigration. And, of course, treaties in the United Kingdom and many other countries are not considered self-executing.

These facts make it difficult to conclude that the United States reservations to the ICCPR violate its object and purpose. As the ICJ noted in the *Genocide Convention* case, a central object and purpose of the Genocide Convention is that “as many States as possible should participate.” Even the Human Rights Committee has described the object and purpose of the ICCPR things tend to make it easier for some States to execute the act necessary to bind themselves finally to participating in the treaty and therefore tend to promote a greater measure of universality in the application of the treaty.” Reports of the International Law Commission on the Second Part of its 17th Session and on its 18th Session, [1966] 2 Y.B. Int’l & Comm’n 169, 205-06, UN Doc. A/6309/Rev. 1.

130 See Redgwell, Reservations, supra note 98, at 393.

131 The information in this paragraph is drawn from the United Nations Treaty Collection, see <http://untreaty.un.org>.

132 Genocide Convention Case, [1951] I.C.J. Rep. at 24. The ICJ continued: “The complete exclusion from the Convention of one or more States would not only restrict the scope of application, but would detract from the authority of its moral and humanitarian principles which are its basis.” Id.
in a similarly general way. 133 This goal is served even when there are reservations to parts of the treaty. 134 While many consider the provisions reserved by the United States as important, it is hard to view the relatively few reservations as incompatible with the fundamental purpose of having as many states as possible become parties to the treaties. 135

Several technical legal arguments under the Vienna Convention support the conclusion that U.S. reservations do not violate the object and purpose of the ICCPR. Unlike other human rights treaties, including one of the optional protocols to the ICCPR (which the United States has not ratified), the ICCPR contains no clause excluding reservations, and no reference to the object and purpose test. Only eleven of the 144 states that are parties to the ICCPR have objected to the U.S. RUDs, nine on the ground that the reservations violated the object and purpose of the treaty. 136 These objecting nations provided little

133 See General Comment 24(52), supra note 102, ¶ 7 (“The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.”).

134 The RUDs also typically contain non-self-execution clauses, but it is difficult to see how these clauses could violate the object and purpose of the treaties. As Professor Vazquez recently explained, “Such a reservation does nothing more than establish for the United States the rule that applies in other countries (such as the United Kingdom) by virtue of their constitutions – i.e., that the treaty will not have the force of domestic law until legislatively implemented. If such a provision were contrary to the object and purpose of the treaty, the U.K. could never become a party to the treaty.” Carlos Manuel Vazquez, Laughing at Treaties, 99 Colum. L. Rev. 2154, 2188 n.138 (1999).

135 If, by contrast, the United States had ratified the Second Optional Protocol to the ICCPR, which prohibits the use of the death penalty, it might well have violated the object and purpose of the Protocol for the United States to have reserved a general right to impose capital punishment. Of course, the United States has not ratified the Protocol and, in any event, the Protocol expressly disallows all reservations except for a reservation providing for the “application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.” G.A. Res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49), U.N. Doc. A/44/49, art. 2(1) (1989). Similarly, it might well have violated the object and purpose of the Genocide Convention and the Torture Convention if the United States had ratified those treaties while reserving the right to commit genocide and torture. But this is not what happened; rather, the United States accepted the prohibitions on genocide and torture and simply attempted, through its RUDs, to clarify the scope of the terms to which it was consenting. See supra text accompanying notes 82-83.

136 See United Nations Treaty Collection, <http://untreaty.un.org>. Twelve of the 130 countries that are parties to the Genocide Convention have objected to the U.S. RUDs; three of the 119 countries that are parties to the Torture Convention have objected to the U.S. RUDs; and none of the 156 countries that are parties to the Race Convention has objected to the U.S. RUDs. See id. Compare those numbers to the test set forth in the Race Convention whereby a reservation will be deemed incompatible with the object and purpose of the Convention if two-thirds of the parties object to the reservation. See International Convention on the Elimination of All Forms of Racial Discrimination, 5 I.L.M. 352 (1966), art. 20(2). There have been no specific objections, in connection with any of the treaties, to the United States’ non-self-execution declarations.
or no explanation for their objections. What is important under the Vienna Convention, however, is that none of the objections came within the twelve months of communication of the U.S. reservations. Under Article 20(5) of the Vienna Convention, therefore, the U.S. reservations are deemed accepted. In addition, none of the nations that objected to the reservations claimed that the United States was not a party to the treaty. Under Articles 20(4)(b) and 21(3) of the Vienna Convention, then, the United States is, at worst, a party to the treaty and the provisions to which the reservations relate do not apply between the United States and the objecting nations.

Some commentators have responded to these latter points by arguing that other nations do not have the power under international law to consent to reservations that violate the object and purpose of the Convention. The Genocide Convention decision did suggest such a restriction. The Vienna Convention, which supersedes the statement of customary international law in the Genocide Convention decision, is unclear about whether the rules for acceptance of reservations in Article 20 apply to all reservations, or only to ones that survive Article 19’s object and purpose test. Both the Vienna Convention’s drafting history and the state practice under the Convention suggest that Article 20 applies to all reservations, and thus that the object and purpose test is not an independent bar to other nations’ acceptance of reservations under the Vienna Convention. The Human Rights Committee appears to agree with this reading of the Convention because, in explaining why the failure by nations to object to reservations to the ICCPR did not constitute an acceptance of the reservations, it felt compelled to maintain that the Vienna Convention’s rules about tacit consent to reservations “are

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137 See Redgwell, Reservations, supra note 98, at 395.
138 See Vienna Convention, supra note 16, art. 20(5) (“[U]nless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.”).
139 See Vienna Convention, supra note 16, art. 20(4)(b) (“[A]n objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitively expressed by the objecting State.”); id., art. 21(3) (“When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.”).
140 In commentary on the original draft version of Articles 19 and 20, the International Law Commission suggested that the object and purpose test is not an independent barrier to reservation acceptance by other nations. See Documents of the Conference on the Vienna Convention, A/CONF.39/11/Add.2. In subsequent negotiations, many nations proposed amendments to the Vienna Convention to clarify that the object and purpose test was an absolute bar to reservations, but these amendments were all rejected. See Redgwell, Universality or Integrity, supra note 98, at 255-60.
141 On the drafting history and state practice, see Redgwell, Universality or Integrity, supra note 98, at 273-77.
inappropriate to address the problem of reservations to human rights treaties. These factors, taken together, suggest that the best reading of the Vienna Convention and related customary international law is that other nations have effectively consented to the validity of the U.S. reservations to the ICCPR.

Because of ambiguities in the Vienna Convention, and the lack of a centralized decisionmaker with authority to determine the validity of reservations, there is room for disagreement with this conclusion. This fact is probably beside the point because, as discussed above, the U.S. reservations almost certainly do not violate the ICCPR’s object and purpose. But even if one concluded that the United States’ RUDs did violate the object and purpose test, and that they were not cured by other nations’ failure to object to them, it is clearly incorrect to conclude, as the ICCPR’s Human Rights Committee and others have, that the United States continues to be bound by the ICCPR, including ICCPR terms to which it did not consent. One of the most established principles in international law is that “in treaty relations a State cannot be bound without its consent.” It would contravene this fundamental principle of international law to invalidate a reservation to a treaty but hold the party to the remainder of the treaty without recognizing the reservation. This conclusion is especially clear where, as with the U.S. ratification of the ICCPR, the reservations are “integral parts of its consent to be bound.” The United Nations’ International Law Commission recently confirmed this conclusion and (along with several individual nations) expressly rejected the contrary views of the ICCPR’s Human Rights Committee.

142 General Comment 24(52), supra note 102, ¶ 17.
143 At the very least, the drafting history of the Vienna Convention, as well as subsequent state practice, suggest that as a matter of customary international law arising from the Vienna Convention, the object and purpose test is not a bar to reservations independent of nations’ consent to the reservations.
144 See id., ¶ 18 (concluding that a reservation that violates the object and purpose test “will generally be severable, in the sense that the Covenant will be operative for the [United States] without benefit of the reservation”).
145 Genocide Convention Case, [1951] I.C.J. Rep. at 21; see also, e.g., Restatement (Third), supra note 22, pt. I, introductory note at 18 (“Modern international law is rooted in acceptance by states which constitute the system.”).
146 See Redgwell, Universality or Integrity, supra note 98, at 267 (“It was never the intention of the ICJ, the ILC or the [Vienna Convention] that a State should be bound by a provision to which it had not indicated its consent.”).
147 Observations by the Government of the United States of America on No. 24(52) (transmitted by letter dated March 28, 1995), reprinted in 16 Human Rights L.J. 422 (1995) [hereinafter “U.S. Response”]. Cf. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 66 (July 6) (separate opinion of Judge Lauterpacht) (arguing that when an invalid reservation is an essential component of a nation’s consent to the compulsory jurisdiction of the International Court of Justice, the entire consent is “devoid of legal effect”).
148 The United States, Great Britain, and France strongly objected to the views of the ICCPR’s Human Rights Committee expressed in General Comment 24(52), including its
In sum, if the U.S. RUDs really do violate the object and purpose of the ICCPR, and the acquiescence of the other parties to the treaty has not rectified this problem, there are only two possible remedies under international law: either the United States is not a party to the treaty provisions with respect to which it has reserved (which yields the same result as if the RUDs were enforced), or the United States is not a party to the treaty at all. 149

IV. DOMESTIC CONSTITUTIONAL LAW

In the last Part, we explained why the U.S. RUDs are consistent with customary international law principles of treaty formation. Even if the international law objections to the RUDs were more persuasive, however, they would not provide a basis for invalidating the RUDs in U.S. courts. In a variety of circumstances, U.S. courts give effect to actions by political branch actors even if those actions violate international law. For example, they apply a federal statute even if it violates customary international law, 150 and even if it

views concerning the proper remedy for invalid reservations. See 4 IHRR 6-8 (1997) (France); 3 IHRR 261-69 (1996) (Great Britain and United States). In a 1997 report, the United Nations’ International Law Commission similarly rejected a number of the conclusions in General Comment 24(52). Among other things, the Commission concluded that the Vienna Convention’s flexible regime for reservations applies to human rights treaties, that “the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role,” and that the proper remedy for situations in which a nation insists on retaining an invalid reservation as a condition of its consent to a treaty is that the nation is no longer a party to the treaty. See Report of the International Law Commission on the work of its forty-ninth session, UN GAOR, 52d Sess., Supp. No. 10, UN Doc. A/52/10(1997). This portion of the Commission’s 1997 Report was based on the Commission’s consideration of reports from Alain Pellet, whom the Commission had appointed as Special Rapporteur for this topic. Pellet’s reports were highly critical of General Comment 24(52). See UN Doc. A/CN.4/470 and Corr. 1 (1995); UN Doc. A/CN.4/477 and Add. 1 (1996).

149 In two controversial decisions, the European Court of Human Rights has enforced provisions of the European Convention on Human Rights notwithstanding reservations to the provisions. See Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995); Belilos v. Switzerland, 132 Eur. Ct. H.R. (ser. A) (1988). Those decisions, however, were based on the particular features of the European Convention and were “not simply applying general principles of treaty law.” Redgwell, Universality or Integrity, supra note 98, at 266; see also Susan Marks, Reservations Unhinged: The Belilos Case Before the European Court of Human Rights, 39 Int’l & Comp. L.Q. 300, 327 (1990) (criticizing the Belilos decision and tying it to “structural features of the [European] Convention”). Moreover, the decisions were premised on a finding that the countries in those cases would have ratified the Convention even without the reservations. By contrast, the United States has made clear that its reservations are an essential condition of its ratification.

150 See, e.g., Galo-Garcia v. INS, 86 F.3d 916, 918 (9th Cir. 1996); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Garcia-Mir v. Meese, 788 F.2d 1446, 1453-54 (11th Cir. 1986).
conflicts with an earlier inconsistent treaty. 151 Similarly, they uphold Executive Branch actions that violate customary international law. 152 In these and many other contexts, the U.S. courts follow a dualist approach to the relationship between international law and domestic law: They treat international and domestic law as distinct, they rely on domestic law to determine international law’s status within the U.S. legal system, and, in case of a conflict, they give domestic law primacy over international law unless domestic law specifies otherwise. 153

American dualism means that U.S. courts will ultimately judge the domestic legal validity of the RUDs by reference to domestic constitutional law. In recognition of this point, critics have argued that the RUDs violate several domestic constitutional principles, including separation of powers, the Supremacy Clause, the treaty power, and federalism. In this Part, we explain why these constitutional arguments are unpersuasive. We begin, however, with thoughts about the nature of judicial review in the context of the RUDs.

A. Judicial Review

Critics of the RUDs argue for extraordinary judicial intervention into the treaty process. Consider the Domingues case, in which the petitioner argued that Nevada’s death penalty for juvenile offenders violated Article 6 of the ICCPR. 154 For the petitioner in Domingues to prevail, a U.S. court would have to hold the treatymakers’ reservation declining consent to Article 6 invalid; determine that the United States was nonetheless still bound by the

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151 See, e.g., Breard v. Greene, 118 S. Ct. 1352 (1998); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 600 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 597-99 (1884). Technically, a statute that violates a treaty also violates the customary international law principle requiring treaty compliance – *pacta sunt servanda*.


154 See supra text accompanying notes 7-12.
entire treaty, including the provision to which it declined consent; and
determine that the non-self-executing declaration was invalid, and that the
entire treaty, including the provision to which the United States did not
consent, applied in the domestic realm to preempt state law. To state these
claims is to understand why courts are not likely to engage in the aggressive
forms of judicial review needed to credit them.

United States courts have never exercised judicial review to invalidate
either the domestic or international effects of a treaty on structural
constitutional grounds. This is in part due to the nature of the treaty power.
Compared to Article I, the Treaty Clause and related provisions for making
international agreements are obscure. As Hayden notes, the treaty clause’s
“elasticity of details” left “to successive Senates and to successive Presidents
the problem and the privilege of determining under the stress of government
the precise manner in which they are to make the treaties of the nation.” In
addition, treaties have a dual nature – they are in part legal instruments, to be
sure, but their creation and especially their enforcement are very much
informed by political factors in a way that is not true of domestic law. These
factors, taken together, have resulted in numerous practical and sometimes
changing accommodations among the treatymakers (some of which have
provoked disagreement) about how treaties are made, enforced, and
terminated. Examples include the particular procedures for making treaties,
the rise of congressional-executive agreements as a substitute (or near-
substitute) for treaties, and the power to terminate treaties, none of which

155 As one commentator on the treaty clause has noted:

“The Constitution contains no elaboration of the treaty clause. There is no
definition or description of the process by which this power shall be
executed. Did the ‘fathers’ intend that the President and Senate should meet
in private conference or did they assume that the President would formally
submit treaties to the Senate and that the upper house would grant or
withhold its consent to ratification? Was the power of the Senate to be co-
extensive with that of the President or were the Senators obliged to defer
action until a formal executive message was received? Was the Senate
empowered to inaugurate negotiations? In regard to the instructions given
negotiators, did the Senate have a right to consider, approve, or reject them?
It is idle to essay answers to the questions from the treaty-making clause.
The debates of the Constitutional Convention evidence that no definitive
procedure was contemplated or agreed upon by the ‘fathers.’”


156 Hayden, supra note 20, at 2.

157 See, e.g., Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 598 (1884)
(“A treaty is primarily a compact between independent Nations. It depends for the
enforcement of its provisions on the interest and the honor of the governments which are
parties to it.”).

158 See Henkin, Foreign Affairs, supra note 18, at 177-78.

159 See Restatement (Third), supra note 22, § 303, cmt. e (“The prevailing view is that
the Congressional-Executive agreement can be used as an alternative to the treaty method in
is addressed by constitutional text, and all of which have developed in particular ways as a result of the contingencies of domestic and international politics.

Recognizing the lack of textual guidance and the importance of political contingency in this context, U.S. courts have taken a largely passive role in the institutional developments concerning the making and enforcement of treaties. They usually defer to the accommodations of the political branches (such as the rise of congressional-executive agreements) or abstain from adjudicating disputes between the political branches (such as the termination of treaties). Similarly, they treat matters pertaining to the negotiation, observance, and termination of treaties as “political questions” committed to the discretion of the political branches. They also give “great weight” to the Executive Branch’s interpretation of a treaty. And, of course, judicial deference to the political branch arrangements is especially strong in situations, as with the RUDs, in which the political branches all agree on the assertion of constitutional power.

With these points in mind, we now turn to the specific constitutional arguments made by critics of the RUDs. Any normative constitutional analysis encounters the initial problem that the appropriate sources of U.S. constitutional law are addressed by constitutional text, and all of which have developed in particular ways as a result of the contingencies of domestic and international politics.

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Constitutional law are contested. We hope to address this problem by showing that under any of the major theories of constitutional interpretation, the RUDs are valid. Because the critics of the RUDs invoke structural constitutional arguments, most of our arguments in support of the validity of the RUDs are structural as well. Along the way, however, we hope to show that our conclusion about the constitutionality of the RUDs is also consistent with originalist, textualist, majoritarian, and translation (or changed circumstances) approaches to constitutional interpretation.

B. Separation of Powers

Some commentators have suggested that the RUDs present a separation of powers conflict between the President and the Senate. There are several related claims here. One is that the RUDs may infringe on the President’s constitutional prerogatives in making treaties. Another is that RUDs are “anti-majoritarian” because they allow a minority of Senators to force limitations on treaties through their power to block the two-thirds consent needed for ratification. Yet another is that the RUDs constitute an improper “line-item veto” because the Senate is in effect trying to change the terms of the treaty.

Separation of powers claims are often difficult to assess because there is no settled understanding of the proper relationship among the three branches of the federal government. Regardless of whether one views these matters from a formalist or functionalist perspective, however, the various arguments made against RUDs under the rubric of separation of powers are unconvincing.


167 One major potential source of constitutional interpretation, original understanding, provides little concrete guidance about most constitutional questions concerning RUDs. We know of nothing in the Founding materials that speaks to the validity of conditional consent one way or another, and critics of the RUDs do not rely on such materials. Moreover, a recent exhaustive historical debate over the related question of whether and to what extent the Founders viewed treaties to be self-executing uncovered no evidence about the original understanding of the conditional consent power. See sources cited supra note 2. As we explained in Part I, however, constitutional practice since the Founding does support the RUDs practice. The treatymakers have attached substantive reservations throughout U.S. history. Functional analogues to non-self-execution declarations have also been attached to treaties since the nineteenth century. In short, historical constitutional practice provides some support for, and certainly does not detract from, the validity of the modern RUDs practice.

168 See, e.g., Damrosch, supra note 4; Riesenfeld & Abbott, supra note 4.

169 See Riesenfeld & Abbott, supra note 4, at 600-01.

170 See, e.g., John Quigley, The Rule of Non-Inquiry and Human Rights Treaties, 45 U. Cath. L. Rev. 1213, 1233-34 (1996). This argument was also made in the Domingues case, discussed above.

This is especially true, we hope to show, when one descends from abstract concerns about democracy and Executive power, and attends to the concrete terms and structure of the Constitution. As the Supreme Court has noted, “[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787.”

There are essentially three problems with separation of powers claims against RUDs. First, the factual supposition underlying the claims – that the Senate “imposes” the RUDs on an otherwise unwilling President – is simply false. As discussed above, RUDs to human rights treaties have all been proposed by presidents in the first instance rather than by the Senate, and they are usually adopted by the Senate without change. The Senate sometimes revises proposed presidential RUDs, but always in cooperation with the Executive Branch, always in a modest way, and sometimes in the direction of narrowing the scope of the RUDs. Even if RUDs could in theory constitute interference with Presidential power, a point we contest below, interference is not an issue with respect to the human rights RUDs, where the President and Senate have worked together.

Second, even if the Senate attached RUDs unilaterally, the RUDs would not in any way bind the President. The Senate must attach RUDs before, and not after, ratification. And the President is never obligated to accept the RUDs. If he disagrees with them, he can simply refuse to ratify the treaty, as several presidents have in fact done. This distinguishes RUDs from the line-item and legislative vetos, which the Supreme Court invalidated because they constituted attempts by one branch or house of the legislature to

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173 For example, when the Senate Foreign Relations Committee ultimately gave its consent to the Torture Convention, it noted that the RUDs were “the product of a cooperative and successful negotiating process between the executive branch, this committee, and interested private groups.” Convention Against Torture and Other Cruel, Inhuman, or Degrading treatment or Punishment, Sen. Exec. Rep. 101-30, 101st Cong., 2d Sess., at 4 (August 30, 1990). Of course, this cooperation takes place against the background of the Senate’s potential threat of non-consent, a point we discuss below.

174 See Fourteen Diamond Rings v. United States, 183 U.S. 176, 180 (1901) (“The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it.”); id. at 183 (Brown, J., concurring) (“The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power . . . .”); New York Indians v. United States, 170 U.S. 1, 23 (1898) (refusing to give effect to treaty proviso adopted by the Senate because “there is no evidence that it ever received the sanction and approval of the President”).

175 For example, President Taft declined to ratify arbitration treaties with France and Great Britain after the Senate insisted on certain reservations. See Restatement (Third), supra note 22, § 303, reporters’ note 3.
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RUDs do not alter already-enacted law. Rather, they are analogous to a Bill passed by both Houses of Congress and sent to the President for his approval or veto. The President retains the discretion to sign the Bill despite disagreements with its content, or to veto the Bill because of disagreement with its content. The President plays a functionally identical role with respect to Senate conditions. In neither case does he have sole discretion to make federal law, but in both cases he has the final say about whether to make federal law.177

Third, RUDs attached by the Senate are not “undemocratic” or “anti-majoritarian” in a constitutionally meaningful sense. It is true that a minority of senators can insist on a package of RUDs as a precondition to senatorial consent to the treaty. As we explained above, this power flows from Article II, which requires two-thirds senatorial consent as a precondition to making treaty commitments.178 In other words, the power of conditional consent is a direct consequence of the Constitution’s particular super-majoritarian treatymaking procedure. This is but one of many devices in the Constitution designed to protect minority interests.179

One might argue that the original reasons for the Senate’s minority veto – to create a structural bias against international agreements, and to protect state prerogatives180 – are no longer valid. This is not a view that we, or any branch of the federal government, share. In any event, this argument has little purchase in the context of RUDs attached to human rights treaties. In this context, Congress and the President remain free to enact a subsequent statute that contains domestic human rights protections without the limitations contained in the RUDs.181 This later enacted statute, which a minority of

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177 Except, of course, that the Senate cannot override the President’s refusal to ratify in the treaty context. In this regard the Senate has less authority vis-a-vis the President in the treatymaking process than the House and Senate have vis-a-vis the President in the lawmaking process.

178 See supra text accompanying notes 19-23.

179 Other constitutional provisions designed to protect minority interests include the Article I bicameralism and presentment process, the Article II impeachment process, the Article V constitutional amendment process, and, of course, the Bill of Rights.

180 See Arthur Bestor, Respective Roles of Senate and President in the Making and Abrogation of Treaties – the Original Intent of the Framers of the Constitution Historically Examined, 55 Wash. L. Rev. 1 (1979); Rakove, supra note 20.

181 Of course, this legislation, like the treaty that it would supersede, must be consistent with the Constitution.
Senators would have no power to block, would trump any prior inconsistent provisions of the treaty. 182

C. Non-Self-Execution

Critics of the RUDs also claim that the non-self-execution declarations are unconstitutional because they violate the Supremacy Clause and exceed implicit limits on the treaty power.

1. The Supremacy Clause

The Supremacy Clause states in relevant part that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.” 183 Many commentators have argued that this language mandates that human rights treaties have the status of self-executing federal law, regardless of the wishes of the U.S. treatymakers. 184 As Professor Henkin argues:

“Article VI of the Constitution provides expressly for lawmaking by treaty: treaties are declared to be the supreme law of the land. The Framers intended that a treaty should become law ipso facto, when the treaty is made; it should not require legislative implementation to convert it into United States law. In effect, lawmaking by treaty was to be an alternative to legislation by Congress.” 185

Henkin concludes that the “patterns of non-self-executing declarations [attached to human rights treaties] threatens to subvert the constitutional treaty system.” 186

This argument misunderstands the Supremacy Clause. By its terms, the Clause makes all federal laws supreme over state laws. The Clause does not, however, affect the power of U.S. lawmakers to define the domestic scope of the law they make, either as to the states or as to other federal laws. In other words, it operates as an enhancement of federal lawmaking power vis-a-vis

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182 See supra note 154. A minority of Senators might have some ability to block such a statute through the filibuster power, just as it would have the power to block any other statute. It is also possible that the President and Congress could adopt the human rights protections by means of a congressional-executive agreement. The conventional wisdom today is that treaties and congressional-executive agreements are largely interchangeable. See supra note 159.

183 U.S. Const. art. VI, cl. 2.

184 See, e.g., Damrosch, supra note 4, at 527; Henkin, Bricker, supra note 4, at 346.

185 Henkin, Bricker, supra note 4, at 346.

186 Id. at 348.
state laws and judges, and not, as RUDs critics would have it, as a limit on federal lawmaking power.

Four examples illustrate this point. First, the Supremacy clause makes federal statutes, like treaties, the supreme law of the land. It is well settled, however, that Congress has the power to specify that federal laws do not preempt state law, do not invalidate prior federal law, or are not subject to enforcement in federal or state courts. Second, the Constitution is also part of the supreme law of the Land, yet many constitutional provisions are non-self-executing. For example, most of the grants of federal court jurisdiction in Article III are non-self-executing. Third, congressional-executive agreements – which are equivalent to treaties on the international plane – are considered part of the supreme law of the land, but it is widely accepted that Congress and the President can limit the self-executing effect of these agreements. Fourth, and most directly relevant, it has long been settled that, notwithstanding the Supremacy Clause, not all treaties are self-executing.

With respect to the last point, critics of the RUDs generally concede that not all treaties are self-executing, but they argue that the self-execution issue must be resolved solely by the terms of the treaty, not conditions imposed on the treaty by the Senate or President. Nothing in the language of the Supremacy Clause or in U.S. historical traditions suggests that this is true. As noted above, federal lawmakers generally have the power to limit the domestic effects of their enactments, and there is no reason to believe that lawmaking by treaty should be viewed differently. Moreover, it has long been accepted

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187 There is some debate over the limits of Congress’s power to preclude federal statutes from judicial review in federal courts, but it is settled that Congress has some such power, and any limits on such power do not come from the Supremacy Clause. See generally Richard A. Fallon et al., Hart and Wechsler’s The Federal Courts and the Federal System 348-87 (4th ed. 1996).

188 See id. at 28.

189 See Restatement (Third), supra note 22, § 111.

190 See, e.g., Henkin, Foreign Affairs, supra note 18, at 217 n.*; Damrosch, supra note 4, at 525-26; Riesenfeld & Abbott, supra note 4, at 641. For example, in the Uruguay Round Agreements Act, which authorizes the latest GATT agreement, Congress stated that “No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States shall have effect.” Pub. L. No. 103-465, 108 Stat. 4809, § 102 (1994). Congress also stated that no one other than the United States “shall have any cause of action or defense under any of the Uruguay Round Agreements” or challenge “any action or inaction of . . . the United States, in any State, or any political subdivision of a state on the ground that such action or inaction is inconsistent” with one of the agreements. Id. § 102(c)(1).


192 Critics of the RUDs often quote from early historical materials to the effect that the inclusion of treaties in the Supremacy Clause was designed to reduce treaty violations attributable to the United States. They argue that non-self-execution declarations contravene
that certain treaties (such as those that declare war, create criminal liability, appropriate money, or impose taxes) are non-self-executing. In these instances, domestic separation of powers considerations are thought to compel non-self-execution, regardless of the terms of the treaties.

In any event, even if it were true that the issue of self-execution had to be determined solely by reference to the terms of the treaty, the United States’ non-self-execution declarations are in fact part of the terms of the treaties. They are included within the U.S. ratification documents that define the nature of the U.S. obligations to other countries, and all other parties to the treaties are on notice of them. Moreover, unlike some of the United States’ substantive reservations, no nation has specifically objected to the non-self-execution declarations. And it would be difficult for any nation to do so, since many nations’ constitutions render all treaties non-self-executing and require separate implementing legislation for the treaties to have domestic force. Thus, even if the treatymakers could only control the domestic scope of a treaty by including limitations within the treaty itself (a point for which there is no support), that is precisely what the non-self-executing declarations accomplish.

2. Scope of the Treaty Power

The second argument made against the non-self-execution declarations is that, even if they do not violate the Supremacy Clause, they exceed the scope of the treaty power. Here it is argued that Article II only allows the
treatymakers to make “Treaties,” and that the non-self-execution declarations are not encompassed within that term. These declarations, the argument goes, concern only the domestic implementation of the treaty and thus are not part of the international agreement itself.\textsuperscript{196}

There are many problems with this argument. First, as noted above, the non-self-execution declarations are included with the U.S. instrument of ratification, and other nations are therefore on notice of the declarations and have an opportunity to object to them. As a result, it is unclear why they do not form part of the international agreement – the “Treaty,” to use the term in Article II – entered into by the U.S. treatymakers.

Second, to the extent that critics of the RUDs are arguing that the treatymakers lack the power to include treaty conditions that are “domestic” in nature, their argument proves too much. If the treaty power were limited to truly “international” matters, human rights treaties, and not just their non-self-execution declarations, would be suspect. These treaties regulate the internal relationships between governments and their citizens. Moreover, as international tribunals have recognized, these treaties do not impose reciprocal obligations in any meaningful sense.\textsuperscript{197} For these reasons, a number of international law scholars, as well as the \textit{Restatement (Third) of Foreign Relations}, have denied that there is any subject matter limitation on the treaty power.\textsuperscript{198} Critics of the RUDs have not disputed this general proposition; instead, they claim that the treatymakers, in effect, have unlimited power to make treaties but no power whatsoever to determine the treaties’ domestic effect. There is nothing in the Article II treaty clause that suggests such an unlikely distinction.

Third, even if there were a subject matter limitation on the \textit{substantive terms} that the U.S. treatymakers could agree to, it would still reasonable to conclude, as argued above, that the power to make such treaties includes within it the power to control the domestic implementation of the treaties. Just as Congress’s Article I powers to make legislation include the power to limit the effect of the legislation in U.S. courts, so too should the treatymakers’

\textsuperscript{196} See, e.g., Halberstam, supra note 4, at 69; Quigley, The International Covenant, supra note 4, at 1303-05; Riesenfeld & Abbott, supra note 4, at 590-600; Dearborn, Note, supra note 4, at 239-44.

\textsuperscript{197} For example, as noted above, the International Court of Justice has stated that with human rights “one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties.” See supra note 122 and accompanying text. Similarly, the ICCPR’s Human Rights Committee has stated that human rights treaties “are not a web of inter-State exchanges of mutual obligations” and that the “principle of inter-State reciprocity has no place” in this context. General Comment 24(52), supra note 102, at ¶ 17.

\textsuperscript{198} See Henkin, Foreign Affairs, supra note 18, at 197-98; Restatement (Third), supra note 22, § 302, reporters’ note 2.
Article II powers to make treaties be construed to include the power of domestic limitation.\textsuperscript{199}

This conclusion is reinforced by the changed nature of treatymaking. As an original matter, the Framers never could have imagined, and probably did not intend, that the treaty power would extend to treaties with other nations concerning how the United States should treat its own citizens.\textsuperscript{200} Rather, original constitutional understandings and long constitutional practice contemplate that changes in domestic rights protections should be made through the bicameral legislative process in order to ensure a broad domestic consensus. The non-self-execution declaration allows the United States to commit itself to international human rights protections while at the same time accommodating this basic constitutional principle. This is a perfectly legitimate decision under international law, which does not require any particular form of domestic implementation.\textsuperscript{201}

Additional support for this conclusion comes from the practice of congressional-executive agreements. As mentioned above, non-self-execution declarations can be attached to congressional-executive agreements.\textsuperscript{202} This shows that nothing inherent in the power to make international agreements precludes control over the domestic scope of these agreements. In addition, the dramatic increase in the use of congressional-executive agreements in place of treaties has been justified on the ground that the bicameral process for making international agreements better reflects majoritarian preferences than the two-thirds Senate consent process.\textsuperscript{203} But this is precisely the same end that is served by non-self-execution declarations, which ensure that important domestic legal changes are implemented through the bicameral legislative process. The non-self-execution declarations thus promote the same

\textsuperscript{199} See Restatement (Third), supra note 22, § 303, reporters’ note 4 (explaining that the attachment of a non-self-execution declaration by the Senate “is an expression of the Senate’s constitutional authority to grant or withhold consent to a treaty”).

\textsuperscript{200} See, e.g., The Federalist No. 64, at 390 (John Jay) (Clinton Rossiter ed., 1961) (noting that treaties will concern issues such as “war, peace, and commerce”); The Federalist No. 75, at 450-51 (Alexander Hamilton) (stating that treaties are “not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign”); The Debates in the Convention of the Commonwealth of Virginia, reprinted in 3 Elliot’s Debates 504 (Jonathan Elliot ed., 2d ed. 1888) (statement by Edmund Randolph that “neither the life nor property of any citizen, not the particular right of any state, can be affected by a treaty”); id. at 514 (statement of James Madison that “[t]he object of treaties it the regulation of intercourse with foreign nations, and is external”).

\textsuperscript{201} See Louis Henkin, et al., International Law: Cases and Materials 153 (3d ed. 1993); see also Henkin, Bricker, supra note 4, at 346 (“International law requires the United States to carry out its treaty obligations but, in the absence of special provision, does not prescribe how, or through which agencies, they shall be carried out.”).

\textsuperscript{202} See supra note 190 and accompanying text.

\textsuperscript{203} See, e.g., Henkin, Foreign Affairs, supra note 18, at 217.
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D. Potential Limits

Nothing in the analysis thus far suggests that there are limitations on the conditional consent power of the President and Senate. We can imagine two possible limitations. We do not embrace these limitations; we merely wish to show that these plausible limitations would not apply to the conditions imposed in connection with human rights treaties.

One possible limitation is that the condition must have some relationship to the treaty. As the Restatement (Third) of Foreign Relations Law argues, “Surely, a condition that has no relation to the treaty would be improper, for example, a requirement that the President dismiss or appoint some cabinet officer.”204 This limitation is simply a weak nexus requirement that presumably attaches to all exercises of constitutional power.205 As the Restatement (Third) acknowledges, the non-self-execution declarations meet this requirement, since they concern the terms and domestic status of the treaty in question.206

A second possible limitation is that the Senate cannot use its conditional consent power to alter pre-existing federal law. This limitation is suggested by the D.C. Circuit’s decision in Power Authority of New York v. Federal Power Commission.207 The question there was the validity of a Senate condition, labeled a “reservation,” to a treaty between the United States and Canada concerning use of the waters of the Niagara River.208 The reservation stated that “no project for redevelopment of the United States’ share of such waters shall be undertaken until it be specifically authorized by Congress.”209 The question in Power Authority was whether the reservation invalidated the Federal Power Commission’s pre-existing licensing authority under the Federal Power Act of 1920.210 The D.C. Circuit concluded that the reservation

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204 Restatement (Third), supra note 22, § 303, cmt. d.
205 For example, the Supreme Court has held that conditions attached by Congress in the exercise of its spending power must have a reasonable relationship to the purpose of the spending. See South Dakota v. Dole, 483 U.S. 203, 207-08 (1987).
206 See Restatement (Third), supra note 22, § 303, cmt. d.
207 247 F.2d 538 (D.C. Cir. 1957), vacated and remanded with directions to dismiss as moot sub nom., 355 U.S. 64 (1957).
208 See Convention on Uses of the Waters of the Niagara River, Feb. 27, 1950, United States-Canada, 1 UST 694, TIAS No. 2130.
209 1 U.S.T. 694, 699.
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did not have this effect because it was not intended by the Senate to be a condition of ratification.211

In reaching this conclusion, the court suggested that if the Senate had intended the statement to be a condition of ratification, the condition might have been beyond the Senate’s powers. To the extent that the court was insinuating that non-self-execution declarations per se are constitutionally suspect, we disagree for the reasons already outlined above.212 Our present concern is with a narrower limitation suggested by Power Authority. The Senate’s “reservation,” if treated as a binding treaty condition, would have limited the effect of a pre-existing domestic statute that, by its terms, governed the development of the Niagara River waters. The court might have believed that the Senate was attempting, through its conditional consent power, to change existing law without the involvement of the House of Representatives.213 Assuming that this characterization of the Niagara reservation is accurate,214 such an exercise of the conditional consent power might exceed the Senate’s powers under Article II.215 Such a limitation, however, would not affect the validity of non-self-execution declarations, which are designed to avoid changing existing law without full participation of the House.

211 One of the three panel judges dissented, arguing that the Senate intended its “reservation” to be a condition of ratification and that the condition was a valid exercise of the Senate’s advice and consent power because it was related to the treaty. The dissenting judge also argued that if the condition were in fact beyond the Senate’s powers, the United States would not be a party to the treaty at all because the Senate would not have given effective consent. See 247 F.2d at 544 (Bastian, J., dissenting).

212 Some have drawn this inference from the court’s statement that the Constitution might not allow the federal treatymakers to create binding treaties, or conditions on treaties, addressing matters of “purely domestic concern.” 247 F.2d at 543. See Halberstam, supra note 4, at 69; Quigley, The International Covenant, supra note 4, at 1303-05; Riesenfeld & Abbott, supra note 4, at 590-600. For a famous, and in our view convincing defense of the Niagara reservation’s validity, see Henkin, The Treaty Makers, supra note 34; see also Damrosch, supra note 4, at 527 n.48 (concluding that the reasoning of the Power Authority decision “would probably not be extended to non-self-executing declarations”); cf. 247 F.2d at 542 (stating that “[t]he Senate could, of course, have attached to its consent a reservation to the effect that the rights and obligations of the signatory parties should not arise until after the passage of an act of Congress” and that “[s]uch a reservation, if accepted by Canada, would have made the treaty executory”).

213 That is precisely how Professors Philip Jessup and Oliver Lissitzyn characterized the issue in a brief they submitted in support of the Power Authority. See Opinion of Phillip C. Jessup & Oliver J. Lissitzyn for the Power Authority of the State of New York (Dec. 1955), quoted in Bishop, supra note 116, at 319-20.

214 Professor Henkin contested that characterization of the Niagara reservation, arguing that “[t]he President and Senate have merely refused to throw new and valuable resources into an old established system of development which Congress may not have intended and may not now desire.” Henkin, The Treaty Makers, supra note 34, at 1174.

215 On the other hand, longstanding case law suggests that the U.S. treatymakers acting together have the power to override a prior inconsistent federal statute, see supra note 154, so it is not entirely clear why the Senate cannot condition its consent on such an effect.
E. Federalism

As noted, the package of RUDs typically includes a federalism understanding that emphasizes that the treaties do not affect the constitutional balance of authority between the State and Federal governments. Many commentators believe that there are no federalism limitations on the treaty power, and they therefore question the need for these understandings. For reasons we have articulated elsewhere, we disagree with this view. The important issue for now, however, is not necessity, but rather the legality of the federalism understandings.

The most common legal argument made against the federalism understandings is that they are inconsistent with the general liability of federal nations under international law for the actions of their constituent states. This principle is reflected in Article 50 of the ICCPR, which states that “[t]he provisions of the present Covenant shall extend to all parts of federal states without any limitations or exceptions.” This argument is obviously not a domestic constitutional argument. In any event, the argument is beside the point because the federalism understandings do not purport to deny the liability of the United States for the actions of its states. Rather, they simply note that, because of the federal nature of the U.S. government, some of the treaty obligations may be implemented at the state rather than federal level. As the Bush Administration explained when it submitted a federalism understanding to the Senate in connection with the ICCPR, “the intent is not to modify or limit U.S. undertakings under the Covenant but rather to put our future treaty partners on notice with regard to the implications of our federal system concerning implementation.”

216 See Henkin, Bricker, supra note 4, at 345; Weissbrodt, supra note 4, at 66; see also Damrosch, supra note 4, at 530-31 (arguing that non-self-execution declarations are not needed to protect federalism).

217 As one of us has explained elsewhere, commentators who view the federalism understandings as unnecessary may be reading Missouri v. Holland, 252 U.S. 416 (1920), more expansively than is warranted. See Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 425-26 (1998). Although the Court in Holland did suggest that the treaty power was broader than Congress’s Article I powers, it did not hold that the treaty power was immune from all federalism limitations. See 252 U.S. at 433-34 (“We do not mean to imply that there are no qualifications as to the treaty-making power; but they must be ascertained in a different way. . . . We must consider what this country has become in deciding what [the Tenth] Amendment has reserved.”). In any event, Holland was decided before the development of both modern human rights treaties and the tremendous expansion of Congress’s domestic legislative powers – developments that might alter the need for, and desirability of, the Holland approach to the treaty power. This conclusion finds support in the Supreme Court’s renewed emphasis on federalism limits on the national government, even in the foreign affairs context. See generally Curtis A. Bradley & Jack L. Goldsmith, The Abiding Relevance of Federalism to U.S. Foreign Relations, 92 Am. J. Int’l L. 675 (1998).

218 ICCPR Report, supra note 69, at 18.
In a recent article, Professor Carlos Vazquez cleverly attempted to use constitutional federalism concerns against the federalism understandings. As he notes, the Supreme Court in recent years has held that the Tenth Amendment bars the federal government from “commandeering” state governments. Vazquez argues that if this anti-commandeering restriction applies to the treaty power, it might be violated by the federalism understandings. He observes that the United States has an international law duty to implement its treaty obligations. “Thus,” he says, “the federalism understanding, alongside the non-self-executing declaration appears to commandeer state legislatures to pass the laws the treaty requires.”

The obvious response to Vazquez is that the federalism understandings are not intended to compel state action. These understandings, in other words, are not designed to carry out an international law duty, but rather to make a political statement about the federal nature of the U.S. system. As a Legal Adviser to the State Department explained to the ICCPR’s Human Rights Committee, the federalism understanding “is not a reservation and does not affect [the United States’] international obligations under the Covenant, but rather concerns the steps to be taken domestically by the respective federal and state authorities.” Vazquez recognizes this possibility, but replies that “if the purpose of the understanding is to make compliance with these treaties ultimately a matter of the states’ option, then the resulting regime is in deep tension with our constitutional scheme.” It is in deep tension with our constitutional scheme, he says, because it allows for the possibility that some state violations of treaties will not be prevented by the federal government. Vazquez thus ultimately returns to the argument, discussed above, that the Supremacy Clause is designed to reduce treaty violations. The historical evidence, however, does not show that it was designed to reduce treaty violations allowed by the federal government. By analogy, the dormant Commerce Clause is designed to reduce state interference with interstate commerce, but it does not preclude the federal government from authorizing

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221 Vazquez, Breard, supra note 220, at 1356.
222 Statement by Conrad K. Harper, Legal Advisor, U.S. Department of State, to the ICCPR’s Human Rights Committee, USUN Press Release #49-(95) (March 29, 1995); see also Stewart, supra note 82, at 1202.
223 Vazquez, Breard, supra note 220, at 1357-58.
224 See supra note 192.
such interference.  

In any event, Vazquez is wrong to assume that it is the understandings that might make treaty compliance “a matter of the states’ option”; to the extent that anything has that effect, it is the federal structure of the Constitution, and the understandings merely highlight that possibility.

V. POLICY IMPLICATIONS OF CONDITIONAL CONSENT

We have tried to show why the United States’ RUDs practice is consistent with both international law and U.S. constitutional law.  Critics of the RUDs, however, do not rely solely on legal arguments.  Closely tied to their legal objections is the view that the RUDs practice is, regardless of its legality, bad policy.  The policy criticisms are of two general types.  The first concerns the message that RUDs send to the international community.  The message, it is claimed, is that the United States does not take international human rights law seriously.  

The second criticism concerns the effect this message has on the international community.  This effect is supposedly to undermine international human rights protection.  

As we explain below, these criticisms are misplaced on several levels.  Perhaps most importantly, they fail to take account of the many virtues of the RUDs practice.  They also rest on a perfectionist view of international human rights law, as well as an idealized view of domestic and international politics.  And, ironically, they might well do more harm than good with respect to U.S. participation in international human rights law regimes and, because U.S. participation appears so crucial, to the broader human rights movement itself.

A. Virtues of the RUDs

Human rights treaties – and especially treaties like the ICCPR – have a dual nature.  They are in part law – a single legal text designed to establish international obligations among all of the countries of the world.  And they are

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225  See, e.g., Northeast Bancorp v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 174 (1985) (“When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.”).

226  See Henkin, Bricker, supra note 4, at 341 (“As a result of those qualifications of its adherence, U.S. ratification [of the human rights treaties] has been described as specious, meretricious, hypocritical.”); Paust, supra note 4, at 1257 (“Rarely has a formal attempt at adherence to a treaty been so blatantly meaningless and so openly defiant of its terms, the needed efficacy of its norms, and the very possibility of its direct application as supreme law of the land.”).

227  See, e.g., Henkin, Bricker, supra note 4, at 344 (“U.S. ratification practice threatens to undermine a half-century of effort to establish international human rights standards as international law.”); Weissbrodt, supra note 4, at 78 (“By offering such an extensive and intensive set of reservations to the Covenants . . . those who drafted these proposals may have undermined the basic purpose of ratifying these treaties: encouraging the implementation of human rights throughout the world.”).
in part aspirational – broad, universalistic norms designed to change national and individual attitudes toward human rights in the face of substantial variations in culture, political systems, moral commitments, and the like. Given this dual nature, as well as the heterogeneity of the world community, it is virtually impossible to reach agreement on a treaty text that is acceptable to all nations. This is why, as the founders of the human rights movement realized, conditional consent is so important. The practice mediates the legal and aspirational natures of human rights treaties. It recognizes that nations of the world are politically and culturally diverse, and makes it possible to reach agreement on and movement toward general principles of human rights while at the same time accommodating national differences.  

This mediating function has been particularly crucial for U.S. participation in the international human rights movement. Since the Founding, many segments of American society have ferociously resisted international entanglements. Sometimes this resistance has been grounded in crass xenophobia. Often, however, it has rested on more defensible grounds. One such ground is a fundamental belief in self-government. This belief underlies both a preference for local decisionmaking and a general concern about the non-democratic and non-transparent ways in which much international law is made. In addition, many Americans are understandably proud of the human rights protections guaranteed by the Bill of Rights and reconstruction Amendments, and the vigorous domestic judicial system that enforces them. They worry that U.S. involvement in international human rights regimes might threaten these domestic rights protections, as well as the liberties guaranteed by separation of powers and federalism. A final ground for resisting international entanglements is the belief that Americans can improve the lot of humanity abroad not by active engagement in international and foreign affairs, but rather by the excellence of its “example [as a] humane, democratic, and prosperous society.”

Whatever its source and motivation, U.S. resistance to international entanglements has been an especially potent force in the twentieth century, resulting in (among other things) the U.S. rejection of the Versailles treaty, the

228 In this respect, conditional consent is akin to the European Court of Human Rights’ “margin of appreciation” doctrine, which gives deference to national differences when enforcing the universalistic norms of the European Convention on Human Rights. The doctrine recognizes that in and among pluralistic democratic societies, there is reasonable scope for disagreement over the requirements of broadly-worded human rights provisions. The doctrine thus aims to reconcile the tension between national democratic decisionmaking and universal aspirational norms. It also aims to avoid damaging confrontations with national authorities, and thereby gradually to legitimize international human rights norms. See generally Howard Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (1996).

Bricker Amendment debates, and the forty-year refusal to ratify modern human rights treaties.\footnote{230}{See generally Edward Luck, Mixed Messages: American Politics and International Organization, 1919-1999 (1999); Kaufman, supra note 49.} Against this background, the RUDs are an extraordinarily important development. They helped break the logjam in domestic politics that had prevented U.S. ratification of any of the major human rights treaties.\footnote{231}{See supra Section II(B).} And, contrary to conventional wisdom in the human rights community, they did not do so in a way that rendered human rights commitments empty promises. Even with the RUDs, the United States has bound itself to almost all of the obligations in each of the four major human rights treaties it has ratified. It has enacted domestic criminal, civil, and immigration laws to implement the Genocide and Torture Conventions.\footnote{232}{See supra note 109.} Although the United States maintained that its pre-treaty domestic laws satisfied its obligations under the ICCPR and the Race Convention, it legally committed itself not to retreat from those laws. Finally, pursuant to the treaties, the United States has opened its domestic human rights practices to official international scrutiny by filing with international bodies a number of reports that describe and defend U.S. human rights practices.

In these and other ways, the United States has made genuine and significant progress toward involvement in the international human rights system. It is clear that these steps would not have been taken without the RUDs as a condition for U.S. ratification. Almost as remarkable as the U.S. evolution towards participation in international human rights regimes is the consensus among U.S. policymakers concerning the wisdom of the RUDs approach. RUDs have had the support of every President and the large majority of every Senate since the United States began considering the modern human rights treaties in the 1970s. This bipartisan and inter-branch agreement is extraordinary when considered against the backdrop of the United States’ historical antagonism towards international human rights law. RUDs made this possible.

With these points in mind, we now consider the specific policy objections made against the RUDs.

B. Message of the RUDs

One prominent criticism of the RUDs is that they send a message of disrespect for international law in general, and international human rights law in particular.\footnote{233}{See Henkin, Bricker, supra note 4, at 344; see also, e.g., Schabas, supra note 4, at 283-84. The legal aspects of this criticism were considered above in Part III.} We have just reiterated why U.S. human rights commitments
under the treaties, even with the RUDs, are far from empty promises. It is equally incorrect to say that the RUDs show disrespect for international law.

Consider first the U.S. reservations, which decline to consent to treaty provisions that violate the U.S. Constitution or that are inconsistent with widely-supported criminal justice practices. The decision by the United States not to embrace these relatively few provisions does not constitute disrespect for international law. Many nations, including the most progressive nations in Western Europe, have similarly conditioned their consent to the treaties.\textsuperscript{234} While some nations have consented to the human rights treaties without condition, there does not appear to be any correlation between these nations (which include nations like Libya and Iraq) and respect for international human rights law. As Arthur Rovine, a former Assistant Legal Adviser to the State Department, has noted, “It is easy to sign a human rights treaty without any reservations. Many authoritarian regimes have done so.”\textsuperscript{235} The central problem for international human rights law has not been selective consent to treaty terms, but rather the failure by nations to adhere to the treaty terms to which they have consented. The U.S. RUDs are expressly designed to ensure that the United States does not consent to an international obligation that it is unable, for constitutional or political reasons, to obey. One can object that the United States has not assumed all of the obligations under the human rights treaties, but it is wrong to conclude that the U.S. practice of declining consent to a small number of human rights obligations shows disrespect for international law. To the contrary, it is much more plausible to conclude that the care with which the United States crafts its consent shows respect for international law and an intention to comply with such law.\textsuperscript{236}

We make these points without purporting to defend the U.S. reservations, and the practices they immunize from international obligation, on their moral merits. We do not believe that the reservations can all be easily defended from this perspective, and, in any event, such a defense would

\textsuperscript{234} See supra Section III(B).


\textsuperscript{236} As Senator Moynihan explained in urging ratification of the ICCPR:

“The administration has not taken a blanket, or catchall reservation. It has not said that our domestic practices, wherever they differ from the covenant, are always superior. Rather, it has undertaken a meticulous examination of U.S. practice to insure that the United States will in fact comply with the obligations that it is assuming. This can certainly be viewed as an indication of the seriousness with which the obligations are regarded rather than as an expression of disdain for the obligations.”

require a different article. Briefly stated, the substantive reservations inspired by free speech concerns, and the interpretive reservations defining the contours of U.S. commitments concerning criminal procedure and discrimination, strike us as the easiest to defend on moral grounds. The juvenile death penalty, which has provoked international condemnation, and which is the touchstone of so many complaints about U.S. human rights practices, strikes us as harder to defend.

What is important for present purposes, however, is not our or any one else’s views about the moral desirability of domestic laws enacted in a free and democratic process. Whatever the moral desirability of the practice, the United States shows no disrespect for international law in not abolishing it, for it has steadfastly declined to consent to any such international law, either in a treaty or by custom. The United States has, it is true, largely ignored international disapproval of the juvenile death penalty (and the death penalty more generally), and it is certainly appropriate for nations (not to mention U.S. citizens) that disagree with this practice to criticize the United States. Nothing in our analysis takes issue with this. We insist only that being out of step with the rest of the world is not, in itself, a reason for a nation to change its domestic practices, and it certainly does not constitute disrespect for international law.

It is also incorrect to contend that the U.S. declaration of non-self-execution shows disrespect for international law. Many nations require implementing legislation before a treaty has domestic effect, and there is no general obligation that a nation implement a treaty in any particular way. Moreover, the United States is under no obligation to change its domestic law after ratifying a human rights treaty if its law already satisfies the treaty obligations. Under the terms of the ICCPR, for example, nations are required to take steps to protect the rights under the treaty only if the rights are “not already provided for by existing legislative or other measures.”237 The non-self-execution declarations therefore can be justified by the fact that the United States already provides adequate domestic legal protections to fulfill its international obligations.

This latter proposition – that U.S. domestic law satisfies U.S. international human rights obligations – is open to debate. The reason it is open to debate, however, only strengthens the case for the non-self-execution declaration. It is open to debate because many human rights treaty terms are couched in broad, open-ended terms. The resulting vagueness, combined with the absence of an authoritative treaty interpreter, makes it difficult if not impossible in many contexts to determine with certainty whether or not U.S. domestic law satisfies its international obligations.

237 ICCPR, art. 2(2).
Consider just a few of literally hundreds of possible examples from the ICCPR. Can one say for sure that the absence of proportional representation in the United States is consistent with the ICCPR’s “right of self-determination”?\(^{238}\) Is the Supreme Court’s rejection of *Lochner*-style economic rights consistent with the ICCPR’s guarantee of freedom “to determine . . . economic development”?\(^{239}\) Are U.S. campaign finance laws consistent with the international human right to “have access, on general terms of equality, to public service”?\(^{240}\) Is the United States’ failure to prohibit discrimination against overweight people, brown-eyed people, and Chicago Cubs baseball fans consistent with its obligation to “prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . status”?\(^{241}\)

These questions, which can proliferate almost endlessly, show how difficult it is to tell for sure whether the United States is complying with all the terms of a human rights treaty. This point sheds light on the persistent complaints that the United States is in widespread violation of the ICCPR. One can indeed interpret the ICCPR’s terms to call into question scores of domestic laws in the United States and many other western democracies. But one can also easily read the ICCPR obligations as satisfied by current U.S. domestic law. There is no authoritative international body to resolve this “legal” disagreement; the ICCPR contemplates only that nations will open their human rights practices for other nations to see and, if they like, criticize. The United States is a liberal democracy with extraordinary, although not perfect, statutory and constitutional human rights protections, and a federal judiciary that has historically protected individual rights. Its human rights protections come close enough to the line to conclude, with justification, that it need not incur the extraordinary litigation and uncertainty costs of directly incorporating these treaty terms into its domestic litigation system.

The U.S. preference for congressional rather than judicial monitoring of the extent to which domestic law comports with international obligations has an additional justification. Sometimes courts look to international bodies and the writings of scholars in giving content to international obligations. The ICCPR Human Rights Committee has no official interpretive authority over the ICCPR, but as its recent Comments on treaty reservations indicate,\(^{242}\) the Committee is not a body that views itself to be bound by consensus international law principles. Unfortunately, this desire to achieve progressive ends at the expense of broadly recognized international law principles also

\(^{238}\) See ICCPR, art. 19.

\(^{239}\) See id.

\(^{240}\) Id., art. 25.

\(^{241}\) Id., art. 26 (emphasis added).

\(^{242}\) See supra text accompanying notes 112-15.
characterizes many academic writings about international human rights law. Since these sources sometimes influence courts, it is understandable why the treatymakers want to maintain political, as opposed to judicial, control of the means of implementing the ICCPR’s open-ended obligations. Any other course of action, at least in the U.S. tradition, would constitute a standardless delegation of U.S. lawmaking power to federal courts and international bodies.

We should emphasize here that we are not suggesting that domestic law perfectly protects human rights, either as written or, especially, as enforced. But in the United States, anyway, international law is not the solution to these problems. The solution is to work within U.S. democratic and constitutional processes to effectuate change and improvement. The RUDs critics are obsessed with international solutions to human rights problems. But this obsession elevates form over substance. Sometimes internationalization of human rights norms – defined as the delegation of human rights responsibilities to a supra-national body – can help achieve domestic human rights reform. This was so in Europe, where there was a post-World War II desire for human rights improvement, but an absence of confidence in domestic institutions to achieve these ends. What works for Europe, however, will not necessarily work for the United States, which has a significantly different political culture (especially in its attitude towards international entanglements) and domestic human rights traditions. It was extraordinary for the United States to assent to the general norms in the ICCPR and to open its human rights practices to official international scrutiny. It does not follow, however, that human rights progress in the United States is best achieved by delegating the responsibility for determining the appropriate content of human rights to bodies outside the United States.

C. Effect of the RUDs

We now move from the meaning of the RUDs to their effect on the international human rights movement. We have seen no empirical evidence to support the claim that the RUDs practice undermines or threatens international human rights law or the international human rights movement. And there is much evidence to the contrary. The United States began ratifying modern human rights treaties fifteen years ago, and it has attached RUDs to all of the treaties. Yet during this same period international human rights law has, by any measure, flourished. It is of course possible that the human rights movement would have flourished even more in the absence of U.S. RUDs.

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244 For example, over 140 nations are now parties to the ICCPR, and over 50 of these nations became parties in the 1990s.
But beyond vague and conclusory platitudes, the critics of the RUDs have not explained how or why this is so.245

The claim that the U.S. RUDs practice harms the human rights movement becomes even less convincing when one considers the many ways that the United States influences human rights development around the world outside the context of the human rights treaties. The United States exerts much of its influence through the example of its own human rights standards, which RUDs have not diminished at all. The United States is also the nation that most aggressively enforces human rights standards in other countries – a practice once again unaffected by the RUDs. More broadly, perhaps the greatest advance for international human rights was the defeat of the Soviet Union in the Cold War. The U.S. RUDs did not delay this victory. Indeed, the RUDs were designed in part to increase U.S. participation in the international human rights community in order to rebut Cold War propaganda about U.S. human rights practices.246

These points indicate another error in the claim that the U.S. RUDs harm international human rights law. These criticisms assume an inappropriate baseline of comparison. They assume that compared to U.S. ratification without RUDs, RUDs harm international human rights. This is an inappropriate baseline of comparison because the RUDs were clearly a precondition to any U.S. ratification.247 The appropriate realistic question is whether U.S. ratification with RUDs or no U.S. ratification whatsoever is better for the international human rights movement. Viewed this way, it is hard to say that the RUDs, which facilitate U.S. engagement in the international human rights movement, harm the movement.

A related argument is that the RUDs undermine the United States’ ability to influence other nations’ human rights practices. The RUDs weaken U.S. credibility on human rights issues, the argument goes, thereby diminishing the effect of its moral pressure.248 Again, critics have presented no

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245 When President Carter first proposed the RUDs package in the late 1970s, commentators expressed concern that the RUDs practice would induce other nations to opt out of many of the important treaty provisions. See, e.g., Weissbrodt, supra note 4, at 56. But this has not happened.

246 See generally 1979 Hearings, supra note 66.

247 See supra text accompanying notes 71-73, 147; see also CRS Study, supra note 14, at 232; Stewart, supra note 82; Rovine, supra note 235, at 54; U.S. Response, supra note 147.

248 See, e.g., Bassiouni, supra note 4, at 1173 (“The Senate’s practice of de facto rewriting treaties, through reservations, declarations, understandings, and provisos, leaves the international credibility of the United States shaken and its reliability as a treaty-negotiating partner with foreign countries in doubt.”); Damrosch, supra note 4, at 515-16 (“Regrettably, the non-self-executing declaration and others of its ilk could undermine the efficacy of the treaties to which they apply, both within the United States and in terms of the potential for the United States to exercise constructive influence abroad.”).
empirical evidence to support this proposition. Evidence to the contrary includes the fact that most nations have not objected to the RUDs as well as the fact that no nation has refused to enter into a treaty relationship with the United States as a result of its RUDs. And when countries criticize U.S. credibility on human rights, usually in response to human rights criticisms from the United States, they do not attack the RUDs. Rather, they attack substantive practices like discrimination, police abuse, and the like.249 This suggests that the U.S. RUDs are not the currency of moral complaint, at least not in political debates between nations (as opposed to complaints from human rights activists).

We cannot, and do not, claim that the U.S. RUDs practice has no effect whatsoever on international affairs. If nothing else, they probably feed the suspicion in some circles that the United States is an arrogant superpower that disdains international law. We have tried to show that the premise of this complaint – that the U.S. RUDs practice shows disrespect for international law – is much less warranted than conventional wisdom suggests. But perceptions matter in international relations, and this perception, warranted or not, might influence the international human rights movement. The RUDs critics have not, however, explained how this influence occurs or its effect; nor have they shown that any realistic alternative to the U.S. RUDs practice would be better for the human rights movement.

VI. CONCLUSION

The rise of human rights treaties has placed great demands on the United States’ treatymaking process. The U.S. treatymakers face international pressures to ratify human rights treaties and participate in international human rights regimes. They also face significant domestic opposition to these treaties grounded in a variety of factors ranging from concerns about altering domestic constitutional lawmaking processes, to general satisfaction with the domestic human rights law regime, to fear of international entanglement.

The RUDs are a reasonable and largely successful response to these competing pressures. They have allowed the United States to make genuine international human rights commitments, and to participate fully in debates about, and development of, international human rights law. They also have opened up U.S. human rights practices to official international scrutiny. These are extraordinary advances for a nation that has instinctively, and sometimes vehemently, resisted the relinquishment of its sovereignty to international law and institutions.

At the same time, the RUDs protect a range of domestic prerogatives. They ensure that the United States does not make international legal commitments that it cannot fulfill for domestic constitutional or political reasons. They leave the concrete implementation of vague human rights commitments to the federal political branches rather than the federal courts. They also help preserve Congress’s traditional role in enacting domestic human rights protections, as well as the states’ traditional role in regulating local matters. As we hope to have shown, the RUDs achieve these many ends consistent with both international law and U.S. constitutional law.

In light of these points, it might seem surprising that the legal academy and the international human rights community are so uniformly opposed to the RUDs. Their opposition to the RUDs, however, is simply one example of the idealistic and perfectionist orientation of these groups – an orientation that tends to overvalue the role of international institutions and undervalue domestic political and structural concerns. Although idealism has its place in human rights advocacy, the stridency, exaggeration, and impatience that characterize the opposition to the RUDs threatens to make U.S. officials less inclined, not more inclined, to continue their involvement with international institutions. In this respect, as with so many other international human rights issues, the perfect becomes the enemy of the good, and aspiration becomes the enemy of the law.