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The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing Treaties"

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THE ROLE OF THE UNITED STATES SENATE CONCERNING "SELF-EXECUTING" AND "NON-SELF-EXECUTING" TREATIES

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This essay concerns a pattern in treaty actions of the U.S. Senate which tends to weaken the domestic legal effect of treaties. Under this pattern, the Senate qualifies its consent to U.S. ratification of the treaty with a declaration or other condition to the effect that the treaty shall be non-self-executing, or otherwise expresses its intention that the treaty shall not be used as a direct source of law in U.S. courts. Such qualifications, referred to hereinafter as "non-self-executing declarations,"[1] give rise to important questions about the place of the affected treaties within the fabric of U.S. law, especially in light of Article VI of the U.S. Constitution, which provides that treaties of the United States shall be the "supreme Law of the Land."[2]

Non-self-executing declarations must be viewed in the context of larger questions concerning the respective roles of the legislative, executive, and judicial branches in the implementation of international law. As a political phenomenon, the non-self-executing declaration belongs with the so-called "sovereignty reservation"[3] and related manifestations of Senatorial reluctance to affect internal U.S. law by means of treaties, and, more generally, with neo-isolationist preferences for shielding U.S. institutions from international trends. Proponents of the non-self-executing declaration argue that it does not impair U.S. treaty compliance but rather leaves the implementation of treaties to the appropriate domestic authorities; both elements of this proposition are subject to question. Re-

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1. Forms other than those labeled "declarations" might be used to the same effect. The shorthand term is not ideal: it is of course the treaty, not the declaration, that is intended to be non-self-executing.

2. U.S. CONST. art. VI, cl.2.

3. The "sovereignty reservation" to the U.S. ratification of the Genocide Convention, Dec. 9, 1948, 78 U.N.T.S. 277, provided as follows: That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States. *See* 132 CONG. REC. S1377 (daily ed. Feb. 19, 1986). In connection with the Torture Convention, notes 14 and 18 *infra*, the Senate endorsed similar language; but the form was to be a notification to all present and prospective ratifying parties rather than a reservation. *See* 136 CONG. REC. 17492.

grettably, 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. Nor are the declarations warranted in view of the constitutional theories justifying the Senate's role in the treaty process.

This essay does not challenge the validity of the basic distinction between self-executing and non-self-executing treaties under U.S. law, which is long-established (although not beyond question or criticism). Supreme Court cases going back to the early days of the Republic have made such distinctions,[4] even though Article VI of the Constitution does not use these categories or suggest that these distinctions can be made. The concept is essentially a judicial one, created by the courts to govern their own role with respect to treaties. In brief, U.S. courts have established a category of "self-executing" treaties that are treated as directly effective and immediately applicable in private lawsuits or otherwise, and have used the term "non-self-executing" to refer to treaties that require implementing action by the political branches of government or that are otherwise unsuitable for judicial application. This essay will not attempt to review the voluminous literature on the self-executing/non-self-executing concept in U.S. law,[5] still less in the law of other countries,[6] nor will it repeat the arguments advanced by others that some U.S. judicial decisions have improperly refused to accord self-executing effect to treaties that warranted direct judicial application.[7] Rather, in line with the theme of the present symposium, this essay will focus on the issues raised by the actions of the U.S. Senate in purporting to control the domestic judicial application of treaties.

It is the assumption of this essay that in declarations of this kind, the Senate has attempted to switch self-executing treaty provisions into

4. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

5. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, reporter's note 5 [hereinafter RESTATEMENT]; Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L. L 310 (1992); Jordan Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988).

6. *See* LUZIUS WILDHABER, TREATY-MAKING POWER AND CONSTITUTION 226-34 (1971). Since Wildhaber examined only pluralistic democracies, he had no occasion to consider the treaty practices of the former Soviet Union, which have lately been of interest to the present writer. Relevant Soviet literature includes REIN MULLERSON, SOOTNOSHENIE MEZHDUNARODNOGO I NATSIONAL'NOGO PRAVA [THE RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL LAW] 55-82 (1982).

Another recent study discusses cross-national comparisons is Jackson, *supra* note 5, at 310.

7. *See, e.g.*, Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties* and *U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980); Paust, *supra* note 5.

the non-self-executing category. That is, if the courts on their own would treat certain provisions as self-executing in the absence of any contrary indication from the "treaty-makers,"[8] the presence of such a declaration purports to reverse that outcome. Although it is hypothetically possible that the Senate might choose to append such declarations only to treaties that the courts would find non-self-executing on their own, that hypothesis does not fit the actual pattern in which such declarations have been used. In the cases discussed below, the Senate has acted out of an explicit or implicit motivation to preclude the courts from using the treaty as a source of law, even though the treaty by its nature or its terms would otherwise lend itself to direct judicial application.[9]

In the peculiar scheme established by Article II of the U.S. Constitution for making treaties, only the Senate participates in this particular form of international agreement, yet there is a widely shared view that the House of Representatives may be constitutionally required to participate with respect to at least some subjects that might be governed by treaty. Although scholars debate the proper delineation of spheres in which the President and Senate as treaty-makers must or should be joined by the Congress in the law-making mode, several areas are usually believed to require the House's participation, including:

- raising of revenue;
- appropriation of funds;
- enactment of criminal penalties; and
- declaration of war.[10]

Treaties making commitments in these fields are sometimes accompanied by an action on the part of the Senate (by reservation, declaration, or otherwise) recognizing the constitutional prerogatives of the other house of Congress; or, even in cases when the participation of the House is not necessarily required by the Constitution, the Senate might choose for political reasons to ensure that the House participates in the domestic implementation of the treaty.[11] To the extent that the Senate acts in def-

8. This term refers to the President and Senate acting together in the treaty mode. Strictly speaking, the declarations in question are actions of the "treaty-makers" rather than the Senate alone. The political impetus for a declaration in a particular case may originate with either the President or the Senate or be shared.

9. *See infra*, text at notes 18-41. The declarations are absent from treaties whose non-self-executing character is non-controversial in U.S. practice; they are not found, for example, in alliance or arms control treaties.

10. RESTATEMENT, *supra* note 5, § 111, cmt. *i* and reporter's note 6. Paust, however, questions the RESTATEMENT on this point.

11. *Cf.* Power Authority of New York v. Federal Power Commission, 247 F.2d 538 (D.C. Cir.), *vacated*, 355 U.S. 64 (1957) (Senate reservation provided that exercise of U.S. rights under treaty would await specific authorization by Congress).

erence to the more majoritarian House of Representatives, its action may be justifiable, but the actual pattern goes well beyond this concern. The Senate has used the non-self-executing declaration even as to issues where the House is not expected to take action, in order to preserve a particular model of federal-state relations and to avoid creating new sources of federal judicial jurisdiction.

In the opinion of this writer the trend toward non-self-executing treaty declarations is unfortunate and should be resisted. Domestic judicial application of international treaties should be encouraged in the interests of effective enforcement of international law as well as the development of a body of jurisprudence under the treaties. The U.S. Senate's motivations for precluding direct judicial application of the treaties doubtless include a justifiable pride in indigenous sources of U.S. law. But judicial application of treaties can enrich rather than pollute those sources, and there is no good reason for the Senate to prevent U.S. courts from contributing to the evolution of international practice.

Part I of this essay examines the usage of non-self-executing declarations in recent U.S. practice, with examples drawn from human rights treaties and economic agreements. Part II considers and criticizes the several rationales that might be proffered in justification of the use of non-self-executing declarations, and contends that the device should be confined to the limited class of cases when the House of Representatives is expected to become actively engaged in implementing the treaty.[12]

I. THE NON-SELF-EXECUTING DECLARATION IN U.S. PRACTICE

The non-self-executing declaration is not new in U.S. practice,[13] but this essay will concentrate on some of its most recent manifestations, especially as regards the Torture Convention.[14] Non-self-executing declarations and similar limiting techniques have also been used or recommended with respect to a variety of other human rights treaties that have been proposed for U.S. ratification. But the pattern is not confined to the human rights sphere: non-self-executing declarations have also been used in treaties of an economic character, including the Berne

12. For a different set of arguments criticizing non-self-executing declarations, *see* Charles H. Dearborn III, Note, *The Domestic Legal Effect of Declarations That Treaty Provisions are Not Self-Executing*, 57 TEX. L. REV. 233 (1979).

13. Riesenfeld, *supra* note 7, refers to historical examples.

14. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984) [hereinafter Torture Convention].

Convention for the Protection of Literary and Artistic Works.[15]

A. *Human Rights Treaties*

The issue of the self-executing or non-self-executing nature of human rights treaties has arisen whenever the U.S. administration has proposed or the Senate has taken up the question of potential U.S. adherence to such treaties. As is well known, treaty opponents led by Senator Bricker sought to amend the U.S. Constitution in the 1950s to thwart U.S. adherence to human rights treaties; and even after that effort failed, political opposition in the Senate made it impossible to bring such treaties forward for many years. Not until the advent of the Carter administration in 1977 was there any significant movement, and even then it was tentative and highly conditioned.

When the Carter administration asked the Senate to approve four human rights treaties in 1977 and a fifth in 1980, the executive branch's submissions would have had the Senate declare each of the treaties to be non-self-executing.[16] This move was intended to make the treaties more palatable to those who shared Senator Bricker's aversion to encroachment on areas traditionally falling within state rather than federal jurisdiction. There were differing opinions on what aspects of the treaties would have been self-executing in the absence of the declarations.[17] In any event, the Senate did not act on the treaties during the Carter administration's tenure, and the Reagan administration let them languish.

1. The Torture Convention

The Senate took up the Torture Convention at the request of Presidents Reagan and Bush and adopted a resolution of advice and consent to ratification on October 27, 1990 which included the following declaration: "(1) That the United States declares that the provisions of Articles

15. Sept. 1986, *as revised* at Paris, July 24, 1971, — U.S.T. —, T.I.A.S. No. —, 3 WIPO & UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD, Berne Conv. (Item H) (Supp. 1974).

16. The four treaties put forward in 1977-78 were the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, the International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, the International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, and the American Convention on Human Rights, July 19, 1978, *reprinted in* 9 I.L.M. 101 (1970). The 1980 submission concerned the Convention on the Elimination of All Forms of Discrimination Against Women. For discussion and criticism of the proposed non-self-executing declarations, see MALVINA HALBERSTAM & ELIZABETH DEFEIS, WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS — AN ALTERNATIVE TO ERA? 50-63 (1987); David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 66-72 (1978).

17. *See generally* International Human Rights Treaties: Hearings before the Sen. For. Rels. Comm., 96th Cong., 1st Sess., at (e.g.) 29-30, 40-41, 276-316, 346-49 (Nov. 14-19, 1979); *see also* PROC. AM. SOC'Y INT'L L. 218 (1978).

1 through 16 of the Convention are not self-executing."[18]

An executive branch lawyer who was involved in the effort to obtain the Senate's advice and consent to the Torture Convention has explained that the declaration means that Articles 1 through 16 "do not establish rights enforceable in United States courts unless and until Congress has approved implementing legislation."[19] He added:

> Given the language of the Convention, for example requiring each State Party to criminalize acts of torture and to take "effective legislative, administrative, judicial and other measures" to prevent such acts, there is little room to argue that the Convention was intended to be self-executing.[20]

With due respect to the author of the quoted passage, the argument that the Convention would have been non-self-executing even without the declaration is fallacious. Admittedly, *provisions* of the Convention requiring the enactment of criminal penalties would be non-self-executing both by their own terms and under U.S. law,[21] but that does not dispose of the remaining provisions. Just as the Senate's declaration differentiated between Articles 1-16 and the remainder of the Convention,[22] distinctions could easily have been made between provisions of the Convention that would be non-self-executing and provisions that would be self-executing.

An example of the latter is Article 15, which provides that statements made as a result of torture shall not be invoked as evidence in any proceedings. Substantively, this provision meets all the ordinary tests to qualify it as self-executing: it aims at securing rights invocable at the instance of private persons, it addresses itself to judicial action, and it is concrete enough to be applied by courts without further legislative direction. A U.S. court, confronted with a motion to suppress evidence on the grounds that the evidence was procured by torture, could readily treat Article 15 as self-executing and exclude evidence in reliance on it.

18. *See* 136 Cong. Rec. S17492 (daily ed. Oct. 27, 1990). As of the time this essay was prepared (fall 1991), the United States had not yet deposited its instrument of ratification of the Torture Convention because implementing legislation had not yet been enacted.

19. David P. Stewart, *The Torture Convention and the Reception of International Criminal Law within the United States*, 15 NOVA L. REV. 449, 467-68 (1991).

20. *Id.* at 468 n.67.

21. For example, Article 4, requiring state parties to "ensure that all acts of torture are offenses under its criminal law" and to "make these offenses punishable by appropriate penalties which take into account their grave nature," appears to be non-self-executing by its own terms and also falls within the category that U.S. courts and commentators have generally considered non-self-executing. *See* RESTATEMENT, *supra* note 5, § 111, cmt. *i* and reporter's note 6.

22. Articles 17-end generally concern the international rather than domestic implementation of the treaty (establishment and competence of the Committee against Torture; final clauses). Thus the question of their self-executing nature does not arise.

The question whether the Constitution and laws of the United States and the several states would require or authorize the same result on independent grounds is analytically distinct from the self-executing treaty issue, and the Administration and Senate may have improperly blurred that distinction. Although this is not the place for a full analysis of potential gaps between what is already established in U.S. law and what the Torture Convention provides, the same example of exclusion of evidence procured by torture can illustrate the point. While U.S. law does require suppression of evidence procured by torture in most circumstances that might arise in a U.S. court, recent cases cast doubt on whether U.S. legal protections satisfy the Torture Convention's requirements where certain transnational elements are involved. Specifically, (1) a non-U.S. citizen may not be able to invoke U.S. constitutional protections with respect to torture committed outside the United States, even if the perpetrators were U.S. officials; and (2) even U.S. citizens might not be protected by the constitutional rule of exclusion of evidence if the torturers were foreign officials.

As to the first situation, in *United States v. Verdugo-Urquidez*,[23] the U.S. Supreme Court refused to apply the Fourth Amendment of the U.S. Constitution to the seizure of evidence from the home of a non-U.S. citizen outside U.S. territory, and the Court's broadly written opinion casts doubt on whether an alien could rely on the Constitution as to any activity occurring outside the United States.[24] As to the second situation, U.S. criminal cases in which the defendant has sought to suppress evidence procured by torture occurring outside the United States have required the defendant (whether citizen or alien) to show that the torturers were U.S. rather than foreign officials, as a prerequisite for applying the Fourth Amendment's exclusionary rule.[25] As a presumptively self-executing provision, Article 15 of the Torture Convention could have supplied the protections that may be lacking under the U.S. Constitution, but now victims of torture in such cases would be left with only such legislative protections as Congress or the several states see fit to grant.

The Administration's argument concerning the alleged relationship between the non-self-executing declaration and potential implementing

23. 494 U.S. 259 (1990). For comprehensive discussion of the issues involved in constitutional claims by aliens, see Gerald Neuman, *Whose Constitution?*, 100 YALE L. J. 909 (1991).

24. Earlier cases from the lower courts, including United States v. Toscanino, 500 F.2d 267 (2d Cir.), *rehearing denied*, 504 F.2d 1380 (2d Cir. 1974), had followed a different line of reasoning to extend constitutional concepts to conduct by U.S. officials abroad that "shocked the conscience." In light of *Verdugo-Urquidez*, the prospects for maintaining such claims are much weaker and possibly extinguished.

25. RESTATEMENT, *supra* note 5, § 433(3) and reporter's notes 1,3.

legislation is likewise misconceived, and indeed the Administration's position seems inconsistent. On the one hand the Administration claimed, and the Senate agreed, that U.S. law taken as a whole (that is, considering federal and state laws in their totality) already complied with the Torture Convention, and only minimal gaps were identified to be filled by implementing legislation.[26] If the Administration is correct about the substantial conformity of U.S. law to the Convention's requirements, then there is no reason to erect an artificial barrier to the application of the Convention as a complementary but fully compatible source of law. On the other hand, to the extent that the Convention may provide greater protection than either the Constitution or statutory law (as in the extraterritorial torture example suggested above), then it is all the more important to allow the Convention to operate of its own force.

2. The Genocide Convention

In connection with the Genocide Convention, the classic form of non-self-executing declaration was not used, but the functional equivalent emerged. Neither the Reagan Administration nor its predecessors[27] proposed an explicit non-self-executing declaration and none was formally added by the Senate, but the Senate Foreign Relations Committee expressed the view in its report on the treaty that the Convention would be non-self-executing.[28] The resolution of advice and consent adopted February 19, 1986 contained the "sovereignty reservation" referred to above,[29] and also declared as follows: That the President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V has been enacted.[30] After a substantial delay (about three years), both houses of Congress finally acted on the implementing legislation which defined genocide as a federal crime and established the applicable criminal penalties.[31] The legislation contained the following provision relevant to the effect of the Genocide Convention in U.S. domestic law: "Nothing in this chapter shall be construed as . . .

26. "Since United States law, at both the federal and state levels, seems to be fully in compliance with the Convention, it may only be necessary to establish federal jurisdiction over offenses committed by United States nationals outside the United States, and over foreign offenders committing torture abroad who are later found in a territory under United States jurisdiction, under Art. VI(1) and (2) respectively." Stewart, *supra* note 19, at 468 n.67.

27. Every American president from Truman through Reagan supported the Convention, with varying degrees of enthusiasm. Senatorial advice and consent to ratification was given during the tenure of President Reagan.

28. *See* S. EXEC. REP. NO. 2, 99th Cong., 2d Sess. 26 (1985), *reprinted in* 80 AM. J. INT'L L. 612, 621 (1986).

29. U.S. CONST. art. IV, cl. 2.

30. 132 CONG. REC. S1377-78 (daily ed. Feb. 19, 1986).

31. 18 U.S.C. §§ 1091-1093 (1988).

creating any substantive or procedural right enforceable by law by any party in any civil proceeding."[32] The cumulative import of the Genocide Convention's history is that the Senate for its part (in acting on the basis of the committee report referred to above), and the Congress as a whole in adopting the implementing legislation, have expressed an intention to confine the domestic legal effect of the Genocide Convention to such criminal proceedings as may be brought pursuant to the implementing legislation, and have purported to preclude reliance on the Genocide Convention as a source of civilly enforceable rights.

3. International Covenant on Civil and Political Rights

As this essay was in preparation, the Bush Administration asked the Senate to take up the International Covenant on Civil and Political Rights, with a package of reservations, declarations, and other provisos drawn in part from the conditions which the Carter Administration suggested[33] and shaped by the recent experience with Senatorial approval of the Torture Convention. Accordingly, a non-self-executing declaration was requested by the Administration and embodied in the resolution of advice and consent to ratification adopted by the Senate on April 2, 1992.[34] No implementing legislation was planned, on the theory that U.S. law is already in sufficient compliance with the Covenant.[35] The apparent effect of the non-self-executing declaration is to remove the Covenant as a potential source of judicially enforceable rights, even when such rights would be fully compatible with the protection already accorded by constitutional, statutory, and common law.

B. Economic Treaties

Lest it be thought that human rights treaties are the sole field in which the treaty-makers have acted to deny the direct applicability of treaties as a source of law, I will make brief mention of comparable activity in the economic field.

1. Berne Convention

In 1989 the United States finally acceded to the 1886 Berne Conven-

32. 18 U.S.C. § 1093 (1988).

33. *See supra* note 15.

34. 138 CONG. REC. 4781 (daily ed. Apr. 2, 1992).

35. In places where U.S. law would not be in compliance—for example, as regards Article 20 of the Covenant, which requires criminalization of certain forms of expression protected under the First Amendment to the Constitution—specific reservations have been adopted as qualifications on U.S. consent to be bound.

tion for the Protection of Literary and Artistic Works,[36] the oldest and most important multilateral copyright treaty. With respect to the question of whether the Berne Convention should be treated as self-executing, the report of the Senate Foreign Relations Committee stated in relevant part as follows:

> If an international agreement is silent as to its self-executing character, then one must look to statements of the Executive and Congress to make this determination. In the case of the Berne Convention, the President, in his letter of transmittal, stated that ". . . the Convention will require legislation. Until this legislation is enacted, the United States instrument of accession will not be deposited . . . ." In addition to the President's statement, both Senate and House Judiciary Committees have emphatically stated that this convention is not self-executing.[37]

Accordingly, the Berne Convention Implementation Act of 1988[38] went to great lengths to establish that the treaty itself could not be invoked as a source of rights in U.S. courts, but rather only the implementing legislation or such other sources of law as the implementing legislation endorsed could be so invoked.[39]

It appears that both the Senate acting in its treaty capacity, and the Congress acting to adopt the implementing legislation, were concerned to ensure that U.S. adherence to the Berne Convention should neither expand nor diminish protections of moral rights of authors. Congress believed that existing U.S. law was adequate to satisfy Berne standards on this point and did not wish to work any substantive change in the sources of law that would be applicable in the absence of Berne with respect to moral rights. The report of the Senate Judiciary Committee was emphatic:

> Neither Berne adherence, nor the satisfaction of U.S. obligations under Berne, should be used by the courts as justification either for expanding or reducing the recognition of these rights under U.S. law. The courts remain free, of course, to expand or reduce the recognition of these rights based on other principles of statutory construction or common law decision-making, wholly apart from U.S. adherence to Berne.[40]

36. *Supra* note 15.

37. S. EXEC. REP. NO. 17, 100th Cong., 2d Sess. 39 (1988), *reprinted in* 83 AM. J. INT'L L. 64, 67 (1989).

38. Pub. L. No. 100-568, 102 Stat. 2853 (codified at 17 U.S.C. § 101 note (1988)). For discussion see John M. Kernochan & Jane C. Ginsburg, *One Hundred and Two Years Later: The United States Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1 (1988).

39. Berne Act, §§ 2, 3, 4, 6, discussed in Kernochan & Ginsburg *supra* note 38 at 5, 6, 27-32.

40. S. REP. NO. 352, 100th Cong., 2d Sess. 39 (1988). The Berne Act, §§ 3 & 4, specifically provides that Berne adherence shall not expand or reduce certain rights claimed under federal, state, or common law.

To an international lawyer concerned with the operation of treaties generally, it is naturally troubling that the Senate and Congress would single out a treaty obligation of the United States as the *only* source of law that U.S. courts are *not* supposed to consider, but that is what happened. The only consolation, apparently, is that the outcome might have been substantively worse, in that opponents of the Berne approach to moral rights did not achieve their objective of preventing any recognition of such rights in the United States.[41]

2. Trade Agreements

The contribution by Professors Riesenfeld and Abbott to the present symposium draws attention to a pattern of statutes in which the U.S. Congress has determined that a series of trade agreements to which the United States is party should not be construed as creating private rights or remedies in U.S. courts.[42] Provisions to this effect are found in the legislation approving and implementing the Tokyo Round Codes, the Israel-United States Free Trade Area Agreement, and the Canada-United States Free Trade Agreement.[43] The import of these provisions is similar to that of non-self-executing declarations, in that U.S. courts are precluded from applying the international agreements as a direct source of law.

Professors Riesenfeld and Abbott distinguish these acts of Congress concerning the domestic legal effect of international agreements from unicameral actions of the U.S. Senate and suggest that only Congress as a whole, and not the Senate acting alone, has the constitutional power to take the actions in question. Under their view, because the Senate lacks the plenary legislative powers which belong to the Congress under the Constitution, its power to attach conditions to treaties should be confined to conditions which are acceptable under international law and practice. Their principal thesis is that the Senate may not attach conditions which would violate international law: the power to legislate in violation of international law is in their view a congressional, not senatorial power. Additionally, they claim that the Senate has no power to control the domestic legal effect of a treaty: only Congress and the courts may constitutionally determine whether a treaty will or will not have self-executing effect. In my view the relevant point is not that Congress has constitu-

41. Kernochan & Ginsburg, *supra* note 38, at 27.

42. Stefan A. Riesenfeld & Fredrick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operaiton of Treaties*, 67 CHI-KENT L. REV. 571, 639 (1991), at text accompanying notes 270-71.

43. *Id.*

tional power to violate international law (a power that the Supreme Court has of course confirmed repeatedly), but rather that Congress has constitutional authority to determine how to implement international agreements in foreign trade as in other fields.[44] In the exercise of that authority Congress may determine to set up domestic regulatory agencies and specialized bodies for the implementation of trade law, in lieu of having these issues go to courts of general jurisdiction. Moreover, Congress may reserve to itself the authority to decide on a case-by-case basis whether, how, and in what time frame to give effect to the results of negotiations or third-party settlement of trade (or other) disputes. The more that Congress has become actively engaged in implementing trade agreements, the more it makes sense to think of a legislative-regulatory model instead of a judicial model for handling trade issues. On that basis the no-private-right-of-action statutes are entirely understandable.

In contrast, non-self-executing declarations of the U.S. Senate typically seem to abdicate the function of deciding how a treaty is to be implemented, rather than exercising that function. The Senate's only opportunity to affect implementation of a treaty is at the time it acts on the resolution of advice and consent; it has no ongoing role thereafter, whereas the Congress has continuing responsibilities with respect to all spheres of law-making, including those involving international obligations. Thus, *unless* the Senate makes a conscious decision to prefer a mode of implementation that will be equal or superior to judicial enforcement of treaties, or to defer to Congress in the expectation that Congress will make such a decision, the non-self-executing declaration is an abdication of responsibility.

II. THE SENATE'S PROPER ROLE IN DETERMINING THE DOMESTIC LEGAL EFFECT OF U.S. TREATIES

As previously noted,[45] the decision whether a treaty is self-executing is ordinarily made by the courts on the basis of criteria elaborated in court decisions. Judicial and scholarly authorities both indicate that "the intent of the parties" is relevant to the determination of a treaty's self-executing effect, and the Senate's position upon giving consent to a treaty will ordinarily be honored by the courts.[46] As a prediction of what judges will do in fact, it is likely that U.S. courts would consider the Senate's expression of preference as carrying great weight and would

44. *E.g.*, U.S. CONST. art. I, § 8, cl. 10 ("Law of Nations"), but also the foreign commerce power and the foreign affairs power, as well as the necessary and proper clause.

45. *See supra* text accompanying notes 4-7.

46. *See* RESTATEMENT, *supra* note 5, §§ 111(3), 111(4)(b) and cmt. h.

therefore be reluctant to apply as a direct source of law any treaty covered by a non-self-executing declaration. Such declarations seem sufficiently related to the Senate's acknowledged powers in connection with the treaty process that courts would probably be inclined to give them effect in accordance with their terms.[47]

Yet this predictive judgment does not conclude the inquiry. The issue of the Senate's constitutional power to control the domestic legal effect of a treaty has never been presented to the Supreme Court for decision, and such lower court authority as exists on related questions is neither directly on point nor considered good law by contemporary experts.[48] There is room for the argument that the Senate's power to attach conditions must be appraised in light of the constitutional justifications for the Senate's role in the treaty process. Non-self-executing declarations do indeed raise constitutional questions in this broader sense.

It is incumbent on each branch of government to exercise its constitutional powers in a manner faithful to the structures, relationships, and values underlying our constitutional scheme. The Senate's prerogative to qualify its consent as an incident of a shared treaty power is not an unfettered discretion to attach any kind of condition. A Senate declaration purporting to negate the legal effect of otherwise self-executing treaty provisions is constitutionally questionable as a derogation from the ordinary application of Article VI of the Constitution; accordingly, it should not be sustained unless there is some constitutionally-based justification for the Senate to inject itself into the question.

Let us consider some of the theories under which Senatorial conditions to ratification might be defended:

A. As a check on Presidential power.

The Senate's power to withhold consent to treaties is part of the Framers' carefully designed system of checks and balances; the Senate acts as the surrogate for the American people in determining the acceptability of Presidential proposals to incur international obligations. Senato-

47. Professor Henkin has pointed out the absence of a generally accepted theory for the Senate's attachment of such conditions to treaties, but has noted that they may be considered part of the treaty's "penumbra" or ancillary to the Senate's advice and consent role. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 160-61 (1972).

48. In the highly exceptional *Power Authority* case cited in note 11 *supra*, an intermediate court of appeals refused to give effect to a Senatorial reservation purporting to affect the domestic implementation of a bilateral treaty. The authority of the case is in doubt (*see generally* HENKIN, *id.* at 134-35, 380-81 n.28), and in any event its reasoning—which concerned limitations on treaty reservations rather than other modes of Senatorial action—would probably not be extended to non-self-executing declarations.

rial conditions aimed at curtailing the risks to the nation of a proposed international agreement or curbing Presidential self-aggrandizement are consistent with this constitutional design. Non-self-executing declarations have nothing to do with this function, however. Indeed, in the instances previously surveyed the Executive Branch not only supported or even initiated the proposed declarations but might well benefit from them, to the extent that the non-self-executing declaration would remove the courts as a potential check on executive actions contrary to the treaty. As an example, an executive officer could invoke the non-self-executing declaration to avoid scrutiny of actions alleged to violate the Torture Convention.

B. As protective of the prerogatives of the House of Representatives.

We should consider three variants of the theory of non-self-executing declarations as protective of the prerogatives of the House of Representatives:

1. Whether the House is constitutionally required to participate.

If the House has a constitutionally mandated role with respect to the subject matter of the treaty (an issue which is itself a controversial one), then a non-self-executing declaration would be most appropriate. In accordance with the widespread view that at least a few subjects do require the participation of the House, I would not quarrel with Senatorial actions intended to affirm that the Senate by itself (or the Senate-and-President together) cannot exercise the power of the purse or the war power, or any other power which by customary practice in the United States is generally handled on the basis of bicameral action.[49] But the sphere of application of the non-self-executing declarations surveyed above goes well beyond this. In particular, there is no constitutional requirement that the House act in parallel to the Senate with respect to treaties that would strengthen judicial protection of human rights.[50]

2. When involvement of the House is politically essential.

The political necessity to engage the House in the implementation of the treaty may be a valid reason for a non-self-executing declaration. But

49. *See supra* text accompanying notes 10-11.

50. As to treaties affecting commerce, the House has a stronger claim to involvement, but in the opinion of the present writer the claim is political rather than constitutionally-mandated. Within the confines of the present essay it is not possible to go into the full constitutional theory underlying this proposition. Suffice it to say that in the treaty practice of the United States, Article II treaties involving the Senate but not the House have often been used.

one may question whether this is always a *bona fide* motivation. The argument of deference to the House may be nothing more than a guise in which a tiny minority of disgruntled Senators can attempt an end-run around the already stringent supra-majoritarian scheme for treaty approval. As Professor Henkin has said:

> Declaring a treaty to be non-self-executing and requiring implementing legislation delays and creates obstacles to our carrying out our international obligations, encourages members of Congress to delay or frustrate legislation to give effect to the treaty, especially Senators who did not favor the treaty and, even more, members of the House of Representatives who had not previously considered it.[51]

If the treaty is of the sort that *could* be applied by courts without further legislative direction, then why go through the superfluous action of adding House approval to the Senate's two-thirds approval, which pursuant to Articles II and VI of the Constitution is constitutionally sufficient for this purpose?

In cases where there is a political imperative to engage the House in implemention, the House's interest is more than adequately protected by a direction to the President not to incur the international obligation until the implementing legislation has been adopted.[52] Upon the enactment of the legislation, however, the rationale of safeguarding the House's interests disappears; and unless the House, Senate and President together determine to use the implementing legislation to preclude the courts from giving direct effect to the treaty, the courts should proceed as they ordinarily would under Articles III and VI.

C. When a preexisting statute deals with the subject matter in a manner inconsistent with the treaty.

The self-executing/non-self-executing distinction can affect the relationship between two different sources of U.S. law that deal inconsistently with the same subject matter. Specifically, the U.S. Supreme Court has followed a "later-in-time" rule that places statutes and treaties on the same footing and allows the U.S. Congress to supersede the domestic legal effect of a treaty by means of subsequently-enacted legislation;[53] the operation of this rule with respect to a subsequent treaty has

51. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 63 (1990); Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 425 (1989).

52. The protection is "more than adequate" because under international law a party to a treaty may be accorded a reasonable amount of time to conform its domestic legislation before it would be considered in default. *See* RESTATEMENT, *supra* note 5, § 111 cmt. h.

53. Whitney v. Robertson, 124 U.S. 190 (1888).

been conditioned, however, on the self-executing nature of the treaty.[54] Thus the apparent effect of a non-self-executing declaration attached to an otherwise self-executing treaty would be to allow prior inconsistent statutory law to prevail, even though the courts would have allowed the treaty to supersede the statute in the absence of the declaration.

It is submitted that there is no justification for using a non-self-executing declaration to preserve an inconsistent statute that predates the treaty. The practice would create an entirely indefensible gap between domestic law and international obligation. Whatever concerns the Senate may have about the relationship of the treaty to statutory policy should be resolved before advice and consent is given and ratification takes place. If the administration, or a faction within the Senate, has a political or philosophical objection to tampering with statutes by means of treaties, then the issue should be confronted directly—as, for example, by submitting the international agreement as a congressional-executive agreement rather than a treaty through the back door of a non-self-executing declaration.

C. As protective of states' rights.

Under this view, Senators serve as proxies for the interests of states; they may promote their perceptions of those interests by acting on a philosophical preference for a state-centered model of the preferable distribution of substantive authorities. But this view ignores the definitive repudiation of theories of limitations on the treaty power emanating from inchoate claims of states' rights. By virtue of both the authoritative decision of the Supreme Court in *Missouri v. Holland*[55] and the rejection of Senator Bricker's attempts to reverse that decision by means of constitutional amendment, our constitutional law is clear: the treaty-makers may make supreme law binding on the states as to any subject, and notions of states' rights should not be asserted as impediments to the full implementation of treaty obligations. If a decision is made at the federal level, concurred in by two-thirds of the Senate, that the national interest would be served by entering into a treaty, then state-centered interests do not justify blunting federal judicial enforcement of an otherwise self-executing treaty.

The proponents of the non-self-executing declarations may have assumed that the declarations would prevent the treaties from displacing existing state laws or policies, but this view misunderstands the applica-

54. Cook v. United States, 288 U.S. 102 (1933).
55. 252 U.S. 416 (1920).

tion of Article VI's Supremacy Clause. As stated by the Restatement of Foreign Relations Law of the United States: "Even a non-self-executing agreement of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be federal policy superseding State law or policy."[56] The Framers insisted on a system of federal treaty supremacy so that it would not be necessary to ask the states to take action to give effect to international obligations. There is no warrant for the Senate to seek to turn this system inside-out with respect to particular treaties.

D. As a limitation on judicial power.

Article III of the Constitution establishes federal judicial jurisdiction over treaty-based cases, yet the non-self-executing declaration purports to tell courts not to apply a treaty in cases that could otherwise properly come before them. This deviation from the normal mode of treaty implementation cannot be justified in view of the respective roles of the Senate and the judiciary concerning treaties. The Framers explicitly contemplated judicial enforcement of treaties; they did not envision any role for the Senate in treaty implementation, beyond giving advice and consent to ratification,[57] and they certainly did not expect the Senate to stand in the way of the courts' discharge of a constitutionally-established function.

The non-self-executing declaration seems to be a vote of no-confidence in the courts which would otherwise have authority to apply the treaty, yet there is no reason to think that courts would discharge this function less responsibly than any other branch. The main factor setting treaties apart from other sources of law that courts typically apply is the participation of non-U.S. actors—for example, foreign tribunals, diplomats, or international organizations—in the interpretation and application of treaties. The Senate most likely acted on an unarticulated preference for insulating the United States from these foreign influences, at least as to subject matters already regulated by a parallel body of U.S. law that is evolving in linear fashion. The concern is at least exaggerated and in my view entirely unwarranted.

To date, the issue of subordinating U.S. courts to some foreign tribunal is largely hypothetical with respect to the treaties covered by non-self-executing declarations.[58] Rather, the prevailing mode of treaty im-

56. RESTATEMENT § 115, cmt. e.

57. *Cf.* Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901) (Senate cannot affect interpretation of treaty after ratification).

58. In the future this issue could arise if, for example, the United States were to accept the

plementation is decentralized action by national decisionmakers, including courts. Under such a decentralized system, no national court is compelled to accept the judgment of any foreign interpreter of the same treaty, but each may (or may not) influence the other to the extent of the persuasive force of its decisions. Thus, U.S. courts applying international treaties as a source of law need not adopt any ill-founded interpretation of the treaty by a foreign actor. Yet if U.S. courts do *not* apply international treaties, then they lose the opportunity to contribute constructively to the evolution of international practice.

III. CONCLUSION

It would be far preferable for the Senate to discontinue the device of non-self-executing treaty declarations, both prospectively and retroactively, outside the limited class of treaties entailing a compelling reason to engage the House of Representatives in implementation. Meanwhile, there may be ways to mitigate the damaging effects of non-self-executing declarations. For example, U.S. courts generally follow a rule of attempting to construe domestic sources of law harmoniously with international obligations, unless they receive unambiguous contrary instructions from the political branches. Even though a non-self-executing declaration purports to tell courts not to give direct effect to the treaty, it does not go so far as to instruct them to violate it; nor does it forbid a judge to take account of how foreign counterparts have applied a treaty to which the United States is a party. Nothing in a non-self-executing declaration necessarily has to prevent internationally-minded jurists from applying other sources of law—constitutional, statutory, regulatory, or customary—in a manner that will promote the objectives of international treaties. But the effectiveness of international law would be strengthened by eliminating this unnecessary impediment to judicial enforcement of treaties.

authority of international committees to consider individual petitions under human rights treaties. The United States has deliberately refrained from doing so with respect to the Torture Convention and the International Convenant on Civil and Political Rights and has not yet considered the question with respect to other human rights treaties. The optional state-to-state form of jurisdiction which the United States has agreed to accept has been virtually ignored in international practice so far.