

## HUMAN RIGHTS TREATIES IN U.S. LAW: THE STATUS QUO, ITS UNDERLYING BASES, AND PATHWAYS FOR CHANGE\*

As of this day, the United States has ratified three of the major seven global human rights treaties (HRTs).<sup>1</sup> The three it has ratified have been assented to only conditionally. They have been qualified by reservations, understandings, and declarations (RUDs) to prevent their direct enforcement in U.S. courts, and bring their provisions into sync with U.S. domestic law. This being said, the greater issues remain far from settled.

Limited and conditional consent to HRTs provokes controversy in the form of two interrelated questions: first, whether U.S. RUDs are legal under international law (the “legality question”), and, second, why the United States has chosen not to increase domestic human rights protection through fuller adherence to HRTs (the “human

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1. See United Nations Office of the High Commissioner for Human Rights Treaty Body Database, available at <http://www.unhcr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet> [hereinafter Treaty Body Database]. See also The University of Minnesota Human Rights Library, at <http://heiwwww.unige.ch/humanrts/instree/ainstls1.htm>. The United States has ratified the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, 1465 U.N.T.S. 85, at <http://heiwwww.unige.ch/humanrts/instree/h2catoc.htm> [hereinafter CAT], the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171, at <http://heiwwww.unige.ch/humanrts/instree/b3ccpr.htm> [hereinafter ICCPR], and the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195, at <http://heiwwww.unige.ch/humanrts/instree/d1cerd.htm> [hereinafter CERD]. It has signed, but not ratified, the Convention on the Elimination of All Forms of Discrimination against Women, adopted Dec. 18, 1979, 1249 U.N.T.S. 13, at <http://heiwwww.unige.ch/humanrts/instree/e1cedaw.htm>, the Convention on the Rights of the Child, adopted Nov. 20, 1989, 28 ILM 1448, at <http://heiwwww.unige.ch/humanrts/instree/k2crc.htm>, and the International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3, at <http://heiwwww.unige.ch/humanrts/instree/b2esc.htm>. It has thus far taken no action on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted Dec. 18, 1990, 30 ILM 1517, at <http://heiwwww.unige.ch/humanrts/instree/n8icprmw.htm> (all cites last visited on Apr. 9, 2003).

rights question”). Conditional consent to HRTs—i.e., the policy that raises the legality question—can only be explained by answering the human rights question. Further, unlike the answer to the legality question, the answer to the human rights question responds to the assumedly desirable goal of guaranteeing the protection of human rights.

Accordingly, this article examines various theories asserting claims to truth as to why the United States has tendered only conditional and limited consent to HRTs. This examination of theories and the diverse hypotheses they produce yields a socio-structural theory of human rights. From this theory, a policy suggestion emerges: to construct social arrangements for a minimum substantive floor of human rights protection. This policy suggestion disposes of the legality question, because it effectively reinterprets U.S. RUDs in a manner that satisfies applicable international rules. Most significantly, it directly addresses the concerns underlying the human rights question.

In times of war and external threat, domestic human rights guarantees have been repealed within the United States—consider, for example, McCarthyism and Japanese internment. Parting from the premise that such practices are undesirable, this article assumes first that such practices may recur during present and future threats, and, second, that it is possible that future instances of such human rights infringement will not be as brief. Both assumptions are worth entertaining, given the ongoing and potentially protracted struggle against terrorism in the post-September 11th era.

At its close, the article suggests that although the United States has severely curtailed the effect of human rights treaties within its territory, the HRTs—even in their diminished state—can serve to establish a substantive standard of human rights protection. That standard would be a mast to which the United States could bind itself to ensure that a meaningful level of freedom be maintained and preserved within its territory, come what may.

Part I contains a summary of relevant U.S. law and practice as regards HRTs. Part II analyzes existing explanations for this law and practice and presents a socio-structural theory for human rights protection. Finally, in Part III, the article surveys two existing proposals for change and suggests a minimum floor approach for U.S. human rights law and policy that builds off the socio-structural theory. Given the breadth and quantity of the issues germane to this matter, this article does not seek to arrive at definitive or exhaustive answers. Rather, it seeks to re-conceptualize a complex problem and facilitate

a resolution responsive to the multiple underpinnings of limited and conditional consent, on the one hand, and the necessity for certain inalienable and permanent rights within the United States on the other.

### I. HRTs IN DOMESTIC LAW

Traditional U.S. judicial conceptions of international law are both antithetical to and insistent upon the enforcement of international human rights. In respect to the former, the U.S. Supreme Court has depicted international law as concerned not with domestic rights and duties, but instead with international rights and duties.<sup>2</sup> In respect to the latter, the Court has declared that the rationale for federal court jurisdiction to hear cases arising under federal treaties is that “all persons who have real claims under a treaty should have their causes decided by the national tribunals.”<sup>3</sup>

The immediate victims of human rights violations are individuals, not states.<sup>4</sup> As such, victims have little leverage within the confines of international law to retaliate against states or their proxies. Their only remedy lies with the courts. The United States, a nation with courts capable of prosecuting government officials for violations of international law,<sup>5</sup> as well as a constitution that makes treaties the law of the land,<sup>6</sup> has intentionally limited the effects of HRTs in its territory. It has done so through a policy of conditional consent carried out through the use of RUDs.<sup>7</sup>

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2. See, e.g., *Skiriotes v. Florida*, 313 U.S. 69, 72–73 (1941) (holding that international law could not prevent the United States from regulating the behavior of its nationals at sea).

3. *Owings v. Norwood's Lessee*, 9 U.S. (5 Cran.) 344, 348 (1809).

4. The eventual consequences of human rights violations, however, are diffuse, including economic effects, general destabilization, and subsequent effects on individuals removed from the immediate victims. The political consensus of the international community, as reflected by the United Nations Instruments, reflects this. See U.N. CHARTER art. 1 & pmb. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, at 71 (1948), pmb. (“[D]isregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.”).

5. See *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 953 (D.C. Cir. 1988) (“There is no question that, in the second half of the twentieth century, the protections afforded individuals under international law have greatly expanded. At one time, international law concerned itself chiefly with relations among states, occasionally with relations between a state and citizens of other states, and almost never with a nation’s treatment of its own citizens. That has now changed and government officials can be held responsible for certain egregious violations of their own citizens’ rights.” (citations omitted)).

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

7. To view RUDs attached to the ICCPR and CAT, see Treaty Body Database, *supra*

Having been declared non-self-executing at the time of ratification, HRTs remain presumptively unenforceable. This can change only if Congress enacts implementing legislation or the judiciary declares an HRT self-executing, thereby defying the express will of the political branches and their broad authority in foreign affairs. Even absent such legislation or judicial revolt, however, HRTs powerfully influence judicial constructions of Congressional statutes and provide significant support for human rights claims.<sup>8</sup> In addition, unratified HRTs are used to guide statutory interpretation,<sup>9</sup> and, regardless of implementing legislation, the provisions of human rights covenants may form part of, but not create, customary international law (“CIL”), which provides the rules of decision in some cases.<sup>10</sup>

Although existing congressional acts and constitutional protections implement many of the norms found in HRTs,<sup>11</sup> norms contained in HRTs not protected under U.S. domestic law have been subjected to RUDs, with one exception.<sup>12</sup> This overwhelming trend

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note 1.

8. HRTs can be used to help construe relevant “constitutional, statutory, common law, or other legal provisions.” Paust, *infra* note 51, at 781. Courts should generally strive to give effect to both international law and other legal authorities. *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243 (1984); *Weinberger v. Rossi*, 456 U.S. 25 (1982); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cran.) 64 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cran.) 1 (1801). For example, the judges in *Kadic* cited the right to be free from torture as a *jus cogens* norm and stated that congressional enactments must be construed to be consistent with this prohibition. *See Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

9. *See Beharry v. Reno*, 183 F. Supp. 2d 584, 593 (E.D.N.Y. 2002) (stating that “[a] treaty has been sometimes said to have force of law only if ratified. Courts, however, often use non-ratified treaties as aids in statutory construction” and citing numerous circuit court opinions that support the proposition).

10. *See Beharry*, 183 F. Supp. 2d at 597 (“[the] United states courts may not ignore the precepts of customary international law”).

11. To name four: the Federal Courts Administration Act of 1992 provides U.S. nationals with a cause of action for acts of “international terrorism.” Pub. L. No. 102-572, 106 Stat. 4506 (1992) (codified at 18 U.S.C. § 2333(a) (1992)). Second, Congress carved an exception into the Foreign Sovereign Immunities Act allowing suits against foreign governments on the State Department’s list of terrorist states. 28 U.S.C. § 1605(a)(7) (1994 & Supp. 1998). Third, the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1992)), allows individual plaintiffs, both citizens and aliens, to raise claims of official torture and extrajudicial killing against aliens under either the Alien Torts Claims Act and federal question jurisdiction generally [hereinafter TVPA]. *See Jennifer Correale, The Torture Victim Protection Act: a Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 PACE INT’L L. REV. 197, 211 (1994). Fourth, and of particular interest, is the Alien Tort Claims Act, 28 U.S.C. § 1350 (1988), which provides federal subject matter jurisdiction when an alien sues for a tort committed in violation of the law of nations [hereinafter ATCA]. *See Kadic*, 70 F.3d at 238. Additionally, reference must be made to the Bill of Rights as offering significant protection of human rights. *See* U.S. CONST. amends. I–X.

12. The United States has enacted implementing legislation for Article 3 of CAT through

has prevented the creation of additional human rights within the United States. The reasons provided for this conditional consent policy are, at best, incomplete, and the potential consequences of this policy are troubling, especially if domestic human rights guarantees continue to decline.<sup>13</sup> Before explaining this curtailment of the power of HRTs and its consequences, a brief look should be taken at the relevant law.

#### A. The Constitutional Power of Treaties

Treaties ratified by the President with the advice and consent of the Senate are “the supreme Law of the Land” and “judges in every State shall be bound thereby.”<sup>14</sup> The power to make treaties is vested in the President, but limited by the requirement that two-thirds of the Senators present concur with the President’s judgment.<sup>15</sup> Cases arising under treaties may be heard by the federal courts,<sup>16</sup> and the Supreme Court is therefore the authoritative interpreter of treaties.<sup>17</sup>

Pronouncements of the Supreme Court have authoritatively elaborated upon these basic tenants of treaty law. The Constitution takes precedence over any treaty,<sup>18</sup> yet treaties are afforded great weight. International law, including treaties, is “part of our law” and the courts are charged with ascertaining and administering it.<sup>19</sup> Trea-

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the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, 112, Stat. 2681, 2681–761, § 2242 (Oct. 21, 1998) [hereinafter FARR]. Article 3 provides in relevant part that “no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” See UNHCHR website, at [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm) (last visited Mar. 2, 2003). The Act has been successfully invoked by individual plaintiffs against U.S. government officials. See, e.g., *Al-Saher v. Immigration and Naturalization Service*, 268 F.3d 1143 (9th Cir. 2001) (holding that an alien who meets the burden of proof in showing that he has been tortured while detained in his multiple arrests and that he is likely to be arrested again if returned to his native country is entitled to a withholding of removal under CAT, as implemented by FARR).

13. Professor Georg Nolte was fond of asking, in his course on Comparative Constitutional Systems at the Duke-Geneva Institute in Transnational Law, Summer 2002, how it is that Americans can be so certain that their democracy and its protection of individual rights would continue to flourish. This question, coupled with what I perceive to be a decline of domestic human rights post September 11th, informs my suggestion for reconciling international legal obligations with the policy of conditional consent to HRTs. See Part III, *infra*.

14. See U.S. CONST., *supra* note 6.

15. *Id.* art. II, § 2 (The President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.”).

16. *Id.* art. III, § 2.

17. *Id.* art. III, §§ 1 and 2.

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

19. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

ties supersede inconsistent state laws and inconsistent state constitutions,<sup>20</sup> as well as inconsistent federal statutes.<sup>21</sup> However, inconsistent federal statutes enacted subsequent to a given treaty supersede the relevant part of the treaty.<sup>22</sup> The hierarchy between treaties and federal statutes is therefore temporally determined such that the “last in time” prevails.<sup>23</sup>

Three additional points of law should be made. First, executive agreements, although considered treaties for purposes of international law, are not treaties for purposes of U.S. law.<sup>24</sup> Second, the judiciary occupies a precarious position in hearing cases that concern treaty law, since matters of “foreign relations” have been held to be among the “non justiciable political questions” in which the judiciary will not intervene.<sup>25</sup> Third, CIL occupies a lower position than treaty law and applies only when no legislation or applicable precedent speaks to the issue.<sup>26</sup> Respecting the latter, CIL is considered federal law,<sup>27</sup> and appears in the Constitution (referred to as “the law of na-

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20. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

21. *The Cherokee Tobacco Case*, 78 U.S. (5 Wall.) 616, 621 (1870) (“A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.”). *See also* *Head Money Cases*, 112 U.S. 580 (1884).

22. *Cherokee Tobacco*, 78 U.S. (5 Wall.) at 621.

23. *See id.* at 599. *See also* *Whitney v. Robertson*, 124 U.S. 190, 193–94 (1888) (“[The act of Congress] was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty or the requirements of the law, the latter must control.”); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (quoting *Reid*, 354 U.S. at 18 (“an Act of Congress . . . is on a full parity with a treaty, and . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”) (internal quotation marks and citation omitted)).

24. Executive agreements: those agreements concluded by the President either through “commander and chief” powers or on the basis of authorization from Congress. *See* *Weinberger v. Rossi*, 456 U.S. 25 (1982) (explaining the presidential authority to make agreements with other nations and the domestic effects thereof).

25. *See, e.g., Kadic*, 70 F.3d at 249. *See also* *Baker v. Carr*, 369 U.S. 186, 217 (1962) (non-justiciable political question involves: “[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question”); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (holding that foreign policy decisions are not apt for the judiciary).

26. *See* *United States v. Alvarez-Machain*, 504 U.S. 655, 666–70 (1992); *United States v. Percheman*, 32 U.S. 51, 65 (1833) (“A detailed examination of the maxims of customary international law . . . is not called for, in the presence of an express treaty stipulation.”).

27. *See* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423–25 (1964) (noting that,

tions”), which gives Congress the power to define its terms and punish those who violate it.<sup>28</sup>

#### B. Limits Imposed Through Conditional Consent: Non-Self-Execution and Forced Conformity with Pre-Existing Domestic Standards

Through RUDs, each party to a treaty can modify, limit, clarify, or preemptively define how the treaty applies to them. In U.S. law, the Senate and President negotiate the ratification of a treaty and the Senate has the power to impose RUDs. The inclusion in a treaty of RUDs therefore constitutes a precondition to the U.S.’ consent to ratify. Yet, under both *customary* and *treaty-based* international law, RUDs that limit, qualify, or contradict the treaty obligations of a party are considered reservations,<sup>29</sup> and reservations are invalid if they are prohibited by the treaty’s text or defeat its *object and purpose*.<sup>30</sup> RUDs made by the Senate become part of the treaty itself, and, therefore, the treaty, as it is intended to apply to the United States, ceases to be a template document, and becomes instead a “corrected version” at the time of ratification.<sup>31</sup>

The ICCPR, CERD, and CAT each require the provision of an impartial forum to address individual claims and provide a responsive remedy when a claim prevails.<sup>32</sup> These provisions, coupled with the

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although the law of nations governs state-to-state relations and therefore cannot control how a country treats a wrong within its own borders, “it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances” and holding that “an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”).

28. U.S. CONST. art. I, § 8. As a textual matter, the law of nations clause would appear to relate only to criminal matters.

29. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 313 cmt. g (1986) (“When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state’s legal obligation.”) [hereinafter RESTATEMENT].

30. Vienna Convention on the Law of Treaties, May 23, 1969, art. 19(c), 1155 U.N.T.S. 331, 337 [hereinafter Vienna Convention]. The object and purpose are determined by the arbiter designated by the treaty itself or with default authority to preside over the controversy, often a regional or international court, such as the European Court of Human Rights or the International Court of Justice.

31. See *infra* notes 235, 236, and 232 and accompanying text. The notion that the “corrected version” applies becomes controversial only for RUDs that may be invalid. See Part IIIA, *infra*.

32. See CAT arts. 8 and 14; ICCPR arts. 2 and 14; CERD art. 6, *supra* note 1. See John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42

status granted to treaties by the Constitution, required the United States to declare HRTs non-self-executing and to limit key terms to their constitutional definition so that judicial obligations beyond those provided for in domestic law could be avoided.

Since their advent, the Senate has indeed either refused to ratify HRTs or declared them non-self-executing through the use of RUDs.<sup>33</sup> For each of the three HRTs it has ratified,<sup>34</sup> the United States has issued more reservations than any other party.<sup>35</sup> It has declared all judicially relevant provisions of these HRTs non-self-executing.<sup>36</sup> The Senate report relevant to the ICCPR explains the intent behind one such declaration:

For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the

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DEPAUL L. REV. 1287, 1296 (1993) (With respect to the ICCPR, “[t]his means, at a minimum, that a court may not permit prosecution and conviction for an act protected under the Covenant, and that a court may entertain a suit by a person whose Covenant rights are violated and provide injunctive and compensatory relief.”).

33. *Beharry*, 183 F. Supp. 2d at 593. See also Steven M. Schneebaum, *Human Rights in the United States Courts: The Role of Lawyers*, 55 WASH. & LEE L. REV. 737, 738 (1998) (“The treaties to which the United States is a party that contain human rights elements either expressly or by implication are not self-executing”). This trend began alongside a state supreme court decision declaring the human rights provisions of the U.N. Charter non-self-executing. See *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952). Notwithstanding RUDs, a fundamental principle of international law serves to limit the direct effects of HRTs: it is generally required that individuals exhaust local remedies before pursuing a claim under an international agreement, both for individual complaints and for state-to-state complaints. See RESTATEMENT, *supra* note 29, § 703 cmt. d (1986). The rule of exhaustion of local remedies—often a preliminary objection before the International Court of Justice—is well established in international law as applied between states. See, e.g., *Interhandel Case (Switzerland v. United States)*, 1959 I.C.J. 6, 26–29 (Mar. 21).

34. See Treaty Body Database, *supra* note 1 (providing electronic access for the ICCPR, CAT, and CERD).

35. See Catherine Redgwell, *US Reservations to Human Rights Treaties: all for one and none for all?*, forthcoming in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 394 (Michael Byers & Georg Nolte eds., 2003) (commenting that the United States is the leader in RUDs among States Parties to the Torture Convention, the Convention on the Elimination of Racial Discrimination, and the ICCPR) (on file with author). See Treaty Body Database, *supra* note 1 (cataloguing all reservations to HRTs). Still, the United States can make a reasonable claim that its existing domestic laws fully satisfy U.S. obligations pursuant to HRTs. Such a claim would have three main components. First, none of the RUDs undermine the existing level of human rights protections absent the HRTs. For example, the existing RUDs could be contrasted to a hypothetical RUD reserving the right to torture criminal suspects. Second, the great majority of the HRT provisions have not been subjected to RUDs, indicating that most of the treaty will be observed, albeit through existing laws, rather than implementing legislation. Finally, the reservations tailor the treaty so as to bring it into sync with domestic law, enabling domestic legal codes to satisfy the HRTs’ terms as applied.

36. See Treaty Body Database, *supra* note 1.



Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated.<sup>37</sup>

The unwillingness to create an individual cause of action itself requires explanation, yet none is given other than “prudence.”<sup>38</sup> Prudence suggests the avoidance of possible debacles, and just one sentence later, it is conceded that existing law “generally,” (presumably meaning not fully), “complies with the Covenant.”<sup>39</sup> Since *general* compliance does not equal full compliance, the refusal to contemplate implementing legislation amounts to a refusal to fully implement the Covenant.<sup>40</sup>

For purposes of supporting human rights claims in U.S. courts, a self-executing treaty is one addressed to the judiciary<sup>41</sup> and/or one for which “no domestic legislation is required to give . . . [it] the force of law in the United States.”<sup>42</sup> The “and/or” qualification exists because different administrations, in their declarations to human rights covenants, attached different meanings to the term “non-self-executing.”<sup>43</sup> Such a declaration is of great import, although its international legal validity is uncertain. Indeed, ambiguity and uncertainty obscure the law of non-self-execution.<sup>44</sup>

With regard to the ICCPR, the U.S. circuit courts stand divided on the issue of domestic enforceability.<sup>45</sup> While the First and the Tenth Circuits have confirmed that the ICCPR does not provide a

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37. STAFF OF SENATE COMMITTEE ON FOREIGN RELATIONS, 102ND CONGRESS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 102 (1992), *reprinted in* 31 ILM 645, 657 (1992).

38. *See id.*

39. *Id.*

40. This explains the necessity of this RUD (a non-self-execution declaration), yet the reasons behind this conditional consent require explanation. *See* Part II, *infra*.

41. The Supreme Court has held that some treaties are directed to “the political, not the judicial department” and that these require implementing legislation in order for the courts to apply them. *See Foster v. Neilson*, 27 U.S. (2 Pete.) 253, 314 (1829) (holding that treaties not addressed to the judiciary are those that constitute a contract between the state parties regarding a particular course of action).

42. *Trans World Airlines*, 466 U.S. at 252.

43. David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Treaties and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 137–38 (1999).

44. *See, e.g.,* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995) (“[M]uch of the doctrinal disarray and judicial confusion is attributable to the failure of the courts and commentators to recognize that for some time four distinct ‘doctrines’ of self-executing treaties have been masquerading as one.”).

45. *See* Margaret Thomas, Comment, ‘Rogue States’ Within American Borders: Remedying State Noncompliance with the International Covenant on Civil and Political Rights, 90 CAL. L. REV. 165, 203–07 (2002).

private right of action,<sup>46</sup> the Ninth and Eleventh Circuits have been willing to apply it and, in one case, looked to the Human Rights Committee (“HRC”)<sup>47</sup> for an authoritative interpretation of its terms.<sup>48</sup>

Still, it is traditionally understood that “unless a treaty is self-executing, it must be implemented by legislation before it can give rise to a private right of action enforceable in a court of the United States.”<sup>49</sup> The Restatement (Third) of Foreign Relations Law states definitively that non-self-executing treaties are not directly enforceable: “Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation.”<sup>50</sup> Even in the absence of such implementation, a non-self-executing treaty can be applied directly, without becoming dispositive, in U.S. courts,<sup>51</sup> and foreign states may in some cases invoke such treaties even though individuals cannot.<sup>52</sup> Furthermore, a State’s failure to promptly im-

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46. *Id.* See *United States v. Green*, 671 F.2d 46, 50 (1st Cir.), *cert. denied*, 457 U.S. 1135 (1982); *Kyler v. Montezuma County*, No. 99-1052, 2000 U.S. App. LEXIS 1145, at \*4 (10th Cir. Jan. 28, 2000) (the ICCPR’s provisions “do not, by their terms, confer rights upon individual citizens.”).

47. The HRC is the international body charged with, among other things, interpreting the ICCPR. For a list of the treaty bodies and a description of their activities, see the UNHCHR website, at <http://www.unhchr.ch/html/menu2/convmech.htm> (last visited Mar. 2, 2003).

48. Thomas, *supra* note 45, at 203–05 (cataloguing Ninth and Eleventh Circuit cases). See, e.g., *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441–03 (9th Cir. 1996) (interpreting the ICCPR); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (applying the ICCPR); *Ma v. Reno*, 208 F.3d 815, 830 (9th Cir. 2000) (applying the ICCPR), *cert. granted*, *Zadvydus v. Davis*, 121 S.Ct. 2491 (2001) (not touching on the issue of the ICCPR’s enforceability); *United States v. Duarte-Acero*, 208 F.3d 1282–09 (11th Cir. 2000) (applying the ICCPR, despite citing to the non self-execution RUD, and looking to the HRC for guidance on the ICCPR’s meaning). Cf. *United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir. 1991), *cert. denied*, 502 U.S. 897 (1991).

49. *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976), *cited in* *Jama v. Immigration and Naturalization Service*, 22 F. Supp. 2d 353, 362 (D.N.J. 1998). See *Foster*, 27 U.S. at 253 (interpreting Article VI, clause 2 of the Constitution as providing the basis for this treaty rule).

50. RESTATEMENT, *supra* note 29, § 111.3 (1986).

51. See generally Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760 (1988) (providing an alternative reading of Supreme Court jurisprudence, leading to the conclusion that the court has never failed to apply a treaty based on a non-self-executing status). The practice of affording significant, but not binding, force to treaties is consistent with the general rule that international law may constitute “persuasive authority in American courts,” although it is rarely binding. See Sandra Day O’Connor, Remarks before the Annual Meeting of the American Law Institute (May 15, 2002) (on file with the librarian of the American Law Institute).

52. *United States v. Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985) (“[U]nless a treaty

plement a non-self-executing treaty can result in default under its treaty obligations.<sup>53</sup>

Even so, the declaration attached to the treaty as deposited at the United Nations provides powerful evidence that the HRTs are not self-executing, as it satisfies the relevant tests for determining the enforceability status of a treaty.<sup>54</sup> Its legality under international law, however, is another matter. A potential conflict between domestic and international law is thus signaled.<sup>55</sup>

In addition to declarations that render treaties non-self-executing, the United States has issued RUDs stipulating that a given provision or phrase must be interpreted identically to constitutional provisions covering similar topics. For example, a U.S. RUD to CAT states that:

the United States considers itself bound by the obligation under article 16 to prevent “cruel, inhuman or degrading treatment or punishment,” only in so far 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.<sup>56</sup>

This “forced conformity” RUD raises the interpretational issue of whether the RUD refers to the meaning of the amendments referenced as their common law interpretation stood at the date of ratification, or whether it refers to the unpredictable and ongoing process of elucidation of meaning inherent in the common law system.<sup>57</sup>

The question of how to construe an RUD is distinct from the question of whether a court might strike down or invalidate an RUD, thus excluding it from the treaty. The notion, raised by the U.S. circuit courts,<sup>58</sup> that the Supreme Court might invalidate the Senate’s RUDs seems legally fantastical. The power to attach conditions to

or intergovernmental agreement is ‘self-executing’ . . . an individual citizen does not have standing to protest when one nation does not follow the terms of such agreement. Only Panama could invoke [the agreement,] and it evinces no such inclination”).

53. RESTATEMENT, *supra* note 29, §111, Reporters’ Note 5 (1986).

54. *See id.* § 111.4 A, B, and C (1986) (explaining that an international agreement is non-self-executing “(a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if it is constitutionally required”).

55. *See* Part III, *infra*.

56. *See* Treaty Body Database, *supra* note 1.

57. This question has great relevance for the notion of a minimum floor for human rights within the United States, and is discussed in Part III, *infra*.

58. *See supra* notes 45–48 and corresponding text.

the ratification of treaties, granted to the Senate by the Constitution, could be seen as empty if the conditions attached were not honored. Despite the admission that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,”<sup>59</sup> the conduct of foreign relations lies at the core of the political branches’ powers. The Supreme Court has stated that the conduct of foreign relations is confined to the political branches,<sup>60</sup> that foreign policy decisions are not apt for the judiciary,<sup>61</sup> and that a treaty that does not confer a private right of action is unenforceable.<sup>62</sup> Yet, it does not necessarily follow that the power to attach conditions and refuse ratification includes an uninhibited right to attach any conditions; rather, this power may be properly limited to certain permissible conditions.<sup>63</sup>

The Senate’s lack of reference to international law governing the legality of RUDs creates a tension between domestic practice and international law. Specifically, reservations contrary to the object and purpose of any treaty are illegal under international law.<sup>64</sup> Although the treaty power can be criticized as undemocratic,<sup>65</sup> the most power-

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59. *Baker*, 369 U.S. at 211.

60. *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

61. *Waterman S.S. Corp.*, 333 U.S. at 111.

62. *Edye v. Robertson*, 112 U.S. 580, 598 (1884) (“A treaty . . . depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. . . . But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.”).

63. See Part IIIA, *infra*.

64. Vienna Convention, *supra* note 30, art. 14 (widely acknowledged to constitute CIL). See also Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 24 (May 28) (“The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation. Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.”).

65. This critique is based on the fact that a mere one-third plus one of the senators present may prevent U.S. ratification unless their terms are included. Executive agreements which of course bind the United States, are far more undemocratic, however. See LISA MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION 57 (2000) (“Because members of Congress are not by law involved in consultations during the negotiation

ful critique is that, if read expansively, it facilitates violations of international law and transnational discord.<sup>66</sup>

Indeed, it is questionable whether and to what extent the constitutional definition of “treaties” coincides with the definition under international law. The constitutional definition differs from the generic international definition in that only treaties to which the Senate consents are considered “treaties” under U.S. law. But if these definitions conflict in other ways, RUDs incompatible with the object and purpose of a treaty might not technically form part of a treaty, and the U.S. judiciary would be obligated to disregard them if it—or the hypothetical authoritative international arbiter—determined that they were invalid under this standard. The current reality, in which RUDs excluded from a treaty are still applied domestically,<sup>67</sup> could change. Because of the changing nature of sovereignty and uncertain status of international law’s domestic role, it is important to understand the argument in favor of the judiciary reinterpreting (and effectively destroying) the Senate’s unchecked power to attach terms and conditions to treaties.<sup>68</sup>

## II. THE UNDERLYING BASES OF CONDITIONAL CONSENT

As shown in the foregoing Part, U.S. law reserves a high place for treaties and, accordingly, imposes procedural constraints on their ratification. Nowhere does U.S. law mandate conditional consent to HRTs. Conditional consent is thus properly termed a “policy,” in that it is a course of action informed not only by legal norms, but also by the interests of decision makers and their constituencies.<sup>69</sup> The former have been described as normative factors, delivering “the impact that shared norms, and the processes by which those norms are

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of executive agreements, and often do not have to vote on them, it seems plausible to interpret them as one of the tools presidents use when they wish to avoid congressional scrutiny”). Incidentally, Martin suggests that the “actual nature of legislative influence” is such that the president cannot evade the legislature so easily. *Id.* Martin’s quantitative model suggests that “the president’s ability to conclude treaties is significantly related to his support in the House, but not to his support in the Senate.” *Id.* at 74. If this is so, then the treaty power would appear more democratic in practice than it does on its face.

66. This is so because, as stated above, reservations potentially invalid under international law are binding on domestic courts’ interpretation of the treaty.

67. See Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151, 1176–77 (1956).

68. See Part IIIA, *infra*.

69. Robert O. Keohane, Comment, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L.J. 487 (1997).

interpreted, have on state policies.”<sup>70</sup> The latter have been described as instrumentalist factors, generated by the “use [of] the rules of international law [by states] as instruments to attain their interests.”<sup>71</sup>

This Part contains an analysis of these norms and interests. The analysis focuses on explanatory value and thereby provides a piece of the answer to the human rights question posed at the outset of this article.<sup>72</sup> A final socio-structural theory of human rights protection is then proposed to supplement the existing theories by responding more fully to the human rights question. This final theory informs Part III, which reviews two proposed solutions to the controversy and suggests a third.

### A. Normative Explanations

1. *The Federalist Papers and the separation of powers.* The Federalists’ view of human nature, specifically Madison’s, proved persuasive as to the necessity of checks and balances on the exercise of power and strict attention to procedural mechanisms for protecting the same.<sup>73</sup> It is not difficult to imagine why this would be so, given the historical context of the founding and the significance of independence and self-governance.

Most concretely, Madisonian principles informed the contours of domestic sovereignty, as institutionalized in U.S. law. In a debate at the time of the Jay Treaty, Hamilton insisted that the “House of Representatives have no moral power to refuse the execution of a treaty which is not contrary to the Constitution.”<sup>74</sup> The House, under the

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70. *Id.* at 488.

71. *Id.*

72. The challenge in examining these theories is to move up and down the various levels of abstraction they present, asking all the while, “how do these different arrangements and processes interrelate?” The goal is to avoid becoming entrenched in any one level of analysis. On the one hand, one risks being detained in a thicket of unsettled law and procedural intricacies. On the other, the risk is in getting stuck pondering the immensity of over-arching, almost metaphysical, constructs of power, sovereignty, and anarchy—a vision of countries as anthropomorphized unitary actors on a Tolkein-esque playing board. See, e.g., C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* (40th Anniversary ed., 2000). One must keep in mind that international policy is a circular phenomenon: norms affect preferences and preferences affect norms. Further, preferences generate and affect institutions, and those institutions, in turn, affect preferences. Countries are not unitary actors; strategies to affect policies must address both internal norms and exogenous preferences. Both agency and social structure (or socialization) must be examined.

73. See *THE FEDERALIST NO. 51* (James Madison) (discussing the separation of powers).

74. *WORKS OF ALEXANDER HAMILTON* 566 (J.C. Hamilton ed., 1851), and 5 *ANNALS OF CONGRESS* 771 (1796), quoted in LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*

leadership of Madison, concluded that “it is the Constitutional right and duty of the House of Representatives [when a treaty purports to regulate on a subject within the power of Congress] to deliberate on the expediency or in expediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.”<sup>75</sup> This debate contextualizes the separate but related roles of the Senate’s advice and consent power, and foreshadows the significant difficulties HRTs face in both houses of Congress.

The tripartite model of government “insure[s] that a wide variety of groups and interests . . . participate in decision-making processes[, and] by assigning most of the governing authority to a Congress divided between a Senate and a House, the Constitution further facilitated the intrusion of parochial considerations into the making of foreign policy.”<sup>76</sup> If the Constitution did not require the approval of two-thirds of the Senators present, surely more treaties would be concluded. This is supported by the comparatively large number of executive agreements, which do not require the Senate’s consent.<sup>77</sup> It may well be that countries with an unhampered executive branch conclude more treaties, but the meaning of those treaties would be diminished since a commitment without legislative consent may lack credibility.<sup>78</sup> Furthermore, in dualist countries, such as the United Kingdom where all treaties are non-self-executing,<sup>79</sup> such a commitment would be less meaningful. Under the British rule, a declaration of non-self-execution would be superfluous, whereas under the American rule such a declaration materially diminishes a treaty’s effect—at least insofar as the treaty contemplates a right or duty or an enforcement or interpretive mechanism absent from domestic law. The purpose of the American rule is to avoid treaty violations,<sup>80</sup> and the advent of RUDs, in turn, prevents the American rule from causing the United States to exclude itself completely from all treaties that

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205 (2d ed. 1996).

75. HENKIN, *supra* note 74, at 205 (“[t]he resolution was reaffirmed in 1871, Cong. Globe, 42d Cong., 1st Sess. 835 (1871)”).

76. Paul E. Peterson, *The President’s Dominance in Foreign Policy Making*, 109 POLITICAL SCIENCE Q. 215, 219 (1994).

77. LAWRENCE MARGOLIS, EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POLICY 45 (1986); LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS: CONGRESS CONFRONTS THE EXECUTIVE 41–46 (1984).

78. See MARTIN, *supra* note 65, at 57.

79. Vazquez, *supra* note 44, at 697.

80. *Id.* at 698.

do not entirely comport with its interests.

In sum, the American rule and Madisonian principles create an environment in which treaties have great impact and must be agreeable to a wide section of interests. The first of these features complicates the second, since one can logically assume that a high degree of impact by an international commitment translates into a high amount of debate. This increases the temptation to resort to RUDs, since RUDs enable compromises to be reached and prevent an ‘all or nothing’ pattern of ratification.

2. *HRTs as contracts, not legislation.* The legal environment described above welcomes a contract theory of treaties. U.S. views on whether treaties are more analogous to contracts or legislation provide an additional component of a normative explanation for U.S. policy on HRTs.

A contracts approach would, all things being equal, provide parties with maximum flexibility in customizing HRTs. Under this approach, HRTs would be interpreted like contracts—through a “subjective, party-oriented approach,”<sup>81</sup> seeking to give effect to parties’ intent, insofar as it could be objectively ascertained. A contracts approach presupposes that parties come to the table with defined interests and that they attempt to realize those interests through a legally binding arrangement. In spite of this, the contracts approach is distinctly normative in application to domestic contracts, since it is informed by, and conducted in accordance with an uncontroversial understanding and use of rules. But, these same rules are controversial as applied to international law and, thus, a contracts approach is instrumental and exceptional when applied to HRTs.

Professors Abram and Antonia Chayes note that

In earlier times, the principal function of treaties was to record bilateral (or sometimes regional) political settlements and arrangements. But in recent decades, the focus of treaty practice has moved to multilateral regulatory agreements addressing complex . . . political and social problems that require cooperative action among states over time. Chief among the areas of concern are . . . human rights.<sup>82</sup>

In this sense, HRTs embody a qualitative change from bilateral agreements to multilateral codes establishing global standards.

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81. MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 85 (2001).

82. ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 1 (1995).



Chayes likens the treaty-making process of today to “legislation in a democratic polity” in which “parties not only weigh the benefits and burdens of commitment, but also explore, redefine, and sometimes discover their interests. It is, at its best, a learning process in which not only national positions but also conceptions of national interest evolve and change.”<sup>83</sup>

Consistent with Chayes’ legislation approach is the establishment of six treaty bodies, one for each of the HRTs.<sup>84</sup> Composed of independent experts from around the world, the treaty bodies monitor parties’ compliance through the receipt of periodic reports, examine information from third-party sources, and issue concluding observations with which parties are expected to comply.<sup>85</sup> Treaty bodies interpret HRTs through adopting “general comments or recommendations in which they share their views about the concrete meaning of specific articles of the treaty.”<sup>86</sup> HRTs contemplate not only supernational interpretation but super-national bargaining, as well. The observation that HRTs are multilateral instruments interpreted by supranational bodies partially discredits the contracts approach.

Nevertheless, HRTs are dissimilar to legislation for the simple reason that states do “contract” into them. Unlike Security Council resolutions, HRTs are not automatically binding on the international community.<sup>87</sup> Even if the multilateral treaty making process entails an exploration and, possibly, re-definition of interests, states have a choice as to whether they wish to be subjected to any given treaty.<sup>88</sup>

Despite the qualitative change from bilateral agreements to multilateral agreements complete with supranational supervisory bodies, the United States maintains a contracts approach to treaties, severely qualifying its consent to treaty provisions through RUDs and insisting that domestic courts honor its pre-determined intent. The Human

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83. *Id.* at 4–5.

84. See UNHCR website, *supra* note 47.

85. See Treaty Bodies in a Nutshell, available at <http://www.unhcr.ch/html/menu2/convmeh.htm> (last visited Mar. 2, 2003).

86. *Id.*

87. Although Security Council resolutions only become binding on a state once it has become a member of the U.N., the great majority of states do not participate in the formation of the resolutions. Upon joining the U.N., states proffer “meta-consent” to whatever the Security Council will decide in the future.

88. This autonomy is greater than that possessed by domestic states that are bound by federal law in the United States. Admittedly, treaties purporting to codify custom would constitute an exception to this line of reasoning.

Rights Committee (HRC),<sup>89</sup> the treaty body empowered to interpret the ICCPR, has condemned this practice, signaling a conflict between the legislation and contracts approaches:

Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general level of policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and . . . a failure to allow individual complaints . . . , all the essential elements of the Covenant guarantees have been removed.<sup>90</sup>

This comment undermines the contract approach, or at least its extreme manifestation in which parties act with absolute autonomy. At minimum, the comment reminds parties that, even under a contract approach, international law governs contracts between nations. Although it could be argued that HRTs are contracts *common* to many nations creating rights that vest in individuals citizens, and are thus not properly termed contracts *between* nations, international law still governs since the rights created arise from treaties and the Vienna Convention governs treaty law. In either case, the HRC's general comments apply to all States Parties. The fact that HRTs mandate compliance with the opinions of a supranational body, creates tension between HRTs and the U.S. approach to treaty law.<sup>91</sup>

The International Court of Justice (ICJ) provides qualified normative support for the U.S. contracts approach. In the Reservations

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89. See UNHCR website, *supra* note 47. Under the legislation approach, the HRC can be viewed as an administrative agency empowered to oversee and facilitate the implementation of legislation, here the ICCPR, approved by a supranational legislature, the UN General Assembly. Under a contract approach, it might be seen as an enforcement-deficient arbitral body whose existence is stipulated to in the contract itself.

90. Human Rights Committee, General Comment 24 (52), ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [hereinafter General Comment 24].

91. Recall from Part IB, *supra*, that the prevailing domestic view appears to be that the Senate could attach RUDs invalid under international law (as contrary to the object and purpose of the treaty). See Vienna Convention, *supra* note 30, art. 19(c), which would nonetheless be honored by domestic courts. See generally HENKIN, *supra* note 74. Again, the rationale behind this argument is ostensibly that the Senate has an implied power to attach any conditions it wishes to its approval of a treaty and expect them to be honored, because it has the express power to attach conditions or withhold ratification altogether. The logic behind this assertion is debatable, however, since the mere fact that a government entity has sole discretion to conduct or to refuse a certain action does not necessarily lead to the proposition that it has the power to undertake that same action in any way it pleases.

to the Genocide Convention Case, the ICJ indicated that a state may suspend the operation of the Genocide Convention between itself and another state by objecting to reservations entered by that state.<sup>92</sup> This advisory opinion, though narrowly tailored to address only the Genocide Convention,<sup>93</sup> conforms to the dictates of Articles 20 and 21 of the Vienna Convention on the Law of Treaties,<sup>94</sup> as noted by the HRC.<sup>95</sup>

The HRC has clarified that this approach to dealing with reservations is inappropriate in the particular context of HRTs, because “such treaties . . . are not a web of inter-State exchanges of mutual obligations.”<sup>96</sup> The formation of contracts implies bargaining for mutual benefit. Legislation, however, does not necessarily serve to narrowly benefit the parties responsible for its enactment. Rather, it pursues some public good and is enacted by representatives to mandate a solution to a broad problem, often a problem whose effects emanate from a source that cannot be influenced by contracts between affected parties. This is also the case with HRTs.

HRTs combat the problem of human rights abuse. Victims of such abuse may be powerless to bind their abusers to contracts illegalizing such abuse.<sup>97</sup> The HRC confirmed this by stating that HRTs “concern the endowment of individuals with rights,”<sup>98</sup> therefore “the principle of inter-State reciprocity has no place.”<sup>99</sup> Consequently “[t]he absence of protest by States cannot imply that a reservation is either compatible or incompatible with [an HRT’s] object and pur-

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92. See *Reservations to the Convention on Genocide*, 1951 I.C.J. 21, 26–7 (“It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. . . . As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. . . . Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.”).

93. *Id.* at 20.

94. Vienna Convention, *supra* note 30, arts. 20, 21.

95. General Comment 24, *supra* note 90, ¶ 16.

96. *Id.* ¶ 17.

97. States or state actors are the usual perpetrators of human rights abuses and will therefore not always be capable or willing to self-police. It is therefore evident that super-national input can facilitate freedom from human rights abuse.

98. General Comment 24, *supra* note 90, ¶ 17.

99. *Id.*

pose.”<sup>100</sup> In sum, HRTs are legislation, but it is conceivable that states might be confused by the disjuncture between ICJ precedent and the Vienna Convention, on the one hand, and the pronouncements of the HRC, on the other.

This entire inquiry—that of contracts versus legislation—could be criticized as preference dependent, since, if the United States considered treaties to be legislation and felt it could not freely attach as many RUDs, it might simply not adhere to *any* HRT. But, if norms and legal institutions influence preferences, then this theory has high explanatory value.

3. *Textual socialization: a short and primarily procedural Constitution.* A comparison of the German and U.S. constitutions points to the role of national experience and the circularity of norms and preferences. As such, it rounds out this first group of theories and segues to the second group, those described as instrumentalist. Still, it belongs within the normative category, since constitutions, although embodying values and goals, are the normative framework with which *all* domestic values and goals must contend.

The objectives of the U.S. Constitution included “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty.”<sup>101</sup> It is quite short and as such may provide less explicit guidance on any given matter than a more recent, longer, and highly specific text.<sup>102</sup> Informed by a suspicion of human nature, it created an architecture of power designed to cause good to be done even if the mal-intentioned occupied significant posts.<sup>103</sup>

The Germans, however, did not suspect or theorize about the negative aspects of human nature when designing their country’s current constitution. Rather, they knew first-hand. The German Basic

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100. *Id.*

101. U.S. CONST. pmb.

102. See Maria McFarland Sanchez-Moreno, *When A “Constitution” is a Constitution: Focus on Peru*, 33 N.Y.U. J. INT’L L. & POL. 561, 606 (2001) (paraphrasing Giovanni Sartori “the aftermath of World War II has seen a great increase in the length of constitutions.”). See GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* 199 (1994) (discussing the Indian Constitution, with 395 articles, and the Brazilian Constitution of 1988, with 245 articles).

103. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 198 (1969) (quoting John Adams: “Liberty depends upon an exact Ballance (sic), a nice Counterpoise of all the Powers of the state . . . . The best Governments of the World have been mixed”). See *generally* THE FEDERALIST NO. 51 (James Madison).

Law (the “*Grundgesetz*”)<sup>104</sup> was intended to raise Germany from the ashes of war and genocide and ensure that nothing akin to the Holocaust would ever recur on its territory. Not willing to place bets on whether a structural safeguard would suffice, the German framers instituted substantive prohibitions and protections that, on their face, significantly diminish the chances of human rights infringements.

The *Grundgesetz* has 144 articles,<sup>105</sup> 19 of which are denominated “Basic Rights.” The especially relevant among these 144 articles are as follows. Article 102 abolishes capital punishment and Article 19(2) states that in no case may the essence of a basic right be undermined or qualified. Also of special significance for human rights protections is Germany’s status as a “fighting democracy” bestowed by Articles 21 and 79. They state, respectively, that political parties seeking to “impair or abolish the free democratic basic order” are unconstitutional, as democracy cannot be used to install a totalitarian state, and that the *Grundgesetz* cannot be amended so as to affect the “basic principles laid down in Articles 1 and 20.”<sup>106</sup> These latter two articles include the right to human dignity, Germany’s status as a “democratic and social federal state,” the right to resist anyone who tries to abolish the constitutional order, and the principle that “all state authority emanates from the people.”<sup>107</sup>

Article 23, as amended in 1992, specifies that German participation in the development of the European Union (EU) is partially premised on a state of affairs in which the EU “guarantees a level of protection of fundamental rights essentially equivalent to that of [the] Basic Law.”<sup>108</sup> It further specifies that it is “to this end [that] the Federation may transfer sovereign powers.”<sup>109</sup> This safeguarding of human rights standards against potential decreases pursuant to the delegation of sovereignty could be seen many years earlier when the German court determined its relationship with the European Court of Justice. In the *Solange Zwei* Case, the Court held that “[s]o long as the . . . European Court . . . generally ensure[s] an effective protection of fundamental rights . . . that is to be regarded as substantially similar to the protection of fundamental rights that the Basic Law re-

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104. GRUNDGESETZ [GG] [Constitution] (F.R.G.), *translated in*, DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 343 (Chi. Univ. Press 1994).

105. *See* GRUNDGESETZ, *supra* note 104.

106. *Id.* arts. 21 and 79.

107. *Id.* arts. 1 and 20.

108. *Id.* art. 23.

109. *Id.*

quires, . . . the Federal Constitutional Court . . . will no longer measure [Community] law against the standard . . . contained in the Basic Law.”<sup>110</sup>

A comparison of two nearly contemporaneous cases sheds light on relevant differences between the U.S. Constitution and the *Grundgesetz*, albeit as interpreted by the subjective lenses of each lands’ highest court. In the *Life Imprisonment Case*,<sup>111</sup> Germany’s Constitutional Court held that a life sentence without the possibility of parole is never permissible, regardless of the crime at issue. The Court confirmed that human dignity is the highest value of the German constitutional order<sup>112</sup> and announced that the duty to defend human dignity hinges on the “conception of man as a spiritual–moral being endowed with the freedom to determine and develop himself;”<sup>113</sup> Given this freedom, any lifetime deprivation of liberty is therefore disproportionate to the crime. To explain why deterrence is not a legitimate objective of the criminal law, the Court commented that, “It is contrary to human dignity to make persons the mere tools of the state.”<sup>114</sup> The Court accepted great responsibility in proclaiming a duty not only to respect human dignity by not directly infringing upon it, but also to ensure its realization through an affirmative obligation to establish the necessary conditions conducive to the same.<sup>115</sup>

This decision contrasts sharply with several U.S. Supreme Court cases concerning human dignity. Human dignity is the underlying value of the Eighth Amendment,<sup>116</sup> and so Eighth Amendment cases

110. Solange Zwei, 73 BverfGE 387 (1986), *quoted in* CURRIE, *supra* note 104, at 96. *See also* the Maastricht Case, 89 BVerfGE 155 (1993), *quoted in* Kommers, *infra* note 111, at 112 (“The new Article 23 inserted into the Basic Law expressly mentions the [future] development of the European Union and subjects it to the principles of democracy and the rule of law, the principles of the social and federal state, and the principle of subsidiarity . . . [I]t is expected that a living democracy will be maintained in the member states as integration proceeds.”).

111. *Life Imprisonment Case*, 45 BverfGE 187 (1977), *in* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 306–13 (1997).

112. *Id.* at 316.

113. *Id.*

114. *Id.*

115. *See id.* at 313–20. In a note to the case, Kommers explains that:

both court and commentators have characterized human dignity as an objective and subjective right: objective in the sense of imposing an affirmative obligation upon the state to establish conditions necessary for the realization of dignity; subjective in the sense of barring the state from any direct interference with the negative freedom of individuals.

*Id.* at 321.

116. *See* *Trop v. Dulles*, 356 U.S. 86 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

are in this sense the U.S. equivalent to the Life Imprisonment Case. In *Gregg v. Georgia*, the Supreme Court upheld the constitutionality of the death penalty against an Eighth Amendment challenge.<sup>117</sup> Thus, state-sponsored executions are not “cruel and unusual” within the meaning of the Eighth Amendment, and government objectives can legitimately require the destruction of a human person. Human dignity in the United States, therefore, is a forfeitable right, and consequently, cannot logically be considered the core value of the U.S. Constitution.

The U.S. Supreme Court’s holdings in the area of life imprisonment demonstrate the depth of the rift. Just this month, in *Ewing v. California* and *Lockyer v. Andrade*, the U.S. Supreme Court decided that neither a fifty-year sentence for stealing videotapes from K-Mart nor a 25-year sentence without the possibility of parole for stealing golf clubs violates the Eighth Amendment.<sup>118</sup> The U.S. Constitution, therefore, considers that human dignity is not impermissibly compromised by the practice of incarcerating people for the remainder of their lives for stealing what amounts to half of the hourly fee of a successful corporate attorney.<sup>119</sup> The level of protection flowing from the Eighth Amendment proved to be quite malleable and quite low in comparison to its German counterpart.

The rift between German and U.S. human dignity jurisprudence may be derived from social mores to the extent that human judgment is involved in eliciting the meaning of each constitution. Social mores do not originate in a vacuum, however. Human dignity’s status as the first article of the *Grundgesetz* creates an objective inference, under

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117. 428 U.S. 153 (1976). Another significant aspect of this case is that it served to effectively reinstate the death penalty after a ten-year period during which it was considered violative of the Eighth Amendment.

118. Respectively, 123 S.Ct. 1179 (2003) and 123 S.Ct. 1166 (2003).

119. The value of the video tapes stolen by Andrade was \$153.54. See Linda Greenhouse, *The Supreme Court: Repeat Offenders, Justices Uphold Long Sentences in Repeat Cases*, N.Y. TIMES, Mar. 6, 2003, at A1. It is apparent that those individuals who steal millions of dollars and cause serious detriment to the entire national and international economy—such as those involved in the Enron scandal—would, even under enhanced penalties, suffer merely a fraction of the prison term imposed on the likes of *Andrade* and *Ewing*. See *Stiffer Penalties Ahead for Corporate Criminals*, US Gov/Info Resources, Jan. 16, 2003, available at <http://usgovinfo.about.com/library/weekly/aa011603a.htm> (last visited Apr. 14, 2003) (“As an example of the enhanced penalties approved by the Commission, an officer of a publicly traded corporation who defrauds more than 250 employees or investors of more than \$1 million will receive a sentence of more than 10 years in prison, almost double the term of imprisonment previously imposed.”). While this comparison is not technically relevant from a narrow legal perspective, it is illustrative of the curious notions of proportionality that reign in U.S. law.

standard precepts of statutory interpretation,<sup>120</sup> that the *Grundgesetz*'s remaining text is to be read and construed in accordance with human dignity. The circularity of norms and preferences hampers analysis of this point, since Germany's experience with the Holocaust led to the adoption of a constitution beginning with the right to human dignity.<sup>121</sup>

The United States, on the other hand, emerged triumphant from a revolutionary war. Protections of individual liberties were not the first order of business; rather, they came in the form of amendments to the Constitution.<sup>122</sup> A different founding and constitutional structure has produced a different orientation to human rights guarantees. It has also produced a different orientation to internationalism.

Although the United States and Germany have both succeeded in protecting their own domestic human rights standards in the face of pressure to cede power to international bodies, the substantive outcome in each case was entirely different. While Germany took steps to ensure that its ceding of sovereignty pursuant to EU membership would not *reduce* the level of protection for fundamental freedoms guaranteed by the *Grundgesetz*, the United States sought to ensure that its participation in human rights instruments would not *increase* the level of protection that it must provide its own citizens.<sup>123</sup> Two very different notions of "prudence"<sup>124</sup> emerge by way of this comparison. These are consistent with the different notions of human dignity elicited earlier; perhaps they are best viewed as the same phenomenon.

Questions remain as to what degree U.S. normative structure has caused the policy of conditional consent in the area of internationally-inspired human rights.

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120. See Vienna Convention, *supra* note 30, art. 31(1) and (2). Although not necessarily influential on the international plane, U.S. domestic principles are supportive of this point. See generally Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

121. There is of course a circular character to either argument, since certain social mores preceding the Holocaust indicated that the Holocaust was indeed a tragedy of the greatest magnitude. And other human experiences and core documents embodying and propagating the lessons from that experience similarly predate the Holocaust.

122. See U.S. CONST. amends. 1–10.

123. Compare Senate Committee on Foreign Relations, *supra* note 37, at 3 with *Grundgesetz*, *supra* note 104, art. 23, and the *Solange Zwei* case, *supra* note 110. Regarding the first, see also *supra* notes 37–39 and accompanying text.

124. *Id.*



## B. Instrumentalist Theories

This second group of theories suggests that preferences matter, perhaps more than norms. By way of anecdotal illustration, the oft-cited U.S. professional standard for legal representation of a client contains two clauses and the order in which they occur is instructive: “to [1] represent his client zealously [2] within the bounds of the law.”<sup>125</sup> An alternative phrasing would require the attorney “to zealously apply the law within the bounds of the client’s interests.” As a textual matter, the actual version suggests that the lawyer concern his or herself first and foremost with satisfying certain interests. The alternative version suggests that the lawyer be first and foremost an officer of the court, have great concern for the integrity of the law, and endeavor to satisfy clients’ interests from that posture. The following theories indicate that the official version best describes the reality of U.S. engagement with HRTs.

To illustrate the value of instrumentalist theories, it need only be mentioned that the human rights question remains unresolved, despite the relevant variables unearthed by the normative theories. For example, although the *Grundgesetz* requires Germany to provide a substantive standard of human rights protections, the U.S. Constitution does not require the United States to provide a lower standard. Rather, the United States chooses to do so of its own accord and stretches the bounds of the law along the way. An instrumentalist theory would thus note that, despite the Senate’s considerable normative leeway to welcome international human rights protections, such protections will be resisted to the extent that individuals such as Senators Bricker and Helms exercise influence.<sup>126</sup> The “Vietnam flavor”<sup>127</sup> of international agreements will, in turn, be resisted by individuals such as Senator Stuart Symington.<sup>128</sup> Instrumentalist theories center on the reasons for this pattern. To be useful, they must isolate key variables that explain and, hence, predict the choices afforded by political discretion in the area of HRTs.

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125. Model Code of Professional Responsibility 1983, EC 7-1, *quoted in* David B. Wilkins, *Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics*, in *EVERYDAY PRACTICES AND TROUBLE CASES 70–75* (Sarat et al. eds., 1998).

126. *See* MARTIN, *supra* note 65, at 76. Senator Bricker attempted to amend the Constitution to the effect that all treaties would become non-self-executing. *See* Louis Henkin, *US Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 348 (1995).

127. This is meant to refer to international involvement at the other side of the spectrum from involvement intended to increase human rights protection.

128. *See* MARTIN, *supra* note 65, at 77.

1. *HRTs threaten domestic sovereignty.* The fact that human rights law deals largely with intra-national duties<sup>129</sup> creates an endemic obstacle to adherence and enforcement; it is perceived that sovereignty is threatened, despite the fact that it is voluntarily ceded.<sup>130</sup> Judge Petren, opining in the Nuclear Tests Case on the significance of the granting of individual rights by international law, stated that “[i]n the relatively recent past . . . [e]ven the most outrageous violations of human rights committed by a State toward its own subjects could not have formed the subject of an application by another State to an international judicial organ.”<sup>131</sup> States generally resist altering their behavior on their own turf at the behest of other states and are reluctant to compromise their autonomy, absent the potential for significant benefits. The power to order and determine one’s own affairs remains, at least in theory, an organizing principle of the international system. President George H.W. Bush evidenced his understanding of this when, in order to convince the U.S. Senate to ratify the ICCPR, he emphasized that U.S. practices would not need to be altered and searched for ways to prevent this internationally-created set of rights from being enforceable in domestic courts.<sup>132</sup>

Professor Karl Kaiser theorizes that transnational relations necessarily entail forms of decision-making antithetical to intra-state control.<sup>133</sup> In particular, transnational relations raise the specter of “technocratic rule,” which undermines politics and, hence, democracy.<sup>134</sup> Kaiser describes three categories of decision-making, a stair-

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129. This is to say that it regulates a state’s conduct with regard to its own citizens.

130. If the ability to retain domestic control of a given matter is given up through a voluntary ceding of power to international bodies, it cannot be maintained that sovereignty has been diminished. Rather, sovereignty implies the ability to make such a choice. To maintain otherwise would be to suggest that being forced into isolation would entail a greater quantity of sovereignty than possessing the ability to choose between isolation and multinational integration. The exception to this rule might lie in a situation where there was no way to regain a power once it had been ceded. These differing views of sovereignty are analogous to that coffee-house conversation on how Americans define freedom in terms of individuality and self-reliance, while Europeans define it in terms of connection to community. Freedom must be the ability to choose, not the substantive choice itself, since any ranking of outcomes presupposes subjective values.

131. *Australia v. France*, 1974 I.C.J. Rep. 253, 303 (Dec. 20).

132. John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287 (1993).

133. Karl Kaiser, *Transnational Relations as a Threat to the Democratic Process*, 25 INT’L ORG. 706 (1971).

134. *Id.* at 708.

way toward undemocratic rule: multibureaucratic decision-making,<sup>135</sup> transnational politics,<sup>136</sup> and multinational integration.<sup>137</sup> He warns that the forces undermining democratic control are themselves favorable,<sup>138</sup> such as “interdependence, internationalism, economic advancement, scientific and technical progress,”<sup>139</sup> and that those facilitating them believe themselves to be acting within “Western democratic traditions.”<sup>140</sup>

Indeed, one of two basic assumptions is required to believe that democracy is undermined by unconditional engagement with the HRTs. First, one may assume that such engagement would in fact produce a democratic deficit. Although HRTs engage elements of both multibureaucratic decision-making and transnational politics, it is unclear whether this implies undemocratic rule. Kaiser’s theory generates a tenable hypothesis: the U.S. policy of conditional consent, qualifying HRTs so that they replicate domestic provisions, is designed to allow the United States to avoid losing control of its domestic policies regarding the treatment of its citizens.

The hypothetical test of this theory—that RUDs would not be issued if democratic control could be maintained without them—is difficult to evaluate since the Senate’s perceptions may be skewed or, as a body, it may be risk averse. Normatively speaking, however, unconditional consent to HRTs would invite only mild transnational influence, since the Constitution would have to be amended to permit any other source of law to supersede it. Further, the last-in-time doctrine would not be affected.

HRTs have a relatively insignificant impact on state sovereignty. This can be illustrated by elucidating the rough “gradations in sovereignty” visible on the international panorama.<sup>141</sup> First, a nation may

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135. As in NATO, where “the decisionmaking structures of different national governmental and international bureaucracies intermesh within specific issue areas for the allocation of values.” *Id.*

136. Such as that concerning currency exchange or movement of investment capital, consisting of “political processes between national governments . . . set in motion by transnational relations.” *Id.* at 709.

137. In which States, as well as societal, and possibly intergovernmental, actors engage in joint-decision-making on the “preparation, formulation, and implementation of political decisions.” *Id.* at 710.

138. This value judgment need not be addressed, except to clarify that his argument is consistent with the phrase, “the road to hell is paved with good intentions.”

139. *Id.* at 715.

140. *Id.* at 706.

141. See Robert O. Keohane, *Political authority after intervention: gradations in sovereignty*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 275 (J.L.

remain free from international obligation altogether. Second, sovereignty may be ceded in agreements whereby an international body interprets the terms of the treaty and recommends courses of action—as illustrated by the treaty bodies, such as the HRC. Third, the right to interpret the law may be ceded to supranational courts that impose courses of action. This was the experience of Switzerland in the *Belilos* case before the European Court of Human Rights.<sup>142</sup> Fourth, outside law is given direct effect superior to domestic law, causing automatic changes therein. EU law as applied to Member States provides an example of this category. Fifth, and finally, U.N.-based sovereignty can exist temporarily, as in the humanitarian intervention in Kosovo.<sup>143</sup>

Although the HRC is empowered to interpret the ICCPR, the last-in-time doctrine would permit Congress to annul undesirable interpretations and the inherent weakness of the HRT regime would generate insignificant repercussions. The HRT regime, as superimposed on the U.S. domestic legal structure, would fall within the second gradation, showing its relative insignificance for domestic sovereignty.

Those who maintain that sovereignty or democratic control is threatened by HRTs may also assume a stable relationship between transnational decision-making and a loss in local control. An absence of transnational decision-making on an issue of global scale may also cause such a loss. As such, their argument omits a relevant variable—the scale of the phenomenon being regulated. Transnational regulation of a global issue can cause an increase in local control, since without international coordination, the efforts of any one country could be futile. This is true, for example, where a country attempts to prevent polluted air from crossing its borders or attempts to forestall global warming. Although coordinated international decision-making could be seen as producing a democratic deficit because the country ceases to be solely accountable to its domestic constituency, this coordination actually causes a democratic surplus, since the affected state becomes empowered to control its fate. Thus, although the states participating in the transnational decisional processes might, for example, have to mandate lower automobile emissions, raise the

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Holzgrefe & Robert O. Keohane eds., 2003).

142. The European Court of Human Rights struck down a reservation made by Switzerland and proceeded to apply the entire treaty to them, instead of exempting them from the improperly reserved-to article. See *Belilos v. Switzerland*, 10 Eur. H.R. Rep. 466 (1988).

143. See Keohane, *supra* note 141, at 282–90.

price of gasoline, or impose tougher standards on factories, they might also gain the ability to prevent their coastal land from becoming an underwater attraction or their farmers from losing the ability to grow certain crops.

So too with human rights protections, insofar as human rights abuses causally correlate with regional instability and frustrate development—economic or otherwise. Countries willing to tolerate minor reductions in their ability to abuse their own citizens may achieve an enhanced ability to accomplish other ends. By incorporating external inputs into domestic law, thereby providing a point of insertion for international influence into domestic decision-making, the ‘collective action problem’ of human rights protection can be addressed.<sup>144</sup>

This notion of trade-offs between different types of sovereignty forces a redefinition of sovereignty, which, in turn, may require that decision-makers reconsider their preferences. Sovereignty encompasses more than the ability to exercise authority over one’s territory. Professor Steven D. Krasner observes three other types of sovereignty, besides “domestic sovereignty,” as defined in the previous sentence. These include “international legal sovereignty[, defined as] the practices associated with mutual recognition, usually between territorial entities,” “Westphalian sovereignty[, defined as] political organization based on the exclusion of external actors from authority structures within a given territory,” and “interdependence sovereignty[, defined as] the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state.”<sup>145</sup>

The observation that “sovereignty” refers to the capabilities of a state in various issue areas leads to the conclusion that it is, in the words of Professor Sohn, “divisible, up or down.”<sup>146</sup> If state A possesses a high ability to organize its authority within its territory, but a low ability to achieve recognition by other states in the international forum, some of that former ability could be used to achieve an increase in the latter ability. This could be accomplished, for example, by agreeing to international input on human rights issues in exchange for being included in transnational decisional fora—i.e., councils,

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144. This analysis is developed more fully in sub-part C, *infra*.

145. See STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3–4 (1999).

146. On the divisibility of sovereignty, see *International Law in a World of Multiple Actors: Conversation with Professors Louis Henkin & Louis Sohn*, 92 AM. SOC’Y INT’L L. PROC. 248, 254 (1998).

conventions, regional bodies, and the like.<sup>147</sup> Phrased differently, 100 units of sovereignty, allocated formerly to domestic sovereignty only, could be divided between that form of sovereignty, as well as international legal sovereignty. Alternatively, it could be divided among even more issue areas. Reductions in one area may accomplish increases in another.<sup>148</sup>

The concept of divisible sovereignty may be difficult for those who still conceive of sovereignty in the original context of rulers whose power emanated from divine origin; however, it need not be so. Even if “there is and must be . . . a supreme, irresistible, absolute, uncontrolled authority, in which the *jura sumi imperii*, or the rights of sovereignty reside,”<sup>149</sup> that authority would necessarily possess the ability to lease part of its omnipotent reign to achieve desirable ends. Otherwise, it would not be supreme or absolute. Indeed, it is sovereignty that permits the United States to make international agreements in the first place.<sup>150</sup>

Absent confusion on the part of the Senate or the president regarding the divisibility of sovereignty or the minimal intrusion on sovereignty inflicted by HRTs, it might be assumed that the decision to tender conditional consent to HRTs was made to avoid the creation of additional human rights within the United States, not to avoid transnational decision-making. Moreover, the afterthought that the maintenance of domestic decisional autonomy is a consistent aspect of U.S. practice, and hence that the decision not to enhance domestic human rights protections was made in order to avoid undemocratic enactment of laws, is hardly worth discussion. The treaty power is exercised quite frequently, and the democratically inferior, court-cre-

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147. Turkey, for example, has been pressured to improve its human rights record and abolish the death penalty in order to gain entry to the EU. See, e.g., *No date for Turkey EU entry talks*, CNN.COM, Oct. 9, 2002, at <http://edition.cnn.com/2002/WORLD/europe/10/09/eu.enlargement.turkey/> (last visited Apr. 14, 2003) (“Turkey’s human rights record has led to the postponement of talks on its entry into the European Union.”); Suzan Fraser, *Turkey Abolishes Death Penalty*, Associated Press, Aug. 3, 2002, available at [http://www.kurdishlibrary.org/Kurdish\\_Library/Aktuel/Turkey\\_EU/AP\\_News\\_020803\\_Eng.htm](http://www.kurdishlibrary.org/Kurdish_Library/Aktuel/Turkey_EU/AP_News_020803_Eng.htm) (last visited Apr. 14, 2003) (“Turkey’s parliament abolished the death penalty and granted more rights to minority Kurds Saturday, taking a major step forward in its bid to join the European Union.”); Case of Öcalan v. Turkey, *Application no. 46221/99*, ECHR, Mar. 12, 2003 (illustrating the practical effects of such change).

148. To provide another example, the ceding of the power to determine tariffs on goods entering a state can result in a contemporaneous increase in power to influence the tariffs set by other states in their territories, as in the world trade scheme.

149. 1 WILLIAM BLACKSTONE, COMMENTARIES \*49.

150. See RESTATEMENT, *supra* note 29, § 302, cmt. a (“The authority of the United States to make international agreements is inherent in its nationhood and sovereignty”).

ated executive agreement, which does not require the Senate's consent, is utilized even more often.<sup>151</sup> Furthermore, several treaties ratified by the United States are at least, if not more, abhorrent to local control, such as the GATT and the WTO agreement, in that they empower a foreign panel of experts to issue binding decisions upon all member countries. Inconsistent practice by the United States on the issue of resisting foreign influence,<sup>152</sup> and two-sided practice in the same area weakens the argument that a simple aversion to transnational influence causes U.S. conditional consent to HRTs.<sup>153</sup> It must be specified who is averse to transnational influence and how decisions are made about whether to allow that influence.

These questions are answered by looking to an additional variety of sovereignty—intra-national sovereignty, referred to in the United States as “states’ rights.” In *Missouri v. Holland*, the Supreme Court established that treaties can intrude into areas otherwise reserved to the states by the Tenth Amendment.<sup>154</sup> The use of the treaty power to regulate such areas may be seen as “federal aggrandizement and diminution of state authority.”<sup>155</sup> A facet of the larger issue of domestic politics, this issue is easily overlooked by theoretical inquiries partly because of “the use of game theory, with its assumption of unitary, rational actors.”<sup>156</sup> The United States is not a unitary actor, given its fifty semi-sovereign component parts. Professor Helen Milner asserts that domestic politics controls domestic ratification in the sense that it “tells us how preferences are aggregated and national in-

151. See MARGOLIS, *supra* note 77; JOHNSON, *supra* note 77.

152. Compare the United States approach to HRTs with its role in the WTO.

153. Compare rejection of the International Criminal Court to simultaneous prosecution of foreign nationals under the Alien Torts Claims Act. See Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L.R. 311, 360 (2002) (“[O]ver the past two decades, aliens have begun to bring human rights suits in the United States against foreign and U.S. governments and officials under the Alien Tort Claims Act (ATCA). Although the jurisdictional reach of this Act is governed by the same due process/minimum contacts limitations as all other suits, the Act does grant federal courts original subject matter jurisdiction over ‘any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’”).

154. *Holland*, 252 U.S. at 416. See Henkin, *supra* note 74, at 190. The *Holland* holding, if respected, would greatly facilitate compliance with article 27 of the Vienna Convention, *supra* note 30 (“a party may not invoke the provisions of its internal law as justification for failure to perform a treaty”).

155. Henkin, *supra* note 74, at 190.

156. Helen Milner, *International Theories of Cooperation Among Nations: Strengths and Weaknesses*, 44 WORLD POL. 466, 489 (1992).

terests are constructed [and] can help explain the strategies states adopt to realize their goals.”<sup>157</sup>

The dialogue between the president and the Senate, which leads to a decision on whether to consent, consent only conditionally, sign but not ratify, negotiate but not sign, withhold all forms of participation, or to offer one of the various possible levels of opposition, must necessarily be shaped by domestic political concerns. The task is to isolate and deconstruct the concerns that have been sufficiently politicized so as to influence the dialogue. With regard to HRTs, states’ rights concerns have culminated in a decision to take the second path outlined above and a federalism RUD was issued for the ICCPR. It makes clear that the ICCPR “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.”<sup>158</sup> This RUD proves that states’ rights concerns have contributed to the policy of conditional consent.

Although not a states’ rights case per se, *Ewing v. California*,<sup>159</sup> the most recent case from the Supreme Court on the Eighth Amendment, illustrates the strength of states’ rights in U.S. law. In *Ewing*, Justice Sandra Day O’Connor emphasized that the Supreme Court “do[es] not sit as a ‘superlegislature’ to second-guess [states’] policy choices,”<sup>160</sup> supporting the general principle that “[s]tates possess primary authority for defining and enforcing the criminal law.”<sup>161</sup> Although obvious from a normative constitutional perspective, it is worth noting that not even the dictates of the Bill of Rights and the authority of the Supreme Court receive “unconditional consent” within the U.S. system. Legal doctrines of intra-national domestic sovereignty constrain their actions. HRTs must contend with these same hurdles, even when they survive the challenges of national domestic sovereignty at step one.

Further evidence of the strength of this intra-national domestic sovereignty can be seen in the practice of executing foreign nationals in violation of the Vienna Convention on Consular Relations.<sup>162</sup> Fur-

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157. *Id.* at 493.

158. See the fifth U.S. understanding to the ICCPR, *supra* note 7.

159. *Ewing*, 123 S.Ct. at 1179.

160. *Id.* at 1189.

161. *Engle v. Isaac*, 456 U.S. 107, 128 (1982), *reaff’d in* *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995).

162. The International Court of Justice has ruled against the United States for thwarting this treaty and the United States has apologized for its violations of the consular rights of other states’ nationals. See, e.g., Press Release, International Court of Justice, LaGrand Case



thermore, states' rights interests appear to be eroding the contours of *Missouri v. Holland*.<sup>163</sup> States' rights pose a formidable obstacle to unconditional consent to HRTs. It may be that maintenance of complete domestic sovereignty, although ill-defined and not a consistent aspect of U.S. practice, is valued more highly than the benefits of unconditional HRT adherence.<sup>164</sup> The benefits of this adherence occupy a central place in theories emphasizing the role of reciprocity in treaty membership and adherence.

2. *Absence of reciprocity.* An examination of reciprocity benefits suggests that HRTs receive only conditional consent because they provide only a limited incentive to do anything more. Professor Robert Keohane, noting that international cooperation does not depend on deference to hierarchical authority nor centralized enforcement, suggests that reciprocity may help explain cooperation. Quoting Professor Alvin Gouldner, Keohane states that reciprocity implies "actions that are contingent on rewarding reactions from others and that cease when these expected reactions are not forthcoming."<sup>165</sup> If human rights norms are less likely than other international norms to derive strength from expectations of reciprocity, a concomitant weakness in participation in HRTs would be expected.

Human rights norms are indeed less likely than other international norms to derive strength from expectations of reciprocity. The former create rights that vest in individuals, while the latter create rights that vest in states. General skepticism about whether international law is "really law" exists largely because of the lack of a judicial system with compulsory jurisdiction to settle disputes, also described

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(Germany v. United States), available at [http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-16bis\\_20010627.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-16bis_20010627.htm) (last visited Apr. 6, 2003) (finding "by fourteen votes to one that, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, and by thereby depriving Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States breached its obligations to Germany and to the LaGrand brothers under Article 36, paragraph 1, of the Convention" and noting that "[t]he United States has presented an apology to Germany for this breach.").

163. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (discussing the changing status of the treaty power).

164. Or, conversely, the perceived consequences of conditional consent may be insufficiently severe to outweigh the perceived costs of international influence.

165. Robert O. Keohane, *Reciprocity in International Relations*, 40 INTERNATIONAL ORGANIZATION 1, 5-6 (1986).

as the condition of international anarchy.<sup>166</sup> This skepticism can be countered by reference to the reciprocity of advantage derived from collective adherence to international law. For example, if State A imposes certain tariffs on goods from State B in violation of a treaty, State B can respond in kind, vindicating its interests, and providing compliance incentives to State A. Yet, if State A tortures its citizens in violation of a treaty, other States Parties to the treaty will obviously not be able to bring State A back into compliance by torturing their own citizens; nor can they vindicate their interests in this way. The lack of a judicial system with compulsory jurisdiction represents a heightened problem for HRTs, since the principle of reciprocity of obligations is at its weakest. The absence of reciprocity results in mediocre adherence at best.<sup>167</sup> WTO compliance generally supports this claim, evidencing high compliance in a situation of high reciprocity.<sup>168</sup>

Another type of reciprocity, known as “diffuse reciprocity,” emanates not from specific “tit-for-tat” effects, but from a “widespread sense of obligation” to contribute to the production of a public good.<sup>169</sup> Situations of diffuse reciprocity produce incentives to “free ride,” in the sense that “a vague sense of global public interests” is often insufficient to motivate good behavior.<sup>170</sup> The codification of human rights norms into treaties that parties give their word to uphold represents an attempt to resolve the collective action problem thus described. HRTs typically generate only diffuse reciprocity,<sup>171</sup> which provides limited incentives for compliance or full adhesion, especially to strong states.

3. *Power facilitates relative immunity from international scrutiny.* Absent a detailed analysis of domestic politics and individual utility functions, it is unclear why certain preferences win

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166. See WALTZ, *infra* note 179.

167. Still, perceptions that no reciprocity can be derived from HRTs reflect a narrow view of self-interest, which ignores the emerging consensus that, as suggested above, respecting human rights fosters public goods, such as stability, the prevention of international conflict, and the ability to participate in markets. Assuming, *arguendo*, that this is so, failing to uphold human rights constitutes free-ridership.

168. Keohane, *supra* note 165, at 15-9.

169. *Id.* at 19-20.

170. *Id.*

171. This statement is logically true unless the receipt of certain benefits or the continuation of certain privileges (or the cessation of certain detriments) is conditioned upon adherence to HRTs. For the transition from diffuse to specific reciprocity to occur, linkages would have to be made between the maintenance of the HRT regime in the United States and the receipt of some immediate benefit or detriment.

out over others, yet it seems plausible that states with greater military, economic, and technological power and, hence greater self-sufficiency, would be less likely to be affected in preference-altering ways by institutions and other states.<sup>172</sup> Peterson summarizes that the “United States is, in some respects, the last place one would look for international constraints on the making of foreign policy.”<sup>173</sup>

Unfortunately, it is difficult to test hypotheses along these lines. HRTs emerged after World War II, and the United States did not need to expend any energy to gain relative superiority over the Soviets in the area of human rights protection, except perhaps to downgrade the importance of the socialist style socio-economic rights.<sup>174</sup> Similarly, nuclear powers such as China, Russia, Pakistan, and India are not difficult to outshine, with the notable exception of executing minors. This theory rests on sound factual ground in that the United States had a primordial role in hatching the United Nations and continues to be its prime sponsor. It has secured a permanent role on the Security Council and enjoys a sort of ‘home court advantage’ in any debates on the topic of U.S. exceptionalism. In addition, the United States has given signs that it is willing to use its disproportionate influence to blackmail the HRC into reversing its position on U.S. RUDs.<sup>175</sup> Power has insulated the United States from criticism and evolving international standards of decency. Still, according to the Senate Committee on Foreign Relations, the United States was motivated by reputational interests to participate in the ICCPR: “The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the

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172. See Peterson, *supra* note 76, at 217–18.

173. *Id.* at 217. See also Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, J. POL. PHIL. (forthcoming 2003) (on file with the author) (“[T]he United States is engaged in a sophisticated effort to secure generally applicable legal changes that, while in principle available to all, will in practice be of use only to the most powerful of countries . . . . If successful, this attempt would create greater ambiguity in the law on the use of force, thus allowing more space for the application of power and influence in determining when and where it is legal to intervene. In practical terms, the result would be a virtually unlimited discretion for the United States to engage in military action under international law, but relatively little if any change in the limited scope of discretion available to other, less-powerful states.”). Byers identifies what is likely a general reality of power just as applicable to HRT RUDs as to the use of force.

174. See DAVID P. FORSYTHE, *HUMAN RIGHTS AND U.S. FOREIGN POLICY: CONGRESS RECONSIDERED 4* (Univ. Fla. Press 1988).

175. See Redgwell, *supra* note 35, at 414 (discussing congressional passage of a bill to “cut off funding for U.S. obligations under the ICCPR unless the Human Rights Committee ‘expressly recognised the validity [of the U.S. reservations, understandings, and declarations] as a matter of international law,’” later vetoed by President Clinton).

impact of U.S. efforts in the human rights field.”<sup>176</sup>

Why a critical mass of U.S. citizens have not joined the “epistemic”<sup>177</sup> human rights community and pressured their government to adopt all HRT norms is a question beyond the scope of this article. U.S. citizens, given their political rights, could pressure their government if they so desired. However, institutions’ preference-altering effects are easiest to resist when the effects themselves are weak. In either case, the power differential between the resisting state and the relevant institutional framework is a relevant variable. History does seem to show that “the place of human rights in U.S. foreign policy depends mainly on considerations of power and policy and only tangentially on law.”<sup>178</sup> Still, the strong legal norms embodied in the contract theory of treaties and separation of powers would simultaneously seem to indicate that policies regarding HRTs are also the result of accepted norms.

### C. A Socio-Structural Theory of Human Rights Protection

Regardless of whether human rights protections are subjected to conditional consent because of a respect for norms or because of self-interest, the result is the same. This theory discounts the distinction between rules and interests, focusing instead on objective features of the international environment. It draws upon concepts from property law and economics, and assumes an environment of competition between states, and a popular belief that infringing human rights in particular instances can be beneficial to national security. It predicts that human rights cannot be reliably and consistently protected within the United States, unless definitive social arrangements are erected to establish a substantive floor beyond which the state cannot pass without formally rescinding the law.

Anarchy may be the most important structural condition informing whether individuals are meaningfully entitled to human rights. If states did not fear each other, national security would not be of such fundamental import and would likely not trump human rights. Professor Kenneth Waltz posits that a Hobbesian state of nature presides over the international system: “[b]ecause any state may at any time use force, all states must constantly be ready either to

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176. See Senate committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Doc. No. 102-23, at 3 (2d Sess. 1992), *reprinted in* 31 I.L.M. 645.

177. For a discussion of epistemic communities, see Milner, *supra* note 156, at 479.

178. FORSYTHE, *supra* note 174, at ix.

counter force with force or to pay the cost of weakness.”<sup>179</sup> The lack of an authoritative neutral arbitrator of disputes with overwhelming enforcement powers distinguishes international issues from their domestic counterparts. The effects of this condition for HRTs can be played out through conducting an analysis that borrows heavily from property law.

International anarchy provides a disincentive for states to award their citizens an entitlement to be free from human rights abuse. If individuals were entitled to their human rights, the government would have to bargain with them prior to violating their rights in order to purchase those rights, pay court-determined damages after violating those rights, or be restricted altogether from violating those rights, even if the individuals wished to sell or cede their entitlement. These three types of rules protecting entitlements are referred to, respectively, as a property rule, liability rule, and inalienability rule.<sup>180</sup> The first two types as applied to human rights would impose a cost on governments for violating any given individual’s entitlement to be free from human rights abuse. The last type would make it illegal for a government to acquire that entitlement under any circumstance. As such, each of these three rules would restrict the government’s action, and, specifically with regard to anarchy, would prevent states from countering threats to national security by exercising increased control over their citizens.

A property rule for human rights is ruled out to the extent that individual rights are codified and non-transferable.<sup>181</sup> Rather, domestic human rights can be subject to a liability rule, insofar as the government “may destroy the initial entitlement if [it] is willing to pay an objectively determined value for it.”<sup>182</sup> That price is the detriment to

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179. KENNETH N. WALTZ, *MAN, THE STATE, AND WAR* 160 (3d ed. 2001). North Korea’s response to the current U.S. war against Iraq is illustrative of this phenomenon. See Howard W. French, *North Korea Says its Arms Will Deter U.S. Attack*, N.Y. TIMES, Apr. 7, 2003, at B13 (“In its strongest reaction yet to the war in Iraq, North Korea said today that only by arming itself with a ‘tremendous military deterrent’ could the country guarantee its security.”).

180. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090–1105 (1972).

181. See, respectively, the Bill of Rights, *supra* note 12, and the illegality doctrine of contract law as described in Restatement (Second) of Contracts § 192 (1981) (“A promise to commit a tort to induce the commission of a tort is unenforceable on grounds of public policy”) and as summarized by Juliet P. Kostritsky: “The doctrine of illegal contracts, which allows parties to avoid their obligations when a contract is ‘illegal’ or against public policy, is a rare limitation on freedom of contract.” *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 116–17 (1988).

182. In its original context, this quote does not refer to human rights, but rather to a type of

public confidence and support that could result from the destruction of the entitlement, and, potentially, the cost of going to court. Since the government will not necessarily compensate victims of human rights abuse, such a rule is best described as a partial liability rule.

Although individuals in the United States are entitled to certain rights, most notably those contained in the Amendments to the Constitution, the meaning of many of those rights is highly variable. This much is evident from a comparison of the entitlement to not be enslaved with the entitlement to due process.<sup>183</sup> Despite the convict caveat, the first is a clear inalienability rule: “Neither Slavery nor involuntary servitude . . . shall exist within the United States.”<sup>184</sup> Therefore, a person in the United States cannot be subjected to “a situation in which one person has absolute power over the[ir] life, fortune, and liberty,”<sup>185</sup> nor can they make a legally valid offer so as to submit themselves to such a situation.<sup>186</sup> However, the Due Process Clause, even in the words of those who know it best, is “cryptic and abstract”<sup>187</sup> in wording, and, in application, “a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.”<sup>188</sup> Since the due process clause “cannot be imprisoned within the treacherous limits of any formula,”<sup>189</sup> it provides essentially no standard of protection other than what the court decides.<sup>190</sup> Therefore,

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rule governing the ownership of property. See CALABRESI & MELAMED, *supra* note 180, at 1092 (“Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.”).

183. See U.S. CONST. amends. 5 and 13.

184. *Id.* amend. 13. The “convict caveat” refers to the exception to the prohibition made for people being punished for a crime whereof they have been duly convicted. *Id.* Additional inalienability rules can be seen domestically in areas such as the sale of body parts and endangered species. See Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 935 (1985) (“Modified inalienability rules appear in such diverse contexts as the transplantation of body parts, the adoption of babies, and the preservation of endangered species. The converse of a modified inalienability rule is modified property. Under this rule, gifts are forbidden but sales at ‘fair’ market prices are permitted.”). The Grundgesetz’s abolition of the death penalty constitutes a foreign example of an inalienability rule. See GRUNDGESETZ, *supra* note 104, art. 102.

185. Black’s Law Dictionary 1393 (7th ed. 1999).

186. See illegality doctrine, *supra* note 181.

187. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

188. See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 160 (1951).

189. *Id.*

190. Although the Supreme Court has noted that “there can be no doubt that at a minimum [the words of the Due Process Clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case,” *Mullane*, 339 U.S. at 313, the nature of the hearing required is left open. Conse-

individuals within the United States are inalienably entitled to whatever due process the Supreme Court gives them. If the Thirteenth Amendment did not on its face prohibit slavery, but “exploitative practices” instead, the right to be free from slavery would not be inalienable. Even if this had been interpreted to prohibit slavery, that interpretation could change within the course of one lawsuit.

This analysis does not suggest anything short of “stout confidence in the strength of the democratic faith,”<sup>191</sup> but does posit that democratic will can erode human rights standards. Fareed Zakaria notes that “[d]emocratically elected regimes, often ones that have been reelected or reaffirmed through referenda, are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms.”<sup>192</sup> The implication is that constitutional liberalism, as defined by “the rule of law, a separation of powers, and the protection of basic liberties,” and democracy, consisting of “free and fair elections,” are independent variables.<sup>193</sup> Given that democracy is an insufficiently disaggregated concept, not by itself guaranteeing a consistent respect for freedom and human dignity, the incentives and safeguards for human rights protections become essential.

Human rights in a democracy are minority rights, in the sense that it will never be politically popular to subject the majority to human-rights-abusive measures, and, even if it were, it would not raise the troubling issues of tyranny or oppression as described by Tocqueville and Madison.<sup>194</sup> The Japanese internment at issue in *Korematsu v. United States*<sup>195</sup> would have been impossible if the United States was primarily composed of people of Japanese ancestry. To emphasize that human rights in a democracy are minority rights, although tautological, is to prove that a democratic government can abuse those rights whenever it is politically popular to do so. This is logically true, unless either existing procedural and substantive safe-

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quently, there is no guarantee that any meaningful level of process will be achieved. This concern over erosion of textually vague standards is heightened with regard to the 8th Amendment right to not be subjected to “cruel and unusual punishment.” See *supra* notes 118 and 163–164 and corresponding text.

191. See *McGrath*, 341 U.S. at 160.

192. See Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFFAIRS 22 (1997).

193. *Id.*

194. See *id.* at 30 (quoting James Madison: “Madison explained in *the Federalist* that ‘the danger of oppression’ in a democracy came from the ‘majority of the community,’” and Alexis de Tocqueville: “Tocqueville warned of the ‘tyranny of the majority,’ writing, ‘The very essence of democratic government consists in the absolute sovereignty of the majority.’”).

195. *Korematsu v. United States*, 323 U.S. 214 (1944).

guards can impose costs on such abuse sufficient to outweigh the benefits derived from the abuse, or that human nature is such that it would never be politically popular to restrict freedom under any circumstance.

An inalienable entitlement to a changing level of protection creates a sense of justice within the populace, while imposing no firm restraint on how the government can achieve its goals. Domestically, deterrence, retribution, and incapacitation are among the most obvious goals behind human rights infringements.<sup>196</sup> In the international sphere, these goals are subsumed within the overarching national security prerogative.

Garrett Hardin maintains that, assuming no ownership rights or management duties, open access to a resource plus a demand for that resource will yield overuse.<sup>197</sup> The fewer the constraints on states, the more they would be tempted to impinge on their citizens' rights, as a simple matter of cost-benefit analysis. It is indeed a paradoxical example of the tragedy of the commons where those who injure their own citizens can be considered "free riders." Recall the analysis of reciprocity above.<sup>198</sup> In the trade regime, a state benefits from membership in the WTO and becomes a free rider to the extent it can receive favorable treatment by countries adhering to the treaty's terms while simultaneously denying that same treatment to other States Parties, assuming it can do so undetected or unpunished. In the human rights regime, however, a state becomes a free rider to the extent it can receive benefits, likely in the form of political and reputational capital, from membership in the HRT regime, while simultaneously denying the rights its own citizens are due per the treaties' terms.

In part, this dynamic is made possible through scale: the presence of non-unitary actors with discrete components, such as the nation-state. Such actors can transgress upon the commons within their own borders to secure goods contributing only to indivisible particularized utility, while insisting that the commons outside of their national ter-

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196. See RICHARD G. SINGER & MARTIN R. GARDNER, *CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW* § 2.03 (1989) (including deterrence, retribution, and incapacitation as primary justifications for punishment).

197. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968), at <http://www.constitution.org/cmt/tragcomm.htm> (last visited Apr. 14, 2003) ("[T]he rational herdsman conclude that the only sensible course for him to pursue is to add another animal to his herd . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit . . . Freedom in a commons brings ruin to all.")

198. See Part IIB2, *supra*.



ritory be respected. States transgress upon the rights of their own citizens, while advocating for international human rights, because it is rational to do so.<sup>199</sup>

A liability rule allows for overuse of human rights. Overuse, in turn, results in externalities such as over-depletion and under-investment. Just as private property was the solution, individual rights also served to allocate the entitlement to those possessing such rights. Those who violated them would be forced to pay. The cost of internalizing externalities was a function of the cost of setting up a monitoring regime with enforcement powers. This is one way to describe the emergence of the U.N. human rights apparatus. In both U.S. property law and international human rights practice, however, the state can exercise a takings without compensation when it perceives a sufficient need, such as the need for increased national security.

A true inalienability rule would require an authority above the United States that could not be co-opted nor superseded. The international system as it stands is akin to the ‘wild west.’ When states abuse the human rights of their own citizens, they act as outlaws who estimate, often correctly, that the sheriff (here, the United Nations or another international body) can be beaten in a gunfight or may simply lack the ability to catch them in the act.<sup>200</sup> Absent a significant change to the international order, a scaled-down version of an inalienability rule would have to be set domestically in order for human rights to be meaningfully guaranteed. This could occur in the form of a constitutional amendment that elaborated in detail and on its face the rights to be preserved and the impermissibility of qualifying them. Inalienability could be further facilitated, albeit less securely,<sup>201</sup> by congressional statutes or treaties specifying clear rights and an individual cause of action. HRTs could provide one such avenue.<sup>202</sup>

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199. Consider the election cycle, for example. If George W. Bush “gets tough on terror,” he can count on receiving the votes of those who are more outraged by terrorism than by a government that would transgress on individual human rights. He estimates that any reputational or diplomatic detriment to him as a result will be inferior to the amount of utility he derives from the disapproved-of actions. It would in a strict sense be irrational for him to be moved by the detriment to either disempowered sectors of society—such as immigrants, minorities, and the poor—or the U.S.’ long-term interests.

200. Still, even if the U.N. did possess superior force, the question “*quis custodiet ipsos custodes?*” remains. Who should guard the guardian?

201. This simply refers to the ease with which an act of congress, as compared to a constitutional amendment, can be passed.

202. See Part IIIB, *infra*.

Although the complexity of the international system naturally increases transaction costs, it is its anarchic character that most complicates and most requires efforts to make human rights less alienable<sup>203</sup> through the HRT regime. In conditions of anarchy, where no international body with enforcement powers exists, even if states agree to an inalienability rule, they are not bound to their word. The struggle for relative and absolute advantage, as well as limited trust, and fierce competition inherent in anarchy go a long way in explaining why substantive human rights protections are trumped by national security. It is mostly because states are competing with each other that they rely on the logic that a relatively unhindered ability to detain, try in secret, and generally control those on their territory allows for greater flexibility in countering internal or external threats to security.

The theory is presumptively that “[i]t is not mathematically possible to maximize for two (or more) variables at the same time.”<sup>204</sup> The implicit logic in this is that human rights and national security are either independent variables or negatively correlated—that is that they are either unrelated or that greater human rights begets greater insecurity. As long as this is assumed, a liability rule for human rights is nothing more than an appeal to the government’s good conscience: *i.e.*, “You shouldn’t violate human rights, because we believe that violating human rights is immoral; and by so doing, you’ll have to stretch the law and your conscience.”

Hardin, discussing the problem of a burgeoning world population, turns to Darwinian logic to explain why conscience is self-eliminating:

People vary. Confronted with appeals to limit breeding, some people will undoubtedly respond to the plea more than others. Those who have more children will produce a larger fraction of the next generation than those with more susceptible consciences. The differences will be accentuated, generation by generation.<sup>205</sup>

As applied to human-rights appeals to governments’ consciences, the quote would read:

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203. I would say “inalienable,” but conditions for derogation are specified in the HRT regime and in treaty law generally. Still, certain norms are described as “non-derogable” or *jus cogens*—that is, a peremptory norm from which no nation may stray if it is to comply with customary international law. Such norms include the prohibition on torture, genocide, and *pacta sunt servanda*. See PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW (7th ed. 1997); Universal Declaration of Human Rights, art. 5, adopted Dec. 10, 1948; ICCPR, *supra* note 1, arts. 2–4, 7; Theodore Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 568–71 (1995).

204. See Hardin, *supra* note 197 n.3 and accompanying text.

205. *Id.* at 1247.

States vary. Confronted with appeals to respect human rights, some states will respond more than others. Those that violate those rights when it benefits them will obtain a larger quantity of control and dominance than those with more susceptible consciences. The differences will be accentuated, generation by generation.

To solve this collective action problem, Hardin proposes “mutual coercion mutually agreed upon.”<sup>206</sup> If responsibility cannot be reliably created through appeals to the conscience, then one must look to definite social arrangements. Hardin writes that “[t]he social arrangements that produce responsibility are arrangements that create coercion, of some sort” and observes that in the case of bank robbery society does not appeal to robbers’ consciences, begging them to cease treating banks as a commons.<sup>207</sup> “Rather . . . we seek the definite social arrangements that will keep it from becoming a commons.”<sup>208</sup> Coercion need not decrease freedom, even governmental freedom. “When men mutually agreed to pass laws against robbing, mankind becomes more free, not less so. Individuals [or governments] locked into the logic of the commons are free only to bring on universal ruin; once they see the necessity of mutual coercion, they become free to pursue other goals. . . . ‘Freedom is the recognition of necessity’.”<sup>209</sup>

Can an inalienability rule, or any form of coercion securing the protection of human rights, be mutually agreed upon? Beryl Crowe surmises that “[t]he factor that sustained the myth of coercive force in the past was the acceptance of a common value system. Whether the latter exists is questionable in the modern nation–state.”<sup>210</sup> More centrally, why would the majority voluntarily grant the minority an inalienable entitlement to be free from incursions upon human rights? Calabresi and Malamed write that “external costs may justify inalienability . . . when external costs do not lend themselves to collective measurement which is acceptably objective and nonarbitrary.”<sup>211</sup> They suggest that although some costs can be called moralisms, there are other types of external costs that similarly defy quantification, and proceed to describe self-paternalism as an efficiency reason in favor

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206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 1248.

210. Beryl Crowe, *The Tragedy of the Commons Revisited* (1969), reprinted in GARRET HARDIN & JOHN BADEN, *MANAGING THE COMMONS* 59–60 (1977), available at <http://dieoff.com/page95.htm> (last visited Apr. 6, 2003).

211. CALABRESI & MELAMED, *supra* note 180, at 1111–12.

of inalienability.<sup>212</sup> Self paternalism describes those situations where individuals take action to prevent themselves from “yielding to . . . temptations which they deem harmful to themselves.”<sup>213</sup>

This choice is efficient, because it “allows the individual to choose what is best in the long run rather than in the short run.”<sup>214</sup> Acting in accordance with human rights principles lends the necessary credibility and prestige for engagement in and positive influence on international comity.<sup>215</sup>

In summary, in an environment of competition between states and in the absence of an authoritative body to coerce states into upholding a given level of human rights protection, states will often resort to human-rights infringing measures. This hypothesis identifies and accounts for the assumptions that fuel the choice to infringe these rights, most notably, the assumption that national security and human rights are juxtaposed, or negatively correlated. It posits that certain social arrangements are necessary in order for domestic human rights to be reliably and consistently preserved, and, hence, that the concerns underlying the human rights question can only be addressed through a scaled down inalienability rule. The contents of one set of social arrangements that could implement such a rule are suggested below, after existing proposals for reforming the U.S. policy of conditional consent are briefly examined.

### III. PROPOSALS FOR RESOLVING THE CONTROVERSIES

Thus far, this Article has explained the domestic and international law pertaining to HRTs, reviewed hypotheses as to why the United States has consented only conditionally to the same, and proposed that the negative incentives inherent in international anarchy can be countered through social arrangements that decrease the ‘alienability’ of human rights. This Part describes two existing suggestions for how to respond to the problems inherent in U.S. practice,

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212. *Id.* at 1112–13.

213. *Id.* at 1113.

214. *Id.*

215. *See, e.g.*, Thomas I. Emerson, *Foreward* to O. JOHN ROGGE, *OUR VANISHING CIVIL LIBERTIES* 7 (1949) (“T[he] Anglo-American tradition of civil liberties is one of the greatest contributions ever made to civilized life. To that tradition the American people must look for assurance of freedom in which to realize the full development of the human spirit. In that tradition we must seek the guiding principles for living together in a modern democratic society. America’s prestige throughout the world rests far more upon its achievement in securing political and civil rights than upon the fading glories or the ‘free enterprise system’ or any other phase of its political life.”).

and proposes a third that builds heavily upon the socio-structural theory.<sup>216</sup>

Solutions to the controversies over conditional consent must be in accordance with international and domestic law as described in Part I; they should strike a reasonable balance between the national and international norms and interests described in Part II; and, ideally, they should respond to existing threats to human rights protection.

A. Two Existing Approaches: “Pulling the Rug Out” From Under the Senate and Reforming its Advice and Consent Power

The following approaches advocate, respectively, for declaring the RUDs illegal, and for qualifying the Senate’s advice and consent power so as to prevent the issuance of RUDs contrary to the object and purpose of the treaty at hand. Although both are plausible, it is ultimately concluded that neither would be responsive to the question of protecting domestic human rights. An explanation of the legal basis for the first approach leads to an explanation of the second.

If the Senate’s declaration of non-self-execution exempts the United States from its obligations under the treaty, it could not properly be termed a “declaration,” defined as “a statement of policy, purpose, or position related to the subject matter of the treaty but not necessarily affecting its provisions,”<sup>217</sup> but would instead be a “reservation,” defined as “a limitation, qualification, or contradiction of the obligations in the treaty, especially as they relate to the party making the reservation.”<sup>218</sup> The Restatement (Third) of Foreign Relations Law confirms this view, noting that anything that excludes, limits, or modifies treaty obligations is in fact a reservation, regardless of what a State chooses to call it.<sup>219</sup> This might apply to the Senate’s declaration of non-self-execution, because the HRTs stipulate the protection of individual rights of the people in the control of the States Parties, including, presumably, some rights additional to constitutional pro-

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216. See Part IIC, *supra*.

217. Senate Foreign Relations Committee, Report on the Salt II Treaty, S. EXEC. Doc No. 96-14, at 34 (1979) [hereinafter Report on the Salt II Treaty].

218. *Id.* See also General Comment 24, *supra* note 90, ¶ 3 (referencing Article 2(1)(d) of the Vienna Convention, *supra* note 30 (“If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation.”)).

219. See *supra* note 29.

tections,<sup>220</sup> and the provision of an impartial forum capable of providing a responsive remedy.<sup>221</sup> If the Senate's reservation to the definition of "cruel and unusual punishment" were to be invalidated, then the non-self-execution reservation would also be invalid. This is so because the treaty would then require protection against a more expansive notion of cruel and unusual punishment, yet the United States has asserted that no individual right of action will be permitted and no implementing legislation is contemplated. Since existing U.S. law does not protect against cruel and unusual punishment as conceived of internationally, then the reservation could be contrary to the object and purpose of the treaty.

In that case, the question becomes whether the Senate's reservation, which the Senate prefers to term a "declaration," binds U.S. courts in their interpretation of the treaty. The argument has been advanced that since *treaties* are the law of the land—not "treaties and invalid declarations"—only the qualifications made to the treaty that are valid under international law should be applied as the law of the land. As defined by the Vienna Convention, a treaty is an international instrument governed by international law.<sup>222</sup> As such, an invalid declaration or reservation would not be part of the treaty and therefore would not be binding upon U.S. courts. This view is compatible with a fair reading of the Restatement (Third) of Foreign Relations Law, which states that a reservation is part of the treaty and becomes law in the United States if the reservation is effective under the principles of section 313.<sup>223</sup> Section 313, like the Vienna Convention and CIL, excludes reservations incompatible with the object and purpose of the treaty.<sup>224</sup>

Professors Riesenfeld and Abbott suggest, in their reading of Supreme Court and Court of Appeals' precedents, that it was for a time considered that "Senate pronouncements which do not have international legal significance would likewise lack domestic legal significance" but that the prevailing view is that the Senate's "authority to impose the condition implies that it must be given effect in the consti-

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220. See *supra* notes 37–40 and accompanying text.

221. See ICCPR, *supra* note 1, arts. 2(2) and 2(3)(A).

222. The Vienna Convention, *supra* note 30, art. 2(1)(a) ("[T]reaty" means an international agreement concluded between States in written form and *governed by international law*, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.") (emphasis added).

223. RESTATEMENT, *supra* note 29, § 314 cmt. b (1986).

224. *Id.* § 313 cmt. c.

tutional system.”<sup>225</sup>

Under a contract theory, and perhaps even under a legislation theory, the result of a finding that RUDs were invalid would result in releasing the State from the treaty, since the RUDs were a condition to the state’s consent to be bound. The U.S. political branches might argue that a contrary holding, such as that recently given by the European Court of Human Rights in *Belilos*,<sup>226</sup> discarding RUDs declared invalid and holding the State to the entire treaty,<sup>227</sup> would be destructive to the international system as States could be more adverse to enter into any agreement that might at some point be construed in a way imperfectly suited to their interests.<sup>228</sup> Nevertheless, this is the policy endorsed by the HRC: “The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.”<sup>229</sup> The United States responded that “reservations are an essential part of a State’s consent to be bound.”<sup>230</sup> The HRC’s policy, limited to unacceptable reservations, is not in tension with the ICCPR that, along with the other HRTs in question, allows reservations. This allowance “reflects a strategy of garnering the greatest possible adherence to the precepts of the treaty by allowing states to undertake some of the treaty’s provisions while rejecting others.”<sup>231</sup> The HRC’s policy requires states to

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225. Stefan A. Riesenfeld & Frederick M. Abbott, *Symposium on Parliamentary Participation in the Making and Operation of Treaties: United States: The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI-KENT L. REV. 571, 593–95 (1991) (discussing *Diamond Rings v. United States*, 183 U.S. 176, 178–80 (1901), *New York Indians v. United States*, 170 U.S. 1 (1898), and *American Pub. Power Ass’n v. Power Auth.*, 355 U.S. 64 (1957)).

226. 10 Eur. H.R. Rep. at 466

227. *See id.*

228. This argument would look something like this: A treaty is a template produced by states, non-governmental organizations and international civil servants in accordance with their interests and assessments of the issues. Parties are free to custom tailor its terms, unless precluded by the treaty’s text, to their goals as determined by their domestic political processes. The United States has never given its consent to make HRTs self-executing or to apply any meaning of the treaty terms to which it has reserved besides that conveyed by its RUDs. Human rights advocates and internationalists may do a disservice to their causes by arguing that courts should invalidate RUDs entered by the United States to the HRTs to which it is party.

229. General Comment 24, *supra* note 90, ¶ 18.

230. *See Redgwell, supra* note 35 n.37, quoting the U.S. response, 3 INT’L H.R. REP. 269 (1996).

231. Madeline Morris, *Few Reservations About Reservations*, 1 CHI. J. INT’L L. 341, 342 (2000).

issue reservations at their own peril.

The basic spectrum of possible approaches to reservations contrary to the object and purpose of the treaty could thus be summarized as follows: (1) the “gotcha” approach, whereby invalid reservations are stripped and the state is held to the treaty’s full terms;<sup>232</sup> (2) the “one-size fits all” approach, whereby each treaty would be accompanied by a “guide to reservations practice” stipulating acceptable reservations practice;<sup>233</sup> (3) the “custom tailoring” approach, whereby reservations objected to by States Parties are respected and the relevant articles simply cease to operate vis-à-vis the reserving and objecting states;<sup>234</sup> and (4) the “boot” approach, whereby a party’s membership in a treaty is revoked.

The “gotcha” approach contradicts the principles of treaty law as understood by the United States. The Supreme Court in *Foster* and *Percheman*, affirmed that the mutual intent of the parties determines whether a given provision of a treaty is self-executing.<sup>235</sup> Similarly, such an approach is at odds with one of the two most basic principles of treaty law—consent to be bound.<sup>236</sup> If clearly expressed, the negotiated conditions that define the voluntary obligations a country assumes, are understood to be a precondition to the continued existence of said obligations. Since the U.S.’ intent is clearly expressed and on the record (a precondition to ratification), a reviewing court would not have to examine the treaty’s text. Other states could not have intended the treaty to be self-executing as it applies to the United States if they were apprised of the clear impossibility of the

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232. See, e.g., *Belilos*, 10 Eur. H.R. Rep. at 466, and General Comment 24, *supra* note 90.

233. See Redgwell, *supra* note 35, at 414 (discussing the reservations guide advocated by a special Rapporteur).

234. See, e.g., *Reservations to the Genocide Convention* case; Vienna Convention, *supra* note 30, arts. 20–21.

235. *Foster v. Neilson*, 27 U.S. 253 (1829), and *Percheman*, 32 U.S. at 70 (“In attempting to ascertain the true meaning of the parties, it is humbly conceived, we are not confined to the language of the treaty; we may look into the negotiations which preceded it. In this instance, there is a particular propriety in doing so. As the instrument of ratification, an essential part of the whole treaty, refers to the history of the negotiation, it lets in the whole of that history, as matter to be adverted to, according to all the strictness of legal argument, in reasoning on the construction of the claim in question.”).

236. Arguably, the other would be *pacta sunt servanda* (agreements must be kept). See Vienna Convention, *supra* note 30, pmbl. & art. 26. If, prior to ratification, a state was made aware of the possibility that if their reservations were to be struck down, the provision reserved to would be applied to them in full, then the ruling would be acceptable as applied to the current topic. It is understood that the European system is different from the U.S. system and that an analysis of the ruling in its proper context (i.e., in the European system, rather than the U.S. system) might yield a different conclusion.



same.<sup>237</sup>

Advocates of the “gotcha” approach must bear in mind the unintended consequences of enforcing upon a state obligations to which it did not consent, or could not reasonably be construed as having consented. For example, the United States might cease to advocate for human rights treaties and fail to join future treaties. This latter implication, however, seems increasingly irrelevant as U.S. “exceptionalism” grows.<sup>238</sup> Nevertheless, even strong human rights proponents, such as Professor Louis Henkin, maintain that in a multilateral treaty, a reservation or understanding embodies the intent of the party and this intent is used to interpret what obligations that party undertook.<sup>239</sup>

The “gotcha” approach seeks to steamroll over the disjuncture between the Senate power as understood by the Senate and, presumably, the Supreme Court, and the official interpretation of applicable rights and duties under international law. The approach is only useful, insofar as its execution constitutes judicial notice of a problem in need of resolution and reminds the political branches that the Con-

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237. An exception to this general rule could be the imposition of a *jus cogens* norm on non-consenting states, such as the United States. Some would assume that this concern only applies to future changes in *jus cogens* norms because for now, all *jus cogens* prohibitions—on torture, genocide, slavery, piracy, and racial discrimination, for example—find a robust ally in U.S. domestic law. These uncontroversial examples of *jus cogens* norms are commonly cited. See, e.g., JAVAID REHMAN, INTERNATIONAL HUMAN RIGHTS LAW: A PRACTICAL APPROACH 23 (2003) (“Although there is no specification as to what constitutes such a norm, fundamental rights such as the right of all peoples to self-determination, and the prohibition of slavery, genocide, torture and racial discrimination represent settled *jus cogens* examples.”). Unfortunately, this view is naive, since a strong case can be made that the prohibition on the execution of minors constitutes such a norm and this norm has no counterpart in U.S. domestic law. Interview with Professor David Weissbrodt in Geneva, Switzerland (July 26, 2002). The HRC has in fact specified that “provisions in the Covenant that represent customary international law, (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. . . . Accordingly a State may not reserve the right to execute pregnant women or children.” General Comment 24 (52), *supra* note 90, ¶ 8.

238. Jane Perlez, *Here’s One Treaty That the Bush Team Loves, to Death*, NEW YORK TIMES, Aug. 26, 2001, at 3 (“The Bush administration has irritated many allies with its aversion to treaties, especially the Kyoto Protocol on global warming and the 1972 Antibalistic Missile Treaty.”); Kenneth Roth, *Is America’s withdrawal from the new International Criminal Court justified?*, WORLD LINK, July 17, 2002, available at [http://www.worldlink.co.uk/stories/storyReader\\$1146](http://www.worldlink.co.uk/stories/storyReader$1146) (last visited Apr. 6, 2003) (“In repudiating Bill Clinton’s signature on the treaty to establish an international criminal court, the Bush administration has taken an audacious step. The move suggests that a radically new vision is guiding American foreign policy: that the United States, with its extraordinary power, is no longer served by the international rule of law.”).

239. See HENKIN, *supra* note 74, at 201.

stitution makes international law “our law.”<sup>240</sup>

A less severe approach would emanate from the legislature and would serve to qualify the Senate’s power such that the Senate would be required to consider the international legality of their actions on the international front. Just as the legislature is bound to consider the constitutionality of its legislation,<sup>241</sup> the Senate and President should also make at least a passing effort to consider the legality of the RUDs upon which they insist.

This approach has been advanced by Professors Riesenfeld and Abbott and summarized as follows: “Since the Senate by itself has no domestic law-making powers, it should not be considered to have ancillary domestic legislative powers as part of its treaty-approving function. Rather, it can attach only such conditions as could validly form part of the treaty on the international plane.”<sup>242</sup> If this view of the law were formally adopted, “the Senate would lack power to attach conditions inimical to the treaty under international law and, moreover, would lack authority to control the domestic effect of treaties, including whether a treaty should be considered self-executing or not.”<sup>243</sup> This proposal is favorable in its democratic appeal, yet unsatisfactory in its inability to address the human rights question.

#### B. A New Proposal: the HRT Regime as a Double Layer of Protection—Both a Substantive Standard and a Minimum Floor

Recall that Germany premised its ceding of domestic sovereignty pursuant to entry into the EU on the maintenance of existing levels of protections guaranteed by the *Grundgesetz*.<sup>244</sup> Similarly, the United States could justify its membership in the HRT regime on the basis that the existing level of human rights protection at the time of HRT ratification became a minimum floor.

Though the use of RUDs whittled down the protections offered by HRTs to the level currently provided by domestic law,<sup>245</sup> U.S. membership would be made meaningful if that level of protection be-

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240. See *infra* note 19 and accompanying text.

241. Justice Anthony Kennedy, Remarks at Duke University School of Law (Nov. 18, 2002), available, in part, at [http://www.law.duke.edu/features/news\\_kennedy.html](http://www.law.duke.edu/features/news_kennedy.html) (last visited Apr. 9, 2003).

242. Lori Fislser Damrosch, *In Honor of Stefan A. Riesenfeld*, 20 HASTINGS INT’L & COMP. L. REV. 589, 595–96 (1997).

243. *Id.*

244. See *supra* notes 108–110 and accompanying text.

245. *But see* implementing legislation, *supra* note 12.

came a substantive standard to be upheld. Otherwise, it would constitute an illusory promise (“the U.S. agrees to do what it already does—for only as long as it wishes—for reasons unrelated to this agreement”). To say, however, that “the United States agrees to do at least what it already does and no less for perpetuity” would indeed constitute consideration for a contract or a dutiful implementation of international legislation.<sup>246</sup> Although, as the Senate desired, no action would be necessary and no increase in rights would be contemplated, the obligation to never stoop below current levels of protection would be undertaken and implementing legislation would be due upon a decrease in the protection offered by the domestic laws that implemented the HRTs in the moment of ratification.

It is indisputable that the United States, upon ratification of the HRTs, undertook an obligation under international law to provide some ascertainable level of protection. Subsequent to the date of ratification of the relevant HRTs, the United States became obligated, somewhat paradoxically, to uphold its own existing domestic laws *as a matter of international law*. Its treaty partners bound themselves under international law to upholding a less qualified, and hence higher international standard. As in the case of the United Kingdom post September 11th,<sup>247</sup> these partners became obligated to notify the United Nations of any derogations from their new standard.<sup>248</sup> They thus faced international shaming and blaming—detriments to their reputation and acknowledgments of their failure to live up to the standards that the world, in its overwhelming majority, has deter-

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246. See analysis of contracts versus legislation, Part II, *supra*.

247. See United Kingdom of Great Britain and Northern Ireland, Reservations and Declarations: CCPR, at 6–7, available at [http://www.bayefsky.com/pdf/uk\\_t2\\_ccpr.pdf](http://www.bayefsky.com/pdf/uk_t2_ccpr.pdf) (last visited Apr. 6, 2003) (“There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. . . . As a result, a public emergency, within the meaning of article 4(1) of the Covenant, exists in the United Kingdom. . . . As a result of the public emergency, provision is made in the Anti-Terrorism, Crime and Security Act, 2001, inter alia, for an extended power to arrest and detain a foreign national . . . with the consequence that the detention would be unlawful under existing domestic law powers. The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person’s presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist.”).

248. See, e.g., ICCPR, *supra* note 1, art. 4(3) (“Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”).

mined to be necessary for the protection of human dignity.<sup>249</sup> The United States, despite exempting itself from the international standard, also became obligated to report any derogation from the standard they agreed to—the level of domestic protection offered at the time of ratification.

The procedural *modus operandi* of the U.S. system quickly breaks down when pushed to its potential limit—namely, nothing stops human rights as codified in U.S. law from being modified through the common law or statute. The most probable of all possible scenarios to this effect is that the bill of rights will be eroded through judicial decisions that take advantage of the Constitution’s brevity and related lack of substantive standards for what such rights are to mean.<sup>250</sup>

In contrast, Germany and the HRC tend to insist on substantive standards. The German “fighting democracy”<sup>251</sup> is an example of this. As noted previously, it requires that constitutional amendments, passed in accordance with the stipulated rules, be declared unconstitutional if they so qualify a basic right; that political parties be outlawed if their goals are determined to be sufficiently contrary, substantively speaking, to the required standards of rights protections;

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249. The requisite seriousness of a situation for derogation to be warranted is reflected in the HRC’s comments:

When a public emergency which threatens the life of a nation arises and it is officially proclaimed, a State party may derogate from a number of rights to the extent strictly required by the situation. The State party, however, may not derogate from certain specific rights and may not take discriminatory measures on a number of grounds. The State party is also under an obligation to inform the other States parties immediately . . . measures taken under article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that, in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made. . . . [I]t is equally important for States parties, in times of public emergency, to inform the other States parties of the nature and extent of the derogations they have made and of the reasons therefor and, further, to fulfil their reporting obligations under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation.

Human Rights Committee, General Comment 5 (4), ¶¶ 1–3, U.N. Doc. HRI/GEN/1/Rev.1 (1981).

250. See *supra* notes 117–119 and accompanying text. Less probable, but still possible scenarios include: the passage of a constitutional amendment repealing, in part or in full, the Bill of Rights or materially altering its content to the detriment of human rights protections; the altering of the federal courts’ jurisdiction by Congress to exclude judicial meddling with the majority’s plan to strip certain individual rights; and a choice by courts, fearing the crisis that would result were their rulings ignored and unenforced, not to intervene.

251. See Part II(A)(3), *supra*.

and that human dignity remain the master value of the entire constitutional order, imposing both positive and negative duties on the state. Substantive legitimacy requires that certain standards be upheld, regardless of whatever passions might surge within the hearts and minds of legislators or their citizen support base.<sup>252</sup>

In this same way, largely symbolic participation in HRTs could be rendered meaningful in light of a subsequent decline in human rights protection within the United States. Such membership ceases to be merely symbolic if U.S. RUDs are understood to reference the static, as opposed to temporally unstable, state of rights protections. If, subsequent to ratification, the United States were to decrease its human rights protections—for example, by effectively repealing habeas corpus—it is inconceivable that its obligations pursuant to the ICCPR (or HRTs generally), even as reserved to, would automatically bend to the new standard.<sup>253</sup> Rather, U.S. human rights obligations pursuant to its membership in the treaty would remain at the level found at the time of ratification—that is, the level offered by domestic law on the date of ratification. Hence, the United States cannot decrease its level of human rights protection without either showing that derogation is legal given changed circumstances or violating international law. This statement is generous in that it assumes at the outset the legitimacy of U.S. reservations.

Recall that implementing legislation, as stated in the Senate report, was not contemplated because the United States “generally complies with” certain HRT obligations.<sup>254</sup> It follows that if U.S. law ceases to generally comply with those obligations, the United States would be required to give notice of derogation or issue implementing legislation. Some reservations, such as the second reservation to the ICCPR, which reserves the right to impose capital punishment, reference the potentiality of “future laws” that could provide for said

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252. Interestingly, Madisonian principles have, at least implicitly, been couched as justifications for non-adherence to HRTs. See “democratic deficit” in Part II, *supra*. Yet, Madison was concerned about abuse of power, not a benevolent exercise of power leading to respect for and guarantees of human dignity. Anti-majoritarian rights still suffer despite, or perhaps *because of*, the separation of powers.

253. The HRC has indicated, specifically with regard to the United States, that the non-self-execution declaration filed to the ICCPR would be impermissible if in fact domestic law did not effectively guarantee the rights codified in the ICCPR. See Human Rights Commission, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Report of the United States of America, U.N. GAOR, 53rd Sess., 1,401st mtg. at 9, para. 38, U.N. Doc. No. CCPR/C/SR.1401 (1995).

254. See *supra* note 37 and accompanying text.

imposition, seem to pre-empt the double layer theory.<sup>255</sup> Others, however, do not. The third reservation is not so malleable and on its face appears to bind the United States to the level of protection existing at the time of ratification, referencing only the “cruel and unusual treatment . . . prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”<sup>256</sup> The same is true of the first reservation to CAT, essentially identical to the former.<sup>257</sup>

Interestingly, and most promisingly for attributing some significance to U.S. participation in HRTs, the United States submitted upon ratification of CAT an understanding recognizing the impermissibility of domestic sanctions on behalf of a State Party that defeat the object and purpose of that convention.<sup>258</sup> This, the most obvious and established duty of treaty membership, does theoretically render HRTs meaningful for people within the United States. The duty, incumbent upon treaty members, not to defeat the object and purpose of a treaty applies not only to reservations entered, but to state practice subsequent to ratification.<sup>259</sup>

Therefore, implementing legislation is now legally due, incumbent upon the United States to so issue, insofar as its domestic human rights protections have declined subsequent to encapsulation in the corresponding HRTs at the moment of ratification.

The use of HRTs to set and uphold a minimum substantive standard fits squarely within U.S. domestic law, responds to States’ rights challenges, and fortifies the easily erodable constitutional protections upon which domestic human rights rely. This usage remedies the international legal flaws in U.S. participation in HRTs by creating non-illusory obligations and implementing a treatment of HRTs that comports with their object and purpose.

The minimum floor should merely be the level of constitutional protection for domestic human rights that existed at the time of ratification. This floor could of course be superseded by subsequent leg-

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255. See RUDs to ICCPR, *supra* note 7.

256. *Id.* (emphasis added).

257. *Id.*

258. *Id.* (“Nonetheless, the United States understands that a State party could not through its domestic sanctions defeat the object and purpose of the convention to prohibit torture.”).

259. See Vienna Convention, *supra* note 30, arts. 19(c) (stating that reservations incompatible with the treaty’s object and purpose are never permissible) and 18(a) (obligating even mere signatories not to defeat the object and purpose of the treaty).

islation by Congress;<sup>260</sup> however, enacting legislation under the guises of increasing security with no perceivable detriment to human rights protective treaties or acts is far more politically viable than when such legislation supersedes human rights guarantees. A diffuse and largely hypothetical impact means very little as compared to a specific and tangible effect. In addition to increasing the cost to the state of infringing those rights, a minimum floor approach could facilitate a cultural attachment to definitive rights and greater political will to respect the same. Embodied in implementing legislation or separate statute, a minimum floor would provide something to which defenders of liberty might hold up and use as leverage to gain legitimacy and visibility. It would do the same for our allies and the U.N. treaty bodies. This being the case, formal acknowledgement that the United States is in fact bound, per international agreement, to offer the amount of human rights protection embodied in the HRTs to its citizens would not, as a practical matter, be a trivial legal development.

Nor would it be a trivial development as a matter of social structure and legal theory. U.S. success in achieving a high level of freedom and well-being for its populace has commonly been interpreted as a result which must necessarily follow from its political structure. To the extent that this political structure has influenced the hearts and minds of the populace and the legislators, and kept the vices of human nature under control—properly incentivized to seek the permissible types of individual advantage—it is possible to assert that the structure has produced its desired result. But it cannot be stated that this result, which includes reasonable human rights protections, will necessarily be reproduced as the political machinery continues to churn through the unknown waters before us.<sup>261</sup>

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260. See last-in-time doctrine, *supra* note 23.

261. A concrete issue is that the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter PATRIOT Act], could be followed up with even more extreme legislation. Democratic popularity enjoys a stranglehold on substantive outcomes to the extent that those outcomes are achieved by legitimate procedural steps. These steps contain no check on intentions or outcomes. And hence, there is nothing to prevent the repealing of human rights in the post-September 11th climate, or in some other future climate unfavorable to minority rights. Great debate already surrounds the Act itself. See, e.g., Panel Discussion with Congressman Barney Frank, Assistant Attorney General Michael Chertoff, Professor David Cole, Mr. Stuart Taylor, Jr., and Ms. Beth Wilkinson, *The USA-PATRIOT Act and the American Response to Terror: Can we Protect Civil Liberties After September 11?*, 39 AM. CRIM. L. REV. 1501 (2002); John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002).

In a prescient dissent in *Olmstead v. United States*, Justice Brandeis remarked, with regard to wire-tapping during the Prohibition era, that

it is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.<sup>262</sup>

This observation was reconfirmed during one of the next periods of domestic human rights abuse. In 1949, Dr. O. John Rogge, detailing the 'vanishment of our civil liberties,' noted the incremental nature of danger to such rights and the contexts in which such danger manifests: "Insiduously, step by step, the enemies of our civil liberties have advanced behind the poisonous smoke-screen of the 'Communist threat'."<sup>263</sup> The origin and strength of current threats to domestic human rights is beyond the scope of this article, but has been the subject of great concern.<sup>264</sup>

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262. 277 U.S. 438, 479 (1928); Cf., John Brady Kiesling, *U.S. Diplomat's Letter of Resignation*, N.Y. TIMES, Feb. 2, 2003, available at <http://www.nytimes.com/2003/02/27/international/27WEB-TNAT.html> (last visited May 19, 2003) (positing that such men of great zeal may not be well-meaning).

263. ROGGE, *supra* note 215, at 275. Dr. Rogge served as Assistant General Counsel to the Securities and Exchange Commission and the Assistant U.S. Attorney General in charge of the Criminal Division before taking on the sedition case, investigating the spread of fascism and the monopoly-cartel system. *See id.* at 14–23.

264. There has arguably been a limited repealing of habeas corpus, open trials, the right to counsel, the attorney-client privilege, equal protection, and privacy rights post September 11th. *See Hamdi v. Rumsfeld* (4th Cir. 2003), No. 02-7338 (Jan. 8, 2003). *See generally* Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, available at <http://www.hrw.org/reports/2002/us911/> (last visited Apr. 6, 2003); American Civil Liberties Union, *A Second Federal Court Rejects Government Secrecy, Orders Open Immigration Hearings in Post-Sept. 11 Challenge*, May 29, 2002, available at <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=10413&c=22> (last visited Apr. 6, 2003); American Civil Liberties Union, *ACLU Calls Immigrant Registration Program Pretext for Mass Detentions*, Dec. 19, 2002, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11503&c=206> (last visited Apr. 6, 2003); Dianne Donovan, *Let's Take Away Your Freedom*, CHI. TRIB., Nov. 27, 2001, at 19, available at <http://www.globalpolicy.org/wtc/liberties/1127freedom.htm> (last visited Apr. 6, 2003); Charles Lane, *Debate Crystallizes on War, Rights; Courts Struggle Over Fighting vs. Defending Liberties*, WASH. POST, Sept. 2, 2002, at A1, available at <http://foi.missouri.edu/terrorandcivillib/hasbushinfringed.html> (last visited Apr. 6, 2003). Writing in 1951, Dean Alison Reppy of New York Law School, prophesized that "if the grist of the mill in the field of civil rights covering the contemporary scene is any criterion of the future, we may be certain that the immediate succeeding years, clouded as they are by the overtones of world conflict, will each produce for discussion their share of new problems involving the maintenance and the advancement of our civil liberties." ALISON REPPY, CIVIL RIGHTS IN THE



A minimum floor would remove the insecurity produced by the precarious existing standards of protection. As Professor Thomas Emerson stated in 1949, “[l]ike most of our ideals the theory of civil liberties has never been fully realized in practice. Grave discrepancies have always existed between ideal and reality. More than that, at certain periods general hysteria has flared throughout the nation, amounting to temporary but almost complete repudiation of the whole tradition.”<sup>265</sup> Emerson cites the Alien and Sedition laws used to quash political opposition, the “frenzy” against immigrants during the middle of the nineteenth century, the “mass convictions under the espionage laws” during the first World War, the non-enforcement of the Thirteenth, Fourteenth, and Fifteenth Amendments in the plight of African Americans, and the issue of his day—the “intolerance, emotion, and fear” propagated by the House Committee on Un-American Activities.<sup>266</sup>

It would be wise to set a substantive standard to preempt the possibility of a recurring pattern of human rights reduction or, worse, the possibility of a downward spiral. The operative logic is akin to Ulysses binding himself to the mast. It responds to the problem of “time inconsistency, where actors know that they will not be able to live up to desirable courses of action in the future unless they take some action to bind themselves today.”<sup>267</sup> All that is required is the will to do so.

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UNITED STATES 266 (1951). It bears mentioning that the “war on terror” did not begin with a declaration of war by Congress, nor is it likely to conclude in the signing of a treaty between the United States on one side of the table and all terrorists, present and future, on the other. Rather, much like the “war on drugs,” this war could be a long-standing feature of life in the United States. See *ACLU v. U.S. Gen. Services Admin.*, 235 F. Supp. 2d. 816, 817 (N.D. Ill. 2002) (“As this Court noted when it gave preliminary approval to this settlement, our Constitution was not among the list of endless casualties suffered by our country on September 11, 2001. This lawsuit, like many others our brother and sister colleagues have confronted since the profoundly tragic events of September 11, 2001, involves the complex tension between national security and personal freedom. This tension is not new to our court system; indeed, our courts repeatedly have been faced with attempts to curtail civil liberties in the face of perceived threats to our national well-being. . . . It is critical that courts again heighten their overall vigilance and willingness to uphold our constitutional freedoms during this turbulent period of our history.”).

265. Emerson, *supra* note 215, at 7.

266. *Id.* at 7–8.

267. See MARTIN, *supra* note 65, at 64 (discussing commitment mechanisms that guarantee certainty, despite the instability of preferences).