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The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties

David Sloss†

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I. INTRODUCTION

A Minnesota statute requires slow-moving vehicles to display a fluorescent orange-red sign while being operated on the state's highways. Police issued traffic citations to members of the Old Order Amish religion for noncompliance with the statute; they now face criminal charges.[1] The Amish contend that compliance with the statute would be contrary to their religious precepts.[2] However, their attorney advises them that the Free Exercise Clause of the U.S. Constitution does not entitle them to a religious exemption from the traffic regulation.[3] Assume, for the purposes of this hypothetical case, that there is no relief available under state law.[4] At their criminal trial, the Amish claim that Minnesota's traffic regulation is invalid, as applied to them, because it conflicts with Article 18 of the International Covenant on Civil and Political Rights (ICCPR),[5] an international human

1. *See* State v. Hershberger, 444 N.W.2d 282, 284 (Minn. 1989).

2. *See id.*

3. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 878–79 (1990) (holding that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"). See *infra* notes 392–408 and accompanying text for further discussion of this point.

4. In the actual case, the Minnesota Supreme Court invalidated the traffic regulation, as applied to the Amish, on the ground that it was inconsistent with the religion provisions of the Minnesota Constitution. *See* State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990).

5. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. Article 18 of the ICCPR protects freedom of religion. *See id.* art. 18. Commentators generally agree that Article 18 provides greater protection for freedom of religion than is available under the Free Exercise Clause, as interpreted in *Smith*. *See, e.g.*, Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores*: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 661 (1998) ("Article 18 thus appears to demand more protection of religious freedom than is required by the Supreme Court's

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rights treaty to which the United States is a party.[6] In response, the prosecution contends that the judge need not decide whether the Minnesota statute conflicts with Article 18, because the United States declared, when it ratified the treaty, that Articles 1 through 27 are not self-executing.[7] Should the judge reach the merits of the Amish's claim? Should the claim be dismissed on the grounds that Article 18 is not self-executing?

Since 1992 the United States has become a party to three major human rights treaties: the ICCPR, the Torture Convention,[8] and the Race Convention.[9] As the preceding hypothetical illustrates, these treaties provide greater protection for individual rights, in certain cases, than is currently available under federal constitutional or statutory law.[10] Under the Supremacy Clause of the United States Constitution,[11] treaties generally prevail over inconsistent state laws, such as the Minnesota traffic regulation objected to by the Amish. However, for each of the three treaties, the U.S. instrument of ratification[12] included a declaration stating that the substantive articles of the treaty are "not self-executing" ("NSE declarations").[13]

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decisions in *Smith* and *Boerne*."); Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33, 43 (1997) (stating that Article 18 expresses a broader conception of religious liberty than the *Smith* interpretation of free exercise). See *infra* Subsection VI.B.4 for further discussion of Article 18.

6. The United States deposited its instrument of ratification for the ICCPR on June 8, 1992. *See* MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT 31 DEC. 1995, at 122, U.N. Doc. ST/LEG/SER.E/14 (1996) [hereinafter MULTILATERAL TREATIES].

7. *See id.* at 130.

8. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), *reprinted in* 23 I.L.M. 1027 (1984) [hereinafter Torture Convention]. The United States deposited its instrument of ratification for the Torture Convention on October 21, 1994. *See* MULTILATERAL TREATIES, *supra* note 6, at 185.

9. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195 [hereinafter Race Convention]. The United States deposited its instrument of ratification on October 21, 1994. *See* MULTILATERAL TREATIES, *supra* note 6, at 96.

10. For additional examples, see *infra* Subsections V.D.4 and VI.B.5.

11. U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

12. The Senate is required to provide its "advice and consent" for treaty ratification, but the President actually ratifies treaties. *See* U.S. CONST. art. II, § 2. The Senate provides its advice and consent by means of a so-called "resolution of ratification." *See* 138 CONG. REC. S7634-35 (1994) (Race Convention); 138 CONG. REC. S4783-84 (1992) (ICCPR); 136 CONG. REC. S17491-92 (1990) (Torture Convention). In the case of multilateral treaties, the President ratifies the treaty by depositing a so-called "instrument of ratification" with the treaty-designated depositary. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312, cmt. c (1987); *see also* Torture Convention, *supra* note 8, art. 25, para. 2; ICCPR, *supra* note 5, art. 48, para. 2; Race Convention, *supra* note 9, art. 17, para. 2.

13. For each of the three treaties, the NSE declaration included in the instrument of ratification is identical to the NSE declaration included in the Senate resolution of ratification. For the

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Generally, private litigants cannot invoke non-self-executing treaty provisions to trump inconsistent state laws.[14]

The Carter Administration first proposed attaching NSE declarations to human rights treaties when it transmitted four human rights treaties to the Senate in 1978.[15] Numerous scholars commented on the NSE declarations at that time.[16] A second wave of scholarship ensued in the early 1990s when the Senate adopted NSE declarations for the Torture Convention and the ICCPR;[17] U.S. ratification of the Race Convention in 1994 generated additional scholarly commentary.[18]

Torture Convention, compare 136 CONG. REC. S17491-92 (1990) with MULTILATERAL TREATIES, *supra* note 6, at 187. For the ICCPR, compare 138 CONG. REC. S4783-84 (1992) with MULTILATERAL TREATIES, *supra* note 6, at 130. For the Race Convention, compare 140 CONG. REC. S7634-35 (1994) with MULTILATERAL TREATIES, *supra* note 6, at 102.

14. *But see infra* Part III (discussing the ambiguity surrounding the usage of the term "not self-executing").

15. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING FOUR TREATIES PERTAINING TO HUMAN RIGHTS, S. EXEC. DOCS. C, D, E and F, 95-2, at vi (1978) [hereinafter CARTER MESSAGE]. The four treaties were the Race Convention; the ICCPR; the International Covenant on Economic, Social and Cultural Rights [hereinafter ICESCR], *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); and the American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978), 9 I.L.M. 673.

16. *See International Human Rights Treaties: Hearings Before the Comm. on Foreign Relations, U.S. Senate*, 96th Cong. 69 (1979) [hereinafter *Carter Hearings*] (statement of John Norton Moore); *id.* at 87 (statement of Oscar Schachter); *id.* at 92 (statement of Louis B. Sohn); *id.* at 97 (statement of Thomas J. Farer); *id.* at 120 (statement of Covey T. Oliver); *id.* at 163 (statement of Louis B. Henkin); *id.* at 168 (statement of J. Philip Anderegg); *id.* at 251 (statement of Norman Redlich); *id.* at 323 (statement of Oscar Garibaldi); *id.* at 330 (statement of Thomas Buergenthal); U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? (Richard B. Lillich ed., 1981) [hereinafter U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES]; Charles H. Dearborn III, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233, 236 (1979); David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 66-72 (1978).

17. *See, e.g.*, Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DEPAUL L. REV. 1241 (1993); Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993); John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287 (1993); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991); David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 42 DEPAUL L. REV. 1183 (1993); *see also* U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS (Hurst Hannum & Dana D. Fischer eds., 1993) (commenting on U.S. participation in international human rights conventions).

18. *See* Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571, 582-90 (1997); Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT'L L. 659, 664-71 (1997) (describing the Race Convention and its interaction with the ICCPR); Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 HOW. L.J. 641,

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Virtually all of the commentators have criticized the NSE declarations on policy grounds.[19] A few commentators have argued that the NSE declarations are invalid.[20] Commentators have been remarkably silent, however, regarding the proper interpretation of the NSE declarations. Virtually all commentators agree, either explicitly or implicitly, that the NSE declarations, if legally valid, preclude U.S. courts[21] from applying human rights treaty provisions directly[22] to resolve cases involving alleged human rights treaty violations by federal, state, or local governments or officials.[23] The few dissenters who have challenged the majority interpretation have done so in cursory fashion.[24]

648–55 (1997); Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 423–24 (1997).

19. *See, e.g.*, Damrosch, *supra* note 17, at 518, 523 (arguing that "the trend toward non-self-executing treaty declarations is unfortunate and should be resisted"); Henkin, *supra* note 17, at 346–48 (claiming that NSE declarations are "against the spirit of the Constitution"); Paust, *supra* note 17, at 1283 (concluding that "the attempted non-self-execution policy is far worse than abnegative and absurd; it brings serious dishonor to the United States and should be abandoned"); Taifa, *supra* note 18, at 642–43 (stating that the Race Convention "could be a powerful instrument in the United States' quest to eradicate racial discrimination, but has consciously been rendered impotent due to U.S. insertion of a non-self-executing declaration"); Weissbrodt, *supra* note 16, at 68 ("The final result of making the Covenants not self-executing can only be to diminish substantially the impact of the treaties in the United States."). *But see* Stewart, *supra* note 17, at 1190–1205 (defending the package of reservations, understandings, and declarations that the United States adopted for the ICCPR).

20. *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 368 (1996) (stating that "an attempted 'reservation' or 'declaration' which conflicts with a *jus cogens* norm must also be void, and such is the case" with respect to NSE declarations); Dearborn, *supra* note 16, at 233–34 (arguing that NSE declarations "are of dubious validity, probably have no binding effect on United States courts, and should not be used as aids in construing the treaties"); Quigley, *supra* note 17, at 1302–03, 1310 (contending that "the validity of the declaration on non-self-execution is doubtful" and concluding that "U.S. courts should apply traditional jurisprudence on self-execution to find that the Covenant is the 'law of the land' in the United States"); Riesenfeld & Abbott, *supra* note 17, at 607–09 (criticizing NSE declarations generally); *id.* at 631–32 (contending that Articles 1 through 16 of the Torture Convention should be deemed to be self-executing, and that the NSE declaration "should be disregarded by municipal courts in the United States"); Louis N. Schulze, Jr., *The United States' Detention of Refugees: Evidence of the Senate's Flawed Ratification of the International Covenant on Civil and Political Rights*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 641 (1997) (arguing that courts should hold that the ICCPR is self-executing despite the NSE declaration).

21. *Cf.* Newman, *supra* note 17, at 1244–49 (contending that the ICCPR is enforceable in administrative actions, but is not enforceable in U.S. courts).

22. When courts apply treaties "indirectly," some provision of law other than the treaty provides the rule of decision in the particular case. In contrast, when courts apply a treaty provision "directly," the treaty itself provides a rule of decision in the particular case. For further discussion of the distinction between "direct" and "indirect" application of treaties, see *infra* Section III.A.

23. *See* Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 220–21 (stating that NSE declarations prevent American courts from applying these treaties as domestic law); Kara H. Ching, *Indigenous Self-Determination in an Age of Genetic Patenting: Recognizing an Emerging Human Rights Norm*, 66 FORDHAM L. REV. 687, 710–11 (1997) (interpreting the NSE declaration attached to the ICCPR to mean that "Congress [must] pass enabling legislation before the provisions can be enforced"); Conkle, *supra* note 5, at 661–62 (stating that Article 18 of the ICCPR "is not yet enforceable as part of the domestic law of the United States,

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This Article is concerned with the proper interpretation of NSE declarations. The term "not self-executing," when applied to treaty provisions, has multiple meanings. Indeed, numerous scholarly articles have discussed the ambiguity of the term "self-executing treaty."[25] Unfortunately, despite an extensive body of literature describing ambiguities in the usage of the terms "self-executing" and "non-self-executing," commentaries about NSE declarations attached to human rights treaties have tended to proceed from the (usually unstated) assumption that the meaning of the term "not self-executing," as used in NSE declarations, is unambiguous. This Article attempts to remedy this oversight by applying insights from the scholarship on the doctrine of self-execution to an analysis of NSE declarations and human rights treaties. The Article analyzes the significance of the NSE declarations for cases raising treaty-based human rights claims—that is, claims by individuals that their human rights, as defined in the treaties, have been violated by federal, state, or local governments or officials.[26] The

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because—according to Senate declaration—the ICCPR is not self-executing"); McDougall, *supra* note 18, at 588 (stating that the NSE declaration attached to the Race Convention stripped the U.S. judiciary of any meaningful role in interpreting it); Neuman, *supra* note 5, at 43 (stating that the NSE declaration attached to the ICCPR means that the treaty is "not directly enforceable in the courts"); Taifa, *supra* note 18, at 642–43 (stating that the Race Convention "has consciously been rendered impotent due to U.S. insertion of a non-self-executing declaration"); Barbara Macgrady, Note, *Resort to International Human Rights Law in Challenging Conditions in U.S. Immigration Detention Centers*, 23 BROOK. J. INT'L L. 271, 300 (1997) ("Since Congress has made its intent clear [by adopting NSE declarations], it is certain that the courts will not enforce these treaties in a domestic action."); *see also* Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 60 (1997) (stating that the effect of adopting an NSE declaration for the Convention on the Elimination of All Forms of Discrimination Against Women would be to "bar[ ] the invocation of *any* provision of the Convention in a U.S. court, either as the basis of a claim or as a defense").

24. *See* Vega, *supra* note 18, at 456 & n.206 (contending that NSE declarations "only affect individuals attempting to base a private cause of action on the treaty clauses" and that "the concept of self-execution does not apply . . . to defensive invocations"); *see also* Paust, *supra* note 18, at 671 n.45 (quoting Vega).

25. *See infra* note 89.

26. The treaty-based human rights claims that are the focus of this Article differ significantly from statutory human rights claims that can be raised under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (1994), and/or the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)). The ATCA and the TVPA are federal statutes that provide a domestic legal remedy for human rights violations committed by foreign government officials. Several recent cases have raised claims under one or both of these federal statutes. *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994); Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994). Suits filed under the ATCA, in particular, have attracted a great deal of scholarly interest. *See, e.g.*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 360–61 (1988). In contrast, this Article focuses on the possibility for litigants in U.S. courts to obtain judicial remedies for violations of international human rights treaties committed by federal, state, or local governments or officials.

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Article's central thesis is that the NSE declarations, properly construed, permit courts to apply the treaties directly to provide a judicial remedy in some, but not all, cases that raise meritorious treaty-based human rights claims.

Just as there has been a remarkably broad consensus regarding the proper interpretation of the NSE declarations, there has been an even greater unanimity of views concerning the presumed purpose of the NSE declarations. The conventional wisdom has been that the purpose of the NSE declarations was precisely to preclude the "domestication" of international human rights treaties—that is, to preclude direct application of human rights treaties by U.S. courts to resolve treaty-based human rights claims.[27] This Article contends that the conventional wisdom is, at best, only half right. Specifically, the Article suggests that the politics of treaty ratification is best understood as an effort to harmonize two conflicting policy objectives: (1) ensuring compliance with U.S. treaty obligations, and (2) avoiding domestication of international human rights treaties. The conventional wisdom is correct, insofar as it emphasizes that the NSE declarations manifest the latter policy objectives. However, the conventional wisdom is wrong, insofar as it presumes that the NSE declarations reflect a deliberate policy decision that, in the event of a conflict, the objective of avoiding domestication of human rights treaties should always take precedence over the objective of treaty compliance. The treaty makers never made any such deliberate policy decision. Rather, the Executive Branch repeatedly assured the Senate that the conditions included in the U.S. instruments of ratification had successfully eliminated any discrepancy between treaty requirements and preexisting domestic law, thereby ensuring that the United States could comply fully with its treaty obligations without having to domesticate the treaties.[28] Hence, the treaty makers purposefully refused to decide which

27. *See, e.g.*, Damrosch, *supra* note 17 (analyzing the trend in the U.S. Senate to use the NSE declaration to impede judicial enforcement of treaties); Henkin, *supra* note 17, at 342 (asserting that the reservations, understandings, and declarations (RUDs) attached to human rights treaties indicate that the United States seeks to assure no change in U.S. laws and policies, "even where they fall below international standards"); McDougall, *supra* note 18, at 588 (noting that the NSE declaration attached to the Race Convention "essentially stripped the U.S. judiciary of any meaningful role in interpreting" the treaties); Paust, *supra* note 17 (arguing that the Executive Branch could not have acted in good faith to fulfill its treaty obligations when it issued the NSE declaration to the ICCPR); Quigley, *supra* note 17, at 1297–98 (noting that ratification of the ICCPR was achieved only after the Bush Administration ensured that the ICCPR would not be enforceable in U.S. courts); Riesenfeld & Abbott, *supra* note 17 (analyzing the effect of NSE declarations on adjudication of human rights claims in U.S. courts); Taifa, *supra* note 18 (arguing that the attachment of an NSE declaration to the Race Convention rendered it impotent); Weissbrodt, *supra* note 16 (asserting that NSE declarations deprive the U.S. courts of a role in interpreting and enforcing human rights treaties).

28. For a detailed discussion of this point, see *infra* Subsection V.C.2.

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objective should take precedence in the event of a conflict because the Executive Branch insisted that there would not be a conflict.[29]

Despite Executive Branch statements to the contrary, however, there is indeed a real conflict between the two objectives. In cases like the Amish hypothetical at the beginning of this Article, direct judicial application of treaty provisions to resolve treaty-based human rights claims promotes the goal of treaty compliance, but undermines the goal of avoiding domestication. Conversely, a judicial refusal to apply the treaty provisions would fulfill the anti-domestication objective, but subvert the goal of treaty compliance. The reinterpretation that this Article advocates—that the NSE declarations permit courts to apply human rights treaty provisions directly in some, but not all, cases involving treaty-based human rights claims—is consistent with the treaty makers' refusal to make the hard decisions about trade-offs between conflicting policy objectives; their purposeful indecision effectively delegated to the courts the responsibility for making these hard decisions on a case-by-case basis. Conversely, the majority interpretation that this Article criticizes—that the NSE declarations preclude direct judicial application in all cases—is based on a mistaken assumption that the treaty makers purposefully elevated the anti-domestication objective above the goal of treaty compliance.

The Article's argument relies heavily on an analysis of statements that Executive Branch officials made to the Senate during the ratification process. There are three distinct reasons for adopting this methodology. First, under Article II of the Constitution, the President is the primary lawmaker for treaties; the Senate role is simply to provide its advice and consent.[30] Second, for each treaty, the Senate has generally acquiesced silently to the Executive Branch's proposed NSE declaration. Third, since the NSE declarations are facially ambiguous, courts must examine the Senate record to ascertain the treaty makers' intent in adopting the NSE declarations.

Part II of this Article provides background information about the ICCPR, the Torture Convention, and the Race Convention. That Part emphasizes the fact that all three treaties obligate the United States to ensure

29. This argument is developed at length in Part V, *infra*. Those who are inclined to reject the thesis without reading further, though, should consider the following point. Just as it is extremely unlikely that two-thirds of the Senate would have consented to ratification of the treaties without explicit assurances from the Executive Branch that the treaties would not be incorporated into domestic law, it is equally implausible that two-thirds of the Senate would have consented to ratification of the treaties without explicit assurances from the Executive Branch that the United States could and would comply fully with its treaty obligations. Hence, any explicit statement that the United States would privilege the anti-domestication objective over the treaty-compliance objective—or that the United States would privilege the treaty-compliance objective over the anti-domestication objective—would have doomed the prospects for ratification.

30. *See* U.S. CONST. art. II, § 2.

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that: (1) any person who alleges a violation of his or her treaty rights receives an individual hearing before an impartial tribunal that has authority to adjudicate the merits of the claim; and (2) any person whose treaty rights are violated obtains an effective remedy.

Part III describes four different concepts of "non-self-execution." Two of these concepts are particularly relevant to an analysis of NSE declarations. If one construes the NSE declarations in accordance with the *Foster* concept of non-self-execution,[31] then these declarations mean that human rights treaty provisions cannot be applied directly by the courts in the absence of implementing legislation. However, if one construes the NSE declarations in accordance with the "private cause of action" concept of non-self-execution, then these declarations mean only that human rights treaty provisions do not create a private cause of action. Under the "private cause of action" concept, the substantive provisions of human rights treaties could still be invoked by defendants in both civil and criminal actions.[32] Moreover, it could be argued that the treaties' substantive provisions should be capable of being invoked by plaintiffs who raise treaty-based human rights claims in reliance on statutory or common law causes of action.[33]

Part IV examines the Senate record associated with ratification of human rights treaties; it shows that Executive Branch explanations of NSE declarations changed over time from a *Foster* concept of non-self-execution to a "private cause of action" concept. Whereas the Carter Administration consistently explained its proposed NSE declarations in terms of the *Foster* concept of non-self-execution, the Clinton Administration consistently explained the NSE declaration attached to the Race Convention in terms of the "private cause of action" concept. The Senate consented to ratification of the ICCPR and the Torture Convention during the Bush Administration, whose explanations of the NSE declarations oscillated between the *Foster* concept and the "private cause of action" concept.

Part V discusses the politics of NSE declarations, developing in greater detail the thesis that the treaty makers refused to make the hard decisions involving trade-offs between conflicting policy objectives. Part VI addresses the judicial dilemma that ensues from the treaty makers' refusal to make

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31. I derive this label from the case of *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), which gave birth to the concept.

32. For a useful discussion of the relationship between the "private cause of action" concept and the defensive invocation of treaties, see Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 719–22 (1995). *See also* Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts: Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401, 1448–52 (1996) (explaining why the standards for defensive invocation of treaties are lower than for a treaty-based private cause of action).

33. *See* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1141–57 (1992).

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these decisions. If courts decline to reach the merits of non-frivolous, nonredundant treaty-based human rights claims, they risk contravening the intent of the treaty makers to comply with U.S. treaty obligations. If courts do reach the merits of such claims, they risk contravening the intent of the treaty makers to avoid domestication of the human rights treaties. In light of this dilemma, the Article proposes an analytic framework for courts to apply in deciding whether the merits of treaty-based human rights claims should be reached. This Article also contends that the dilemma can be attenuated, though not eliminated, by construing the NSE declarations in accordance with the "private cause of action" concept.

II. BACKGROUND

A. *Substantive Provisions of the Human Rights Treaties*

The ICCPR primarily imposes negative obligations on states: It obligates parties to refrain from interfering in a protected sphere of personal liberty. The range of rights protected under the ICCPR is truly impressive, including, inter alia, the right to life, the right to privacy, the right to "freedom of thought, conscience and religion," and the rights to freedom from discrimination and equality before the law.[34]

The Race Convention, like the ICCPR, prohibits racial discrimination by government entities. However, the Race Convention goes further—it also obligates governments to take affirmative steps to eliminate discrimination by private groups.[35] Whereas the ICCPR obligates states to ensure equal treatment with respect to civil and political rights, the Race Convention also

34. *See* ICCPR, *supra* note 5, arts. 6, 17, 18, 26. The ICCPR also includes the right not to be "subjected to torture or to cruel, inhuman or degrading treatment or punishment;" the right not to be held in slavery or servitude; the right to liberty and security of person; the right of "all persons deprived of their liberty [to] be treated with humanity and with respect for the inherent dignity of the human person;" the right to freedom of movement within and between states; the right not to be expelled from a state without due process of law; the right to a fair hearing before an impartial tribunal for those facing criminal charges; the right to freedom of expression; the right of peaceful assembly; the right to freedom of association; the right to marry; the right of every child to "such measures of protection as are required by his status as a minor;" and the right to vote and to take part in the conduct of public affairs. *See id.* arts. 7–25.

35. *See, e.g.*, Race Convention, *supra* note 9, art. 2, para. 1(d) ("Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization."). Article 3 obligates parties to "prevent, prohibit and eradicate" racial segregation and apartheid. Article 4 obligates parties to, inter alia, "declare an offence punishable by law all dissemination of ideas based on racial superiority." Article 6 obligates parties to provide effective remedies for victims of racial discrimination. Article 7 obligates parties to adopt measures to combat prejudice and to promote "understanding, tolerance and friendship among nations and racial or ethnical groups." *See id.* arts. 3–7. When the United States ratified the Race Convention, it adopted a reservation limiting its obligation to eliminate racial discrimination by private groups. *See* 140 CONG. REC. S7634 (1994).

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guarantees racial equality in the enjoyment of specified economic, social, and cultural rights.[36]

The Torture Convention primarily imposes affirmative obligations on state parties, rather than negative obligations. The Torture Convention requires governments to ensure that persons who commit acts of torture are subjected to criminal penalties.[37] Several articles are directed primarily to the Executive Branch: They require education of law enforcement officers, systematic review of rules for detention of prisoners, and prompt investigation of any complaints "wherever there is reasonable ground to believe that an act of torture has been committed."[38] Thus, many of the Convention's provisions are not intended to create rights for individuals.

However, Articles 3 and 15 of the Torture Convention are intended to create rights for individual torture victims. Article 3 obligates parties not to deport 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."[39] Article 15 obligates parties to ensure that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."[40]

B. *U.S. Ratification of the Human Rights Treaties*

President Carter submitted the ICCPR and the Race Convention to the Senate, along with two other human rights treaties, on February 23, 1978.[41] For all four treaties, the President proposed a package of "reservations," "understandings," and "declarations" (RUDs), including a declaration that the substantive provisions of the treaties are not self-executing.[42] The Senate Foreign Relations Committee held four days of hearings on the human rights

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36. *See* Race Convention, *supra* note 9, art. 5, para. (e) (obliging states to guarantee equality before the law in the enjoyment of the right to work, the right to unionize, the right to housing, the right to health and social services, the right to education, and the right to "equal participation in cultural activities").

37. For example, the Convention obligates each party to "ensure that all acts of torture are offences under its criminal law," Torture Convention, *supra* note 8, art. 4, para. 1; to establish jurisdiction to prosecute torturers who are nationals of that state, or who are present in that state, or whose victims are nationals of that state, regardless of where the act of torture occurred, *see id.* art. 5; to either prosecute offenders, or extradite them to another country that will subject them to prosecution, *see id.* art. 7; and to assist each other in connection with criminal proceedings, *see id.* art. 9.

38. *See* Torture Convention, *supra* note 8, arts. 10–12.

39. *Id.* art. 3.

40. *Id.* art. 15.

41. *See* CARTER MESSAGE, *supra* note 15.

42. *See id.* at vi.

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treaties, from November 14 to 19, 1979.[43] However, "[d]omestic and international events at the end of 1979, including the Soviet invasion of Afghanistan and the hostage crisis in Iran, prevented the Committee from moving to a vote" on the treaties.[44] After President Carter's term ended, the treaties remained dormant in the Senate Foreign Relations Committee for more than a decade, largely because "[t]he Reagan Administration did not indicate any interest in ratifying" them.[45]

In 1988, while the ICCPR and Race Convention were dormant in the Senate, the United States signed the Torture Convention, and President Reagan promptly submitted it to the Senate along with a proposed package of RUDs.[46] In July 1989, Senator Claiborne Pell, chairman of the Senate Foreign Relations Committee, wrote to the Bush Administration, asking it to reconsider the proposed RUDs in light of substantial "opposition from human rights groups and other interested parties."[47] The Bush Administration responded in December of 1989 with a revised package of RUDs,[48] including a declaration "that the provisions of Articles 1 through 16 of the Convention are not self-executing."[49] The Senate Foreign Relations Committee held one day of hearings on the Convention.[50] The Senate adopted the NSE declaration without change,[51] and it was included in the U.S. instrument of ratification.[52] The Senate provided its advice and consent to ratification in 1990,[53] Congress enacted implementing legislation in 1994,[54] and the United States became a party to the Convention shortly thereafter.[55]

On August 8, 1991—after the Senate consented to ratification of the Torture Convention, but before the United States ratified it—President Bush wrote to the Senate Foreign Relations Committee "to urge the Senate to

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43. *See Carter Hearings*, *supra* note 16.

44. SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: REPORT, S. EXEC. REP. NO. 102-23, at 2 (1992) [hereinafter ICCPR REPORT].

45. *Id.*

46. *See* SENATE COMM. ON FOREIGN RELATIONS, REPORT ON CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30, at 2 (1990) [hereinafter TORTURE REPORT].

47. *Id.* at 35.

48. *See id.* at 36-37.

49. *Id.* at 12. Articles 1 through 16 define the parties' substantive obligations. Articles 17 through 33 deal with treaty administration.

50. *See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1990, Treaty Doc. 100-20, Hearing Before the Comm. on Foreign Relations, U.S. Senate*, 101st Cong. (1990) [hereinafter *Torture Hearing*].

51. *See* 136 CONG. REC. S17,492 (1990).

52. *See* MULTILATERAL TREATIES, *supra* note 6, at 187.

53. *See* 136 CONG. REC. S17,492 (1990).

54. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463 (1994) (codified at 18 U.S.C. §§ 2340-2340B (1994)).

55. The implementing legislation was enacted in April 1994, and the United States deposited its instrument of ratification in October 1994. *See* MULTILATERAL TREATIES, *supra* note 6, at 185.

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renew its consideration of the International Covenant on Civil and Political Rights with a view to providing advice and consent to ratification."[56] President Bush proposed a set of RUDs that largely tracked the conditions proposed by the Carter Administration.[57] One proposed declaration was "that the provisions of Articles 1 through 27 of the ICCPR are not self-executing."[58] This provision was identical to the NSE declaration previously proposed by President Carter.[59] The Senate Foreign Relations Committee held one day of hearings on the ICCPR,[60] and the Committee voted unanimously to report the ICCPR to the Senate with a recommendation favoring ratification.[61] The Senate gave its advice and consent to ratification of the ICCPR on April 2, 1992.[62] In its resolution of ratification, the Senate adopted verbatim the entire package of RUDs proposed by President Bush, including the NSE declaration.[63] On June 8, 1992, the United States deposited its instrument of ratification, including the RUDs, with the United Nations.[64]

In April 1994, the Clinton Administration urged the Senate "to give its prompt attention to and approval of" the Race Convention.[65] The Administration proposed a set of RUDs that were broadly similar to the conditions proposed by the Carter Administration.[66] One proposed declaration was "that the provisions of the Convention are not self-executing."[67] This is substantially identical to the NSE declaration previously proposed by President Carter.[68] The Senate Foreign Relations Committee held one day of hearings on the Convention.[69] On May 25, 1994, the Committee voted unanimously to report the Convention to the Senate with a

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56. ICCPR REPORT, *supra* note 44, at 25.

57. *See id.* at 10–21.

58. *Id.* at 19.

59. *See* CARTER MESSAGE, *supra* note 15, at xv.

60. *See International Covenant on Civil and Political Rights: Hearing Before the Comm. on Foreign Relations, U.S. Senate*, 102d Cong. (1992) [hereinafter *ICCPR Hearing*].

61. *See* ICCPR REPORT, *supra* note 44, at 3.

62. *See* 138 CONG. REC. S4781–84 (1992).

63. *See id.*

64. *See* MULTILATERAL TREATIES, *supra* note 6, at 122, 130–31.

65. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, S. EXEC. REP. NO. 103-29, at 2 (1994) [hereinafter RACE REPORT].

66. *See id.* at 10–11.

67. *Id.* at 11.

68. *Compare id.* at 11 *with* CARTER MESSAGE, *supra* note 15, at viii ("It is further recommended that a declaration indicate the non-self-executing nature of Articles 1 through 7 of the Convention.").

69. *See International Convention on the Elimination of All Forms of Racial Discrimination (EX. C, 95-2): Hearing Before the Comm. on Foreign Relations, U.S. Senate*, 103d Cong. (1994) [hereinafter *Race Hearing*].

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recommendation favoring ratification.[70] The Senate provided its advice and consent to ratification in June 1994.[71] In its resolution of ratification, the Senate adopted verbatim the entire package of RUDs proposed by President Clinton, including the NSE declaration.[72] In October 1994, the United States deposited its instrument of ratification, including the RUDs, with the United Nations.[73]

C. *The Obligation to Enforce the Treaties Domestically*

The ICCPR, the Race Convention, and the Torture Convention all obligate parties to provide an effective remedy for any person whose rights are violated.[74] Implicit in the obligation to provide a remedy is the obligation to ensure that any person who raises a non-frivolous allegation that his treaty rights have been violated obtains an individual hearing before an impartial tribunal that is authorized to adjudicate the merits of the claim. No country can fulfill its obligation to provide remedies for violations of individual rights if the individuals who allege such violations are left without a forum in which to raise their claims.[75]

Moreover, the right to an individual hearing before an impartial tribunal is stated explicitly in each of the treaties. For example, the Torture Convention provides: "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities."[76] Similarly, the ICCPR not only entitles individuals to an effective remedy, but also states that "any person claiming [entitlement to] such a remedy shall have his right thereto

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70. *See* RACE REPORT, *supra* note 65, at 3.

71. *See* 140 CONG. REC. S7634–35 (1994).

72. *See id.*

73. *See* MULTILATERAL TREATIES, *supra* note 6, at 96, 102.

74. *See* Torture Convention, *supra* note 8, art. 14, para. 1 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation . . . . In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation."); ICCPR, *supra* note 5, art. 2, para. 3(a) (obligating parties "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy"); Race Convention, *supra* note 9, art. 6 (obligating parties to "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention").

75. For further elaboration of this point, see Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 611–28 (1989). A revised version of this article is in PAUST, *supra* note 20, at 198–212.

76. Torture Convention, *supra* note 8, art. 13.

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determined by . . . [some] competent authority provided for by the legal system of the State."[77]

The right to an individual hearing does not necessarily entail a right to judicial review. The Torture Convention simply refers to an impartial examination by "competent authorities."[78] Similarly, the Race Convention refers to "competent national tribunals."[79] The ICCPR obligates parties to "develop the possibilities of judicial remedy,"[80] but it does not mandate judicial review of all treaty-based human rights claims. Thus, states are not obligated to provide for judicial enforcement of treaty rights, but they are obligated to ensure that: (1) any person who raises a non-frivolous allegation that his or her treaty rights have been violated obtains an individual hearing before an impartial tribunal; and (2) any person whose rights are violated obtains an effective remedy.

Although the treaties do not require judicial enforcement, some have argued that the United States is obligated to provide for judicial enforcement, because, in the U.S. legal system, there is no alternative forum other than the courts with the institutional competence to adjudicate the merits of individual claims.[81] In fact, there are at least some treaty-based human rights claims that can be adjudicated outside of Article III courts.[82] Moreover, courts need not apply the treaties directly in cases where a remedy is available under some other provision of U.S. law.[83] However, in cases where there is no alternative forum, and no remedy is available under other provisions of U.S. law, the United States would be in violation of its treaty obligations to provide for an individual hearing and an effective remedy if courts refuse to reach the merits of non-frivolous[84] treaty-based human rights claims.

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77. ICCPR, art. 2, para. 3(b); *see also* ICCPR, art. 14, para. 1 ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."). The Race Convention is less explicit than the other treaties, but it does obligate parties to ensure that everyone within their jurisdiction has "the right to seek from [competent national] tribunals just and adequate reparation or satisfaction for any damage suffered as a result of" treaty violations. Race Convention, *supra* note 9, art. 6. The right to seek reparation necessarily implies the right to an individual hearing.

78. Torture Convention, *supra* note 8, art. 13.

79. Race Convention, *supra* note 9, art. 6.

80. ICCPR, *supra* note 5, art. 2, para. 3(b).

81. *See, e.g.*, Quigley, *supra* note 17, at 1296 ("Since the United States has no legislative or administrative mechanism available to individuals, the only possible remedy is judicial. Thus, as applied to the United States, paragraph 3 of Article 2 [of the ICCPR] requires that the courts ensure observance of the Covenant.")

82. For instance, the Secretary of State has final discretion in ruling on extradition cases. See *infra* Subsection VI.B.3 for a discussion of one example.

83. See *infra* Subsection VI.B.2 for fuller development of this point.

84. See *infra* Subsection V.D.1 for further discussion of the "non-frivolous" caveat.

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Most commentators have interpreted the NSE declarations to mean that courts are precluded from reaching the merits of treaty-based human rights claims in such cases.[85] Since this interpretation is inconsistent with U.S. treaty obligations, it is necessary to analyze more closely the meaning of the term "not self-executing."

III. THE MEANING OF THE TERM "NOT SELF-EXECUTING"

When courts hold that a particular treaty provision is "not self-executing," they generally refuse to apply the treaty provision in the manner that the litigant invoking the provision wishes it to apply.[86] However, this consistent refusal masks an underlying conceptual confusion about the meaning of the term. A 1948 memorandum prepared for the Department of State Legal Adviser stated that, "An examination of adjudicated cases and of some treatises and of some of the law reviews has failed to disclose a clear definition of the term 'Self-Executing Treaty.'"[87] Three years later, Professor Myres McDougal stated that, "this word 'self-executing' is essentially meaningless, and . . . the quicker we drop it from our vocabulary the better for clarity and understanding."[88] Nevertheless, despite repeated exhortations by scholars to either clarify or dispense with the concept of self-execution, courts continue to employ the term, and the ambiguity surrounding its usage has only increased with the passage of time.

This Part describes the different meanings of the term "not self-executing" used by courts with reference to treaties. The various non-self-execution concepts are divided into two groups: (1) those concepts that preclude altogether the direct judicial application of non-self-executing treaty provisions; and (2) those concepts that limit the direct judicial application of non-self-executing treaty provisions to certain types of claims and/or certain types of litigants. The discussion draws heavily from the work of other scholars who have explored the multiple meanings of the term "not self-

85. *See supra* note 23 and accompanying text. *But see* John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 492 n.185 (1997) (stating that NSE declarations are "of limited legal effect upon the obligation of the United States to provide 'an effective remedy'").

86. *But cf.* Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (holding that Paraguay had standing to sue under certain treaties, because it is an actual party to the contract, even though the treaties are not self-executing in the sense that they do not confer rights of action on private individuals), *aff'd*, 134 F.3d 622 (4th Cir.), *cert. denied sub nom.* Breard v. Greene, 118 S.Ct. 1352 (1998).

87. Memorandum from Attorney Adviser Diven to Legal Adviser Gross, Department of State, "Definition of 'Self-Executing Treaty'" (Apr. 22, 1948), Department of State, file 711.009/4-2248, *reprinted in* MARJORIE M. WHITEMAN, 14 DIGEST OF INTERNATIONAL LAW 304, 304 (1970).

88. Myres McDougal, Remarks at the Annual Meeting of the American Society of International Law (Apr. 27, 1951), *in* 45 PROC. AM. SOC'Y INT'L L. 101, 102 (1951).

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executing."[89] The purpose of this Part, therefore, is not to break new ground in the analysis of the doctrine of self-execution, but rather to establish a framework for analyzing statements by Executive Branch officials who, at different times, have offered different explanations to the Senate regarding the meaning of NSE declarations attached to different human rights treaties.

A. *Concepts That Preclude Direct Judicial Application*

Courts sometimes refer to treaties as an aid for interpreting federal statutes.[90] At other times, courts apply legislation that has been enacted pursuant to a treaty.[91] These are examples of "indirect" judicial application of treaties. When courts apply treaties indirectly, some provision of law other than the treaty itself provides a rule of decision in the particular case. In contrast, when courts apply a treaty provision "directly," the treaty itself provides a rule of decision in the particular case. Judges can apply treaty provisions indirectly, regardless of whether they are self-executing or not.[92] In fact, judges often apply treaty provisions indirectly even when the United States is not a party to the treaty.[93] However, certain concepts of non-self-execution would preclude altogether the direct judicial application of non-self-executing treaty provisions. This Section briefly describes two such concepts.

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89. The literature on the doctrine of self-executing treaties is extensive. Important recent articles include Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992) [hereinafter Jackson, *Status of Treaties*]; John H. Jackson, *United States*, *in* THE EFFECT OF TREATIES IN DOMESTIC LAW 141 (Francis G. Jacobs & Shelley Roberts eds., 1987) [hereinafter Jackson, *United States*]; Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal*: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980); Vazquez, *supra* note 32; and Vazquez, *supra* note 33.

90. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

91. *See id.* § 111 cmt. h (stating that, with respect to non-self-executing treaties, "it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States").

92. Indeed, the United States has told the U.N. Human Rights Committee that the NSE declaration attached to the ICCPR does not preclude indirect judicial application of the ICCPR. *See Concluding Observations of the Human Rights Committee: United States of America*, U.N. GAOR Hum. Rts. Comm., 53d Sess., 1413th mtg. at para. 276, U.N. Doc. CCPR/C/79/Add.50 (1995) ("[N]otwithstanding the non-self-executing declaration of the United States, American courts are not prevented from seeking guidance from the Covenant in interpreting American law."); *see also* Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1573 n.200 (1998) (quoting the Concluding Observations).

93. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 883–84 (2d Cir. 1980) (citing the ICCPR and other human rights treaties to which the United States was not then a party in support of the proposition that torture is a "violation of the law of nations" within the meaning of 28 U.S.C. § 1350).

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1. *Automatic Incorporation*

When courts say that a particular treaty provision is self-executing, they sometimes mean that it is automatically incorporated into domestic law upon ratification of the treaty. Under this interpretation, the statement that a treaty provision is not self-executing means that it has no status as domestic law in the absence of implementing legislation.[94]

The earliest use of the term "self-executing" in this sense appears to have been in *Whitney v. Robertson*.[95] There, the Supreme Court stated that:

> When the [treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect . . . . If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.[96]

Under this concept of self-execution, self-executing treaty provisions are automatically incorporated into domestic law upon treaty ratification; non-self-executing provisions have no domestic legal status in the absence of implementing legislation, even if they are obligatory as a matter of international law.[97]

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94. In this Article, the following statements are all considered to be semantically equivalent: (1) a treaty provision has the status of domestic law; (2) a treaty provision has domestic legal effect; (3) a treaty provision has domestic legal force; and (4) a treaty provision has been incorporated into domestic law.

95. 124 U.S. 190 (1888).

96. *Id.* at 194.

97. The Supremacy Clause states that "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The proposition that a treaty has no status as domestic law implies that it is not the "Law of the Land" under the Supremacy Clause. Although the author is unaware of any court decision holding explicitly that a non-self-executing treaty is not the "Law of the Land," that conclusion is implicit in many court decisions. *See, e.g.*, United States v. Gonzalez, 776 F.2d 931, 937–38 (11th Cir. 1985) (stating that Article 6 of the Convention on the High Seas is not self-executing and that "the United States' ratification of the treaty did not incorporate the restrictive language of Article 6 . . . into its domestic law"); Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985) (stating that international agreements that are not self-executing "are merely executory agreements between the two nations and have no effect on domestic law absent additional governmental action"); Spiess v. C. Itoh & Co., 643 F.2d 353, 356 (5th Cir. 1981) (defining self-executing treaties as ones that "are binding domestic law of their own accord, without the need for implementing legislation"); United States v. Postal, 589 F.2d 862, 875 (5th Cir. 1979) ("Article 6 of the United States Constitution declares treaties made 'under the Authority of the United States [to] be the supreme Law of the Land,' but it was early decided that treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing.").

It is beyond the scope of this Article to present a comprehensive scheme for determining which treaty provisions are the "Law of the Land." However, the author believes that, subject to a few narrow exceptions, non-self-executing treaty provisions are the "Law of the Land" under the Supremacy Clause, even if courts cannot apply them directly. This is the view shared by most scholars. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 203 (2d ed. 1996) ("Whether a treaty is self-executing or not . . . it is supreme law of the land."); PAUST, *supra* note 20, at 62–63 (discussing domestic legal effects of non-self-executing treaties); Iwasawa, *supra* note 89, at 645 ("U.S. courts have consistently recognized that provisions of constitutions and statutes

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Trans World Airlines, Inc. v. Franklin Mint Corp.[98] is the most recent Supreme Court case that employs the automatic incorporation concept of self-execution. There, the Supreme Court stated that the Warsaw Convention, an international air carriage treaty to which the United States is a party, is self-executing.[99] The Court explained that the term "self-executing" means that "no domestic legislation is required to give the Convention the force of law in the United States."[100] This is consistent with the *Whitney* concept of self-execution as automatic incorporation. Numerous lower courts have employed this concept of self-execution.[101]

2. *The Foster Concept of Non-Self-Execution*

Although *Foster v. Neilson*[102] does not use the term "self-executing," the case is widely regarded as the source of the distinction in United States law between self-executing and non-self-executing treaties. In *Foster*, Chief Justice John Marshall stated that some treaties are addressed "to the political, not the judicial department; and the legislature must execute the contract [i.e., the treaty] before it can become a rule for the Court."[103] Thus, Marshall distinguished between: (1) treaties that address themselves to the judicial department, which can be applied directly by the courts (self-executing);[104] and (2) treaties that address themselves to the political branches, which require legislative implementation before they can provide a rule of decision for the judiciary (non-self-executing).[105]

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are the law of the land, whether or not they are self-executing. Non-self-executing treaty provisions should not be treated any differently."); Jackson, *Status of Treaties*, *supra* note 89, at 316 (distinguishing between the issue of domestic validity—whether a treaty is the law of the land—and the issue of direct applicability, which is equated with self-execution).

98. 466 U.S. 243 (1984).

99. *See id.* at 252.

100. *Id.*

101. *See* cases cited *supra* note 97.

102. 27 U.S. (2 Pet.) 253 (1829).

103. *Id.* at 314.

104. Marshall stated that such treaties should "be regarded in courts of justice as equivalent to an act of the legislature." *Id.*

105. Unfortunately, Chief Justice Marshall did not articulate clearly the criteria that judges should apply in determining whether a particular treaty provision is self-executing. Just four years after deciding *Foster*, the Chief Justice reversed himself and held that Article 8 of an 1819 treaty with Spain was self-executing, despite the fact that *Foster* held the same treaty article to be non-self-executing. *See* United States v. Percheman, 32 U.S. (7 Pet.) 51, 87–89 (1833) (relying on the Spanish text of the treaty to support the conclusion that Article 8 was self-executing). Ever since then, courts and commentators have struggled, largely without success, to develop a coherent set of criteria for judges to apply in determining whether a particular treaty provision requires implementing legislation before it can provide a rule of decision for the courts. *See generally* Iwasawa, *supra* note 89 (arguing, among other things, that the intent of the parties is not a reliable criterion for determining direct applicability for treaties, because the parties are not generally concerned with that question); Jackson, *United States*, *supra* note 89 (discussing the complexity of the law regarding application of treaties in

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In *United States v. Alvarez-Machain*,[106] the Supreme Court apparently understood the term "self-executing" in accordance with the *Foster* concept. With respect to the extradition treaty between the United States and Mexico, Chief Justice Rehnquist stated that, "The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual . . . ."[107] The statement that the treaty "has the force of law" is unqualified, implying that it is true regardless of whether the treaty is self-executing. However, according to Justice Rehnquist, even though the treaty has the force of law, the court's duty to enforce the treaty on behalf of an individual depends on whether it is self-executing. In other words, only self-executing treaties can be applied directly by the judiciary.

No treaty provision can be directly applicable unless it is also automatically incorporated—that is, judges cannot rely on a provision as a rule of decision if it has no status as domestic law. However, the fact that a treaty provision is automatically incorporated into domestic law does not necessarily mean that judges can rely on it to provide a rule of decision in a case. For example, an arms control treaty provision that obligates the United States to destroy certain missiles is not directly applicable by the judiciary, because it manifestly "addresses itself to the political, not the judicial department."[108] The fact that the provision is not directly applicable by the judiciary, however, does not mean that it is without domestic legal force. It is analogous to a statute that authorizes funds for missile production—such a statute has domestic legal force, but it does not provide a rule of decision for the courts.

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the domestic law of the United States); Paust, *supra* note 89 (arguing that the history of constitutional interpretation suggests that no treaty is inherently self-executing except those which would seek to declare war on behalf of the United States); Riesenfeld, *supra* note 89 (arguing that the hostility in case law to the domestic applicability of customary international law or treaties is regrettable and unsalutary); Vazquez, *supra* note 32 (arguing that much of the confusion over whether treaties are self-executing stems from the failure of courts and commentators to recognize that four distinct "doctrines" of self-executing treaties have been conflated).

Although courts and commentators generally agree that the key criterion is intent, the unresolved questions include the following: (1) Should judges seek to ascertain the common intent of all the treaty parties, or is the unilateral intent of the United States dispositive?; (2) Should judges rely primarily on the text of the treaty to determine intent, or should they consult other sources as well?; (3) Should treaties be presumed to be self-executing, absent evidence of intent to the contrary, or should treaties be presumed to be non-self-executing, in which case the burden of proof rests with the party who advocates a self-executing interpretation?; and (4) What is the substantive content of the "intent" for which judges are searching? Is it an intent to create judicially enforceable private rights, or is it an intent that the treaty should be applied directly, without the need for implementing legislation?

106. 504 U.S. 655 (1992).

107. *Id.* at 667.

108. *Foster*, 27 U.S. at 314.

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Thus, under the *Foster* concept of self-execution, a non-self-executing treaty has domestic legal force, but it cannot be applied directly by the judiciary. As will be discussed below, Executive Branch officials often explained the meaning of NSE declarations attached to human rights treaties in terms of the *Foster* concept of non-self-execution.

B. *Concepts That Permit Direct Judicial Application in Some Cases*

The preceding Section described concepts of non-self-execution that share one common feature: courts are precluded from applying non-self-executing treaty provisions directly as a rule of decision. In contrast, this Section describes two concepts of non-self-execution that would permit direct judicial application of non-self-executing treaty provisions in some cases, depending on the nature of the claim and/or the identities of the litigants. It is important to emphasize that, to the best of the author's knowledge, no U.S. court has ever held a treaty provision to be non-self-executing and then applied it directly to decide a case. However, courts often apply treaty provisions directly to cases before them without considering whether the treaty provision is self-executing.[109] Moreover, courts frequently discuss the concept of non-self-execution in terms that imply the possibility of direct judicial application in some cases.

1. *Self-Execution and Standing*

Although courts sometimes treat the issues of standing and self-execution as distinct inquiries,[110] there are cases in which courts have fused the concepts of standing and self-execution.[111] For example, in *United States*

109. *See* Paust, *supra* note 89, at 772–73 (tracing a line of Supreme Court decisions that simply ignores the distinction between self-executing and non-self-executing treaty provisions). One way to explain these cases is to say that the courts, in such cases, simply assume that the treaty provision at issue is self-executing. However, an alternative explanation is that the courts assume that the self-execution question is irrelevant because they understand "self-execution" in terms of the "private cause of action" concept, *see infra* Subsection III.B.2, and the litigant who seeks to invoke the treaty provision is not relying on it to establish a private cause of action.

110. *See, e.g.*, United States v. Caro-Quintero, 745 F. Supp. 599, 607 (C.D. Cal. 1990) ("Whether a treaty is self-executing is a question distinct from whether a party has standing to enforce its terms.").

111. *See, e.g.*, More v. Intelcom Support Servs., Inc., 960 F.2d 466, 474 (5th Cir. 1992) ("In regards to employees of contractors, the Treaty is not self-executing and therefore Plaintiffs have no standing to complain in federal court that they did not receive benefits of which they believe the Treaty assures them."); United States v. Thompson, 928 F.2d 1060, 1066 (11th Cir. 1991) ("We have held that a treaty must be self-executing in order for an individual citizen to have standing to protest a violation of the treaty."); United States v. Noriega, 808 F. Supp. 791, 798 n.11 (S.D. Fla. 1992) (quoting the sentencing transcript, which argued that the Geneva Convention is "not self-executing; that is, only a signatory power can invoke the rights and privileges under the treaties to the benefit of a prisoner of war, and that indeed a prisoner of war himself had no standing to do that for himself").

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v. Bent-Santana,[112] U.S. Coast Guard officials boarded a Panamanian flag vessel one hundred miles off the U.S. coast. The officials found drugs on board the vessel and arrested the captain, Bent-Santana. An agreement between the United States and Panama stipulated that "it shall be arranged that in any boarding of a Panamanian Flag Vessel, a Panamanian Consular Official is to be present."[113] No Panamanian consular official was present when Coast Guard officials boarded the vessel in this case. Bent-Santana raised this argument as a defense to criminal prosecution.[114] The court questioned whether the agreement relied upon by Bent-Santana had a "binding force."[115] However, even assuming that it was a binding agreement, the court said that "unless a treaty 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.*"[116] The court concluded that the defendant lacked standing to raise the claim because the agreement was not self-executing.

Suppose, however, that Panama had objected to the boarding of the ship because a Panamanian consular official was not present. The clear implication of the court's analysis is that the defendant would then have a valid defense, because Panama had the power to invoke the international agreement on behalf of the defendant, despite the fact that the agreement was not self-executing.[117] By linking the concept of self-execution to the concept of standing, and suggesting that countries have the power to invoke non-self-executing agreements, but individuals do not, the court left open the possibility that countries could invoke non-self-executing treaties on behalf of their nationals when their nationals are involved in litigation in U.S. courts. Under this concept of self-execution, a court can apply a non-self-executing treaty provision directly if a U.S. treaty partner invokes the treaty to provide a rule of decision in a particular case.[118] Thus, the self-execution

112. 774 F.2d 1545 (11th Cir. 1985).

113. *Id.* at 1548 n.1.

114. *See id.* at 1550.

115. *Id.*

116. *Id.* (emphasis added) (citations omitted).

117. In *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), the Ninth Circuit specifically held that a criminal defendant had standing to raise a treaty-based objection to the court's exercise of personal jurisdiction. *See id.* at 1355–57. The court based the defendant's standing on the fact that his native country, Mexico, objected that the United States had violated its extradition treaty with Mexico when individuals acting at the behest of the United States government kidnapped the defendant from Mexico and forcibly abducted him to the United States. *See id.* Under this analysis, as in *Bent-Santana*, the defendant has standing to raise a treaty-based claim only if his government objects to the treaty violation. *Verdugo-Urquidez* differs from *Bent-Santana*, however, in that the Ninth Circuit treated the self-execution question, *Verdugo-Urquidez*, 939 F.2d at 1358 n.17, separately from the standing question, *id.* at 1355–57, whereas the Eleventh Circuit fused the two questions.

118. *See* Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (holding

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inquiry, in this sense, turns not on whether the court may apply the treaty directly, but on who has the right to invoke the treaty.

At no time during the formal ratification process did any Executive Branch official explain the NSE declarations attached to human rights treaties in terms of the concept of standing. Thus, there is no basis for interpreting the NSE declarations in this manner.

2. *The "Private Cause of Action" Concept of Non-Self-Execution*

In analyzing the domestic legal effect of treaties, courts have frequently linked the concept of self-execution with the concept of a private right of action, or a private cause of action.[119] Similarly, state court decisions analyzing whether state constitutional provisions are "self-executing" have also linked the concept of self-execution to the concept of a private cause of action.[120]

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that Paraguay had standing to sue under certain treaties, because it is "an actual party to the contract," even though the treaties are not self-executing in the sense that they do not confer "rights of action on private individuals"), *aff'd*, 134 F.2d 622 (4th Cir.), *cert. denied sub nom.* Breard v. Greene, 118 S.Ct. 1352 (1998).

119. *See, e.g.*, *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 503 (9th Cir. 1992) ("[N]o private cause of action can ever be implied from a non-self-executing treaty."); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) ("Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action."); More v. Intelcom Support Servs., Inc., 960 F.2d 466, 469 (5th Cir. 1992) (listing "the implications of permitting a private right of action" as one of several factors courts consider in determining whether a treaty is self-executing (quoting Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985))); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) ("Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action."); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979) ("[U]nless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action."); *Republic of Paraguay*, 949 F. Supp. at 1274 (stating that one definition of "self-executing" is that "a treaty . . . confers rights of action on private individuals"); Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F. Supp. 306, 311 n.6 (E.D.N.Y. 1995) ("A treaty is self-executing when it expressly or impliedly provides a private right of action."); United States v. Noriega, 808 F. Supp. 791, 799 (S.D. Fla. 1992) ("[I]f a treaty expressly or impliedly provides a private right of action, it is self-executing and can be invoked by the individual."); Jaffe v. Boyles, 616 F. Supp. 1371, 1378 (W.D.N.Y. 1985) ("Not every treaty violation gives rise to a cause of action for private parties: It is only when a treaty is self-executing . . . that it may be relied upon for the enforcement of such rights." (quoting Dreyfus v. Von Finck, 534 F.2d 24, 28 (2d Cir. 1976))); Handel v. Artukovic, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985) ("In the absence of authorizing legislation, an individual may enforce a treaty's provisions only when it is self-executing, i.e., when it expressly or impliedly provides a private right of action.").

120. *See, e.g.*, Brown v. State, 674 N.E.2d 1129, 1137 (N.Y. 1996) ("A civil damage remedy cannot be implied for a violation of the State constitutional provision unless the provision is self-executing."); *see also* Gail Donoghue & Jonathan I. Edelstein, *Life After* Brown*: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, 447 (1998) (analyzing the implications of the decision of the New York Court of Appeals in *Brown* "to recognize a direct cause of action for damages based on violation of its state constitution").

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The statement that a treaty is not self-executing, in the sense that it does not create a private cause of action, does not mean that the treaty cannot be applied directly by the courts. As Professor Vazquez has stated:

> [A] treaty that does not itself confer a right of action . . . is not for that reason unenforceable in the courts. A right of action is not necessary if the treaty is being invoked as a defense. Moreover, treaties have long been enforced pursuant to common law forms of action. Furthermore, there are a number of possible federal statutory bases for rights of action to enforce treaties, the most important being section 1983 and the APA. Only if there is no other basis for the right of action should it be necessary to locate a right of action in the treaty itself.[121]

Thus, under the "private cause of action" concept, like the standing concept, the self-execution inquiry turns on whether a particular litigant may invoke a treaty provision in a particular case. However, the fact that a treaty provision is not self-executing, in the sense that it does not create a private cause of action, does not preclude direct judicial application of the provision in all cases.[122]

From a policy standpoint, the "private cause of action" concept makes sense in cases where the treaty makers wish to prevent the treaty from being utilized to create new avenues of litigation, while still permitting judicial enforcement of the treaty in other contexts to help ensure compliance with treaty obligations. As Part IV below reveals, Executive Branch officials often explained the meaning of NSE declarations attached to human rights treaties in terms of the "private cause of action" concept of non-self-execution.

IV. EXECUTIVE BRANCH EXPLANATIONS OF NSE DECLARATIONS

President Carter first proposed attaching NSE declarations to the four human rights treaties he submitted to the Senate in 1978.[123] Since then, NSE declarations have consistently been added to human rights treaties at the initiative of the Executive Branch, not the Senate. Part IV discusses how the Executive Branch has explained NSE declarations to the Senate. Analysis of

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121. Vazquez, *supra* note 33, at 1143. Professor Vazquez later elaborates this point in great detail. *See id.* at 1143–57; *see also* McDonnell, *supra* note 32, at 1448–52 (arguing that the threshold for asserting a treaty-based cause of action for damages is higher than that for invoking a treaty as a defense).

122. Moreover, the statement that a treaty does not create a private cause of action says nothing about the possibilities for administrative enforcement of the treaty. *See* Newman, *supra* note 17, at 1244–47. Indeed, not even the *Foster* concept of non-self-execution precludes enforcement by administrative law judges (ALJs), because the *Foster* concept turns on whether a treaty addresses itself to the judicial branch or to the political branches, and ALJs are members of the political branches. *See supra* Subsection III.A.2 (discussing the *Foster* concept of self-execution). For discussion of an actual case involving the possibility of administrative enforcement of Article 3 of the Torture Convention, see *infra* notes 308–313 and accompanying text.

123. *See supra* Section II.B.

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the Senate record shows that the Carter Administration consistently explained its proposed NSE declarations in accordance with the *Foster* concept of non-self-execution, which would preclude direct judicial application of human rights treaties in all cases. In contrast, the Clinton Administration consistently explained its proposed NSE declarations in accordance with the "private cause of action" concept, which would permit direct judicial application of human rights treaties in some cases. The Bush Administration presented different explanations at different times, shifting back and forth between the *Foster* concept and the "private cause of action" concept.

Section IV.A contends that the NSE declarations are intended to convert what would otherwise be self-executing treaty provisions into non-self-executing provisions. Section IV.B examines statements by Carter Administration officials explaining the meaning of the term "not self-executing," as used in NSE declarations. Sections IV.C, IV.D, and IV.E, respectively, discuss Executive Branch explanations of the NSE declarations attached to the Torture Convention, the ICCPR, and the Race Convention.

A. *Switching Self-Executing Provisions into Non-Self-Executing Provisions*

During Senate hearings on human rights treaties in 1979, Senator Jacob Javits asked several witnesses to submit, for the record, answers to the following question: "Are the treaties in and of themselves self-executing?"[124] The Carter Administration replied that all four treaties are non-self-executing.[125] However, it noted, "[i]n the United States the final determination as to whether a treaty is self-executing or not is made by the judiciary."[126] According to the Carter Administration, the courts would make this determination by examining "the terms of the treaty and . . . its legislative and drafting history" to ascertain "the intent of the parties."[127] Even without the NSE declarations, the Administration claimed, the courts would probably find the treaties to be non-self-executing. The purpose of the NSE declarations, therefore, was simply to provide "further evidence of the U.S. intention."[128] Thus, the Carter Administration claimed that it was not trying to convert self-executing treaty provisions into non-self-executing treaty provisions. Rather, the parties had always intended for the treaties to

124. *Carter Hearings*, *supra* note 16, at 275.

125. *See id.* at 315 ("In our judgment the substantive provisions of the four human rights treaties submitted to the Senate in February 1978 are in and of themselves non-self-executing.").

126. *Id.*

127. *Id.*

128. *Id.*

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be non-self-executing, and the NSE declarations were designed to assist the courts in the difficult task of deciphering the intent of the parties.[129]

Aside from the Carter Administration, seven other witnesses submitted written responses to Senator Javits's question. They generally agreed that most of the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[130] would not be self-executing, even without an NSE declaration.[131] However, all except one of the nongovernment witnesses contended that most of the ICCPR's provisions would be self-executing, absent the NSE declaration,[132] and the one dissenter conceded that "certain language of this Covenant may lend support to" a self-executing interpretation.[133] Only five of the seven nongovernment witnesses specifically addressed the Race Convention; they all agreed that at least some provisions of the Race Convention would be self-executing, absent the NSE declaration.[134] In short, almost no one bought the government's story.

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129. *See id.* at 40–41 (prepared statement of Jack M. Goldklang, attorney adviser in the Department of Justice) ("In broadly based multilateral treaties such as these, it is difficult to infer a common intent among the parties since nations have different practices on this subject. . . . In such a situation the intent of the Executive and Senate at the time of ratification become significant and *it is their duty to make that intention clear.*" (emphasis added)).

130. ICESCR, *supra* note 15.

131. *See Carter Hearings*, *supra* note 16, at 277 (statement of Oscar Schachter) ("[M]any of the provisions of the Covenant on Economic, Social and Economic [sic] Rights could not be self-executing."); *id.* at 280 (statement of J. Philip Anderegg); *id.* at 284 (statement of International Human Rights Law Group) ("Many provisions of the International Covenant on Economic, Social and Cultural Rights . . . are more statements of aspiration than concrete directives which courts could interpret."); *id.* at 288 (statement of Louis Henkin) ("[A]lmost all of the provisions in the Covenant on Economic, Social and Cultural Rights are not self-executing."); *id.* at 289–90 (statement of Morton Sklar) ("While I have characterized the Covenant on Economic and Social Rights . . . as non-self-executing in general, some of [its] provisions do have a self-executing character."); *id.* at 291 (statement of Dean Norman Redlich) ("The Covenant on Economic, Social and Cultural Rights would clearly not be self-executing even in the absence of the declaration."); *id.* at 300 (statement of Oscar Garibaldi) (stating that the "vast majority of the provisions in the Covenant on Economic, Social and Cultural Rights" are non-self-executing).

132. *See id.* at 277 (statement of Oscar Schachter) (suggesting that many, but not all, of the ICCPR's provisions would be self-executing); *id.* at 280 (statement of J. Philip Anderegg) (stating that all but a few articles of the ICCPR would be self-executing); *id.* at 284–85 (statement of International Human Rights Law Group) (contrasting the ICCPR to the ICESCR, and concluding that many provisions of the ICCPR "would be interpreted by the courts as self-executing, directly granting justiciable rights to individuals"); *id.* at 287 (statement of Louis Henkin) ("Most of the provisions of the Covenant on Civil and Political Rights would be self-executing."); *id.* at 290 (statement of Morton Sklar) (comparing the ICCPR to the ICESCR, and suggesting that "the drafters of these documents" deliberately chose "these two different approaches . . . to establish the automatically binding character" of the ICCPR); *id.* at 299 (statement of Oscar Garibaldi) (contending that "most of the text of the Covenant on Civil and Political Rights . . . would be automatically incorporated into our municipal law, and would be directly applicable by our courts").

133. *Id.* at 291 (statement of Dean Norman Redlich).

134. *See id.* at 277 (statement of Oscar Schachter) (stating that clear "examples of provisions that would be self-executing are found in . . . the Convention on the Elimination of All Forms of Racial Discrimination"); *id.* at 280 (statement of J. Philip Anderegg) (stating that "Articles 2(1)(a), 2(1)(b), 3, 4(c) and 5" of the Race Convention would be self-executing); *id.* at 284 (statement of International Human Rights Law Group) (stating that many provisions of the Race Convention "are

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The nongovernment witnesses believed that the purpose of the NSE declarations was to convert what would otherwise be self-executing treaty provisions into non-self-executing provisions. Subsequent commentators have generally shared this view.[135]

It is important to understand the Carter Administration's argument as to why the treaties would be non-self-executing, even without the NSE declarations. The ICCPR is a prime example. The Carter position was based primarily on the language of Article 2(2), which states:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[136]

The Carter Administration argued that this language reflects the parties' shared intent that implementing legislation would be necessary for ICCPR rights to be directly applicable in the courts.[137]

The Carter argument implicitly relies on a *Foster* concept of self-execution. However, even if one defines self-execution in terms of the *Foster* concept, the Carter argument is plainly wrong. State parties to multilateral treaties, and to the ICCPR in particular, have a variety of domestic legal systems. In some states, all treaties require implementing legislation before they can be applied by the courts.[138] In many states, though, implementing legislation is never required, and all treaties can be applied directly by the courts.[139] The drafters of the ICCPR were well aware of the varying systems for incorporating treaties into domestic law. Hence,

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more statements of aspiration than concrete directives which courts could interpret," but that several articles "are imperative in tone, precise and specific in language," and therefore should be construed to be self-executing); *id.* at 288 (statement of Louis Henkin) (stating, with respect to the Race Convention, that "most of [its] provisions would probably be self-executing, though some would not"); *id.* at 289 (statement of Morton Sklar) (contending that most of the provisions of the Race Convention are not self-executing, but that "some of [its] provisions do have a self-executing character").

135. *See, e.g.*, Damrosch, *supra* note 17, at 516–17 ("It is the assumption of this essay that in [NSE] declarations of this kind, the Senate has attempted to switch self-executing treaty provisions into the non-self-executing category.").

136. ICCPR, *supra* note 5, art. 2, para. 2.

137. *See Carter Hearings*, *supra* note 16, at 315. In a recent case raising claims under the ICCPR and the Torture Convention for nonconsensual medical experimentation, the district court adopted a very similar rationale in support of its conclusion that neither treaty provides a private right of action. *See* White v. Paulsen, 997 F. Supp. 1380, 1386–87 (E.D. Wash. 1998).

138. The United Kingdom is the classic example of a state in which no treaties are self-executing, in the *Foster* sense. For a description of the U.K. system, see Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI.-KENT L. REV. 459, 467–71 (1991).

139. For example, in France all treaties are self-executing in the *Foster* sense. *See* Francois Luchaire, *The Participation of Parliament in the Elaboration and Application of Treaties*, 67 CHI.-KENT L. REV. 341, 350–53 (1991).

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Article 2(2) of the ICCPR specifies that each party will "take the necessary steps, in accordance with its constitutional processes" to give effect to the rights recognized in the ICCPR.[140] The drafters did not say that legislation was required, because such a requirement would have been inconsistent with the "constitutional processes" of many countries. Instead, the text obliges parties to "adopt such legislative or other measures *as may be necessary*."[141] Thus, far from reflecting a mutual intent to require implementing legislation, the language of Article 2(2) reflects a mutual intent to permit each party to decide for itself whether implementing legislation is necessary.

Numerous commentators have pointed out the fallacy in the Carter Administration's interpretation of Article 2(2), both in the context of the 1979 Senate hearings,[142] and in subsequent scholarly articles.[143] The Executive Branch apparently learned from this experience, because no subsequent Administration has suggested that Article 2(2) renders the ICCPR non-self-executing, or that comparable language in any other human rights treaty makes it non-self-executing. Thus, despite the Carter Administration's protestations to the contrary, it is reasonable to conclude

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140. ICCPR, *supra* note 5, art. 2, para. 2.

141. *Id.* (emphasis added).

142. See, for example, Oscar Schachter's statement during the 1979 hearings:

> There is a further general point that warrants consideration. This relates to the articles in the Treaties imposing an obligation to adopt legislative or other measures as may be necessary to give effect to the rights recognized in the treaty. . . . The State Department's letter of transmittal relating to the American Convention suggests that Article 2 indicates that the provisions of the Convention are not self-executing. . . . Presumably the same inference is drawn as to Article 2 of the Covenant on Civil and Political Rights. That inference seems to me plainly wrong. How can an obligation to adopt legislative or other measures as may be necessary be read as requiring legislation that is not necessary? When the constitution provides that a treaty shall be the law of the land and when a provision of that treaty can be directly applied by a court, then it is obvious that no legislation is necessary for that purpose. The constitution has ensured that the treaty provision is given effect. To read Article 2 as requiring legislation for every article of the treaty even though the constitution has made such legislation unnecessary in respect of many articles is to ignore the clear language of Article 2.

Carter Hearings, *supra* note 16, at 277–78 (statement of Oscar Schachter).

143. *See, e.g.*, Vazquez, *supra* note 32, at 709–10. Professor Vazquez criticizes the Third Circuit's interpretation of a so-called "domestic implementation clause" in a patent treaty, which is similar to Article 2(2) of the ICCPR. *See id.* (discussing Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979)). The clause states: "Every country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to insure the application of this Convention." Vazquez, *supra* note 32, at 709 (quoting Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, art. 17, 13 U.S.T. 1, 41, 828 U.N.T.S. 107, 149). The Third Circuit, in an argument very similar to the Carter Administration's interpretation of Article 2(2), held that this language demonstrated that the parties intended the treaty to be non-self-executing. *See Mannington Mills*, 595 F.2d at 1298–99. Professor Vazquez contends that "[t]he quoted treaty provision tells us that parties must enact the domestic measures that are 'necessary' to ensure the application of the Convention; it does not make legislation 'necessary' if it otherwise would not be. For this reason, such provisions should not . . . render a treaty non-self-executing under *Foster*." Vazquez, *supra* note 32, at 710.

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that the NSE declarations are intended to convert what would otherwise be self-executing treaty provisions into non-self-executing provisions.[144]

Commentators disagree as to whether the NSE declarations are legally binding on the judiciary.[145] This Article does not attempt to answer that question. However, this Article assumes that the intent of the U.S. treaty makers is an important factor that courts must weigh in determining whether particular treaty provisions are self-executing.[146] Given the manifest intent of the President and the Senate to render the treaties non-self-executing, the question remains—How did the President and the Senate understand the term "not self-executing"? The remainder of Part IV addresses this question.

B. *The Carter Administration*

In February 1978, President Carter transmitted to the Senate the two Covenants, the Race Convention and the American Convention on Human Rights.[147] The so-called "letter of transmittal" from the President to the Senate did not mention NSE declarations. However, attached to the letter of transmittal was a "letter of submittal" from the Secretary of State to the President, which set forth the proposed declarations. The letter of submittal stated that "declarations that the treaties are not self-executing are recommended. With such declarations, the substantive provisions of the treaties would not of themselves become effective as domestic law."[148] The words "of themselves" are clearly intended to signify that implementing legislation is required. The statement that the treaties would not "become effective" could mean either: (1) that they would have no domestic legal status in the absence of implementing legislation; or (2) that courts could not apply them directly (*Foster* non-self-execution).

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144. Absent the NSE declaration, courts would probably find many provisions of the Torture Convention to be non-self-executing, but most courts would probably hold Articles 3 and 15, and perhaps others as well, to be self-executing. *See* Riesenfeld & Abbott, *supra* note 17, at 631 (claiming that "it is likely that the [Torture] Convention will be deemed self-executing, at least in part, by an international judicial body or municipal court in the United States").

145. The Restatement suggests that the NSE declarations are binding. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (1987) ("An international agreement of the United States is 'non-self-executing' . . . if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation."). However, several commentators have challenged that assertion. *See supra* note 20 and accompanying text.

146. *See, e.g.*, Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); Cameron Septic Co. v. Knoxville, 227 U.S. 39, 48–50 (1913) (placing great weight on the views expressed by Congress and the Executive Branch in supporting its conclusion that the treaty provision at issue was not self-executing). *But see* Warren v. United States, 340 U.S. 523, 526–28 & 526 n.2 (1951) (holding that the treaty provision at issue was self-executing, despite the Secretary of State's view to the contrary).

147. *See* CARTER MESSAGE, *supra* note 15.

148. *Id.* at vi.

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Having introduced the concept generally, the letter of submittal then discussed each treaty separately. With respect to the Race Convention, the letter states: "It is further recommended that a declaration indicate the non-self-executing nature of Articles 1 through 7 of the Convention. Absent such a statement, the terms of the Convention might be considered as directly enforceable law on a par with Congressional statutes."[149] The use of the phrase "directly enforceable law" expresses the Carter Administration's understanding that the NSE declaration would preclude the courts from applying directly Articles 1 through 7 of the Race Convention. Immediately after the statement quoted above, the letter says: "While the terms of the Convention, with the suggested reservations and understanding, are consonant with United States law, it is nevertheless preferable to leave any further implementation that may be desired to the domestic legislative *and judicial process*. [Therefore,] [t]he following [NSE] declaration is recommended."[150] The reference here to the "judicial process" is puzzling. If the Convention is not "effective as domestic law,"[151] and is not "directly enforceable law on a par with Congressional statutes,"[152] it is unclear what role the judicial process could play in treaty implementation, absent implementing legislation.

The letter of submittal also recommends NSE declarations with respect to Articles 1 through 15 of the ICESCR,[153] and Articles 1 through 27 of the ICCPR.[154] In proposing NSE declarations for the two Covenants, the letter of submittal does not offer any additional explanation of the meaning of the term "not self-executing," but simply refers back to the explanation provided with respect to the Race Convention.[155]

During Senate Foreign Relations Committee hearings on the human rights treaties, Roberts Owen, the State Department Legal Adviser, explained the concept of non-self-execution as follows: "A treaty is self-executing, and thus automatically the law of the land upon entry into force, or non-self-executing, requiring implementing legislation before it becomes a rule for the courts, depending upon its terms and the intention of the parties adhering to it."[156] It is unclear from this statement whether Mr.

149. *Id.* at viii. Articles 1 through 7 are the articles that define the substantive rights protected under the Convention. The remaining articles deal with topics such as the creation of an international committee to monitor implementation of the convention, signature, entry into force, and other aspects of treaty administration. Clearly, no one would suppose that the articles relating to treaty administration would be "directly enforceable law."

150. *Id.* (emphasis added).

151. *Id.* at vi.

152. *Id.* at viii.

153. *See id.* at xi.

154. *See id.* at xv.

155. *Id.*

156. *Carter Hearings*, *supra* note 16, at 29 (statement of Roberts B. Owen).

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Owen thought that a non-self-executing treaty is automatically incorporated into domestic law. However, Mr. Owen clearly believed that a non-self-executing treaty requires implementing legislation before it can provide a rule of decision for the courts (*Foster* non-self-execution).[157]

After the hearings, in a written response to questions submitted by Senator Javits, Mr. Owen added this explanation of the NSE declarations: "Under U.S. law a self-executing treaty provision, like a statute, may be applied directly by the courts as a rule of decision in a particular case. A treaty provision that is non-self-executing may not be enforced directly by the courts, but rather requires implementing legislation."[158] Again, this explanation is phrased in terms of the *Foster* concept of non-self-execution. Thus, although statements by the Carter Administration are not entirely unambiguous, the basic thrust of their comments is that the human rights treaties, with NSE declarations attached, would be non-self-executing in the *Foster* sense—i.e., they would require implementing legislation before they could provide a rule of decision for the courts. As noted earlier,[159] *Foster* non-self-execution would preclude direct judicial application of the treaties in all cases.

However, none of the four treaties was ratified during the Carter Administration, and subsequent administrations developed their own explanations of the NSE declarations. Thus, statements by the Carter Administration, while of historical interest, should not be considered authoritative explanations of the meaning of the NSE declarations.[160] For authoritative statements, we must turn to the explanations provided by subsequent administrations, during whose tenures the treaties were actually ratified.

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157. It is noteworthy that Mr. Owen's explanation is almost a direct quote from *Foster*. Mr. Owen stated that a non-self-executing treaty requires "implementing legislation before it becomes a rule for the courts." *Id.* In *Foster*, Chief Justice Marshall stated that, for some treaty provisions, "the legislature must execute the contract before it can become a rule for the Court." Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

158. *Carter Hearings*, *supra* note 16, at 314–15 (letter from Roberts B. Owen, Legal Adviser, U.S. Department of State, to Senator Javits (Feb. 6, 1980)).

159. *See supra* Subsection III.A.2.

160. In the 11 years from 1979, when the Foreign Relations Committee held hearings on the four treaties submitted by the Carter Administration, until 1990, when the Senate provided its advice and consent for ratification of the Torture Convention, the composition of the U.S. Senate changed significantly. There were nineteen members of the Senate Foreign Relations Committee at the time of the 1990 hearings on the Torture Convention. *See Torture Hearing*, *supra* note 50, at ii. Only four of them were Committee members in 1979. *See Carter Hearings*, *supra* note 16, at ii. It is highly unlikely that any of the Senators bothered to read the text of the 1979 Senate hearings. So, as a practical matter, the record of the 1979 hearings probably had relatively little effect on the Senate's understanding of the NSE declarations in the 1990s.

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C. *The Torture Convention*

1. *The Reagan Administration*

President Reagan transmitted the Torture Convention to the Senate on May 20, 1988.[161] Along with the letter of transmittal, the Reagan Administration included a "summary and analysis" of the Convention.[162] In that document, the Reagan Administration proposed a declaration "that the provisions of Articles 1 through 16 of the Convention are not self-executing."[163]

The Reagan Administration explained its proposed NSE declaration as follows: "The following declaration is therefore recommended, to clarify that the provisions of the Convention *would not of themselves become effective as domestic law.*"[164] This sentence is taken almost verbatim from the Carter Administration's explanation of its proposed NSE declarations.[165] Like the Carter Administration's statement,[166] the Reagan explanation could mean either: (1) that the provisions have no domestic legal status, absent implementing legislation; or (2) that they would not provide a rule of decision for the courts, absent implementing legislation. Regardless, the statement takes on a somewhat different meaning in the context of the Torture Convention, because the Reagan Administration envisioned implementing legislation for the Torture Convention, whereas the Carter Administration did not envision implementing legislation for any of the human rights treaties that it submitted to the Senate.[167]

The Reagan Administration stated that implementing legislation would be necessary "only to establish Article 5(1)(b) jurisdiction over offenses committed by U.S. nationals outside the United States, and to establish Article 5(2) jurisdiction over foreign offenders committing torture abroad who are later found in territory under U.S. jurisdiction."[168] Congress enacted the requisite implementing legislation in 1994; the legislation was limited in scope to implement only Article 5—and no other provision—of the

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161. *See* TORTURE REPORT, *supra* note 46, at 2.

162. *See id.* at 11–28.

163. *Id.* at 12.

164. *Id.* (emphasis added).

165. *See* CARTER MESSAGE, *supra* note 15, at vi ("With such declarations, the substantive provisions of the treaties would not of themselves become effective as domestic law.").

166. *See supra* notes 147–148 and accompanying text.

167. In his prepared statement to the Foreign Relations Committee, Mr. Owen stated on behalf of the Carter Administration that the NSE declarations do "not mean that vast new implementing legislation is required, as the great majority of the treaty provisions are already implemented in our domestic law." *Carter Hearings*, *supra* note 16, at 29.

168. TORTURE REPORT, *supra* note 46, at 20. In its subsequent report, the Foreign Relations Committee reiterated that "additional implementing legislation will be needed only with respect to Article 5, dealing with areas of criminal jurisdiction." *Id.* at 10.

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Convention.[169] In light of the Reagan Administration's explanation of the NSE declaration—i.e., that the Convention's provisions would not "become effective as domestic law"[170] in the absence of implementing legislation—one might infer that the Reagan Administration intended to preclude provisions of the Torture Convention other than Article 5 from ever having domestic legal effect.

That inference is contradicted, though, by the subsequent testimony of Abraham Sofaer, the State Department Legal Adviser, who probably drafted the "summary and analysis" of the Convention[171] on behalf of the Reagan Administration, and who later testified to the Senate as a member of the Bush Administration.[172] Thus, the Reagan Administration's view of the domestic legal status of Torture Convention provisions other than Article 5 remains an enigma. Regardless, the Reagan Administration's view is not dispositive, because the Senate did not act on the Torture Convention during President Reagan's term in office. Hence, it is necessary to examine statements by Bush Administration officials to ascertain the proper relationship between the NSE declarations and the implementing legislation.

2. *The Bush Administration*

In a December 10, 1989 letter from the State Department to the Senate Foreign Relations Committee, the Bush Administration submitted a revised package of proposed RUDs.[173] The Bush Administration's proposal repeated the proposed NSE declaration, with the explanation that it was "retained without modification from the 1988 transmittal."[174] Thus, the Bush Administration's December 1989 letter did not address the crucial question whether the implementing legislation would make the entire Convention effective as domestic law.

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169. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463-64 (1994) (codified at 18 U.S.C. §§ 2340-2340B (1994)). Apart from defining certain terms, the scope of the implementing legislation was indeed limited to the two issues identified by the Reagan Administration.

170. TORTURE REPORT, *supra* note 46, at 12.

171. *See id.* at 11-28.

172. Abraham D. Sofaer, one of the principal spokespersons for the Bush Administration during the Senate hearings on the Torture Convention, also served as Legal Adviser during the Reagan Administration. One might expect, based on Mr. Sofaer's tenure in his position, that the Reagan and Bush Administrations would have explained the NSE declaration attached to the Torture Convention in similar terms. Thus, it is rather puzzling that the language used by the Reagan and Carter Administrations was very similar; both were phrased in terms of the *Foster* concept of non-self-execution. In contrast, as discussed below, *see infra* notes 175-183 and accompanying text, Mr. Sofaer's explanation of the Convention, in his capacity as a spokesperson for the Bush Administration, seems in certain respects to be much closer to the Clinton Administration's "private cause of action" concept of non-self-execution.

173. *See* TORTURE REPORT, *supra* note 46, at 35-38.

174. *Id.* at 37.

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However, in his testimony to the Senate Foreign Relations Committee on January 30, 1990, Mr. Sofaer, who remained as the State Department Legal Adviser, made a series of statements that, taken together, clearly indicate the Bush Administration's view that the entire Convention, and not just Article 5, would become effective as domestic law once the requisite implementing legislation had been enacted. First, in his prepared statement, Sofaer said:

> If the Convention were simply a political statement, imprecision would cause no difficulties. However, because the Convention is a legal instrument and creates legal obligations, and especially because it requires establishment of criminal penalties under our domestic law, we must pay particular attention to the meaning and interpretation of its provisions, especially concerning the standards by which *the Convention will be applied as a matter of U.S. law.* The administration in fact believes that a number of reservations, declarations and understandings to the Convention are necessary to ensure that we know precisely the scope of the *domestic and international legal obligations the United States will assume when the Convention is ratified.*[175]

Mr. Sofaer stated that the "Convention will be applied as a matter of U.S. law," and that the United States would assume "domestic . . . legal obligations . . . when the Convention is ratified."[176] These statements strongly suggest that the entire Convention will "become effective as domestic law" once the treaty is ratified.[177]

Viewing the preceding statement in isolation, one might infer that the Convention applies, as a matter of domestic law, only to those portions of Article 5 that were the subject of implementing legislation—i.e., only to acts of torture committed outside the United States.[178] However, in an oral response to a question posed by Senator Helms during the hearing, Mr. Sofaer made quite clear that, in his view, the domestic legal effect of the Torture Convention would not be limited to acts of torture committed outside the United States:

> Senator HELMS. All right. Hypothetically again, if a law enforcement official in New York tortures a suspect in custody in New York whose alleged criminal activity took place in New York, would this torture convention apply?
> Mr. SOFAER. Yes.[179]

In other words, the Convention will apply, as a matter of domestic law, not just to acts of torture committed overseas, which are the subject of implementing legislation, but also to acts of torture committed within the United States, which are not the subject of implementing legislation.

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175. *Torture Hearing*, *supra* note 50, at 8 (emphasis added).

176. *Id.*

177. The United States did not deposit its instrument of ratification until after the implementing legislation was enacted. *See supra* notes 46–55 and accompanying text.

178. *See supra* note 169 and accompanying text.

179. *See Torture Hearing*, *supra* note 50, at 41.

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After additional discussion between Senator Helms and Mr. Sofaer, Senator Helms asked whether international law is superior to domestic law.[180] Mr. Sofaer replied: "Well, it would be with respect to anything that was torture because it would be part of domestic law. If you adopt this treaty, it is not just international law. The standard becomes part of our law."[181] The clear implication of Mr. Sofaer's testimony is that the entire Torture Convention, not just those provisions specifically addressed in the implementing legislation, became effective as domestic law once the implementing legislation was enacted in April 1994[182] and the United States deposited its instrument of ratification in October 1994.[183]

The proposition that the implementing legislation made the entire Convention effective as domestic law seems to imply that the NSE declaration has no effect whatsoever after ratification of the Convention. The Senate record associated with ratification of the Genocide Convention[184] reveals that the Senate sometimes does attach declarations to treaties that are not intended to have any effect after treaty ratification.[185] However, the NSE

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180. *Id.* at 42.

181. *Id.*

182. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463-64 (1994) (codified at 18 U.S.C. §§ 2340-2340B (1994)).

183. *See* MULTILATERAL TREATIES, *supra* note 6, at 185.

184. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, S. EXEC. DOC. O, 81-1 (1949), 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. President Truman first asked the Senate to approve the Genocide Convention in 1949. *See* S. EXEC. REP. No. 99-2, at 2 (1985). "Presidents Kennedy, Johnson, Nixon, Ford, and Carter each renewed this request. On September 6, 1984, President Reagan became the seventh President to urge the Senate to give its consent to ratification." *Id.* The Senate finally consented on February 19, 1986. *See* 132 CONG. REC. S1377 (1986). Implementing legislation was enacted in November 1988. *See* Genocide Convention Implementation Act of 1987 (The Proxmire Act), Pub. L. No. 100-606, § 2(a), 102 Stat. 3045 (1988) (codified at 18 U.S.C. §§ 1091-1093 (1994)). The United States deposited its instrument of ratification with the United Nations on November 25, 1988. *See* MULTILATERAL TREATIES, *supra* note 6, at 88.

For an insightful analysis of the political controversy that delayed U.S. ratification of the Genocide Convention for almost 40 years, see NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE 37-64 (1990).

185. The United States did not adopt an NSE declaration for the Genocide Convention. The Senate resolution of ratification included a declaration that "the President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V [of the Convention] has been enacted." 132 CONG. REC. S1378 (1986). The Senate Foreign Relations Committee explained this declaration as follows: "The Committee's declaration reinforces the fact that the Convention is not self-executing. In other words, no part of the Convention becomes law by itself. The Convention is effective only through legislation implementing its various provisions." S. EXEC. REP. No. 99-2, at 26 (1985). Of course, no treaty is "law" in the United States until after it has been ratified. The purpose of the Committee's declaration was to ensure that the President would not ratify the Convention until after implementing legislation had been enacted. In accordance with the Senate declaration, the President did not deposit the U.S. instrument of ratification until after the implementing legislation was enacted. *See supra* note 183. Hence, in the case of the Genocide Convention, a Senate declaration that the Foreign Relations Committee explained in terms of the concept of non-self-execution had no effect whatsoever after treaty ratification, because the

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declaration attached to the Torture Convention clearly signals some intention to limit the domestic legal application of the Convention.[186] In light of that intention, there are two possible ways to construe the NSE declaration that are consistent with Mr. Sofaer's testimony.

First, although Mr. Sofaer stated that the Torture Convention "would be part of domestic law"[187] and "will be applied as a matter of U.S. law,"[188] he never explicitly stated that the courts could apply the Convention directly. Thus, one possible way to construe the NSE declaration, in light of Mr. Sofaer's testimony, is to say that the Convention was automatically incorporated into domestic law upon ratification, but that the NSE declaration means that the Convention cannot be applied directly by the courts. Under this interpretation, the NSE declaration has an independent effect, separate from the implementing legislation. This interpretation makes sense in cases where it is possible to give effect to the Convention as the "Law of the Land" without direct judicial application.[189] However, Mr. Sofaer's testimony suggests that the NSE declaration should not be construed as a bar to direct judicial application of the Convention in cases where that is the only feasible way to implement the Convention as a matter of domestic law.[190]

Second, even assuming that the implementing legislation made the entire Convention effective as domestic law, the implementing legislation itself imposes limitations on the domestic application of the Torture Convention. The statute states: "Nothing in this chapter shall be construed as . . . creating any substantive or procedural right enforceable by law by

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declaration's purpose (to ensure enactment of implementing legislation) was fulfilled prior to ratification.

186. There are two factors that distinguish the Torture Convention from the Genocide Convention. First, the Genocide Convention Implementation Act, on its face, appears to be designed to implement the entire Genocide Convention. *See* Genocide Convention Implementation Act, § 2(a); Genocide Convention, *supra* note 184, arts. I–XIX. In contrast, the implementing legislation for the Torture Convention, on its face, appears to be designed to implement only a small piece of the Torture Convention. *See* Foreign Relations Authorization Act, § 506; Torture Convention, *supra* note 8, arts. 1–16. Second, when the Reagan Administration transmitted the Torture Convention to the Senate, it proposed, in addition to the NSE declaration, a declaration that was almost identical to the one included in the Senate resolution of ratification for the Genocide Convention. *See* TORTURE REPORT, *supra* note 46, at 20 (recommending a declaration that "[t]he United States will not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted"). The Bush Administration later proposed deleting this declaration on the grounds that it was unnecessary. *See id.* at 37. The Bush Administration, however, retained the NSE declaration. This strongly suggests that the purpose of the NSE declaration is different from the purpose of the declaration attached to the Genocide Convention.

187. *Torture Hearing*, *supra* note 50, at 42.

188. *Id.* at 8.

189. *See infra* Subsection VI.B.3 for one example of how the Convention can be given domestic legal effect without direct judicial application.

190. As a practical matter, such cases are likely to arise infrequently.

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any party in any civil proceeding."[191] If one interprets "this chapter" to mean "this chapter or the Convention which it implements," then this statement establishes a clear limit on the domestic legal effect of the Convention—as a matter of domestic law, the Torture Convention does not apply to civil proceedings. This limitation on the domestic legal application of the Torture Convention is similar, in some respects, to the limitation imposed by the "private cause of action" concept of non-self-execution, which the Clinton Administration adopted in its explanation of the NSE declaration attached to the Race Convention.[192] Hence, under this interpretation, the purpose of the NSE declaration is effectively implemented by means of the limiting language in the statute.

In sum, the Reagan Administration stated that the NSE declaration attached to the Torture Convention meant that the Convention would not "become effective as domestic law" in the absence of implementing legislation. However, the Bush Administration testified that the entire Convention would become effective as domestic law after enactment of the implementing legislation. This implies that the NSE declaration imposes no barrier to domestic legal application of the Convention, now that implementing legislation has been enacted. However, the legislation itself appears to preclude application of the Convention in any civil proceeding. Moreover, in cases where the Convention can be given effect as domestic law without direct judicial application of its terms, it is reasonable to construe the NSE declaration as an expression of the treaty makers' intent to avoid direct judicial application.

D. *The ICCPR*

On August 8, 1991, President Bush sent a letter to Senator Pell, urging the Senate to reconsider the possibility of providing its consent to ratification of the ICCPR.[193] On November 21, 1991, the Bush Administration submitted a package of proposed reservations, understandings, and declarations for the ICCPR, along with an explanation thereof.[194] The

191. Foreign Relations Authorization Act, § 506.

192. The "no civil proceedings" limitation is similar to the "private right of action" concept of non-self-execution, inasmuch as both would allow criminal defendants to invoke the treaties. However, there are two key differences between these concepts. First, the "no civil proceedings" limitation would preclude defensive invocation of the Torture Convention in a civil proceeding, whereas the "private cause of action" concept of non-self-execution would permit defensive invocation of the Race Convention in a civil proceeding. Second, the "private cause of action" concept arguably permits invocation of the Race Convention by plaintiffs in civil suits where the plaintiff is relying on some other provision of law to establish a private cause of action. The "no civil proceedings" limitation would clearly preclude invocation of the Torture Convention by plaintiffs in civil suits.

193. *See* ICCPR REPORT, *supra* note 44, at 2.

194. *See id.* at 10–21.

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package included a proposed declaration "that the provisions of Articles 1 through 27 of the Covenant are not self-executing."[195]

The Bush Administration explained the NSE declaration as follows: "The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts."[196] This is the first instance in which any administration used the term "private cause of action" to explain the meaning of an NSE declaration. As noted above,[197] the term "private cause of action" is a fairly narrow technical term. If the NSE declaration means only that the ICCPR will not create a private cause of action, and nothing more, then the ICCPR could still be invoked by defendants in civil or criminal litigation initiated by the government.[198] Moreover, one could argue that federal statutes, such as 42 U.S.C. § 1983, could be used to create a cause of action to enforce ICCPR rights.[199]

However, the Bush Administration's explanations of the NSE declaration attached to the ICCPR were not entirely consistent. At a hearing before the Senate Foreign Relations Committee, Richard Schifter, the Assistant Secretary of State for Human Rights and Humanitarian Affairs, submitted a prepared statement that said, in relevant part: "The substantive provisions of the ICCPR should be declared to be non-self-executing. This would mean that the ICCPR provisions, when ratified, will not by themselves create private rights enforceable in U.S. courts; that could only be done by legislation adopted by the Congress."[200] The statement that the ICCPR provisions "will not by themselves create private rights enforceable in U.S. courts" is ambiguous. The phrase "private rights" could be understood to mean "private rights of action," in which case this statement is equivalent to the explanation provided in the November 21 package. On the other hand, Mr. Schifter's statement could be understood to mean that the ICCPR does not create any judicially enforceable private rights, in which case it would not be capable of being invoked by defendants in litigation initiated by the government.

After the Committee hearings, Senator Helms submitted written questions about the ICCPR, to which the Bush Administration provided written answers.[201] In one such question, Senator Helms asked: "Do you believe that treaties can change domestic law? Do you believe that treaties

195. *Id.* at 19.

196. *Id.*; *see also ICCPR Hearing*, *supra* note 60, at 14 (reprinting the Bush Administration's explanation of its proposed declaration).

197. *See supra* notes 119–122 and accompanying text.

198. The ICCPR does not address litigation initiated by a private party, because the ICCPR governs only relations between a government and its citizens, not relations between private parties.

199. *See* Vazquez, *supra* note 33, at 1146–54.

200. *ICCPR Hearing*, *supra* note 60, at 18 (statement of Richard Schifter). In his oral statement, Mr. Schifter repeated this language almost verbatim. *See id.* at 15.

201. *See id.* at 79–84.

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should change domestic law? In our American legal system, does international law ever supersede domestic law?"[202] The Bush Administration replied:

> Under the Supremacy Clause, ratified treaties are the law of the land, equivalent to federal statutes. . . . Consequently, properly ratified treaties can and do supersede inconsistent domestic law. In interpreting the Supremacy Clause, the Supreme Court has long distinguished between treaties which are self-executing and those which are not, the latter being said not to create directly enforceable rights absent subsequent implementing legislation. With respect to the Covenant, the Administration has proposed to declare Articles 1–27 non-self-executing.[203]

On the one hand, the Bush Administration appears to be suggesting that the ICCPR will be "the law of the land," and will supersede inconsistent domestic law, despite the fact that it is not self-executing. In that respect, the above quotation appears to be consistent with the Clinton Administration's interpretation of the NSE declaration attached to the Race Convention[204] and with Mr. Sofaer's testimony about the domestic effects of the Torture Convention.[205] On the other hand, the statement that non-self-executing treaties do not "create directly enforceable rights" implies that the ICCPR, with the NSE declaration, is non-self-executing in the *Foster* sense of the term. In that respect, the Bush Administration's answer to Senator Helms's question is inconsistent with its initial explanation, which suggested that the NSE declaration meant that the ICCPR did not create a private cause of action.[206]

Thus, courts that strive to interpret the NSE declaration are presented with a quandary. At times, the Bush Administration explained the NSE declaration in accordance with the "private cause of action" concept of non-self-execution. At other times, the Bush Administration explained the NSE declaration in accordance with the *Foster* concept. One possible resolution of this quandary would be for courts to construe the NSE declaration for the ICCPR in a manner that is consistent with the Executive Branch's

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202. *Id.* at 80.

203. *Id.* (citations omitted).

204. *See infra* Section IV.E.

205. *See supra* notes 175–183 and accompanying text.

206. Granted, the statement that a treaty provision does not "create directly enforceable rights," *ICCPR Hearing*, *supra* note 60, at 19, is not logically inconsistent with the statement that the provision does not "create a private cause of action," ICCPR REPORT, *supra* note 44, at 19, because the latter statement is ambiguous as to whether the provision can be applied directly in favor of defendants. Even so, if the Bush Administration had consciously considered the differences between the *Foster* and "private cause of action" concepts of non-self-execution, and had decided in favor of the *Foster* concept, then it is unlikely that the Bush Administration would have stated that the intent of the NSE declaration "is to clarify that the Covenant will not create a private cause of action in U.S. courts." *Id.* Thus, at a minimum, the Bush Administration's shifting explanations indicate either that the Administration was being deliberately ambiguous, or that it had not considered the different implications of the *Foster* concept versus the "private cause of action" concept.

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explanations of the NSE declarations attached to the Torture Convention and the Race Convention. In principle, this is eminently reasonable. After all, the wording of all three NSE declarations is almost identical.[207] Moreover, when the Bush Administration proposed its NSE declaration for the ICCPR, it stated that the declaration was "virtually identical to . . . the one adopted by the Senate with respect to the Torture Convention."[208] Similarly, the Clinton Administration stated that the NSE declaration attached to the Race Convention reflected the "same approach"[209] as the approach adopted with respect to the ICCPR and the Torture Convention.

There are two reasons, though, why the Reagan and Bush Administrations' explanations of the NSE declaration for the Torture Convention are a poor guide for judges attempting to construe the NSE declaration for the ICCPR. First, the attempt to construe the NSE declaration for the Torture Convention poses its own interpretive difficulties.[210] Second, the proper interpretation of the NSE declaration for the Torture Convention is colored by the fact that the United States enacted implementing legislation for the Torture Convention before it ratified the Convention. In contrast, the United States ratified the ICCPR without any implementing legislation.[211] Thus, despite the similarities in wording between the two NSE declarations, the fact that the United States adopted implementing legislation for one treaty, but not the other, may require different interpretations of the two declarations.

If judges look to the Race Convention as a guide for interpreting the NSE declaration attached to the ICCPR, they do not encounter either of these problems. The Clinton Administration clearly and consistently explained the NSE declaration for the Race Convention in terms of the "private cause of action" concept.[212] Also, the United States ratified the Race Convention without implementing legislation,[213] as it did for the ICCPR. Thus, one could argue that courts should construe the NSE declaration for the ICCPR in accordance with the "private cause of action"

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207. Compare the following: (1) "[T]he United States declares that the provisions of articles 1 through 27 of the [ICCPR] are not self-executing." MULTILATERAL TREATIES, *supra* note 6, at 130; (2) "[T]he United States declares that the provisions of articles 1 through 16 of the [Torture] Convention are not self-executing." *Id.* at 187; (3) "[T]he United States declares that the provisions of the [Race] Convention are not self-executing." *Id.* at 102.

208. ICCPR REPORT, *supra* note 44, at 19.

209. *Race Hearing*, *supra* note 69, at 18.

210. *See supra* Section IV.C.

211. In its package of proposed RUDs, the Bush Administration stated explicitly that "implementing legislation is not contemplated." ICCPR REPORT, *supra* note 44, at 19.

212. *See infra* Section IV.E.

213. *See* RACE REPORT, *supra* note 65, at 6 ("The Administration believes that no new implementing legislation is necessary for the United States to assume the obligations under the Convention.").

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concept, because that would be consistent with the Clinton Administration's explanation of the NSE declaration for the Race Convention.

E. *The Clinton Administration and the Race Convention*

On April 26, 1994, Acting Secretary of State Strobe Talbott, writing on behalf of President Clinton, sent a letter to the Chairman of the Senate Foreign Relations Committee, Senator Claiborne Pell, urging the Senate "to give its prompt attention to and approval of [the Race] Convention."[214] The letter included a package of proposed reservations, understandings, and declarations, including a declaration "that the provisions of the Convention are not self-executing."[215] The letter explained the NSE declaration as follows:

> The intent is to clarify that the treaty will not create a new or independently enforceable private cause of action in U.S. courts. . . . Given the extensive provisions already present in U.S. law, there is no discernible need for the establishment of additional causes of action or new avenues of litigation in order to enforce the essential requirements of the Convention.[216]

Two points merit attention here. First, the Clinton Administration's explanation of the NSE declaration is phrased in terms of the "private cause of action" concept, which leaves open the possibility that courts could apply the treaty directly to enforce the rights of defendants in civil or criminal proceedings initiated by the government.[217] Second, permitting the treaty to be invoked defensively in that manner would be entirely consistent with the Administration's apparent objective of avoiding "new avenues of litigation,"[218] because private parties could not initiate litigation on the basis of the Convention; they could only invoke it in proceedings initiated by the government.[219]

On May 11, 1994, Conrad Harper, the State Department Legal Adviser, testified before the Senate Foreign Relations Committee. His testimony was consistent with this narrow interpretation of the NSE declaration. His prepared statement says:

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214. *Id.* at 2.

215. *Id.* at 26.

216. *Id.* at 25–26.

217. *See supra* notes 119–122 and accompanying text. As noted above, if the NSE declaration means only that the treaty does not create a private cause of action, then it might also be possible to utilize federal statutes, such as the Administrative Procedures Act, 5 U.S.C. § 702 (1994) or 42 U.S.C. § 1983 (1994), to provide a cause of action to enforce treaty rights.

218. RACE REPORT, *supra* note 65, at 26.

219. Neither the Clinton Administration nor any other Administration ever stated that courts could or should apply non-self-executing provisions of human rights treaties directly to enforce the rights of defendants in proceedings initiated by the government. However, no statement by the Clinton Administration or the Senate forecloses that possibility.

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> Finally, we have submitted a proposed declaration indicating that the Convention's provisions are not self-executing. Under Article VI, Clause 2 of the Constitution, duly ratified treaties become the supreme law of the land, equivalent to a federal statute. By making clear that this Convention is not self-executing, we ensure that it does not create a new or independently enforceable private cause of action in U.S. courts. . . . [E]xisting U.S. law provides extensive protection and remedies against racial discrimination sufficient to satisfy the requirements of the present Convention. . . . There is thus no need for the establishment of additional causes of action to enforce the requirements of the Convention.[220]

Recall that the Carter Administration suggested that the Race Convention, with the NSE declaration attached, would not be "directly enforceable law on a par with Congressional statutes."[221] In contrast, one can infer from Mr. Harper's statement that the Race Convention, even with the NSE declaration, is "the supreme law of the land, equivalent to a federal statute."[222]

After delivering his prepared testimony, Mr. Harper had this exchange with Senator Pell, the Chairman of the Committee:

> THE CHAIRMAN. If you entered a treaty and the treaty runs in one direction, domestic law runs in another, does the treaty not have priority?
> MR. HARPER. The treaty is equivalent only to a Federal statute. It is not equivalent to our—
> THE CHAIRMAN. It is equivalent. I thought it was superior.
> MR. HARPER. It is not superior of the Federal statute. No. It simply has the same status under our constitutional scheme. I should note that a duly ratified treaty will supercede prior inconsistent federal law . . . .[223]

Note that Mr. Harper did not say that a self-executing treaty supercedes prior inconsistent federal law. He said that a duly ratified treaty—presumably including even a non-self-executing treaty—supercedes prior inconsistent federal law. This concept of non-self-execution is very different from the Carter Administration's concept. In the Carter view, non-self-executing treaties cannot supercede prior inconsistent federal law, because "the substantive provisions of the treaties would not of themselves become effective as domestic law."[224] Under the Clinton Administration's "private cause of action" concept, however, the effect of the NSE declaration is not to preclude direct judicial application of the ICCPR altogether, but merely to "ensure that it does not create a new or independently enforceable private cause of action."[225]

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220. *Race Hearing*, *supra* note 69, at 18. See also the transcript of Mr. Harper's oral statement, *id.* at 13–14, which is virtually identical to his prepared statement.

221. CARTER MESSAGE, *supra* note 15, at viii.

222. *Race Hearing*, *supra* note 69, at 18. Note that Mr. Harper said that "duly ratified treaties" are equivalent to a federal statute. The Race Convention is a duly ratified treaty.

223. *Id.* at 20.

224. CARTER MESSAGE, *supra* note 15, at vi.

225. *Id.* On October 20, 1998, the author spoke with a State Department official who was

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Political realists are likely to argue that it would be a mistake for courts to construe the NSE declarations for any of the three treaties in accordance with the "private cause of action" concept of non-self-execution, because that would be contrary to the political intent of the treaty makers in adopting the NSE declarations. Clearly, the ratification of human rights treaties has been a subject of great political controversy in the United States Senate. Therefore, no attempt to interpret the legal significance of the NSE declarations would be complete without a discussion of the political context in which those declarations were adopted. That is the subject of Part V of this Article.

V. THE POLITICS OF NSE DECLARATIONS

Broadly speaking, one can divide treaty-based human rights claims into three categories: (1) frivolous claims—i.e., those which are not well founded in the treaty; (2) redundant claims—i.e., those claims which attempt to vindicate treaty rights that are protected under other provisions of U.S. law; and (3) non-frivolous, nonredundant claims—i.e., those claims which are well founded in the treaty, and which attempt to vindicate treaty rights that are not protected under other provisions of U.S. law.[226] In ratifying human rights treaties, the United States has generally attempted to eliminate the possibility of litigants raising non-frivolous, nonredundant claims by adopting "reservations" to modify its international legal obligations. These adoptions exempt the United States from the obligation to protect any rights that were not already protected under other provisions of U.S. law prior to ratification.[227] The term "reservation" is used here, as that term is defined

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personally involved in crafting the RUDs. He stated that the "private cause of action" interpretation is consistent with the State Department's understanding of the NSE declarations. On the other hand, he suggested that other Executive Branch agencies may not share that view. This suggests that disagreements between agencies within the Executive Branch may be one factor that helps to explain the change over time from the Executive Branch's initial explanation of the NSE declarations in terms of the *Foster* concept to its later explanation in terms of the "private cause of action" concept. *See* Telephone Interview with David Stewart, Office of Legal Adviser, Department of State (Oct. 20, 1998).

226. Examples of non-frivolous, nonredundant claims include: the right not to be subjected to forcible, transnational abduction, *see infra* notes 314–320 and accompanying text; the right not to be deported to a country where one is likely to be tortured, *see infra* notes 308–313 and accompanying text; certain freedom of religion claims under Article 18 of the ICCPR, *see infra* notes 392–408 and accompanying text; and the right of homosexuals to engage in private consensual sexual activities, *see infra* notes 409–420 and accompanying text.

227. Several other commentators have also noted this aspect of the U.S. approach to ratification of human rights treaties. *See, e.g.*, Henkin, *supra* note 17, at 342 ("By its reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies or practices, even where they fall below international standards"); Quigley, *supra* note 17, at 1287 ("When President George Bush urged the U.S. Senate to consent to the ratification of the [ICCPR], . . . Bush assured the Senate that ratification would require

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under international law, to include any condition that "purports to exclude or to modify the legal effect of certain provisions" of a treaty.[228] As such, the term "reservation" includes some conditions that the United States has called "understandings," as well as conditions that the United States has called "reservations."[229]

The U.S. strategy regarding treaty reservations can best be understood as an effort to reconcile two conflicting policy objectives: (1) ensuring that the United States would be able to comply with its treaty obligations; and (2) preventing human rights treaties from altering domestic law.[230] The Torture Convention, the ICCPR, and the Race Convention all contain some nonredundant rights—that is, the treaties protect some rights that are not protected under other provisions of U.S. law. Thus, if the United States ratified those treaties without reservations, it would be forced to choose between: (1) refusing to protect the nonredundant rights, in which case it would fail to satisfy the first objective; or (2) protecting the nonredundant rights, in which case it would fail to satisfy the second objective. In theory, by adopting the appropriate reservations, the United States could relieve itself of any international legal obligation to protect nonredundant rights. In that case, there would be no conflict between the two objectives. In essence, this has been the strategy underlying the United States's approach to ratification of human rights treaties.

The Executive Branch adopted the policy objective of avoiding the domestication of human rights treaties in reaction to the Bricker Amendment

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no change in U.S. practice").

228. Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, para. 1(d), 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. The Convention defines the term "reservation" to mean "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." *Id.*

229. The U.S. Senate has defined the terms "reservation," "understanding," and "declaration" as follows: "A reservation is usually defined as a unilateral statement made by a contracting party which purports to exclude or modify the terms of a treaty or the legal effect of certain provisions." S. EXEC. REP. NO. 99-2, at 16 (1985). "An understanding is generally defined as a statement which interprets or clarifies the obligation undertaken by a party to a treaty." *Id.* "A declaration is generally defined as a formal statement, explanation or clarification made by a party about its opinion or intentions relating to issues raised by the treaty under consideration. Ordinarily, declarations do not touch upon a party's obligations under a treaty." *Id.* at 17.

Despite these definitions, several of the U.S. "understandings" attached to human rights treaties appear to be designed to "exclude or to modify the legal effect of certain provisions." *See infra* Section V.B. Hence, those "understandings" are properly classified as "reservations" under international law. *See* Vienna Convention, *supra* note 228, art. 2, para. 1(d).

230. The State Department's Assistant Legal Adviser for Human Rights and Refugees has affirmed that the Executive Branch purposefully sought to prevent human rights treaties from altering domestic law. In his words, policymakers were guided by the principle "that the United States would not commit itself to do anything that would require a change in present U.S. law or practice." Stewart, *supra* note 17, at 1206.

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controversy of the 1950s. Section V.A provides historical background on the Bricker Amendment. Section V.B describes briefly the RUDs that the United States included in its instruments of ratification for the Torture Convention, the ICCPR, and the Race Convention. Section V.C examines the Senate record associated with ratification of the three treaties in order to document two key points: (1) the treaty makers have consistently placed a high value on ensuring that the United States would be able to comply with its treaty obligations; and (2) the Executive Branch "sold" the treaties to the Senate by giving assurance that the reservations they adopted had relieved the United States of any international legal obligation to protect nonredundant rights, thereby eliminating the possibility of litigants raising non-frivolous, nonredundant claims. Section V.D addresses the relationship between the NSE declarations and the overall United States approach to ratification of human rights treaties.

A. *The Bricker Amendment*

The term "Bricker Amendment" refers to a series of proposals for constitutional amendments, several of which were sponsored by Senator John Bricker, that the Senate debated extensively from about 1951 until about 1957.[231] All of the proposals attempted, in different ways, to limit the domestic legal effects of treaties and other international agreements. Most of the proposals included language that would have precluded ratified treaties from having any domestic legal effect in the absence of implementing legislation.[232]

The Eisenhower Administration feared that some version of the Bricker Amendment, which it viewed as an intolerable encroachment on the President's foreign policy powers, might actually pass the Senate. In an effort to defeat the proposed constitutional amendment, Secretary of State John Foster Dulles testified before a subcommittee of the Senate Judiciary Committee in April 1953. During that testimony, Secretary Dulles stated:

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231. *See Treaties and Executive Agreements: Hearing Before a Subcomm. of the Senate Judiciary Comm. on S.J. Res. 3*, 85th Cong. (1957); *Treaties and Executive Agreements: Hearings Before a Subcomm. of the Senate Judiciary Comm. on S.J. Res. 1*, 84th Cong. (1955); *Treaties and Executive Agreements: Hearings Before a Subcomm. of the Senate Judiciary Comm. on S.J. Res. 1 and S.J. Res. 43*, 83d Cong. (1953) [hereinafter *1953 Hearings*]; *Treaties and Executive Agreements: Hearings Before a Subcomm. of the Senate Judiciary Comm. on S.J. Res. 130*, 82d Cong. (1952).

232. For example, on February 7, 1952, Senator Bricker introduced a proposed constitutional amendment, known as S.J. Res. 130, along with 58 co-sponsors. *See* 98 CONG. REC. 907–08 (1952). It provided, in part, that "[n]o treaty . . . shall alter or abridge the laws of the United States or the Constitution or laws of the several States unless, and then only to the extent that, Congress shall so provide by act or joint resolution." *Id.* at 908.

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> The present administration intends to encourage the promotion everywhere of human rights and individual freedoms, but to favor methods of persuasion, education and example rather than formal undertakings . . . . Therefore, while we shall not withhold our counsel from those who seek to draft a treaty or covenant on human rights, we do not ourselves look upon a treaty as the means which we would now select as the proper and most effective way to spread throughout the world the goals of human liberty to which this Nation has been dedicated since its inception. *We therefore do not intend to become a party to any such covenant or present it as a treaty for consideration by the Senate.*[233]

Dulles's statement had a dual effect. On the one hand, it added legitimacy to the argument that the treaty power should not be used to effect changes in domestic protection of human rights. On the other hand, it helped defeat the move for a constitutional amendment[234] by persuading at least some Senators that restraint by the Executive Branch, rather than a constitutional amendment, was the best way to ensure that the United States would not domesticate human rights treaties.

Although Senator Bricker's effort to amend the Constitution failed, he succeeded in creating a political environment in which the Senate was hostile towards U.S. ratification of human rights treaties and suspicious of any attempt to use the treaty power to effect domestic social reforms.[235] Consequently, from the time of Dulles's speech in 1953, until President Carter submitted four human rights treaties to the Senate in 1978, U.S. human rights policy generally followed the approach established by John Foster Dulles: refraining from participating in human rights treaties,[236] favoring instead the "methods of persuasion, education and example rather than formal undertakings."[237] Moreover, when President Carter did finally advocate U.S. adherence to several major human rights treaties, he felt that it was a political necessity to assure the Senate that the treaty power would not be used to change domestic law. No subsequent administration has challenged the inherited political wisdom that such an assurance is the price

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233. *1953 Hearings*, *supra* note 231, at 824 (emphasis added).

234. *See* KAUFMAN, *supra* note 184, at 104–06 ("When the vote was finally taken, the Bricker version failed to receive the requisite two-thirds vote for a constitutional amendment. . . . A weaker version proposed by Senator George came closer, falling one vote short of the requirement.").

235. For a more detailed political analysis of the Bricker Amendment debate and its relationship to U.S. ratification of human rights treaties, see *id.* at 94–116.

236. The United States did ratify three human rights treaties between 1953, the date of Dulles's testimony, and 1978, when President Carter submitted four human rights treaties to the Senate: the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *opened for signature* Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3; The Convention on the Political Rights of Women, *opened for signature* March 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135; and the Inter-American Convention on the Granting of Political Rights to Women, May 2, 1948, 27 U.S.T. 3301, O.A.S.T.S. No. 3. *See* KAUFMAN, *supra* note 184, at 119–47 (discussing the context of ratification of two of the three treaties submitted to the Senate by the Kennedy Administration); Weissbrodt, *supra* note 16, at 38 n.45 (discussing the historical context of the ratification of the three treaties).

237. *1953 Hearings*, *supra* note 231, at 825.

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that must be paid to obtain Senate consent to ratification of human rights treaties.[238] Thus, from the Executive Branch's perspective, one key purpose of the NSE declarations has been to forestall opposition to treaty ratification from the "Bricker wing" of the U.S. Senate by reassuring them that human rights treaties would not affect domestic law.[239]

B. *Treaty Reservations*

The ICCPR, the Torture Convention, and the Race Convention all provide, in certain respects, greater protection for human rights than was available under preexisting domestic law at the time of ratification. For example, Article 6 of the ICCPR obligates parties not to impose the death penalty for crimes committed by persons below eighteen years of age.[240] The

238. It is noteworthy that the proposed Bricker Amendment was not limited to human rights treaties. Inasmuch as the Amendment would have affected all treaties, the political battle over the Bricker Amendment can be viewed as part of a broader trend, whereby the House has come to exercise increasingly greater control over international agreements of all types, and the Senate's power has been correspondingly reduced. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995) (defending the increasing use of congressional-executive agreements, whereby U.S. international agreements are approved by a simple majority of both houses of Congress, rather than being submitted for a two-thirds vote in the Senate, as required in the Treaty Clause). *But see* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (questioning, in response to the Ackerman-Golove article, the constitutionality of congressional-executive agreements in certain cases).

Notably, the premise underlying Senator Bricker's proposal was that a President who favored U.S. participation in a treaty would face a greater hurdle if he was forced to obtain the consent of both houses of Congress, not just the Senate. Thus, Bricker advocated a requirement of bicameral approval to further his objective of making it more difficult to domesticate international agreements. In contrast, the premise underlying the Ackerman-Golove article appears to be that it is easier for the President to "sell" a treaty to a simple majority in both Houses than it is to sell it to two-thirds of the Senate. Thus, Professors Ackerman and Golove favor the bicameral approach, in part, because they believe that it poses fewer obstacles to the domestication of international agreements. If Professors Ackerman and Golove are right, then a President who favored domestication of international human rights treaties might consider submitting an international human rights agreement to Congress as a congressional-executive agreement, rather than proceeding under the Treaty Clause, in order to circumvent the "Bricker wing" of the Senate. However, it is likely that political forces hostile to domestication of international human rights agreements would take steps to limit the domestic legal effects of any such agreement to which the United States becomes a party, regardless of whether it is handled under the Treaty Clause or as a congressional-executive agreement.

239. For obvious reasons, formal statements to the Senate by Executive Branch officials have been rather circumspect in describing the political calculus underlying the RUDs. However, one Carter Administration official, in an unofficial forum, described this political calculus quite clearly. *See* Arthur Rovine & Jack Goldklang, *Defense of Declarations, Reservations, and Understandings, in* U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES, *supra* note 16, at 54.

240. *See* ICCPR, *supra* note 5, art. VI, para. 5 ("Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . ."). The United States adopted a reservation stating that "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." 138 CONG. REC. S4783 (1992). The

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United States, however, permits imposition of the death penalty for crimes committed by persons who are sixteen or older.[241] These types of "discrepancies" between domestic law and treaty standards posed a problem for Executive Branch officials who favored treaty ratification, because of the perceived political requirement to avoid domestication of the treaties.

In theory, the treaty makers could have attempted to solve this problem in one of three ways. First, they could have ratified the treaties without any reservations and announced that the United States did not intend to comply with any treaty provisions that provided greater protection for human rights than was available under preexisting domestic law.[242] Such an approach would have been inconsistent with the policy objective of ensuring U.S. compliance with its treaty obligations.[243] It is also extremely unlikely that two-thirds of the Senate would consent to ratification of a treaty if the Executive Branch stated explicitly that it did not intend for the United States to comply with the treaty.

Second, the treaty makers could have ratified the treaties without any reservations, and changed domestic law to augment the level of human rights protection in the United States to conform to treaty standards. They could have made the necessary changes in domestic law either by enacting the requisite implementing legislation, or by declaring the treaties to be self-executing.[244] However, the Executive Branch rejected this option because it believed that the "Bricker forces" in the Senate would block ratification under this approach.

Human Rights Committee has stated that the U.S. reservation to Article 6 is "incompatible with the object and purpose of the Covenant." U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1413th mtg., U.N. Doc. CCPR/C/79/Add.50 (1995), *reprinted in* 2 INT'L HUM. RTS. REP. 638, 640 (1995) [hereinafter Human Rights Committee]; *see also* William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 324–25 (1995) (concluding that "[t]he Committee ought to have declared that the reservation to Article 6 as a whole, as formulated, was invalid").

241. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the imposition of capital punishment for murders committed at age sixteen or seventeen "does not offend the Eighth Amendment's prohibition against cruel and unusual punishment"); *see also* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that "the Eighth and Fourteenth Amendments prohibit the execution of a person who was under sixteen years of age at the time of his or her offense").

242. In fact, the Carter Administration apparently considered proposing a "general reservation" for all human rights treaties that "would have subordinated all such treaties to the Constitution and laws of the United States." Weissbrodt, *supra* note 16, at 48. However, "[o]pponents of such a general reservation convincingly argued that such a sweeping reservation would make ratification meaningless, and would harm the cause of human rights." *Id.*

243. *See infra* Subsection V.C.1.

244. The term "self-executing" is used here to mean that a treaty has domestic legal force, even without enactment of implementing legislation, and that at least some of its provisions can be applied directly by the courts and do create a private cause of action. It is likely that the treaty makers could have achieved this result without actually declaring the treaties to be self-executing, if they had simply refrained from declaring them to be non-self-executing. *See supra* Section IV.A.

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The treaty makers, therefore, chose a third option. They ratified the treaties with reservations that modified the U.S. treaty obligations under international law[245] in order to eliminate discrepancies between the treaty standards and preexisting domestic law.[246] This was the only option that could satisfy the twin objectives of ensuring U.S. compliance with its treaty obligations and avoiding the domestication of human rights treaties.

C. *Treaty Conditions and Treaty Compliance*

Human rights advocates have consistently criticized the practice of attaching numerous RUDs to U.S. instruments of ratification for human rights treaties,[247] claiming that the conditional nature of U.S. adherence demonstrates that the United States does not take its treaty obligations seriously. The central purpose of human rights treaties, they contend, is for states to assume international legal obligations that augment the domestic protection of human rights to conform to international standards. If every state adopted the U.S. approach, and ratified the treaties subject to the caveat that they would protect human rights only to the extent that such rights are already protected under domestic law, global adherence to human rights treaties would accomplish nothing.[248]

The treaty makers have consistently responded to these criticisms by arguing that the RUDs, properly understood, demonstrate that the United States takes its treaty obligations very seriously. This Section examines statements by government officials during the ratification process for human rights treaties. Two main points emerge from the analysis: (1) the President and the Senate have consistently placed a high value on the importance of ensuring that the United States would be able to comply with all of its

245. A detailed analysis of the various RUDs attached to the Torture Convention, the ICCPR, and the Race Convention is beyond the scope of this article. Detailed discussion of the RUDs is included in the TORTURE REPORT, *supra* note 46, at 7–28; the ICCPR REPORT, *supra* note 44, at 6–21; and the RACE REPORT, *supra* note 65, at 7–32.

246. This Article argues below that the treaty makers were not wholly successful in eliminating the discrepancies between treaty standards and preexisting domestic law. *See infra* Subsection V.D.4. Regardless, the main point here is that many, but not all, of the reservations and understandings were intended to eliminate such discrepancies.

247. *See, e.g.*, *Race Hearing*, *supra* note 69, at 61–63 (prepared statement of the American Civil Liberties Union); *ICCPR Hearing*, *supra* note 60, at 101–35 (statement of the International Human Rights Law Group); *Torture Hearing*, *supra* note 50, at 46–49 (prepared statement of Winston Nagan, Chairman of the Board of Directors of Amnesty International USA); *Carter Hearings*, *supra* note 16, at 48–54 (critiquing the RUDs submitted by the Lawyers Committee for International Human Rights).

248. *See, e.g.*, Henkin, *supra* note 17, at 343 ("Reservations designed to reject any obligation to rise above existing law and practice are of dubious propriety: if states generally entered such reservations, the convention would be futile."); Weissbrodt, *supra* note 16, at 78 ("By offering such an extensive and intensive set of reservations to the Covenants, however, those who drafted these proposals may have undermined the basic purpose of ratifying the treaties . . . .").

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international legal obligations under human rights treaties; and (2) every administration has claimed that existing law provides sufficient protection for human rights to ensure U.S. compliance with its treaty obligations, as modified by the reservations, and, therefore, neither implementing legislation nor self-execution is necessary to ensure treaty compliance.

1. *The Importance of Treaty Compliance*

In January 1979, after President Carter transmitted the human rights treaties to the Senate, but before the Senate held hearings on those treaties, the International Human Rights Law Group held a conference to discuss the treaties.[249] Most of the conference participants, including many distinguished experts in the field of international law, were critical of the Carter Administration's proposed RUDs.[250] In response to these criticisms, a State Department official who spoke on behalf of the Carter Administration said:

> It is very easy to sign a human rights treaty without any reservations or understandings. Many authoritarian regimes have done so. The liberal democracies have not taken that approach. . . . [O]ne can almost judge those nations that take human rights obligations seriously by the manner in which they have approached the problems of reservations or understandings . . . I would say that those Western liberal democracies that are entering a few reservations to make their law and the treaties compatible are doing a better job, a more serious job, and a more committed job because they are taking the treaties more seriously than those nations that become parties with no intention of conforming their practices to human rights treaty obligations and that make no statements indicating that they have any problems.[251]

From the government's perspective, if the United States did not care about complying with its treaty obligations, it could simply ratify human rights treaties with no reservations, declare them to be non-self-executing, and then refuse to enact implementing legislation to conform domestic law to the treaty requirements.[252] The fact that the United States has adopted various RUDs, according to the government, demonstrates that the United States is serious about complying with its treaty obligations.

In April 1992, when the Senate provided its advice and consent for ratification of the ICCPR, Senator Daniel Patrick Moynihan defended the

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249. *See* U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES, *supra* note 16, at vii.

250. *See* Clyde Ferguson, *International Convention on the Elimination of All Forms of Racial Discrimination*, *in* U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES, *supra* note 16, at 41, 41–46; Louis Henkin, *The Covenant on Civil and Political Rights*, *in* U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES, *supra* note 16, at 20, 20–26.

251. Rovine, *supra* note 239, at 57–58.

252. As noted above, this approach would be very unlikely to gain the approval of the necessary two-thirds of the Senate. *See supra* text accompanying notes 242–243. Moreover, this approach runs the risk that the courts would find the treaty to be self-executing, despite the NSE declaration. In that event, judicial decisions could effectively domesticate the treaties.

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RUD package in a manner that is strikingly similar to the Carter Administration's defense of its proposed RUDs:

> Others have raised the legitimate concern that the number of reservations in the administration's package might imply to some that the United States does not take the obligations of the covenant seriously. . . . [I]t is possible to place a wholly different interpretation on the administration's package of reservations. The administration has not taken a blanket, or catchall reservation. . . . Rather, it has undertaken a meticulous examination of U.S. practice to insure that the United States will in fact comply with the obligations that it is assuming. This can certainly be viewed as an indication of the seriousness with which the obligations are regarded rather than as an expression of disdain for the obligations. Certainly, there was a time when the nations of the totalitarian block ratified obligations without reservation—obligations that they had no intention of carrying out. Far better to ratify with the firm intention of living up to the covenant's terms.[253]

Thus, in Senator Moynihan's view, the RUDs, far from signaling a lack of seriousness about treaty compliance, demonstrate the importance that the United States places on ensuring that it can comply with its treaty obligations. Every administration from Carter to Clinton has made a similar claim.

An examination of statements by Executive Branch officials about the so-called "free speech" reservations to the ICCPR and the Race Convention demonstrates that the above statements are not merely empty rhetoric. This Article has suggested that two broad objectives guided the U.S. approach to ratification of human rights treaties: (1) ensuring that the United States would be able to comply with its treaty obligations; and (2) avoiding the domestication of human rights treaties. Whereas most of the U.S. reservations and understandings were intended to advance both objectives simultaneously,[254] it is critical to note that the free speech reservations attached to Article 20 of the ICCPR[255] and Article 4 of the Race Convention[256] did not advance the second objective. Even without the reservations, Article 20 of the ICCPR and Article 4 of the Race Convention could not have effected changes in domestic law, because they conflict with the First Amendment, which is higher law.[257] As one Carter Administration official stated:

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253. 138 CONG. REC. S4783 (1992) (statement of Sen. Moynihan).

254. *See supra* Section V.B.

255. *See* 138 CONG. REC. S4783 (1992) ("Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.").

256. *See* 140 CONG. REC. S7634 (1994) ("[T]he Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights . . . .").

257. *See* ICCPR, *supra* note 5, art. 20(1) (obligating parties to ban "propaganda for war");

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> The most effective limit on the treaty power is that a treaty cannot violate a specific provision of the Constitution. If we did not have reservations for these [free speech] problems, the Constitution still would prevail as the law of the United States—this is a very important point to remember—but we would be in default as far as our international obligations are concerned.[258]

Thus, the only purpose served by the "free speech" reservations was to ensure that the United States would not be in breach of its international obligations.

Yet despite the fact that the "free speech" reservations served only the first objective (treaty compliance), and did not advance the second objective (avoiding domestication), every administration has insisted that the "free speech" reservations were absolutely essential. For example, in testimony before the Senate Foreign Relations Committee in 1979, Jack Goldklang, an attorney adviser in the Department of Justice, stated with respect to the free speech reservations, "To the extent that the treaty is inconsistent with the Constitution, *we have no option*. . . . Thus, reservations where we have constitutional problems are *required.*"[259] Similarly, Roberts Owen, the State Department legal adviser, characterized the "free speech" reservations as "*absolutely essential* in order to avoid conflicts with our own Constitution."[260] The statements that "we have no option" and that the "free speech" reservations are "absolutely essential" demonstrate that the Carter Administration simply could not conceive of the possibility of undertaking a treaty obligation with which the United States could not comply.[261]

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id. art. 20(2) (obligating parties to ban "advocacy of national, racial or religious hatred"); Race Convention, *supra* note 9, art. 4(a) (obligating parties to ban "dissemination of ideas based on racial superiority"); *id.* art. 4(b) (obligating parties to prohibit organizations "which promote and incite racial discrimination"). The United States could not comply with these obligations, even if it wanted to, because the First Amendment, subject to a few narrow exceptions, forbids the federal government from banning the dissemination of obnoxious ideas. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (holding that a St. Paul bias-motivated crime ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses"); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. a (1987) ("[P]rovisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions, and requirements of the Constitution, and cannot be given effect in violation of them").

258. *Carter Hearings*, *supra* note 16, at 35 (statement of Jack Goldklang, attorney adviser, Department of Justice).

259. *Id.* (emphasis added).

260. *Id.* at 42 (statement of Roberts B. Owen) (emphasis added).

261. The Carter Administration made it clear that, in its view, the other reservations and understandings were less important. Consider the following exchange between Senator Claiborne Pell and Mr. Owen:

> SENATOR PELL. Do you think by affixing reservations we may be making an error in that we would be permitting other nations also to affix reservations and reinterpret the covenants according to their own ideologies?
>
> MR. OWEN. The ["free speech"] reservations . . . are absolutely essential in order to avoid conflicts with our own Constitution. *As to the other reservations*, if the Senate should decide that they are not necessary, I think *the administration would be willing to*

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The Bush Administration, in presenting the ICCPR to the Senate, also assumed that the "free speech" reservation was essential. In testimony before the Senate Foreign Relations Committee, Assistant Secretary of State for Human Rights and Humanitarian Affairs Richard Schifter said: "It is *axiomatic* that the United States cannot agree in a treaty to an unconstitutional obligation. One article (Article 20) would conflict with our Constitutional guarantee of free speech. . . . We *must*, accordingly, take a strong and clear reservation to this Article."[262] Similarly, Conrad Harper, testifying on behalf of the Clinton Administration in Senate hearings on the Race Convention, characterized the "free speech" reservation as the "most important" of the RUDs in the Clinton package, stating that it "is *required* by the First Amendment."[263] In fact, the "free speech" reservation is "required" by the First Amendment only if one views the goal of treaty compliance as sacrosanct. Similarly, it is "axiomatic" that the United States cannot agree to an unconstitutional obligation only if one assumes that treaty compliance is absolutely essential. Thus, statements by Executive Branch officials from the Carter, Bush, and Clinton Administrations about the "free speech" reservations to the ICCPR and the Race Convention demonstrate that each administration believed that the objective of ensuring U.S. compliance with its treaty obligations was sufficiently important that no compromise was possible.

The Reagan/Bush approach to the Torture Convention is consistent with the thesis that each administration viewed the goal of ensuring U.S. compliance with its treaty obligations as sacrosanct. When the Reagan Administration transmitted the Torture Convention to the Senate, it stated

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dispense with them. Then we would be, in effect, bringing about a more rigorous civil rights regime.

Id. (emphasis added). The fact that the Carter Administration would be willing to dispense with the other reservations, thereby bringing about a more rigorous civil rights regime, shows that the objective of avoiding domestication was considered to be negotiable. In contrast, the insistence that the free speech reservations were "absolutely essential" shows that the objective of ensuring U.S. compliance with its treaty obligations was considered to be nonnegotiable.

262. *ICCPR Hearing*, *supra* note 60, at 18 (emphasis added).

263. *Race Hearing*, *supra* note 69, at 17 (emphasis added). President Clinton also proposed a so-called "private conduct" reservation to the Race Convention to limit the U.S. treaty obligation to regulate discriminatory conduct by private entities. *See* 140 CONG. REC. S7634 (1994) (statement of Senator Pell). With respect to the private conduct reservation, Mr. Harper said only that "[w]e believe such a measure is prudent." *Race Hearing*, *supra* note 69, at 18. The private conduct reservation is merely "prudent," and not "required," because it is not the only way to ensure U.S. compliance with the treaty provisions requiring regulation of private discriminatory conduct. If the United States was willing to incorporate the Race Convention into domestic law, then it could ensure compliance with those treaty provisions either by enacting implementing legislation to enforce those provisions, or by interpreting the provisions to be self-executing. Thus, Mr. Harper's characterization of the "private conduct" reservation as "prudent" suggests that the Clinton Administration viewed the goal of avoiding domestication as merely a prudential consideration.

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that implementing legislation would be needed for Article 5.[264] In addition, it proposed a declaration, as part of its RUD package, that stated, "The United States will not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted."[265] The deposit of the instrument of ratification is the act that triggers U.S. obligations under international law. If the United States deposited its instrument of ratification for the Torture Convention prior to enactment of implementing legislation, it would be able to comply with most of its treaty obligations, but it would not be able to comply with those portions of Article 5 that the legislation was intended to implement.[266] The declaration that the United States would not deposit its instrument of ratification until after enactment of the implementing legislation was designed to ensure that the United States would be able to comply with all its treaty obligations beginning at the moment when those obligations became effective as a matter of international law.

When the Bush Administration revised the Reagan package of RUDs for the Torture Convention, it recommended deleting the declaration concerning the timing for depositing the U.S. instrument of ratification.[267] However, this recommendation was not intended to signal any diminution in the seriousness with which the Bush Administration viewed the importance of treaty compliance. To underscore this point, Abraham Sofaer, the State Department Legal Adviser, explained the proposed deletion as follows: "Although we have deleted the proposed declaration . . . as unnecessary, we intend to deposit the instrument of ratification as soon as the implementing legislation has been enacted. *We should make this Convention legally binding only after Congress has provided the means for fulfilling its obligations.*"[268] Thus, he reiterated the basic principle that motivated the declaration in the first place. It is not acceptable for the United States to ratify a treaty on the assumption that it can comply with most of the obligations immediately upon ratification, and that it will enact legislation later to ensure compliance with the remaining obligations. On the contrary, the principle of complying with treaty obligations is sufficiently important

264. *See* TORTURE REPORT, *supra* note 46, at 20.

265. *Id.* This was modeled on a similar declaration that the Senate included as part of its resolution of ratification for the Genocide Convention. *See* 132 CONG. REC. S1378 (1986) (declaring that "the President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V has been enacted").

266. The specific provisions in Article 5 that the legislation was intended to implement obligate the United States to impose criminal penalties for specified acts. *See supra* notes 168–170 and accompanying text.

267. *See* TORTURE REPORT, *supra* note 46, at 37. The Bush Administration explained the proposed deletion as follows: "Although it remains our intention to not deposit the instrument of ratification until after implementing legislation of the Convention has been enacted, it is not necessary that this declaration be included in the formal instrument of ratification." *Id.*

268. *Torture Hearing*, *supra* note 50, at 12 (emphasis added).

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that the United States must ensure that it is able to comply with all the obligations before it assumes any of them.[269]

2. *We Can Have Our Cake and Eat It Too*

Thus far, we have seen that: (1) every administration placed a high value on ensuring that the United States would be able to comply with its treaty obligations; and (2) every administration believed that it was politically necessary to assure the Senate that human rights treaties would not be incorporated into domestic law.[270] If the treaty makers, by means of treaty reservations, successfully eliminated every discrepancy between treaty requirements and preexisting domestic law, then there would be no conflict between the objective of treaty compliance and the objective of avoiding domestication. However, if the treaty makers, in designing the package of reservations, inadvertently overlooked a discrepancy between treaty requirements and preexisting domestic law, then there would be a conflict between the objective of treaty compliance and the objective of avoiding domestication. Hence, the question arises: If there is an actual conflict between these two objectives, which one should take precedence?

Every administration has handled this question in roughly the same manner: by assuring the Senate that its proposed package of reservations successfully eliminated every discrepancy between treaty requirements and preexisting domestic law, thereby resolving any possible conflict between the objective of treaty compliance and the objective of avoiding domestication. For example, in its 1978 letter of submittal, the Carter Administration stated:

> The treaties contain a small number of provisions which are or appear to be in conflict with United States law. The most serious examples are [the restrictions on free speech]. Reservations to these and other provisions, discussed below, along with a number of statements of understanding, are designed to harmonize the treaties with existing provisions of domestic law. . . . The Department of Justice is of the view that, with these reservations, declarations and understandings, there are no constitutional or other legal objections to United States ratification of the treaties.[271]

There were no "legal objections"[272] to ratification because the Carter Administration had designed a package of reservations that eliminated the

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269. Consistent with this principle, although the Senate provided its consent for ratification in October 1990, 136 CONG. REC. S17,491-92 (1990), the United States did not deposit its instrument of ratification until October 21, 1994. *See* MULTILATERAL TREATIES, *supra* note 6, at 185. Implementing legislation was enacted on April 30, 1994. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463 (codified at 18 U.S.C. §§ 2340-2340B (1994)).

270. *See supra* Section V.A.

271. CARTER MESSAGE, *supra* note 15, at vi.

272. *Id.*

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"small number"[273] of discrepancies between treaty requirements and preexisting domestic law. By utilizing the reservations to "harmonize the treaties with existing provisions of domestic law,"[274] the Administration ensured that the United States can fulfill all of its international legal obligations under the treaties without having to change domestic law.

In testimony before the Senate Foreign Relations Committee, Roberts Owen, the State Department Legal Adviser during the Carter Administration, provided similar assurances to the Senate. He noted that "critics fear" that the divergence between domestic law and treaty requirements "will cause changes in that domestic law outside the normal legislative process."[275] He replied that "we need not fear a confusion of standards due to possible conflicts between the treaty provisions and domestic law," because the Administration's package of RUDs eliminates any divergence between domestic law and treaty requirements.[276]

> In the few instances where it was felt that a provision of the treaties could reasonably be interpreted to diverge from the requirements of our constitution or from federal or state law presently in force, the Administration has suggested that a reservation or understanding be made to that provision. In our view, these reservations . . . permit us to accept the treaties in a form consonant with our domestic legal requirements.[277]

Mr. Owen's statement implies that the Carter Administration had successfully eliminated every discrepancy between treaty requirements and preexisting domestic law.[278] If that assessment were correct, then there would be no need to confront difficult decisions about trade-offs between the objective of treaty compliance and the objective of avoiding changes in domestic law. The United States could fully satisfy both objectives.

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273. *Id.*

274. *Id.*

275. *Carter Hearings*, *supra* note 16, at 29 (statement of Roberts B. Owen).

276. *Id.* at 30.

277. *Id.*

278. Unofficially, Jack Goldklang, who testified before the Senate on behalf of the Department of Justice, seemed less confident that the Carter Administration had successfully eliminated every discrepancy between treaty requirements and preexisting domestic law. At a conference attended by international law scholars and human rights activists, he stated:

> I do not know how many of you in the audience have actually sat down and tried to read through the texts of all of these treaties. I found it fascinating that on a panel filled with highly skilled lawyers, nobody pointed out an ambiguity or a possible inconsistency with our domestic law that we had overlooked in our messages to the Senate. I am sure, however, that if we have hearings before the Senate, we will be met with dozens of such examples. They exist. Ingenious committee counsel could challenge us and make us explain every last clause in these treaties.

Rovine & Goldklang, *supra* note 239, at 64. However, no Carter Administration official ever made such a frank admission in any formal presentation to the Senate, nor did any representatives of any subsequent administration. Thus, whatever private doubts Executive Branch officials may have harbored, they consistently told the Senate that their proposed reservations would successfully eliminate all discrepancies between treaty requirements and preexisting domestic law.

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The Reagan and Bush Administrations also sought to assure the Senate that the United States could comply fully with its international legal obligations under the Torture Convention, as modified by the proposed reservations, without having to make changes in domestic law (other than the minor changes embodied in the implementing legislation for Article 5). When the Reagan Administration transmitted the Torture Convention to the Senate, it included a detailed article-by-article analysis that explained, for each substantive article of the treaty: (1) how existing domestic law already satisfied most of the treaty requirements; and (2) how its proposed reservations and understandings would fill the remaining "gaps" between the treaty requirements and preexisting domestic law.[279]

During Senate hearings, Abraham Sofaer, the State Department Legal Adviser, explained why changes in domestic law were not necessary to ensure U.S. compliance with the treaty:

> Existing U.S. law makes any acts falling within the Convention's definition of torture a criminal offense, as well as a violation of various civil statutes. Potential remedies include incarceration, compensation, and the full range of equitable relief. Any Public official in the United States, at any level of government, who inflicts torture (or instigates, consents to, acquiesces in, or tolerates torture) would be subject to an effective system of control and punishment in the U.S. legal system.[280]

The Executive Branch apparently succeeded in its effort to persuade the Senate that the proposed reservations had eliminated any potential discrepancy between treaty requirements and preexisting domestic law. The Senate Foreign Relations Committee adopted the Bush Administration's proposed RUDs, and expressed its "strong belief that they [the RUDs] resolve fully any potential conflicts between the Convention and U.S. law."[281] Given the assumption that they had eliminated all discrepancies between treaty requirements and preexisting domestic law, there was no perceived need for the treaty makers to confront difficult decisions about

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279. *See* TORTURE REPORT, *supra* note 46, at 13–28. Of course, in the case of the Torture Convention, the treaty makers decided to fill one "gap" by means of implementing legislation, rather than a reservation. Interestingly enough, the one area where they felt it was politically acceptable to use a human rights treaty to effect changes in domestic law did not actually augment protection for individuals against government interference. Rather, the legislation expanded the power of government to prosecute criminals. *See supra* notes 168–170 and accompanying text. Similarly, implementing legislation for the Genocide Convention was also designed to expand the power of government to prosecute criminals. *See* Genocide Convention Implementation Act of 1987 (The Proxmire Act), Pub. L. No. 100-606, § 2(a), 102 Stat. 3046 (1988) (codified at 18 U.S.C. §§ 1091–1093 (1994)). Thus, the political calculus seems to be that it is politically unacceptable to use human rights treaties to augment protection of individual freedom from government interference, but it is politically acceptable to use human rights treaties to expand the power of government to prosecute human rights violators.

280. *Torture Hearing*, *supra* note 50, at 8 (statement of Abraham D. Sofaer).

281. TORTURE REPORT, *supra* note 46, at 4.

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trade-offs between the objective of treaty compliance and the objective of avoiding changes in domestic law.

When the Bush Administration submitted to the Senate its proposed RUDs for the ICCPR, it also sought to assure the Senate that the United States could comply fully with the ICCPR, as modified by the proposed reservations, without having to domesticate the ICCPR. The Bush Administration said:

> In general, the substantive provisions of the Covenant are consistent with the letter and spirit of the United States Constitution and laws, both state and federal. Consequently, the United States can accept the majority of the Covenant's obligations and undertakings without qualification. In a few instances, however, it is necessary to subject U.S. ratification to reservations, understandings or declarations in order to ensure that the United States can fulfill its obligations under the Covenant . . . .[282]

This statement implies, without saying so explicitly: (1) that the Bush Administration has identified every discrepancy between treaty requirements and preexisting domestic law; and (2) that therefore the United States can rely on preexisting domestic law to fulfill all of its obligations with respect to those ICCPR provisions for which the Administration did not propose a reservation or understanding.[283]

In its report on the ICCPR, the Senate Foreign Relations Committee stated: "The overwhelming majority of the provisions in the Covenant are compatible with existing U.S. domestic law. In those few areas where the two diverge, the Administration has proposed a reservation or other form of condition to clarify the nature of the obligation being undertaken by the United States."[284] This statement suggests that the Committee believed that the Bush package of RUDs successfully harmonized the ICCPR requirements with preexisting domestic law, thereby enabling the treaty

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282. ICCPR REPORT, *supra* note 44, at 10.

283. During testimony before the Senate Foreign Relations Committee, Assistant Secretary of State Schifter also sought to assure the Senate that the Administration's proposed package of RUDs eliminated any potential discrepancy between the ICCPR and domestic law. However, his assurance that the Administration had identified *every possible* discrepancy was more implicit than explicit. He said:

> The Covenant on Civil and Political Rights basically sets forth the individual rights and freedoms which are enjoyed by all Americans and which have played a key role in the birth of our nation and throughout our history. . . . Our basic human rights are secure in America through their incorporation in the Bill of Rights and other provisions of the Constitution . . . .

ICCPR Hearing, *supra* note 60, at 18. Mr. Schifter then noted that the Administration had proposed reservations for "those few provisions of the Covenant which are not in accord with existing law," thereby implying that all those provisions that were not subject to RUDs are in accord with existing law. *Id.* He also emphasized that the Bush package "reflects the carefully considered views of the various governmental departments which are most directly concerned," implying that the Administration had thoroughly considered all other possible discrepancies between the ICCPR and preexisting domestic law. *Id.*

284. ICCPR REPORT, *supra* note 44, at 4.

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makers to sidestep difficult decisions about trade-offs between the objective of treaty compliance and the objective of avoiding changes in domestic law.

The Clinton Administration was perhaps more explicit than any of its predecessors in providing assurances to the Senate that the United States could comply fully with its international legal obligations under a human rights treaty, as modified by the reservations, without having to domesticate the treaty in question—the Race Convention. In its proposed package of RUDs, the Clinton Administration stated:

> As was the case with the prior treaties, existing U.S. law provides extensive protections and remedies *sufficient to satisfy the requirements of the present Convention* [as modified by the RUDs]. Moreover, federal, state and local laws already provide a *comprehensive* basis for challenging discriminatory statutes, regulations and other governmental actions in court, as well as certain forms of discriminatory conduct by private actors. Given the extensive provisions already present in U.S. law, there is no discernible need for the establishment of additional causes of action or new avenues of litigation to enforce the essential requirements of the Convention.[285]

In short, the United States does not need to domesticate the Convention to ensure compliance with its treaty obligations, because: (1) preexisting domestic law already fulfills most of the Convention's requirements; and (2) the reservations eliminate completely any discrepancies between the Convention and preexisting domestic law. As with the other treaties, this assumption rendered it unnecessary for the treaty makers to confront trade-offs between the objective of treaty compliance and the objective of avoiding changes in domestic law.

Given the Executive Branch's desire to obtain Senate consent for ratification, it was tactically advantageous to claim that there was no need to make trade-offs between treaty compliance and avoiding changes in domestic law. If the Executive Branch had indicated a willingness to sacrifice the latter objective in favor of treaty compliance, it would have met stiff resistance from the Bricker wing of the Senate. If the Executive Branch had indicated a willingness to sacrifice the goal of treaty compliance in favor of avoiding changes in domestic law, it would have met stiff resistance from human rights advocates in the Senate, not to mention those who believed that treaty compliance was important as a matter of principle. Thus, the "we can have our cake and eat it too" sales pitch was a clever tactic for advancing the short-term goal of obtaining Senate consent for treaty ratification. Part VI explains, however, that the treaty makers left a difficult problem for the

285. RACE REPORT, *supra* note 65, at 25-26 (emphases added). Conrad Harper, the State Department Legal Adviser, made a very similar statement in testimony before the Senate Foreign Relations Committee. In particular, he repeated the claim that existing provisions of U.S. law are "sufficient to satisfy the requirements of the present Convention." *Race Hearing*, *supra* note 69, at 18.

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judiciary by deliberately avoiding the difficult trade-offs between conflicting policy objectives.

D. *NSE Declarations and the Politics of Ratification*

Assume that the treaty makers were so successful in crafting reservations and understandings to the Torture Convention, the ICCPR, and the Race Convention that they eliminated every discrepancy between domestic law and treaty requirements. In that case, the only possible claims that litigants could raise under the treaties would be either frivolous, i.e., not well founded in the treaties, or redundant, i.e., already covered under existing provisions of domestic law. A litigant who raised a frivolous claim would lose, regardless of whether the court applied the treaty directly as a rule of decision in the case. A litigant who raised a redundant claim would win, regardless of whether the court applied the treaty directly as a rule of decision in the case.[286] Thus, as a practical matter, the treaties would have absolutely no effect on domestic legal outcomes, even if they were self-executing.[287] Therefore, if the reservations actually eliminated every discrepancy between treaty requirements and preexisting domestic law, the NSE declarations would have no domestic legal effect, because the treaties would have no domestic legal effect, even without the NSE declarations.

Moreover, the NSE declarations would have no effect on U.S. compliance with its international legal obligations, because every claimant entitled to relief under a treaty would obtain that relief on the basis of some other redundant provision of U.S. law.[288] In sum, if the assurances the Executive Branch provided the Senate were true—i.e., if the reservations successfully eliminated every discrepancy between treaty requirements and preexisting domestic law—then the NSE declarations would have no relevance either to the objective of treaty compliance or to the objective of avoiding changes in domestic law. The declarations would be mere "window dressing," tactically useful to reassure the Bricker wing of the Senate, but in fact substantially unrelated to any broader policy objective.

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286. If the court applied the treaty directly, the litigant would win on the basis of the treaty. If the court refused to apply the treaty directly, the litigant would win on the basis of the redundant legal provision. Either way, the essential outcome would be the same.

287. Here, the term "self-executing" is used to mean that the treaties create a private cause of action and are directly applicable by the courts.

288. The treaties do not obligate the United States to ensure that courts apply the treaty provisions directly as rules of decision in particular cases. No broadly based multilateral treaty could include such an obligation, because many countries, such as the United Kingdom, have domestic legal systems in which courts never apply treaties directly. *See supra* note 138 and accompanying text. Thus, even if the treaties are non-self-executing, the United States fulfills its international legal obligations under the treaties if: (1) those who claim that their treaty rights were violated obtain an individual hearing before an impartial tribunal; and (2) claimants who are entitled to a remedy obtain a remedy. *See supra* Section II.C.

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1. *Two Possible Theories*

In light of the above, there are two possible ways to explain the role of the NSE declarations in the context of the overall U.S. approach to treaty ratification. These approaches will be referred to as the "safety valve" theory and the "window dressing" theory. According to the safety valve theory, the treaty makers recognized that, despite their best efforts, they might not have eliminated every single discrepancy between treaty requirements and preexisting domestic law, and that therefore individuals might still be able to raise some nonredundant, non-frivolous claims. Hence, the NSE declarations were intended as a safety valve to preclude judges from reaching the merits of non-frivolous, nonredundant claims that the treaty makers had overlooked when they developed the U.S. reservations. As noted above, the United States has an international legal obligation under the ICCPR, the Torture Convention, and the Race Convention to ensure that every person who raises a non-frivolous, nonredundant claim that his or her treaty rights have been violated obtains an individual hearing before an impartial tribunal.[289] If the NSE declarations are intended to preclude judges from reaching the merits of non-frivolous, nonredundant treaty-based human rights claims, then those declarations are inconsistent with the U.S. treaty obligation to provide an individual hearing before an impartial tribunal.[290] Because a judge's failure to reach the merits of a nonredundant, non-frivolous claim would place the United States in breach of its treaty obligations, the safety valve theory assumes that the United States made a deliberate policy decision that, in the event of a conflict, the objective of avoiding domestication should always take precedence over the objective of treaty compliance.[291]

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289. *See supra* Section II.C. Although the relevant treaty articles—Articles 2(3) and 14(1) of the ICCPR, Article 14 of the Torture Convention, and Article 6 of the Race Convention—do not distinguish between frivolous and non-frivolous claims, it would be unreasonable to interpret these provisions to require the United States to provide an individual hearing for every frivolous claim. Similarly, although the articles do not distinguish between redundant and nonredundant claims, the United States fulfills its treaty obligations with respect to redundant claims if it provides relief under another provision of U.S. law.

290. *But see infra* Subsection VI.B.3 (discussing cases in which the United States can fulfill its obligation to provide an individual hearing by providing an alternative, non-judicial forum).

291. Most commentators have assumed that the NSE declarations do signal a deliberate choice by the treaty makers to elevate the objective of avoiding domestication over the objective of treaty compliance. *See, e.g.*, Paust, *supra* note 17, at 1257 ("It was a sad day in American legal history when . . . the U.S. Senate . . . unquestionably accepted the Bush Administration's declaration that the [ICCPR] should not be self-executing. . . . Rarely has a formal attempt at adherence to a treaty been so blatantly meaningless and so openly defiant of its terms."). For a more nuanced assessment of the political horse-trading embodied in the NSE declarations, see *Round Table Discussion on International Human Rights Standards in the United States: The Case of Religion or Belief*, 12 EMORY INT'L L. REV. 973, 993 (1998) (statement of Douglas Laycock) (suggesting that the ratification of human rights treaties with numerous RUDs is a result of conflicts among "different

In contrast, according to the window dressing theory, the treaty makers deliberately avoided making any decision concerning possible trade-offs between the objective of treaty compliance and the objective of avoiding changes in domestic law. They believed, or acted as if they believed, that the reservations eliminated all discrepancies between treaty requirements and preexisting domestic law,[292] thereby enabling the United States to satisfy both the objective of treaty compliance and the objective of avoiding changes in domestic law, without having to choose between the two. Under this view, the NSE declarations were merely window dressing, intended to secure the votes of the Bricker forces in the Senate, but without sacrificing the objective of treaty compliance.

2. *A Defense of the Window Dressing Theory*

There are several reasons why the window dressing theory provides a better explanation of the treaty makers' intentions than the safety valve theory. First, the safety valve theory is inconsistent with both: (1) the treaty makers' manifest intention to ensure U.S. compliance with its treaty obligations;[293] and (2) the treaty makers' expressed belief that the reservations they adopted had eliminated any discrepancies between treaty requirements and preexisting domestic law.[294] In contrast, the window dressing theory suffers from neither deficiency.

Second, the United States did nothing to modify its international legal obligations to provide remedies for treaty violations or to provide an individual hearing for persons who allege violations of their treaty rights.[295]

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political factions who can succeed in controlling different organs of governments because of the doctrine of separation of powers").

292. The window dressing theory is consistent with the thesis that officials recognized the possibility that they might not have eliminated every discrepancy between treaty requirements and preexisting domestic law, and that therefore individuals might still be able to raise some nonredundant, non-frivolous claims. The crux of the theory is that the relevant policy-making organs, in the process of formal deliberations, discounted such a possibility sufficiently that they never confronted the difficult trade-offs that would arise if an individual did raise a nonredundant, non-frivolous claim.

293. *See supra* notes 249–269 and accompanying text.

294. *See supra* notes 270–285 and accompanying text.

295. One might wonder whether the NSE declarations themselves modify these international legal obligations. The answer is clearly "no." Executive Branch spokespersons have consistently stated that the NSE declarations do not derogate from U.S. obligations under international law. *See, e.g.*, RACE REPORT, *supra* note 65, at 26 ("Declaring the Convention to be non-self-executing in no way lessens the obligation of the United States to comply with its provisions as a matter of international law."); *see also Carter Hearings*, *supra* note 16, at 29–30 (statement of Roberts B. Owen, State Department Legal Adviser) ("This understanding as to the non-self-executing nature of the substantive provisions of the treaties would not derogate from or diminish in any way our international obligations under the treaties; it touches only upon the role the treaty provisions will play in our domestic law."). Nongovernment witnesses also agreed that the NSE declarations do not modify U.S. obligations under international law. *See, e.g.*, *ICCPR Hearing*, *supra* note 60, at 59

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If the treaty makers did not intend for the United States to comply with its obligations under Article 2(3) of the ICCPR to provide remedies and an individual hearing,[296] they could have attached a reservation to Article 2(3); however, they chose not to do so. If the treaty makers did not intend for the United States to comply with its obligations under Article 6 of the Race Convention to provide remedies and an individual hearing,[297] they could have attached a reservation to Article 6, but they chose not to do so.[298]

Similarly, if the treaty makers did not intend for the United States to comply with its obligations under Articles 13 and 14 of the Torture Convention,[299] they could have attached appropriate reservations; however, they chose not to do so.[300] The fact that the United States did nothing to modify its obligations to provide remedies and an individual hearing strongly suggests that the treaty makers intended to comply with those obligations. The safety valve theory is not persuasive because it suggests that the treaty makers did not intend to comply with those obligations. In contrast, the window dressing theory is entirely consistent with the conclusion that the treaty makers intended for the United States to comply with its obligations to provide remedies and an individual hearing.

Third, the safety valve theory is unpersuasive because there is not a single statement in the Senate record associated with U.S. ratification of the Torture Convention, the ICCPR, or the Race Convention indicating that the treaty makers intended, by means of the NSE declaration, to elevate the objective of avoiding domestication above the objective of treaty compliance. To the contrary, the record is replete with statements indicating that the treaty makers thought that the NSE declarations were fully consistent with the objective of treaty compliance. For example, the Senate

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(prepared statement of William T. Lake on behalf of the International Human Rights Law Group) ("[A] declaration that the treaty is non-self-executing would not absolve the United States from its duty under international law to bring its domestic laws into compliance with the Covenant.")

296. See *supra* notes 74–80 and accompanying text for a discussion of Article 2(3).

297. See *id.* for a discussion of Article 6.

298. It is noteworthy that the main substantive provisions of the Race Convention are included in Articles 1 through 7. The U.S. reservations address portions of Articles 1 through 5 and 7, but not Article 6. *See* 140 CONG. REC. S7634–35 (1994).

299. See *supra* notes 74–80 and accompanying text for a discussion of Articles 13 and 14.

300. The United States did adopt an understanding with respect to Article 14, stating "[t]hat it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party." MULTILATERAL TREATIES, *supra* note 6, at 187. However, this statement does not offer any indication that the United States does not intend to comply with its obligation to provide a private right of action for damages. To the contrary, the statement strongly implies that the United States does intend to provide such a private right of action, but only for acts of torture committed in territory under U.S. jurisdiction. The Reagan Administration confirmed this intention. *See* TORTURE REPORT, *supra* note 46, at 24 ("Existing U.S. law already establishes private rights of suit sufficient to implement Article 14.").

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Foreign Relations Committee explained the NSE declaration attached to the Race Convention as follows:

> In view of the extensive provisions present in U.S. law to provide protections and remedies sufficient to satisfy the requirements of the Convention, the Administration sees no need for the establishment of additional causes of action or new avenues of litigation in order to enforce the essential requirements of the Convention. *Therefore, the Administration proposes a declaration to the effect that the Convention is non-self-executing.*[301]

In short, the United States adopted an NSE declaration because self-execution is unnecessary to achieve treaty compliance; it is unnecessary because preexisting provisions of U.S. law are "sufficient to satisfy the requirements of the Convention."[302] The fact that the treaty makers justified the NSE declarations by claiming that such declarations are entirely consistent with the objective of treaty compliance supports the window dressing theory.

Finally, assume that the safety valve theory is correct. Specifically, assume that the treaty makers adopted the NSE declarations because they made a deliberate policy choice to elevate the goal of avoiding domestication above the goal of treaty compliance. If the treaty makers had made such a deliberate policy choice, one would think that they would have decided to either: (1) subordinate the goal of treaty compliance in every case by precluding judges from applying the treaties directly in any case (*Foster* non-self-execution); or (2) subordinate the goal of treaty compliance only in some cases by precluding judges from applying the treaties directly only in some cases (the "private cause of action" concept). The safety valve theory is consistent with either choice (1) or choice (2), because either one represents a deliberate policy decision. However, the theory is inconsistent with a failure to choose between (1) and (2), because this failure indicates the absence of any deliberate policy decision. Thus, the fact that the Executive Branch in general, and the Bush Administration in particular, shifted between the *Foster* concept of non-self-execution and the "private cause of action" concept[303] makes the safety valve theory appear less plausible.

In contrast, the window dressing theory helps make sense of the seemingly inadvertent oscillation between the *Foster* concept and the "private cause of action" concept. According to the window dressing theory, the treaty makers believed, or acted as if they believed, that the reservations eliminated all discrepancies between treaty requirements and preexisting domestic law. If the treaty makers genuinely believed that, then the

301. RACE REPORT, *supra* note 65, at 8 (emphasis added).
302. *Id.*
303. *See supra* Part IV.

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difference between the *Foster* concept of non-self-execution and the "private cause of action" concept would have seemed relatively unimportant to them, because under either concept the United States would still be able to comply fully with its treaty obligations without having to domesticate the treaties.

In sum, the evidence supports the window dressing theory, which says that the treaty makers did not make a deliberate policy choice to elevate the objective of avoiding domestication above the objective of treaty compliance. Nor did the treaty makers renounce the objective of avoiding domestication in favor of promoting treaty compliance. Rather, the window dressing theory suggests that the treaty makers valued both objectives equally, and that they deliberately avoided making any decision concerning possible trade-offs between the two objectives. Hence, judges should strive to give effect to both objectives, without categorically favoring one over the other.

3. *The Harmonization Theory*

Some might claim that the preceding analysis ignores a third possible theory that is different from either the safety valve or the window dressing theory. Under this theory, which I call the "harmonization" theory, the NSE declarations should be construed as a general directive to the courts to interpret human rights treaty provisions so as to harmonize the treaties with constitutional, statutory, and common law. There are two versions of this theory: a weak version and a strong version.

The weak version is that judges should, *whenever possible*, strive to construe treaty provisions so as to harmonize them with corresponding constitutional and statutory provisions. If judges can *plausibly* interpret an ambiguous statutory provision to conform to a relatively clear treaty provision, or interpret an ambiguous treaty provision to conform to a relatively clear statutory provision, then judges can avoid the need to make trade-offs between the goal of treaty compliance and the desire to avoid domestication.[304] This is because, insofar as U.S. treaty obligations conform with other provisions of domestic law, there is no conflict between the two objectives. Hence, the weak version of the harmonization theory is

304. As such, the weak version is essentially a restatement of the so-called *Charming Betsy* canon, which derives from Chief Justice Marshall's opinion in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), in which he stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.* at 118. For further discussion of the *Charming Betsy* canon, see *infra* notes 367–372, 405–408 and accompanying text; *see also* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1998) (contending that the canon "is best thought of today as a device to preserve the proper separation of powers between the three branches of the federal government").

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consistent with the window dressing theory, because it accords equal weight to the twin objectives of treaty compliance and avoiding domestication.

The strong version of the harmonization theory construes the NSE declarations to mean that courts should, *in every case*, interpret human rights treaty provisions so that they provide no greater protection for individual rights than is available under other provisions of constitutional, statutory, or common law. The strong version is problematic for two reasons. First, it assumes that the treaty makers intended to privilege the objective of avoiding domestication over the objective of treaty compliance. That assumption is at odds with the Senate record, which shows that the treaty makers valued both objectives equally. Second, the strong version is at odds with fundamental separation of powers principles. As Chief Justice Marshall stated almost two hundred years ago, "It is emphatically the province and duty of the judicial department to say what the law is."[305] That principle applies to treaties, just as it does to other laws.[306] Although the judiciary properly accords great weight to Executive Branch interpretations of specific treaty provisions,[307] the Executive Branch would be exceeding its constitutional authority if it attempted to issue a general directive to the judiciary, instructing it to interpret every provision of a human rights treaty so that no provision offers any greater protection for human rights than is already available under other provisions of domestic law.

4. *Limits of the Weak Version*

The weak version of the harmonization theory is a useful corollary to the window dressing theory, in that it instructs judges to interpret human rights treaty provisions, whenever possible, so as to harmonize them with corresponding constitutional and statutory provisions. However, there are some cases in which it is simply not possible to harmonize the treaties with other provisions of domestic law. Two examples will suffice.

In one case, the Immigration and Naturalization Service sought to deport Zakari Abu, a native and citizen of Nigeria, on the grounds that he had unlawfully entered the United States after having previously been deported.[308] The immigration judge found that, due to Abu's prior participation in a failed coup attempt, he would be "immediately arrested

305. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

306. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, cmt. e (1987) ("Cases arising under treaties to which the United States is a party . . . are 'Cases . . . arising under . . . the Laws of the United States, and Treaties made . . . under their Authority,' and therefore within the Judicial Power of the United States under Article III, Section 2 of the Constitution." (quoting U.S. CONST. art. III, § 2)).

307. *See, e.g.*, Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982).

308. *See* Matter of Abu, No. A29 499 143 (I.N.S. Feb. 19, 1997) (pending on cross-appeal to B.I.A.).

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and murdered by the government of Nigeria if he returns to that country."[309] Yet the judge also concluded that Abu was ineligible for relief under U.S. immigration laws, because he had a prior felony conviction in the United States.[310] Article 3 of the Torture Convention prohibits the deportation of any individual to a country where he is more likely than not to be tortured.[311] Accepting as true the immigration judge's factual finding that Abu would almost certainly be murdered upon his return to Nigeria, deportation of Abu to Nigeria would be a flagrant violation of the U.S. obligations under Article 3.[312] Hence, Abu's case presents a stark conflict between federal statutes and U.S. treaty obligations, because Article 3 clearly prohibits Abu's deportation to Nigeria, but no relief was available to him under federal statutes.[313]

In another case, Humberto Alvarez-Machain, a citizen and resident of Mexico, was forcibly kidnapped from his office in Mexico and flown to the United States, where he was arrested by officials of the U.S. Drug

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309. *Id.* at 17.

310. *See id.* at 7–12. Abu's felony conviction occurred when, under instructions from a superior military officer, he carried an attaché case into the United States that, without Abu's knowledge, contained narcotics in a hidden compartment.

311. Article 3 states: "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." Torture Convention, *supra* note 8, art. 3, para. 1. In its instrument of ratification, the United States adopted an understanding, interpreting the "substantial grounds" test to mean that "it is more likely than not that he would be tortured." MULTILATERAL TREATIES, *supra* note 6, at 187.

312. Judge Richardson considered the application of Article 3 in Abu's case, but mistakenly concluded that the Convention "does not yet carry the force of law in the United States," because it is not self-executing. *See Matter of Abu*, No. A29 499 143, at 14. Therefore, he did not explicitly reach the question of whether deportation to Nigeria would violate Article 3, although he left little room for doubt about how he would decide that issue.

Note that Judge Richardson, by holding that the Convention "does not yet carry the force of law," was effectively interpreting the NSE declaration in accordance with the automatic incorporation concept, not the *Foster* concept. *See supra* notes 121–134 and accompanying text. Judge Richardson's interpretation of the NSE declaration is controverted by the General Counsel's Office of the Immigration and Naturalization Service, which has stated that, notwithstanding the NSE declaration, "Article 3 is United States law, equal in force to a federal statute." Memorandum from INS Office of General Counsel to Regional Counsel, District Counsel and All Headquarters Attorneys 2 (May 14, 1997) (on file with the author).

313. Despite his conclusion that Abu was not eligible under U.S. law for any form of relief from deportation, Judge Richardson could not, in good conscience, allow Abu to be deported to a place where he would be summarily executed. Judge Richardson resolved this dilemma by holding that deportation to Nigeria would violate customary international law. *See Matter of Abu*, No. A29 499 143, at 14–17. He ordered:

> that the case be held in abeyance pending a change in the circumstances of the respondent which would allow him to return to Nigeria without being subject to official torture or until such time as Congress enacts legislation implementing the Torture Convention and relief can be granted to the respondent under such legislation.

Id. at 19. Thus, Abu is being held in indefinite detention in the United States, in apparent violation of Article 9 of the ICCPR, which prohibits "arbitrary arrest or detention." ICCPR, *supra* note 5, art. 9.

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Enforcement Agency (DEA).[314] DEA agents were "responsible for respondent's abduction, although they were not personally involved in it."[315] Alvarez-Machain argued that the court lacked jurisdiction to try him on criminal charges, because the DEA agents' conduct violated both the Fifth Amendment Due Process Clause and the extradition treaty between the United States and Mexico.[316] The Supreme Court ultimately held that Alvarez-Machain did not have "a defense to the jurisdiction of this country's courts."[317] In contrast, the Human Rights Committee has held in at least two separate cases that transnational forcible abductions violate Article 9(1) of the ICCPR,[318] and that the appropriate remedy for such a violation is to release the kidnapping victim and permit him to depart the country.[319] The United States did not adopt a reservation to Article 9(1). Therefore, if something like the *Alvarez-Machain* case occurred again in the future,[320] and the defendant raised Article 9(1) of the ICCPR as a defense to the jurisdiction of U.S. courts, the defendant would have a non-frivolous, nonredundant claim.

These two examples are not exhaustive, but they serve to illustrate a crucial point. Despite the treaty makers' best efforts to eliminate all discrepancies between treaty requirements and preexisting domestic law, there are still a variety of non-frivolous, nonredundant claims that litigants could raise under these treaties.[321] Such claims pose difficulties for judges, which are the subject of Part VI.

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314. *See* United States v. Alvarez-Machain, 504 U.S. 655, 657 (1992).

315. *Id.*

316. *See* United States v. Caro-Quintero, 745 F. Supp. 599, 601 (C.D.Cal. 1990), United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd, Alvarez-Machain*, 504 U.S. at 655.

317. *Alvarez-Machain*, 504 U.S. at 657.

318. "Everyone has the right to liberty and security of person. . . . No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." ICCPR, *supra* note 5, art. 9, para. 1.

319. *See* Case of Lilian Celiberti de Casariego, U.N. GAOR, 36th Sess., Supp. No. 40, at 185, U.N. Doc. A/36/40 (1981), *reprinted in* 68 I.L.R. 41 (1981) (holding that forcible abduction of a Uruguayan-Italian citizen to Uruguay from Brazil violated Article 9(1), and that Uruguay was obligated to release the victim and allow her to leave the country); Case of Sergio Ruben Lopez Burgos, U.N. GAOR, 36th Sess., Supp. No. 40, at 76, U.N. Doc. A/36/40 (1981), *reprinted in* 68 I.L.R. 29 (1981) (holding that forcible abduction of Uruguayan citizen to Uruguay from Argentina violated Article 9(1), and that Uruguay was obligated to release the victim and allow him to leave the country). For a more detailed analysis of international human rights law, as it applies to forcible trans-border abductions, see Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After* Alvarez-Machain, 29 CORNELL INT'L L.J. 383, 436-47 (1996).

320. There are other recent cases, in addition to *Alvarez-Machain*, that involve international kidnapping by U.S. government agents. *See, e.g.*, United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995); United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991).

321. For other examples of non-frivolous, nonredundant claims, see *infra* Section VI.B.

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VI. THE JUDICIAL DILEMMA

When litigants do raise non-frivolous, nonredundant treaty-based human rights claims, courts are presented with a dilemma. On the one hand, if courts refuse to reach the merits of such claims, they risk contravening the manifest intent of the treaty makers to comply with treaty obligations, in particular, the obligation to ensure that persons who raise such claims receive an individual hearing before an impartial tribunal. On the other hand, if courts do reach the merits of such claims, they risk domestication of the human rights treaties,[322] which would be contrary to the assurances that the Executive Branch provided the Senate. In short, the judge cannot carry out the treaty makers' intent to both: (1) comply with the treaty; and (2) avoid domestication.

To help resolve the dilemma, the judge might examine the Senate record to ascertain how the Executive Branch explained the meaning of the NSE declarations. The judge would find that Executive Branch explanations inadvertently shifted over time from a *Foster* concept of non-self-execution to a "private cause of action" concept. If the case is a civil suit in which the plaintiff is relying on the ICCPR to create a private cause of action, the claim is barred under either concept of non-self-execution. If the claimant has been charged with a crime and is invoking the ICCPR defensively, however, the difference between the *Foster* concept and the "private cause of action" concept is critical. Should the judge apply the "private cause of action" concept, and reach the merits of the claim, or should the judge apply the *Foster* concept, and decline to reach the merits?

Part VI explores this judicial dilemma. Section VI.A briefly summarizes actual cases in which litigants have raised claims under the Torture Convention, the ICCPR and/or the Race Convention. Section VI.B proposes an analytic framework for judges to utilize in deciding whether to reach the merits of treaty-based human rights claims.

A. *Summary of Judicial Decisions*

Since the United States joined the Race Convention in 1994, there has been only one published disposition that even mentions the Convention.[323] In that case, plaintiffs challenged the constitutionality of Proposition 227, an

322. Of course, there would invariably be some cases in which courts would decide on the merits that the individual's claim, though non-frivolous, is non-meritorious. In such cases, no change in domestic law would be needed to satisfy the treaty requirements. On the other hand, there would also be cases in which courts would decide that an individual's claim is meritorious. In such cases, the treaties would change domestic legal outcomes from what they would otherwise have been.

323. *See* Valeria v. Wilson, No. C-98-2252-CAL, 1998 WL 400119 (N.D. Cal. July 15, 1998).

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initiative that changed the public educational system in California for students with limited English language proficiency. An amicus brief contended that Proposition 227 violated the Race Convention and the ICCPR, though the court concluded that the arguments raised by the amicus brief "are not properly within the scope of this action,"[324] apparently because the plaintiffs had not raised those claims.

In contrast, the Torture Convention has attracted much greater attention in the courts. Since 1990, when the Senate gave its advice and consent for ratification of the Torture Convention, there have been sixteen published dispositions in which courts have mentioned the Torture Convention.[325] Of those sixteen dispositions, eight involved claims against foreign governments and/or officials for human rights abuses committed outside the United States.[326] In three other cases, the court discussed the Torture Convention *sua sponte*, but did not base its decision on the Convention.[327] Thus, only five of the sixteen published dispositions involve cases in which litigants have raised claims, based on the Convention, alleging that federal, state, or local governments or officials have committed

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324. *Id.* at *20.

325. There are also four unpublished dispositions that cite the Convention: Anabtawi v. I.N.S., No. 93-2565, 1996 WL 380352 (4th Cir. June 27, 1996); Visser v. Penn, No. 94-5152, 1994 WL 479570 (D.C. Cir. Aug. 25, 1994); Abebe-Jiri v. Negewo, No. 1:90-CV-2010-GET, 1993 WL 814304 (N.D. Ga. Aug. 20, 1993); and United States v. Quiceno De La Pava, No. 91 CR 206, 1993 WL 50943 (N.D. Ill. Feb. 23, 1993).

326. Of those eight dispositions, five involve claims against the estate of Ferdinand Marcos, the former President of the Philippines. *See* Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996); *In re* Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d 539 (9th Cir. 1996); *In re* Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. 1992); *In re* Estate of Marcos Human Rights Litig., 910 F. Supp. 1460 (D. Haw. 1995). The Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), provides the basis for federal court jurisdiction over the Marcos litigation. *See Estate of Marcos*, 978 F.2d at 498–501. The Torture Convention is relevant, because Section 1350 confers jurisdiction for torts "committed in violation of the law of nations," and the Convention is one of several documents establishing that torture does violate the law of nations. *See id.* at 499 n.14.

Two other cases also involve claims based, at least in part, on the Alien Tort Claims Act. *See* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (concerning victims from Bosnia-Herzegovina who sued the leader of the Bosnian Serb forces); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (regarding expatriate citizens of Guatemala who sued the former Guatemalan Minister of Defense). The final case in this category is *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), which concerned plaintiffs who alleged eighteen causes of action arising out of the torture of José Siderman and the expropriation of the Sidermans' property by Argentine military officials. Detailed discussion of these cases is beyond the scope of this Article because this Article addresses the possibilities for raising treaty-based human rights claims for human rights abuses committed by U.S. federal, state, and local governments and officials.

327. *See* Ratnam v. I.N.S., 154 F.3d 990, 993 (9th Cir. 1998) (noting that although Sri Lanka had acceded to the Torture Convention, the government continued to torture Tamil rebels); United States v. Matta-Ballesteros, 71 F.3d 754, 775 (9th Cir. 1995) (Noonan, J., concurring) (suggesting that he might view the case differently if the United States had been a party to the Torture Convention at the time the defendant was kidnapped from Honduras by U.S. Marshals); United States v. Ekwunoh, 888 F. Supp. 369, 374 (E.D.N.Y. 1994) (making brief reference to the Torture Convention to help justify a sentence reduction under the Sentencing Guidelines).

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human rights violations. In three of those five cases, the court did not even mention the NSE declaration, but nevertheless declined to reach the merits of the treaty-based human rights claims for other reasons.[328]

There were only two cases in which the court explicitly addressed the legal effect of the NSE declaration: *White v. Paulsen*[329] and *In re Extradition of Cheung*.[330] *Cheung* is discussed in detail below.[331] *White* involved claims by former prisoners that they had been subjected to nonconsensual medical experiments while they were prisoners in the custody of the State of Washington.[332] The plaintiffs raised claims under state tort law, the U.S. Constitution, customary international law, the Torture Convention, and the ICCPR.[333] The Court held that neither the Torture Convention nor the ICCPR gives rise to a private cause of action.[334] In reaching this conclusion, the court relied primarily on the language of the treaties,[335] and only secondarily on the NSE declarations.[336] Regardless of the rationale, the court was almost certainly correct to conclude that the treaties do not create a private cause of action.[337]

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328. *See* White v. Johnson, 79 F.3d 432, 437–39 & 440 n.2. (5th Cir. 1996) (finding that where a Texas state prisoner petitioned for habeas corpus relief, challenging his death sentence under the ICCPR, the Torture Convention, and the Eighth Amendment, the prisoner's treaty and constitutional claims were barred under the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), and that his treaty claims were precluded by Senate reservations); Ozdemir v. I.N.S., 46 F.3d 6, 8 (5th Cir. 1994) (finding that where the petitioner alleged, inter alia, that deportation to Turkey would violate his rights under Article 3 of the Torture Convention, "[w]e have no jurisdiction to decide this issue because it was not raised" to the Board of Immigration Appeals); Price v. Dixon, 961 F. Supp. 894, 896, 903 (E.D.N.C. 1997) (adopting, without discussing, a magistrate judge's recommendation of summary judgment against a prisoner who claimed abuses in violation of the torture convention).

329. 997 F. Supp. 1380 (E.D. Wash. 1998).

330. 968 F. Supp. 791 (D. Conn. 1997).

331. *See infra* Subsection VI.B.3.

332. *See White*, 997 F. Supp. at 1382.

333. The ICCPR prohibits "cruel, inhuman or degrading treatment or punishment," stating expressly that "no one shall be subjected without his free consent to medical or scientific experimentation." ICCPR, *supra* note 5, art. 7. The Torture Convention also prohibits "cruel, inhuman or degrading treatment or punishment." Torture Convention, *supra* note 8, art. 16, para. 1. The United States adopted reservations to both articles, limiting U.S. obligations under the treaties so that the United States is obligated to protect the subject rights only to the extent that they are already protected by the U.S. Constitution. *See* 138 CONG. REC. S4783 (1992); 136 CONG. REC. S17,491 (1990).

334. *See White*, 997 F. Supp. at 1385–87.

335. *See id.* The court's argument, based on the language of the treaty, parallels the Carter Administration's argument that the human rights treaties were inherently non-self-executing even in the absence of NSE declarations. *See supra* Section IV.A. For the reasons noted above, the "language of the treaty" argument is not persuasive. *See id.*

336. With respect to the NSE declaration(s), the court stated that "this declaration may not carry controlling weight on this issue, [but] the view of the Senate is entitled to substantial deference given the role the United States Constitution confides in the Senate with regard to the process of making treaties the law of the United States." *White*, 997 F. Supp. at 1387.

337. See *infra* Subsection VI.B.5 for further elaboration of this point.

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Since April 2, 1992, when the Senate provided its advice and consent for ratification of the ICCPR, there have been twenty-four published dispositions in which courts have mentioned the ICCPR.[338] Seven of those twenty-four cases have been discussed above, because they also make reference to the Race Convention or the Torture Convention.[339] In nine of the other seventeen cases, the litigants did not raise claims under the ICCPR.[340] Thus, there are only eight cases that do not mention the Torture Convention or the Race Convention in which litigants raised ICCPR-based claims. In one of those eight cases, the court reached the merits of the claim without discussing the NSE declaration.[341] In six other cases, the courts

338. In addition, there have been five unpublished dispositions in which Courts have mentioned the ICCPR. *See* Weber v. Brayton, No. c-95-2-154 RMW, 1995 WL 429238 (N.D. Cal. July 13, 1995); Abebe-Jiri v. Negewo, No. 1:90-CV-2010-GET, 1993 WL 814304 (N.D. Ga. Aug. 20, 1993); Denegri v. Chile, Civ. A. No. 86-3085, 1992 WL 91914 (D.D.C. April 6, 1992); Domingues v. State, No. 29896, 1998 WL 433791 (Nev. July 3, 1998); State v. Keene, No. 14375, 1996 WL 531606 (Ohio Ct. App. Sept. 20, 1996).

339. *See* Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996); White v. Johnson, 79 F.3d 432 (5th Cir. 1996); Siderman de Blake v. Argentina, 965 F.2d 699 (9th Cir. 1992); Valeria v. Wilson, No. C-98-2252-Cal, 1998 WL 400119 (N.D. Cal. July 15, 1998); White v. Paulsen, 997 F. Supp. 1380 (E.D. Wash. 1998); *In re* Extradition of Cheung, 968 F. Supp. 791 (D. Conn. 1997); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass 1995).

340. In two of those nine cases, the courts made only passing reference to the ICCPR. *See* United States v. Balsys, 118 S.Ct. 2218, 2234 n.16 (1998); Austin v. Hopper, No. CIV.A.95-T-637-N, 1998 WL 497693, at *59 n.222 (M.D. Ala. Aug. 10, 1998). In the other seven cases, the courts referred to the ICCPR as an aid to interpreting statutory or constitutional provisions. *See* Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998) (citing the ICCPR in support of the proposition "that there is a clear international prohibition against arbitrary arrest and detention" in the context of a claim under the Alien Tort Claims Act); Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1252 n.11 (S.D. Fla. 1997) (holding the Cuban Air Force liable for extrajudicial killings of U.S. citizens, and citing the ICCPR in support of the proposition that extrajudicial killing violates international law); United States v. Bakeas, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997) (citing the ICCPR as part of the rationale for departure from the Sentencing Guidelines); Mojica v. Reno, 970 F. Supp. 130, 151–52 (E.D. N.Y. 1997) (citing the ICCPR and the *Charming Betsy* principle in support of its conclusion that Section 440(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), could not be applied retroactively to petitioners); Caballero v. Caplinger, 914 F. Supp. 1374, 1378, 1379 n.6 (E.D. La. 1996) (mentioning briefly, in a habeas case, the ICCPR and other human rights instruments to support the conclusion that a federal statute deprived petitioner, an alien, of his due process rights, because the statute allowed the Immigration and Naturalization Service to place him in custody and "does not provide any procedures for protecting [his] liberty interest" in remaining free pending deportation); Bott v. DeLand, 922 P.2d 732, 740 (Utah 1996) (referring, in a civil suit by a prisoner against prison officials, to the ICCPR and other international human rights instruments in the context of discussing the proper interpretation of the "unnecessary abuse" standard under the Utah Constitution); Kazi v. Dubai Petroleum Co., 961 S.W.2d 313, 315–18 (Tex. App. 1997, writ granted) (holding that the ICCPR establishes "equal treaty rights" between the United States and India within the meaning of the Texas wrongful death statute, and that therefore the lower court erred by dismissing, for lack of subject matter jurisdiction, a wrongful death action by Indian citizens).

341. In *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996), the plaintiffs challenged the constitutionality of regulations restricting travel to Cuba. *See id.* at 1433. They also alleged that the regulations conflict with Article 12 of the ICCPR. *See id.* at 1441. The court did not discuss the NSE declaration. The majority addressed the merits of the ICCPR claim, holding that Article 12(2) merely protects the right to "leave any country;" it does not protect the

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declined to reach the merits of ICCPR-based claims for reasons that had nothing to do with the NSE declaration.[342]

There was only one case in which the court explicitly addressed the legal effect of the NSE declaration. In *Igartua de la Rosa v. United States*,[343] residents of Puerto Rico alleged that their inability to vote in the U.S. presidential election violated their constitutional and ICCPR rights. The court rejected their constitutional claim on the merits,[344] and dismissed their ICCPR claim with the conclusory assertion that the claim "is without merit."[345] The court's cursory treatment of the plaintiffs' ICCPR claim was unfortunate. Article 25 of the ICCPR specifically provides that "[e]very citizen shall have the right . . . to vote."[346] The court stated explicitly that

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right of U.S. citizens to travel to a particular foreign destination, such as Cuba. *See id.* at 1441–42. Judge Kozinski, in a concurring opinion, argued that most of the plaintiffs' claims, including the ICCPR claim, were not ripe, because petitioners had not "applied for and been denied a license." *Id.* at 1443 (Kozinski, J., concurring).

342. *See* United Mexican States v. Woods, 126 F.3d 1220, 1223 (9th Cir. 1997) (holding that the Eleventh Amendment barred suit by Mexico against a state attorney general in a case in which Mexico argued that execution of a Mexican citizen would violate the ICCPR); Roman-Nose v. New Mexico Dept. of Human Servs., 967 F.2d 435, 437 (10th Cir. 1992) (stating that, in a *pro se* action challenging the termination of parental rights by the State of New Mexico as a violation of the ICCPR, the court did not "know of any manner by which Plaintiff can obtain relief from state actions which violate international treaties"); United States v. Dunifer, 997 F. Supp. 1235, 1238 n.5 (N.D. Cal. 1998) (declining to review ICCPR-based claims that the defendant had raised before the Federal Communications Commission but had not reasserted in court); United States v. Any and All Radio Station Transmission Equip., 976 F. Supp. 1255, 1259 (D. Minn. 1997) (dismissing ICCPR-based and other challenges to FCC regulations on the ground that exclusive jurisdiction to determine the validity of FCC regulations is vested in the U.S. Court of Appeals); Backlund v. Hessen, 904 F. Supp. 964 (D. Minn. 1995) (interpreting a suit under 42 U.S.C. §§ 1981 and 1983 (1994), claiming violations of Articles 2 and 26 of the ICCPR, as an attempt to apply the Alien Tort Statute, 28 U.S.C. § 1350 (1994), and holding the statute inapplicable); Rodgers v. Ohio Dept. of Rehabilitation and Correction, 632 N.E.2d 1355 (Ohio App. 1993) (rejecting prisoner's claim that defendant violated his ICCPR rights on the grounds that: (1) defendant is immune from liability; and (2) the Ohio Court of Claims, in which plaintiff filed suit, lacked jurisdiction over the allegations in the complaint).

343. 32 F.3d 8 (1st Cir. 1994).

344. The gist of the court's constitutional analysis is summarized in the following paragraph:

> While appellants are citizens of the United States, the Constitution does not grant citizens the right to vote directly for the President. Instead, the Constitution provides that the President is to be chosen by electors who, in turn, are chosen by "each state . . . in such manner as the Legislature thereof may direct." Pursuant to Article II, therefore, only citizens residing in states can vote for electors and thereby indirectly for the President. Since Puerto Rico is concededly not a state, it is not entitled under Article II to choose electors for the President, and residents of Puerto Rico have no constitutional right to participate in that election.

Id. at 9–10 (citations omitted).

345. *Id.* at 10 n.1.

346. Article 25 provides, in relevant part: "Every citizen shall have the right and the opportunity . . . *without unreasonable restrictions* . . . to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." ICCPR, *supra* note 5, art. 25 (emphasis added).

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"appellants are citizens of the United States."[347] Thus, the ICCPR clearly protects their right to vote. The court noted that U.S. citizens residing in Puerto Rico are "eligible to vote in the federal election for the Resident Commissioner."[348] However, it is questionable whether the United States is fulfilling its treaty obligation under Article 25 by allowing citizens who reside in Puerto Rico to vote for Resident Commissioner, while denying them the opportunity to vote for President.[349] Thus, the plaintiffs in this case raised a non-frivolous, nonredundant claim.[350]

After concluding that the ICCPR claim was without merit, the court stated, "Even if Article 25 could be read to imply such a right, Articles 1 through 27 of the ICCPR were not self-executing . . . and could not therefore give rise to privately enforceable rights under United States law."[351] The phrase "privately enforceable rights" is somewhat ambiguous and perhaps overbroad.[352] Regardless, the court correctly concluded that the NSE declaration barred this particular claim, because the plaintiffs attempted to rely on the ICCPR to create a private cause of action.

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347. *Igartua de la Rosa*, 32 F.3d at 9.

348. *Id.* at 11 n.3.

349. The parameters of the Article 25 right to vote are not well defined. The most detailed scholarly commentary on the ICCPR indicates that "Art. 25(b) does not establish which *organs* are to be filled by election. . . . What is decisive is that those State organs in which both legal and *de facto* power is concentrated are either directly or indirectly legitimated by elections." MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 443 (1993). Moreover, Article 25 requires "that voters have a certain minimum amount of political influence." *Id.* at 444. Finally, "restrictions on the principle of free elections, such as the prohibition that certain parties or groups may not take part in elections, require special, factual justification, since they would otherwise have to be deemed unreasonable within the meaning of Art. 25." *Id.* at 450. Thus, although the plaintiffs in *Igartua de la Rosa* might or might not have a meritorious claim, it is clearly a non-frivolous claim.

350. The court also argued that the ICCPR cannot "override . . . constitutional limits." *Igartua de la Rosa*, 32 F.3d at 10 n.1. This statement is true, but irrelevant. If the Constitution prohibited Puerto Rican residents from voting for President, the fact that a treaty cannot override constitutional limits would be relevant. The Constitution, however, does not include any such prohibition. It merely provides that the President is chosen by electors who are chosen by "each state." U.S. CONST. art. II, § 1, cl. 2. Because residents of Puerto Rico are not residents of a "state," they are denied the opportunity to vote for President. The court concludes that only a "constitutional amendment or a grant of statehood to Puerto Rico, therefore, can provide appellants the right to vote in the presidential election." *Igartua de la Rosa*, 32 F.3d at 10. The court's conclusion is erroneous. The court discusses the Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff (1994), which allows U.S. citizens who reside outside the United States to vote for President by absentee ballot in the state in which they last resided, provided that they otherwise qualify to vote in that state. *See Igartua de la Rosa*, 32 F.3d at 10. The Act does not accord rights to Puerto Rican residents, because they do not reside "outside the United States." However, that statutory provision could easily be amended to provide a similar right to residents of Puerto Rico. Nothing in the Constitution prohibits Congress from enacting such legislation. Indeed, the United States may have an obligation to do so under Article 25 of the ICCPR.

351. *Igartua de la Rosa*, 32 F.3d at 10 n.1.

352. *See supra* note 200 and accompanying text.

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This brief summary of the case law shows that litigants rarely raise treaty-based human rights claims. Moreover, when litigants do raise such claims, courts usually do not even mention the NSE declaration. Out of fourteen cases in which litigants did raise treaty-based human rights claims,[353] only three judicial opinions mention the NSE declaration,[354] and in two of those cases the issue is relegated to a single footnote.[355] In short, both advocates and judges have failed to appreciate the possibilities for judicial application of human rights treaties to which the United States is a party.

B. *A Proposed Framework for Judicial Decision-Making*

This Section presents a proposed decision-making model for judges to apply in determining whether to address the merits of treaty-based human rights claims.

1. *Is It a Frivolous Claim?*

If either a plaintiff or a defendant presents a frivolous treaty-based human rights claim, the court should not entertain the claim. For example, in one recent case an Ohio prisoner claimed that the state's prohibition against conjugal visits and masturbation by prisoners violated his constitutional and ICCPR rights.[356] The ICCPR provides that prisoners "shall be treated with humanity and with respect for the inherent dignity of the human person."[357] In light of prison conditions in many facilities today, one could imagine many non-frivolous claims that prisoners could raise under this particular ICCPR provision.[358] However, the claim that the

353. *See* United Mexican States v. Woods, 126 F.3d 1220, 1223 (9th Cir. 1997); Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431 (9th Cir. 1996); White v. Johnson, 79 F.3d 432 (5th Cir. 1996); Ozdemir v. I.N.S., 46 F.3d 6 (5th Cir. 1994); *Igartua de la Rosa*, 32 F.3d at 8; Roman-Nose v. New Mexico Dept. of Human Servs., 967 F.2d 435 (10th Cir. 1992); Valeria v. Wilson, No. C-98-2252-CAL., 1998 WL 400119 (N.D. Cal. July 15, 1998); White v. Paulsen, 997 F. Supp. 1380 (E.D. Wash. 1998); United States v. Dunifer, 997 F. Supp. 1235, 1238 n.5 (N.D. Cal. 1998); United States v. Any and All Radio Station Transmission Equip., 976 F. Supp. 1255 (D. Minn. 1997); Matter of Extradition of Cheung, 968 F. Supp. 791 (D. Conn. 1997); Price v. Dixon, 961 F. Supp. 894 (E.D.N.C. 1997); Backlund v. Hessen, 904 F. Supp. 964 (D. Minn. 1995); and Rodgers v. Ohio Dept. of Rehabilitation and Correction, 632 N.E.2d 1355 (Ohio App. 1993).

354. *See Igartua de la Rosa*, 32 F.3d at 10 n.1; *White*, 997 F. Supp. at 1380; *Extradition of Cheung*, 968 F. Supp. at 803 n.17.

355. *See Igartua de la Rosa*, 32 F.3d at 10 n.1; *Extradition of Cheung*, 968 F. Supp. at 803 n.17.

356. *See* Rodgers v. Ohio Dept. of Rehabilitation and Correction, 632 N.E.2d 1355 (Ohio App. 1993).

357. ICCPR, *supra* note 5, art. 10, para. 1. Surprisingly, the United States did not adopt any reservation or understanding to modify its obligations under Article 10(1), although it did adopt one reservation and one understanding with respect to Article 10(2) and 10(3). *See* 138 CONG. REC. S4783-84 (1992).

358. In its comments on the report submitted by the United States, the Human Rights

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ICCPR protects a prisoner's right to masturbate is ridiculous. It is clear that one purpose of the NSE declaration was to ensure that litigants do not flood the already crowded dockets of federal and state courts with frivolous treaty-based human rights claims.[359] Hence, the court properly dismissed this claim.[360]

2. *Is Relief Available Under Some Other Provision of U.S. Law?*

If the relief the claimant seeks is available under state or federal constitutional, statutory, or common law, then the court should grant the claimant the relief he seeks without addressing the treaty-based human rights claim. This proposition is axiomatic in "easy cases," in which the relief the claimant seeks is clearly available under other provisions of domestic law. However, "hard cases" that could be decided either way under other provisions of domestic law merit further discussion.

For example, suppose that U.S. law enforcement officers forcibly abducted a Honduran national from his home in Honduras, tortured him, extracted a confession as a result of torture, and then brought him to the United States to stand trial on criminal charges.[361] If the government attempted to introduce the confession as evidence at trial, the defendant could object that admission of the evidence would violate both Article 15 of

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Committee said the following about prison conditions and U.S. compliance with Article 10(1):

> The Committee is concerned about conditions of detention of persons deprived of liberty in federal or state prisons, particularly with regard to planned measures which would lead to further overcrowding of detention centres. The Committee is also concerned at the practice which allows male prison officers access to women's detention centres and which has led to serious allegations of sexual abuse of women and the invasion of their privacy. The Committee is particularly concerned at the conditions of detention in certain maximum security prisons which are incompatible with Article 10 of the Covenant and run counter to the Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials.

Human Rights Committee, *supra* note 240, at 640.

359. *See, e.g.*, *Carter Hearings*, *supra* note 16, at 40 (prepared statement of Jack M. Goldklang) (stating that the NSE declarations mean "that the treaties will not be a source of additional litigation in our own courts"); RACE REPORT, *supra* note 65, at 25-26 (stating, as part of its justification for the NSE declaration, that "there is no discernible need for the establishment of additional causes of action or new avenues of litigation in order to enforce the essential requirements of the Convention").

360. The court rejected the claim on two grounds: (1) that defendant was immune from liability; and (2) the Ohio Court of Claims, in which plaintiff filed suit, lacked jurisdiction over the allegations in the complaint. *See Rodgers*, 632 N.E.2d at 1355.

361. In *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995), U.S. marshals forcibly abducted a Honduran national from his home in Honduras and brought him to the United States to stand trial on criminal charges. The defendant alleged that "he was beaten and burned with a stun gun at the direction of the Marshals. He claims that during his flight he was once again beaten and tortured by a stun gun applied to various parts of his body, including his feet and genitals." *Id.* at 761. The government disputed his allegations of torture. *Id.* He apparently did not confess to the crime for which he was charged.

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the Torture Convention and the Fifth Amendment Due Process Clause. If the confession was indeed obtained as a result of torture, Article 15 of the Torture Convention clearly prohibits admission of the evidence.[362] The Due Process Clause would also prohibit admission of the evidence if the defendant made the confession in the United States, but it is uncertain how the Fifth Amendment applies to a confession made by a non-U.S. citizen outside the United States.[363] In such a case, the court should interpret the Fifth Amendment to prohibit admission of the evidence, and decline to reach the merits of the treaty-based claim.

There are two powerful arguments to support this result. First, the treaty makers intended that victims of human rights abuses would be able to vindicate their treaty-based rights by relying on preexisting state and federal constitutional, statutory, and common law,[364] without having to invoke the treaty rights directly. Indeed, the treaty makers justified the NSE declarations by claiming that neither self-execution nor implementing legislation was necessary for the United States to carry out its treaty obligations, because preexisting U.S. laws already provided greater protection for human rights than the United States was obligated to provide under the treaties.[365] With respect to the Torture Convention, in particular,

362. Article 15 of the Torture Convention obligates the United States to "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." Torture Convention, *supra* note 8, art. 15.

It would be unreasonable to interpret Article 15 to apply only to acts of torture committed within the geographical boundaries of the United States. The language of Article 15 is quite broad; it suggests no geographical limitation. Moreover, it is clear that the treaty makers intended for at least some provisions of the Convention to have extraterritorial application. Indeed, the purpose of the U.S. implementing legislation was to establish federal criminal jurisdiction for acts of torture committed outside the United States. *See supra* notes 168–170 and accompanying text. Moreover, with respect to Article 14, the United States adopted an understanding to clarify that it applies only to acts of torture committed in the United States. *See* 136 CONG. REC. S17,492 (1990). If the treaty makers had intended to establish a similar geographical limitation on Article 15, they presumably would have adopted an understanding to that effect.

363. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 261, 264 (1990) (holding that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country," but suggesting that different considerations might apply to Fifth Amendment claims); *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.").

364. *See supra* Subsection V.C.2.

365. *See, e.g.*, ICCPR REPORT, *supra* note 44, at 19 (stating, in the context of justifying the NSE declaration for the ICCPR, that "existing U.S. law generally complies with the ICCPR; hence, implementing legislation is not contemplated"). The Clinton Administration stated the following to justify the NSE declaration for the Race Convention:

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the Reagan Administration assured the Senate that any confessions obtained in violation of Article 15 would be inadmissible under the Fifth Amendment.[366] In short, the treaty makers intended for the courts to construe other provisions of domestic law to provide remedies for violations of rights protected under human rights treaties, thereby avoiding the need for direct judicial application of the treaties. Therefore, in the hypothetical case discussed above, the court should interpret the Fifth Amendment to prohibit admission of the coerced confession, and decline to reach the merits of the treaty-based claim, because that is precisely what the treaty makers intended.

Even apart from the treaty makers' intent, there is a separate argument that supports this result. Almost two hundred years ago, in *Murray v. The Schooner Charming Betsy*, Chief Justice Marshall wrote that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[367] The Supreme Court has invoked this maxim both to avoid conflicts with general principles of international law,[368] and to avoid conflicts with specific provisions of international agreements.[369] Although the Supreme Court has typically applied this maxim in cases involving statutory construction, the underlying principle applies with equal force, regardless of whether a court is interpreting constitutional, statutory, or common law.[370] The decision for the United States to violate an

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> As was the case with the prior treaties, existing U.S. law provides extensive protections and remedies sufficient to satisfy the requirements of the present Convention. Moreover, federal, state and local laws already provide a comprehensive basis for challenging discriminatory statutes, regulations and other governmental actions in court, as well as certain forms of discriminatory conduct by private actors. Given the extensive provisions already present in U.S. law, there is no discernible need for the establishment of additional causes of action or new avenues of litigation in order to enforce the essential requirements of the Convention.

RACE REPORT, *supra* note 65, at 25-26.

366. *See* TORTURE REPORT, *supra* note 46, at 24-25 ("Statements made under torture generally would be subject to exclusion under U.S. rules of evidence. . . . The United States rules against admissibility of illegally obtained evidence and involuntary confessions are stricter than is provided for under the Convention.").

367. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

368. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting) (contending that the Sherman Act should not be construed to apply extraterritorially, because such a construction is contrary to customary international law); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (holding that the National Labor Relations Act does not extend to maritime operations of foreign flag ships employing alien seamen); Lauritzen v. Larsen, 345 U.S. 571, 593 (1953) (holding that there is "no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in our waters").

369. *See* Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (holding that Section 106 of Pub. L. 92-129, which prohibits employment discrimination against U.S. citizens on military bases overseas, did not abrogate executive agreements between the United States and foreign countries that provide for preferential hiring of local nationals on U.S. military bases overseas).

370. For fuller development of this argument, see Gordon Christenson, *Using Human Rights*

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international legal obligation is a political decision, best entrusted to the political branches of government. Therefore, the judiciary should, whenever possible, construe state and federal constitutional, statutory, and common law in a manner that is consistent with the U.S. international legal obligations, absent a clearly expressed decision by the political branches to violate those obligations.[371] The political branches have not expressed an intention for the United States to violate its obligations under human rights treaties; to the contrary, they have clearly expressed their intention to comply.[372] Therefore, in accordance with the *Charming Betsy* maxim, courts should, wherever possible, construe other provisions of U.S. law in a manner that is consistent with U.S. obligations under human rights treaties.

3. *Is There an Alternative Forum Available?*

As noted above, the United States has an international legal obligation under human rights treaties to ensure that any person who raises a non-frivolous allegation that his or her treaty rights have been violated is entitled to an individual hearing before an impartial tribunal that has authority to adjudicate the merits of the claim. However, the treaties do not obligate the United States to ensure that all such claims are adjudicated before an Article III judge.[373] Moreover, the NSE declarations clearly reflect a general reluctance on the part of the treaty makers to permit litigation of treaty-based human rights claims in Article III courts. Therefore, in cases where some other forum is available that can satisfy the U.S. treaty obligation to provide an individual hearing before an impartial tribunal, judges should decline to reach the merits of treaty-based human rights claims.

Law to Inform Due Process and Equal Protection Analyses, 52 U. CIN. L. REV. 3 (1983); *see also* PAUST, *supra* note 20, at 191–96 (presenting Supreme Court recognition of human rights as useful content for the explication of constitutional and statutory norms).

371. Applying this principle in cases involving treaty obligations, the Court has stated that "a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (quoting Cook v. United States, 288 U.S. 102, 120 (1933)); *see also* Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968) ("the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress" (quoting Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 (1934))). In *Trans World Airlines*, the Court relied on this principle to sustain its conclusion that the Warsaw Convention's cargo liability limit was enforceable in U.S. courts, notwithstanding subsequent acts of Congress that could reasonably have been interpreted to render that Convention unenforceable. *See Trans World Airlines*, 466 U.S. at 251–53. In *Cook*, the Court relied on this principle to reach its conclusion that a 1924 Treaty with Great Britain controlled the disposition of a liquor smuggling case, and that a subsequent act of Congress had not superseded the 1924 Treaty. *See Cook*, 288 U.S. at 119–20.

372. *See supra* Subsection V.C.1.

373. *See supra* notes 78–80 and accompanying text.

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For example, *In re Extradition of Cheung*[374] involved a request by the United Kingdom for the United States to extradite John Cheung to Hong Kong. Cheung claimed that, if he were extradited, "he could be subjected to inhumane treatment, torture and possibly execution."[375] He argued that extradition would therefore violate his rights under Article 3 of the Torture Convention and Articles 6 and 14 of the ICCPR.[376] Neither Article 6 nor Article 14 of the ICCPR addresses extradition;[377] accordingly, the court did not address the merits of Cheung's ICCPR-based claims. However, Article 3 of the Torture Convention expressly prohibits extradition "where there are *substantial grounds* for believing" that a person would be "in danger of being subjected to torture."[378] The United States adopted an understanding with respect to Article 3, stating that it interpreted this provision to prohibit extradition "if it is *more likely than not* that he would be tortured."[379] The court reached the merits of Cheung's Torture Convention claim, holding that "[t]he factual proof offered by Cheung . . . meets neither the 'substantial grounds' nor the 'more likely than not' standard of proof with respect to the Convention Against Torture."[380]

With respect to the NSE declarations, the court added the following in a footnote:

> Even if there were sufficient factual grounds, Cheung's reliance on the ICCPR and the Covenant [sic] Against Torture will not prevent extradition. . . . [B]oth treaties were ratified with the express proviso that they were not self-executing. Since Congress has not enacted any implementing legislation, *Cheung may not rely on them to avoid extradition.*[381]

The court's conclusion that Cheung could not rely on the treaties to avoid extradition exhibits a fundamental confusion about the meaning of the NSE declarations. Suppose, hypothetically, that it was "more likely than not" that

374. 968 F. Supp. 791 (D. Conn. 1997).

375. *Id.* at 802. The court might well have dismissed these claims as baseless, but for the fact that the decision was rendered shortly before Hong Kong's long-awaited return to China, and Cheung submitted extensive documentation regarding China's human rights abuses.

376. *See id.*

377. Article 14 provides a variety of procedural safeguards for criminal defendants. *See* ICCPR, *supra* note 5, art. 14. Although the United States, as a party to the ICCPR, is obligated to ensure that criminal defendants in the United States receive the benefits of Article 14, that article does not prohibit the United States from extraditing a person to a country where the procedural safeguards for criminal defendants fail to satisfy the requirements of Article 14. Article 6 protects the right to life. *See* ICCPR, *supra* note 5, art. 6. Although Article 6 says nothing, on its face, about extradition, one could make a plausible argument that the United States would violate Article 6 if it extradited a person to a third country, knowing that the third country intended to execute the person, and knowing that the criminal justice system in that country lacked adequate procedural safeguards with respect to the imposition of the death penalty.

378. Torture Convention, *supra* note 8, art. 3, para. 1 (emphasis added).

379. 136 CONG. REC. S17,492 (1990) (emphasis added).

380. *Extradition of Cheung*, 968 F. Supp. at 802.

381. *Id.* at 803 n.17 (emphasis added).

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Cheung would be tortured if he were extradited to Hong Kong. In that case, the United States would have an international legal obligation under the Torture Convention to refrain from extraditing Cheung.[382] Moreover, even under the *Foster* concept of non-self-execution, that treaty obligation has domestic legal force. The fact that it is not self-executing means only that it is not a "rule for the courts."[383] In Cheung's case, however, the question whether Article 3 of the Torture Convention is a "rule for the courts" is unimportant, because under U.S. law the Secretary of State, not the court, is the final decision-maker in extradition cases.[384] Moreover, the Secretary of State has a constitutional duty to "take Care that the Laws be faithfully executed."[385] This duty applies to treaties as well as other laws.[386] Thus, the NSE declaration notwithstanding, the Secretary of State has a duty to ensure that no one is extradited in violation of the Torture Convention, and Cheung is entitled to expect that the Secretary will perform his duty. Therefore, the court's conclusion that Cheung could not rely on the treaties to avoid extradition is erroneous.

The "legislative history" of the Torture Convention is consistent with the preceding analysis. As noted above, Article 3 prohibits extradition in cases "where there are substantial grounds for believing that [a person] would be in danger of being subjected to torture."[387] Article 3 also states: "For the purpose of determining whether there are such grounds, the *competent authorities* shall take into account all relevant considerations . . . ."[388] When President Reagan transmitted the Convention to the Senate, he proposed a declaration stating that "the phrase, 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases."[389]

382. This follows from Article 3 and from the U.S. understanding. *See supra* notes 378–379 and accompanying text.

383. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) ("Our constitution declares a treaty to be the law of the land. . . . [But a non-self-executing] treaty addresses itself to the political, not the judicial department."). The *Foster* formulation makes clear that non-self-executing treaties are binding on the political branches.

384. *See* 18 U.S.C. §§ 3184–3186 (1994). Section 3184 provides that if a judge "deems the evidence sufficient to sustain the charge under the provisions of the proper [extradition] treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State." 18 U.S.C. § 3184. Section 3186 provides that the "Secretary of State *may* order the person . . . to be delivered to any authorized agent of such foreign government." 18 U.S.C. § 3186 (emphasis added). Thus, the judge's responsibility under the statute is simply to determine whether the "evidence is sufficient to sustain the charge" under the relevant treaty. However, the Secretary of State has the discretion to choose not to extradite the person, even after the judge determines that the requirements of the extradition treaty have been satisfied.

385. U.S. CONST. art. II, § 3.

386. *See* HENKIN, *supra* note 97, at 50.

387. Torture Convention, *supra* note 8, art. 3, para. 1.

388. *Id.* art. 3, para. 2.

389. TORTURE REPORT, *supra* note 46, at 17.

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President Bush later recommended deleting the declaration on the grounds that it was unnecessary, but stated that "it remains true that the competent authorities referred to in Article 3 would be the Secretary of State in extradition cases and the Attorney General in deportation cases."[390] These statements show that the NSE declaration was not intended to preclude the government from granting relief under Article 3. Rather, the treaty makers intended for the Executive Branch, and not the courts, to decide the merits of individual claims under Article 3.[391]

In the U.S. legal system, of course, Article III courts are the most common fora in which individuals seek remedies for violations of their rights. Hence, many cases will undoubtedly arise in which litigants seek judicial remedies for violations of treaty-based rights, and no alternative forum is available. The *Cheung* case, though, demonstrates that Article III courts are not the only bodies capable of adjudicating treaty-based human rights claims. Since the NSE declaration reflects a general reluctance on the part of the treaty makers for Article III courts to adjudicate such claims, courts should exercise appropriate restraint whenever an alternative forum is available.

4. *Is the Treaty Being Invoked as a Defense to a Civil or Criminal Action Initiated by the Government?*

Thus far, this Section has discussed cases in which it is not necessary for judges to reach the merits of treaty-based human rights claims, because the United States can fulfill its treaty obligations either by providing judicial relief under some other provision of domestic law, or by adjudicating the claim in an alternative forum. The more difficult cases are those in which the litigant raises a non-frivolous claim, there is no alternative forum in which to adjudicate the claim, and there is no relief available under other provisions of domestic law. If a judge declines to reach the merits of such a claim, the judge would contravene the treaty makers' intent for the United

390. *Id.* at 37.

391. Thus, even if the United States had not attached an NSE declaration to the Torture Convention, it would still be appropriate for the courts in extradition cases to refrain from adjudicating claims under Article 3, because: (1) the treaty makers intended for the Secretary of State to decide the merits of such claims, and (2) federal statutes give the Secretary the final decision-making authority.

Individuals facing the threat of deportation to countries where they are likely to be tortured have also begun to raise claims under Article 3 of the Torture Convention during hearings before U.S. immigration judges. *See supra* notes 308–313 and accompanying text (discussing *Matter of Abu*). Since immigration judges are members of the Executive Branch, not the Judicial Branch, the NSE declarations do not preclude enforcement of Article 3 by U.S. immigration judges, even under the *Foster* concept. *See supra* notes 103–105 and accompanying text. However, deportation cases differ from extradition cases insofar as federal statutes explicitly provide for judicial review of decisions by immigration judges in deportation cases. *See* 8 U.S.C. § 1252 (1994).

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States to comply with its international treaty obligations. But if a judge reaches the merits and decides that the claim is meritorious, he would be contravening the treaty makers' intent to avoid domesticating human rights treaties. How should judges resolve this dilemma?

Consider once again the case of the Old Order Amish. In Minnesota, police issued traffic citations to members of the Amish religion for noncompliance with a statute that required slow-moving vehicles to display a fluorescent orange-red sign.[392] The Amish claimed that the statute infringed on their First Amendment right to the free exercise of religion.[393] The Minnesota Supreme Court agreed and dismissed the charges against the defendants.[394] The State of Minnesota petitioned the U.S. Supreme Court for a writ of certiorari. Unfortunately for the Amish, the Supreme Court decided *Employment Division, Department of Human Resources v. Smith*[395] while the petition for certiorari was pending. The Supreme Court granted certiorari, vacated the judgment and remanded for further consideration in light of *Smith*.[396] On remand, the Minnesota Supreme Court declined to decide the federal constitutional issue; instead, it invalidated the traffic regulation, as applied to the Amish, on the ground that it was inconsistent with the religion provisions of the Minnesota Constitution.[397]

Suppose, hypothetically, that the Amish could not obtain relief under state law. The Free Exercise Clause of the U.S. Constitution, as interpreted in *Smith*, does not entitle the Amish to a religious exemption from a "valid and neutral law of general applicability,"[398] such as the Minnesota traffic regulation. There is no federal statute on which the Amish could base a defense to the traffic citations.[399] If this case arose after the United States became a party to the ICCPR, however, the Amish could invoke Article 18

392. *See* State v. Hershberger, 444 N.W.2d 282, 284 (Minn. 1989).

393. *See id.*

394. *See id.* at 289–90.

395. 494 U.S. 872, 879 (1990) (holding that, with certain exceptions, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (Stevens, J., concurring) (1982))).

396. Minnesota v. Hershberger, 495 U.S. 901, 901 (1990).

397. *See* State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990).

398. *Smith*, 494 U.S. at 879.

399. Congress attempted to overrule the Supreme Court's holding in *Smith* by passing the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (1994). However, in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the Supreme Court ruled that RFRA was unconstitutional because Congress had exceeded its powers under Section 5 of the Fourteenth Amendment. Congress is still weighing possible responses to the Supreme Court's decision in *Flores*. One possible response would be to re-enact RFRA, or something like RFRA, as implementing legislation for Article 18 of the ICCPR. *See* Neuman, *supra* note 5, at 49–51. Such a law would almost certainly be constitutional. *See id.* Regardless, as of the date of this Article, *Smith* defines the scope of federal constitutional protection for the free exercise of religion.

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of the ICCPR as a defense.[400] While such a claim may or may not be meritorious, it is certainly non-frivolous.[401] Since the ICCPR is a duly ratified treaty, it supersedes inconsistent state law, even if it is non-self-executing.[402] Thus, the question is whether the Amish can invoke Article 18 as a defense to criminal charges, and whether the judge should reach the merits of that claim.

The NSE declaration is ambiguous in this respect. If the NSE declaration is interpreted in accordance with the *Foster* concept of non-self-execution, then it would preclude the judge from reaching the merits of the Amish's claim.[403] If the NSE declaration is construed in accordance with the "private cause of action" concept, however, it would not preclude the judge from reaching the merits of the claim because the Amish are not relying on the ICCPR to establish a private cause of action. To the contrary, they seek to invoke the ICCPR to establish a defense to a criminal charge. The

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400. Article 18 provides, in relevant part:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and *in public or private, to manifest his religion or belief* in worship, observance, practice and teaching . . . .
>
> . . . .
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are *necessary to protect public safety*, order, health, or morals or the fundamental rights and freedoms of others.

ICCPR, *supra* note 5, art. 18 (emphasis added). The United States did not adopt any reservations or understandings with respect to Article 18.

401. Commentators generally agree that Article 18 provides greater protection for freedom of religion than is available under the Free Exercise Clause, as interpreted in *Smith*. *See, e.g.*, NOWAK, *supra* note 349, at 324–25. In defense of their ICCPR claim, the Amish could argue that their right to a religious exemption from the traffic regulation is covered by Article 18's guarantee of the right to manifest one's religion in public. *See* ICCPR, *supra* note 5, art. 18, para. 1. In response, the State could argue that the regulation is "necessary to protect public safety." *Id.* at para. 3. Commentators generally agree that the "requirement of necessity implies that the restriction must be *proportional* in severity and intensity to the purpose being sought." NOWAK, *supra* note 349, at 325. *See also* U.N. GAOR, Hum. Rts. Comm., 48th Sess., General Comment No. 22 (1993), *reprinted in* INT'L HUM. RTS. REP., May 1994, at 31–32 (stating "that paragraph 3 of Article 18 is to be strictly interpreted . . . . Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated."). Nowak adds that "the relevant criterion for evaluating whether interference is necessary is not a common, democratic minimum standard but rather solely whether it was proportional in the given case." NOWAK, *supra* note 349, at 325. In light of these standards, reasonable people could disagree about whether the requirement to display a fluorescent orange-red sign is "necessary to protect public safety." Inasmuch as reasonable people could disagree, the Amish's ICCPR claim is non-frivolous.

402. See, for example, the Bush Administration's response to Senator Helms's inquiry, *supra* note 203 and accompanying text, which stated that "properly ratified treaties can and do supersede inconsistent domestic law. . . . [T]he Supreme Court has long distinguished between treaties which are self-executing and those which are not, the latter being said not to create directly enforceable rights absent subsequent implementing legislation." This answer clearly implies that even a non-self-executing treaty would supersede inconsistent state law. The self-execution question, as explained by the Bush Administration in this passage, does not relate to the status of a treaty within the domestic legal hierarchy. Rather, it relates to the invocability of treaty rights.

403. *See supra* Subsection III.A.2.

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"legislative history" of the ICCPR is of little use in deciding whether to construe the NSE declaration in accordance with the *Foster* concept or the "private cause of action" concept because the Bush Administration explained the NSE declaration differently at different times.[404]

This Article has already referred to the *Charming Betsy* maxim—that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[405] The Supreme Court has given this principle its greatest reach in cases where a statute is designed to implement a treaty, because it is unreasonable to suppose that Congress intended to abrogate or violate a treaty commitment in the very process of implementing it, unless no other interpretation is possible.[406] Similarly, the principle applies with even greater force when interpreting a declaration included in the U.S. instrument of ratification for a treaty, because, in the words of Justice Harlan, "it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government"[407] for a court to assume that the very instrument in which the United States accepted international treaty obligations manifested an intention to violate that treaty, unless no other interpretation is possible. Thus, in cases where a defendant seeks to invoke a human rights treaty as a defense to civil or criminal charges brought by the government, courts should not construe the NSE declarations to violate U.S. treaty obligations, "if any other possible construction remains."[408]

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404. *See supra* Section IV.D.

405. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see supra* notes 367–371 and accompanying text.

406. *See, e.g.*, Chew Heong v. United States, 112 U.S. 536 (1884) (applying the *Charming Betsy* principle to avoid an apparent conflict between an 1880 treaty, which seemingly secured the petitioner's right of entry into the United States, and a subsequent statute that was purportedly intended to implement the treaty, but that appeared on its face to conflict directly with the right of entry secured by the treaty). Justice Harlan, writing for the majority, argued that "the Court should be slow to assume that Congress intended to violate the stipulations of a treaty, so recently made with the government of another country." *Id.* at 539. Moreover, he added:

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the Court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.

Id. at 540. Thus, relying on the fact that Congress had not explicitly stated its intent to abrogate or violate the 1880 treaty with China, the majority deliberately overlooked apparent inconsistencies between the treaty and subsequent statutes, and interpreted the subsequent statutes in a manner that was consistent with the treaty's promised right of entry.

407. *Chew Heong*, 112 U.S. at 540.

408. *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

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The United States has a treaty obligation to ensure that any person who raises a non-frivolous claim that his or her treaty rights have been violated obtains an individual hearing before an impartial tribunal. If the judge in the Amish case construes the NSE declaration in accordance with the *Foster* concept of non-self-execution, and refuses to reach the merits of the claim, then the United States would be in violation of its treaty obligation to provide an individual hearing before an impartial tribunal, because there is no alternative forum in which the Amish's claim can be heard. In this case, the treaty violation is unnecessary because a different interpretation of the NSE declaration is possible. Specifically, the judge can and should interpret the NSE declaration in accordance with the "private cause of action" concept, reach the merits of the claim, and avoid the treaty violation.

More broadly, in any case where a defendant in a civil or criminal proceeding initiated by the government invokes a human rights treaty as a defense to the government's charges, the court should reach the merits of the defendant's claim, unless the claim is frivolous, relief is available under some other provision of domestic law, or there is an alternative forum available in which to adjudicate the claim. Failure to reach the merits of the claim in such cases would be inconsistent with the *Charming Betsy* principle, and with the general intent of the treaty makers to ensure U.S. compliance with its treaty obligations.

5. *Is the Plaintiff Relying on the Treaty to Establish a Private Cause of Action?*

Consider the following case:

> The Atlanta Police arrested Michael Hardwick . . . because he had committed the crime of sodomy with a consenting male adult in the bedroom of his own home. Charges were brought as a result of the arrest . . . [but] the District Attorney's office decided not to present the case to the grand jury unless further evidence developed. Hardwick then filed . . . suit asking the federal district court to declare unconstitutional the Georgia statute that criminalizes sodomy.[409]

The Supreme Court upheld the Georgia statute, ruling that the U.S. Constitution does not protect the right of adult homosexuals to engage in private consensual sexual activity.[410]

Suppose, hypothetically, that Hardwick was arrested in 1996, and his complaint alleged that the Georgia statute violated his right to privacy under Article 17 of the ICCPR.[411] Nicholas Toonen, a homosexual Australian

409. Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir. 1985), *rev'd*, 478 U.S. 186, 192 (1986).

410. *See* Bowers v. Hardwick, 478 U.S. 186, 192 (declining to "extend a fundamental right to homosexuals to engage in acts of consensual sodomy").

411. *See* ICCPR, *supra* note 5, art. 17, para. 1. ("No one shall be subjected to arbitrary or

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citizen residing in the Australian state of Tasmania, made a similar claim in a case presented to the Human Rights Committee.[412] The Committee ruled that Tasmania's criminal sodomy statute violated Mr. Toonen's Article 17 right to privacy.[413] In similar cases, the European Court of Human Rights has also ruled that criminal sodomy laws violate the right to privacy[414] protected by Article 8 of the European Convention on Human Rights.[415] Thus, Hardwick's claim that he has been deprived of his ICCPR rights is non-frivolous and nonredundant.[416]

Even so, if Hardwick does not adduce any other provision of law that provides an independent cause of action to support his claim, the court should dismiss the case for failure to state a claim upon which relief can be granted.[417] Although the Executive Branch's explanations of the NSE declaration changed over time, the one constant factor in those shifting explanations is that the NSE declarations preclude plaintiffs from relying on human rights treaties to establish a private cause of action.[418] Thus, if a plaintiff attempts to use a human rights treaty to establish a private cause of action, the judge should cite the NSE declaration and refuse to reach the merits of the claim, even if this places the United States in violation of its treaty obligation to ensure that individuals obtain an individual hearing before an impartial tribunal. The *Charming Betsy* principle, as applied to the NSE declarations, says that judges should interpret the NSE declarations in a manner that is consistent with U.S. treaty obligations, unless no "other

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unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."). The United States did not adopt any reservation or understanding with respect to Article 17; it is therefore binding on the United States as a matter of international law.

412. *See* Toonen v. Australia, U.N. GAOR, Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994), *reprinted in* INT'L HUM. RTS. REP., Sept. 1994, at 97 [hereinafter "Toonen Case"]. The Toonen case arose under the Optional Protocol to the ICCPR, which permits citizens of state parties to file individual complaints against their governments before the Human Rights Committee, a quasi-judicial body established by the ICCPR. As the United States is not a party to the Optional Protocol, a U.S. citizen could not file an individual complaint with the Human Rights Committee.

413. "The Human Rights Committee . . . is of the view that the facts before it reveal a violation of Article[ ] 17, paragraph 1 . . . of the Covenant . . . . In the opinion of the Committee, an effective remedy would be the repeal of Sections 122 (a), (c) and 123 of the Tasmanian Criminal Code." Toonen Case, *supra* note 412, at 105-06. For a more detailed discussion of the Toonen case, *see* Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with* Bowers v. Hardwick, 58 ALB. L. REV. 725 (1995).

414. *See* Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) (1989); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981).

415. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 230. Paragraph 1 of Article 8 provides: "Everyone has the right to respect for private and family life, his home and his correspondence."

416. The Human Rights Committee's decisions are not legally binding on the United States, but they constitute persuasive authority for proper interpretation of the ICCPR's provisions.

417. *See* FED. R. CIV. P. 12(b)(6).

418. *See supra* Part IV.

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possible construction remains."[419] Here, no other possible construction remains. The NSE declaration, if it means anything at all, means that plaintiffs cannot rely on these treaties to establish a private cause of action.[420] The treaty makers' general intent to comply with U.S. treaty obligations cannot override their specific intent to preclude reliance on the treaties to create a private cause of action.

6. *Other Factors*

There are a variety of ways in which plaintiffs might seek to raise treaty-based human rights claims by relying on federal or state statutory or common law to establish a private cause of action.[421] For example, plaintiffs could potentially raise treaty-based human rights claims under 42 U.S.C. § 1983, habeas corpus statutes,[422] the Administrative Procedures Act,[423] the Declaratory Judgment Act,[424] or a variety of state statutes.[425] Such cases differ from the above criminal sodomy example, because plaintiffs would not technically be relying on the treaties to establish a private cause of action. Instead, they would be relying on statutory or common law to establish a private cause of action.

When a plaintiff raises a non-frivolous claim in reliance on a statutory or common law right of action, there is no alternative forum in which to

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419. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

420. One could argue that the treaty makers intended for the NSE declarations to preclude only frivolous and/or redundant claims, and that judges should therefore reach the merits of non-frivolous, nonredundant treaty-based claims, even in cases where the plaintiff is relying on the treaty to establish a private cause of action. The difficulty with this argument is that it essentially discounts the NSE declarations entirely. Assuming the NSE declarations are valid, courts must give them some effect. This Article has argued in favor of a narrow construction of the NSE declarations. However, there is a key difference between: (1) a relatively narrow construction that still gives some effect to the declaration, which this Article contends is legitimate; and (2) an extremely narrow construction that gives no effect to the NSE declarations, which this Article contends is illegitimate.

421. *See generally* Vazquez, *supra* note 33, at 1141–57 (describing rights of action and remedial rights).

422. *See* 28 U.S.C. §§ 2241–2255. Of particular relevance are sections 2241(c)(3) (providing that the writ of habeas corpus extends to prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States") and 2254(a) (stating that courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States").

423. 5 U.S.C. § 702 (1994) (providing that "[a] person suffering legal wrong because of [federal] agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

424. 28 U.S.C. § 2201(a) (1994) (authorizing "any court of the United States," if presented with an "actual controversy within its jurisdiction," to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought").

425. *See, e.g.*, Kazi v. Dubai Petroleum Co., 961 S.W.2d 313, 315–18 (Tex. App. 1997, writ granted) (holding that the ICCPR establishes "equal treaty rights" between the United States and India within the meaning of the Texas wrongful death statute, and that therefore the lower court erred by dismissing, for lack of subject matter jurisdiction, a wrongful death action by Indian citizens).

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adjudicate the claim, and there is no relief available under other provisions of domestic law; courts are faced with a dilemma. A blanket rule precluding courts from reaching the merits of any such claim would be inconsistent with the treaty makers' intention for the United States to comply with its treaty obligations. A blanket rule permitting courts to reach the merits of all such claims would effectively deprive the NSE declarations of any legal force whatsoever. Different considerations will arise, depending upon whether the claimant is relying on the federal habeas corpus statute,[426] 42 U.S.C. § 1983,[427] or some other provision of law to establish a private cause of action. In each case, courts should balance the need to give some legal effect to the NSE declarations against the need to give effect to the treaty makers' intent to promote compliance with U.S. treaty obligations.

As a practical matter, courts are likely to give great weight to any views expressed by the Executive Branch.[428] In cases involving treaty-based human rights claims against the federal government, or federal officials, the Executive Branch will presumably oppose direct judicial application of the treaty.[429] In cases involving treaty-based human rights claims against state or local governments or officials, however, it is conceivable that the Executive Branch might submit an amicus brief in support of a plaintiff who claims a human rights treaty violation.[430] Indeed, given the President's duty to "take Care that the Laws be faithfully executed,"[431] the Executive Branch arguably has a constitutional duty to speak in favor of treaty compliance if a case

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426. *See, e.g.*, White v. Johnson, 79 F.3d 432, 437–39 and 440 n.2 (5th Cir. 1996) (holding, in a habeas case, that the prisoner's claims based on the ICCPR and the Torture Convention were barred by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989)).

427. *See, e.g.*, Weber v. Brayton, No. C-95-20154 RMW, 1995 WL 429238, at *1 (N.D. Cal. July 13, 1995) (dismissing § 1983 claims against state and local government officials for alleged violations of ICCPR rights).

428. *See* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

429. If a person alleges a human rights treaty violation by a federal official, the Executive Branch will presumably decide before the case ever goes to court whether it believes there is any merit to the claim. If the Executive Branch decides that the claim has some merit, it can try to resolve the matter before it goes to court. Thus, once a case gets to court, that is probably an indication that the Executive Branch has decided that, in its view, the claim lacks merit.

430. In its "federalism" understanding attached to the ICCPR, the United States stated: "to the extent that state and local governments exercise jurisdiction over such [treaty] matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." 138 CONG. REC. S4784 (1992). The United States adopted similar understandings for the Torture Convention and the Race Convention. *See* 140 CONG. REC. S7634 (1994); 136 CONG. REC. S17492 (1990). In a case where the United States Government believed that a state or local government or official had violated an individual's treaty-based human rights, the filing of an amicus brief might be a "measure[] appropriate to the Federal system," 138 CONG. REC. S4784 (1992), to promote treaty compliance.

431. U.S. CONST. art. II, § 3.

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arises where a court's failure to apply the relevant provision would place the United States in violation of its treaty obligations.

Of course, the President would not wish to provoke charges from the Senate that he was breaching a promise, implicit in the NSE declaration, that the Executive Branch would oppose direct judicial application of human rights treaty provisions.[432] The risk of provoking such a response, however, will vary greatly, depending upon the nature of the claim. In light of recent battles between Congress and the Supreme Court concerning freedom of religion,[433] if a sympathetic plaintiff presented a plausible freedom of religion claim under Article 18 of the ICCPR,[434] many in Congress would applaud an amicus brief filed by the Attorney General in support of the plaintiff. Similarly, a court ruling in favor of the plaintiff would be unlikely to provoke charges of judicial activism. On the other hand, if a homosexual

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432. In any case where the Executive Branch supports direct judicial application of human rights treaty provisions, Senators opposed to the domestication of international human rights treaties are likely to argue that the Executive Branch is reinterpreting the NSE declaration in a manner inconsistent with Executive Branch statements to the Senate during ratification hearings. Analogies to the ABM reinterpretation debate come readily to mind. *See generally* Abram Chayes & Antonia Handler Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956, 1958-59 (1986) (criticizing the reinterpretation of statements made by Secretary of State Rogers to the Senate during the ABM ratification hearings); David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1371 (1989) (discussing the hostile reactions of Senators to the Executive's attempts at reinterpretation); Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986) (defending the Reagan administration's broad interpretation of the ABM treaty). In the ABM debate, the "broad" interpretation would have permitted testing and development of exotic systems, whereas the "narrow" interpretation would have prohibited such testing and development. In the NSE controversy, the "narrow" ("private cause of action") interpretation would permit direct judicial application of the treaties in some cases, whereas the "broad" (*Foster*) interpretation would prohibit it. In the NSE debate, like the ABM debate, both sides can selectively quote from the Senate record to bolster their preferred positions.

There are at least two important distinctions, however, between the ABM controversy and the NSE interpretation issue. First, if the Executive Branch argues against direct judicial application of a human rights treaty in a case where failure to apply the treaty would place the United States in violation of its treaty obligations, some Senators might rightly argue that the Executive Branch had breached its promise that the United States would comply fully with its treaty commitments. Thus, in any hard case that presents a stark choice between treaty compliance and avoiding changes in domestic law, no matter what position the Executive Branch advocates, it is vulnerable to charges that its actions are inconsistent with assurances provided to the Senate. In contrast, in the ABM debate, no one ever claimed that adoption of the narrow interpretation would be inconsistent with Executive Branch assurances to the Senate.

Second, the proposed reinterpretation of the ABM Treaty (the "broad" interpretation) was designed to weaken the treaty regime and was arguably inconsistent with the object and purpose of the treaty. *See* Chayes & Chayes, *supra*, at 1963-65. In contrast, this Article's proposed reinterpretation of the NSE declarations is designed to strengthen U.S. compliance with the treaty regimes and is entirely consistent with the object and purpose of the human rights treaties. Indeed, the chief criticism of the "broad interpretation" (the *Foster* interpretation) of the NSE declarations is that such an interpretation is inconsistent with the object and purpose of the treaties.

433. *See supra* note 423.

434. *See supra* Subsection VI.B.4.

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challenged a state sodomy law on the basis of Article 17 of the ICCPR,[435] the Executive Branch would incur greater political costs if it chose to support the plaintiff, and a ruling in the plaintiff's favor would be widely decried as unwarranted judicial activism. In principle, the distinction between a freedom of religion claim under Article 18 and a gay rights claim under Article 17 should have no bearing on a court's decision about whether to reach the merits of a treaty-based human rights claim. In practice, though, these types of distinctions are likely to be critical because the courts will show great deference to the views of the Executive Branch, which are likely to be heavily influenced by political considerations.

VII. CONCLUSION

This Article has focused on the universe of cases in which: (1) an individual alleges that federal, state, or local governments and/or officials have infringed his or her human rights; (2) the right is (at least arguably) protected under the ICCPR, the Torture Convention or the Race Convention; and (3) the right is (at least arguably) not protected under constitutional, statutory, or common law to the same degree. Even if the United States had not adopted any reservations when it ratified these human rights treaties, the set of cases satisfying these criteria would have been relatively small. By adopting reservations for each of the treaties, the United States further diminished the size of an already small set. Yet the examples discussed throughout this Article relating to freedom of religion, state sodomy laws, transnational forcible abductions, and deportation to countries where the individual is likely to be tortured demonstrate that the set of cases that satisfy the above criteria is not a null set.

During the ratification process for the ICCPR, the Torture Convention, and the Race Convention, the Executive Branch assured the Senate that the NSE declarations were entirely consistent with U.S. treaty obligations, because the reservations and understandings included in the U.S. instruments of ratification had successfully eliminated any discrepancies between treaty requirements and preexisting domestic law. The Executive Branch must now acknowledge that it was mistaken, that certain discrepancies remain, and that the NSE declarations are inconsistent with U.S. treaty obligations, insofar as those declarations preclude judges from reaching the merits of non-frivolous, nonredundant, treaty-based human rights claims. The Executive Branch has the primary responsibility within the U.S. government for ensuring U.S. compliance with its treaty obligations. Therefore, the Executive Branch should take steps to bring the United States into compliance with its

435. *See supra* Subsection VI.B.5.

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obligation to ensure that plaintiffs who raise non-frivolous, nonredundant claims under these treaties receive an individual hearing before an impartial tribunal.

The best way to ensure U.S. compliance with its treaty obligations would be to enact legislation to create a private cause of action in federal court for all treaty-based human rights claims. With vigorous lobbying by the President, it is conceivable that Congress might enact such legislation. If the President cannot persuade Congress to enact legislation to create a private cause of action for treaty-based human rights claims, then legislation in specific areas in which the United States falls short of substantive international norms should be advocated. Freedom of religion, in particular, is an area where Congress is eager to augment federal protection for individual rights.[436] Given the President's duty to "take Care that the Laws be faithfully executed,"[437] the President should lobby Congress to strengthen federal protection for freedom of religion to conform with the requirements of Article 18 of the ICCPR.

In addition to lobbying Congress, the Executive Branch should also take an active role in court cases where litigants raise treaty-based human rights claims. In particular, the Executive Branch should file amicus briefs to support interpretation of the NSE declarations in accordance with the "private cause of action" concept. If the Executive Branch supports the "private cause of action" concept, courts are much more likely to interpret the NSE declarations in accordance with this concept, and therefore are more likely to act in a manner that is consonant with U.S. treaty obligations.

Courts need to recognize the ambiguity of the term "not self-executing" as used in NSE declarations attached to human rights treaties. In light of the treaty makers' manifest intention for the United States to comply with its treaty obligations, courts should construe the NSE declarations in accordance with the "private cause of action" concept of non-self-execution, thus minimizing conflicts with treaty obligations. Accordingly, courts should reach the merits of treaty-based human rights claims when individuals raise those claims as defenses to civil or criminal charges filed by the government. Courts should decline to reach the merits of treaty-based human rights claims when plaintiffs seek to rely on human rights treaties to create a private cause of action. In intermediate cases—where plaintiffs seek to raise treaty-based human rights claims by relying on federal or state statutory or common law to establish a private cause of action—courts should ask whether allowing the claim to go forward would effectively deprive the NSE declarations of any legal force whatsoever. If the answer is "no," then the court should reach the merits of the claim.

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436. *See supra* note 423.

437. U.S. CONST. art. II, § 3.

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The United States is likely to ratify other human rights treaties in the future. The President and the Senate, in their role as treaty makers, can draw several important lessons from past experience. First, they should assume that, no matter how thorough they are in crafting reservations and understandings to human rights treaties, there will inevitably be some discrepancies between treaty requirements and preexisting domestic law that are overlooked in the treaty ratification process. Therefore, to ensure compliance with treaty requirements, when the treaty makers ratify a human rights treaty they should either: (1) agree on implementing legislation to fulfill the requirements of the treaty; or (2) agree that the treaty will be self-executing. If the President remains convinced that NSE declarations are a political necessity in order to obtain Senate consent for ratification of human rights treaties, then the Executive Branch should decide which concept of non-self-execution to adopt. If something like an NSE declaration is politically necessary, then the Executive Branch should propose language that is unambiguous, by, for example, declaring that the treaty does not create a private cause of action instead of declaring that it is not self-executing.

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