Seattle Journal for Social Justice

Volume 18 | Issue 2 Article 9

6-2020

40 Years Later: It's Time for U.S. Ratification of the American Convention on Human Rights

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The year 2018 marked the 40th anniversary of the entry into force of the American Convention on Human Rights.[1] On July 16 of that year, United Nations Secretary-General António Guterres arrived at the Inter-American Court of Human Rights in San José, Costa Rica, to kick off a week of celebratory symposiums, panels, and lectures.[2] Amid protests just outside the Court on the human rights violations in Nicaragua under Daniel Ortega, which the UN had just condemned,[3] international jurists, human rights scholars, and dignitaries convened to hear Secretary-General Guterres and Costa Rican President Carlos Alvarado Quesada give welcoming keynote addresses and congratulate the Court on its 40th birthday.[4]

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[1] I/A Court H.R., Comunicado: *Más de 1500 personas asisten a la semana de eventos en conmemoración del 40 Aniversario de la creación de la Corte Interamericana de Derechos Humanos* (July 23, 2018), http://www.corteidh.or.cr/docs/comunicados/cp_31_18.pdf [https://perma.cc/CWZ3-VDVE].

[2] Author witnessed events firsthand; *see also Nicaragua, Costa Rica… Las noticias del lunes,* UN NEWS (July 16, 2018), https://news.un.org/es/story/2018/07/1437932 [https://perma.cc/JK4E-NL2A].

[3] *Guterres y Alvarado hablan sobre democracia y condenan la violencia en Nicaragua*, AGENCIA EFE (July 17, 2018), https://www.efe.com/efe/america/portada/guterres-y-alvarado-hablan-sobre-democracia-condenan-la-violencia-en-nicaragua/20000064-3693252 [https://perma.cc/G3Q3-G6TS].

[4] I/A Court H.R., *supra* note 1; *Alvarado y Guterres celebrarán el 40 aniversario de creación de la CorteIDH*, AGENCIA EFE (July 10, 2018), https://www.efe.com/efe/america/portada/alvarado-y-guterres-celebraran-el-40-aniversario-de-creacion-la-corteidh/20000064-3677881 [https://perma.cc/9HJG-JKAN].

One of the world's three regional human rights tribunals, the Inter-American Court of Human Rights ("Inter-American Court")[5] is part of a broader regional system conceived within the ambit of the Organization of American States (OAS) during the 1948 genesis of the American Declaration of the Rights and Duties of Man ("American Declaration").[6] The American Declaration and the American Convention on Human Rights ("American Convention," "ACHR"), together with the OAS Charter, may be said to comprise an "Inter-American Bill of Human Rights." As the principal human rights treaty of the OAS, the American Convention lists the positive rights of individuals and guidelines for interpreting those rights, supplies instructions for adopting the treaty, and provides for an Inter-American Court and an Inter-American Commission of Human Rights ("Inter-American Commission," "Commission").[7] To access the Inter-American Court, an

[5] The Inter-American Court, located in San José, Costa Rica, is an autonomous institution with the mission of applying and interpreting the American Convention. It is comprised of seven judges, elected by the Member States of the OAS. INTER-AM CT. H.R., ABC OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 2018: WHAT, HOW, WHEN, WHERE AND WHY OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: FREQUENTLY ASKED QUESTIONS 2-3 (2019) ["*ABC of the Inter-American Court*"], *available at* http://www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH_2019_eng.pdf [https://perma.cc/A4UW-H72H]. It has the following three primary functions: contentious, in which it may determine whether a state has violated any of the rights enshrined in the Convention; advisory, in which it may respond to consultations or make interpretations requested by OAS Member States or organs of the OAS itself; and cautionary, in which it may prescribe provisional means in cases of "*extrema gravedad y urgencia, y cuando se haga necesario evitar daños irreparables a las personas*" ("extreme gravity and urgency, and whenever necessary to avoid irreparable harm to individuals"). Organization of American States, American Convention on Human Rights "Pact of San José, Costa Rica," arts. 63, 64, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36 [hereinafter American Convention].

[6] *See* Inter-American Commission on Human Rights, American Declaration of the Rights and Duties of Man, Bogotá, Colombia, May 2, 1948 [hereinafter American Declaration].

[7] *See* American Convention, *passim*. The Inter-American Commission is a principal organ of the OAS, with the primary objective of promoting the observance and defense of human rights, and decides cases of complaints submitted by Member States, individuals, and NGOs, and serves as a consultative organ of the OAS to this end. It is composed of seven commissioners, and is headquartered in Washington, D.C., USA. I/A Court H.R., *ABC of the Inter-American Court* 5 (2018), *available at* http://www.corteidh.or.cr/

OAS Member State must ratify the ACHR and take the additional step of declaring that it recognizes the contentious competence[8] of the Court as binding *ipso facto*.[9] At present, 23 States have signed and ratified the Convention[10] and, of those, 20 have recognized the jurisdiction of the Court.[11]

As an OAS Member State, the United States is subject to the jurisdiction of the Inter-American Commission.[12] Because the US was part of the Ninth International Conference of American States, which adopted the American Declaration, but has not ratified or acceded to the ACHR, the Commission applies the principles of the American Declaration in deciding cases with regard to the US.[13] Indeed, the Commission has scrutinized the US with respect to its practices in such areas as the death penalty, immigration, racial justice, and conditions at the Guatánamo Bay Detention Center.[14] However, the US has rarely implemented the decisions of the Commission, considering them to be mere recommendations or suggestions.[15] In the same way, despite holdings that contemplate the American Declaration as a source of legal obligations,[16] the US considers the American Declaration to be a non-binding

sitios/libros/todos/docs/ABCCorteIDH.pdf [https://perma.cc/SF5X-TEFT]; *see* IACHR, *What is the IACHR?*, OAS, http://www.oas. org/en/iachr/mandate/what.asp, [https://perma.cc/Y8PZ-HF24] (last visited Aug. 8, 2018).

[8] *See supra* note 5 and accompanying text.

[9] American Convention, art. 62(1).

[10] *ABC of the Inter-American Court, supra* note 7, at 3.

[11] *Id.* at 6.

[12] The US was part of the Ninth American International Conference, which approved the adoption of the American Declaration in 1948 in Bogotá, Colombia. *See* American Declaration.

[13] Thomas Antkowiak, *The Americas*, *in* INTERNATIONAL HUMAN RIGHTS LAW 425, 428 (Daniel Moeckli, Sangeeta Shah, & Sandesh Sivakumarian eds., 3rd ed. 2018).

[14] Michael Camilleri & Danielle Edmonds, Working Paper, *An Institution Worth Defending: The Inter-American Human Rights System in the Trump Era* 2 (THE DIALOGUE, Working Paper, 2017) [hereinafter *An Institution Worth Defending*], *available at* http://www.thedialogue.org/wp-content/uploads/2017/06/IACHR-Working-Paper_Download-Resolution.pdf [https://perma.cc/J7WH-7EQY].

[15] *Id.*

[16] Antkowiak, *supra* note 13, at 426.

instrument "'that does not itself create legal rights or impose legal obligations on signatury [*sic*] states' and that . . . does not constitute a source of affirmative obligations such as the exercise of due diligence."[17] In contrast to the American Convention, which is undoubtedly a binding treaty, the US refers to the Declaration as "*una noble enunciación de las aspiraciones de los Estados Americanos en cuanto a los derechos humanos*" [18] ("a noble statement of the aspirations of the American States in regard to human rights")—and that's all.[19] Despite this friction, the US has historically been a vocal supporter of the Commission; indeed, it was instrumental during the Commission's early years and, from the beginning, the US has been a major donor to both the Commission and the OAS.[20]

The United States signed the American Convention in 1977 but has neither ratified it nor accepted the contentious jurisdiction of the Inter-American Court.[21] Ratification is the next step in implementing the treaty's provisions in the US, and thus in increasing human rights protection in the country and

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[17] IACHR, *Considerations Related to the Universal Ratification of the American Convention and other Inter-American Human Rights Treaties* 30, OAS/Ser.L/V/II.152 Doc. 21 (2014) (quoting INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS, ¶ 24, (OEA/Ser.L/V/II. Doc. 78/10 2010)).

[18] Interpretación de la Declaración Americana de los Derechos y Deberes del Hombre en el marco del artículo 64 de la Convención Americana sobre Derechos Humanos, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 12. (July 14, 1989).

[19] The US has historically recognized the significance of the Declaration, stating in proceedings before the Commission that it "accepts and promotes the importance of the American Declaration. It is a solemn moral and political statement … against which each member state's respect for human rights is to be evaluated and monitored, including the policies and practices of the US," but it does not consider it to be a binding treaty. William Andrews v. United States, Case 11.139, Inter-Am. Comm'n H.R., Report No. 57/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 60 (1997).

[20] Camilleri & Edmonds, *supra* note 14, at 2. However, the amounts of financial support over the years have been minor, for example, less than US $6 million in 2016. *Id.*

[21] Convención Americana Sobre Derechos Humanos Suscrita en la Conferencia Especializada Interamericana Sobre Derechos Humanos (B-32) [American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32)], OAS, https://www.oas.org/dil/esp/tratados_B-32_Convencion_Americana_sobre_Derechos_Humanos_firmas.htm (last visited Aug. 8, 2018) [https://perma.cc/TD3Q-5DNA].

the region. By investigating the principal legal and political barriers to US ratification of the ACHR and analyzing potential impacts of ratification on the US legal system, this article recommends that the United States Congress ratify the American Convention on Human Rights with no reservations.[22] Specifically, the first part of the article discusses the United States' continuing concerns over state sovereignty; reservations, understandings, and declarations in the legacy of the Bricker Amendment and the doctrine of non-self-execution; preservation of the federalist balance of powers; and the apparent incompatibilities between the American Convention and existing US law. The second section suggests strategic legal and political reasons for US ratification of the Convention given the present political climate. Finally, the third portion briefly assesses the potential domestic legal repercussions of avoiding the attachment of any reservations, and suggests options moving forward in advocating for US ratification.

I. UNITED STATES CONCERNS: SOVEREIGNTY, RUDS, FEDERALISM, AND THE INTERACTION OF THE ACHR WITH US LAW

A. State Sovereignty and US Exceptionalism vs. Conventionality Control

As perhaps the dominant international relations fear of the United States since the 1950s, the concern over ceding state sovereignty to a "world government"[23] has been repeatedly cited directly and indirectly in arguments by the US against ratifying numerous international human rights instruments.[24] An isolationist mentality developed during the Cold War that was based in a *realpolitik* concern that the US, and many other states, should

[22] It should be noted that the recommendation is not necessarily to also accept the Court's contentious jurisdiction, which is a distinct legal question with potential ramifications that exceeds the scope of this article.

[23] Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309, 324-325 (1988) [hereinafter *The Legacy of the Bricker Amendment*].

[24] *See, e.g.,* Joseph Diab, *United States Ratification of the American Convention on Human Rights*, 22 DUKE J. COMP. & INT'L L. 323 (1992).

focus on protecting their material and political resources and, in the specific case of the US, do what was necessary to reinforce its status as a main world power.[25] In the human rights context, this mentality has manifested as an extreme reluctance to sign or ratify international human rights treaties. Esteemed human rights scholar Louis Henkin notes in this regard that

> the resistance is deeper. There is resistance to imposing national standards on matters that have long been deemed "local"; even more, there is resistance to accepting international standards and scrutiny on matters that have been ours to decide. A deep isolationism continues to motivate many Americans, even some who are eager to judge others and to intercede on behalf of human rights in other countries. Human rights in the United States, they believe, are alive and well. We have nothing to learn, and do not need scrutiny from others, surely not from the many countries where human rights fare so badly.[26]

As suggested by Professor Henkin, for many, this Hobbesian, political realist attitude of conservatism also went hand-in-hand with a "city on a hill"-flavored "US exceptionalism."[27] As a cultural and political ideology, US exceptionalism involves the self-congratulatory presumption that both the

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[25] *See*, *e.g.*, Francisco J. Rivera Juaristi, *U.S. Exceptionalism and the Strengthening Process of the Inter-American Human Rights System,* 20 HUM. RTS. BRIEF 19 (2003). For example, the phenomenon of political realism has been evidenced in the context of the universal human rights system, in which the US and many other Western countries were generally receptive to civil and political rights, reflected more in the constitutions and laws of the US and Europe, while rejecting economic, social, and cultural rights as on a lesser level than civil and political rights and the domain of communist states; ratification of the International Covenant on Economic, Social, and Cultural Rights was thus in some contexts seen to be a display of support for socialism. *See* JEFFREY L. DUNOFF, STEVEN R. RATNER, & DAVID WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 382-391 (4th ed., 2015).

[26] Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 422-23 (1979).

[27] *See* Rivera Juaristi, *supra* note 25; *see* Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.*, 3 N.Y. CITY L. REV. 59, 63 (1998) ("[W]e must confront the myth that the U.S. Constitution is the best in the world. Domestically, the myth obscures the fact that the Constitution was drawn to protect the interests of white, male, propertied men and that the legitimation of slavery was at its heart and remains today its unredressed legacy.").

values and the political and legal systems—and therefore the human rights framework—of the US are unique and worthy of global admiration.[28] In the present context, it manifests, as Professor Henkin implies, in the belief that the US need not ratify international human rights treaties because it already has a strong legal system and internal mechanisms to protect human rights.[29] For its part, the US Congress has flipflopped over the years in its support of the Inter-American system; the latest round of ebbs and flows in support involved Republican Senators' opposition to funding the Inter-American Commission in early 2019.[30]

Unsurprisingly, the phenomenon of US exceptionalism has opened the United States to global criticism. The practice has invited other states to condemn and challenge the US for not fully implementing the principles of mutuality and reciprocity, and, by extension, to criticize the OAS for allowing this to happen.[31] For instance, former Bolivian President Evo Morales and former Venezuelan President Hugo Chávez were vocal critics during their respective presidencies of what they saw as a hypocritical "U.S. empire," and Chávez justified Venezuela's infamous denouncement of the American Convention in 2012 in part on the reasoning that Venezuela need

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[28] Stephen M. Walt, *The Myth of American Exceptionalism*, FOREIGN POL'Y (Oct. 11, 2011), https://foreignpolicy.com/2011/10/11/the-myth-of-american-exceptionalism/ [https://perma.cc/LVD2-QY3Y].

[29] Henkin, *supra* note 26, at 422-23.

[30] In December 2018, nine Republican Senators sent a letter to the US State Department demanding that it cut funding to the Inter-American system based on the latter's support for the legalization of abortion; in February 2019, two Senators and two Congressmen, all Democrats, as well as five former US members of and nominees to the IACHR, sent two respective letters in response, recognizing the great human rights impacts of the Commission in the region and urging the Secretary of State to instead bolster funding. *See Former U.S. IACHR Members and Nominees Urge State Department Not to Withdraw Funding*, GLOBAL AMERICANS (Feb. 19, 2019), https://theglobalamericans.org/2020/02/former-u-s-iachr-members-and-nominees-urge-state-department-funding/ [https://perma.cc/U22P-HD6D]; *see* Press Release, U.S. H.R. Comm. on Foreign Aff., Democratic Leaders to Pompeo: Continue Funding the Inter-American Commission on Human Rights (Feb. 26, 2019) (on file with author).

[31] Rivera Juaristi, *supra* note 25, at 19-20.

not continue to bind itself to a treaty to which other OAS Member States are not bound.[32]

Moreover, former US Ambassador to the UN Charles Yost stated in 1979, during the Senate hearings on ratification of the ACHR and other human rights treaties, that the United States' failure in the past to ratify such accords had been politically embarrassing:

> Our refusal to join in the international implementation of the principles we so loudly and frequently proclaim cannot help but give the impression that we do not practice what we preach, that we have something to hide, that we are afraid to allow outsiders even to inquire whether we practice racial discrimination or violate other basic human rights. Yet we constantly take it upon ourselves to denounce the Soviet Union, Cuba, Vietnam, Argentina, Chile, and many other states for violating these rights. We are in most instances quite right to do so, but we seriously undermine our own case when we resist joining in the international endeavor to enforce these rights, which we ourselves had so much to do with launching.[33]

While discussing possible cessions of state sovereignty is already controversial, this conversation may be furthered strained by what some may see as the potential for increased state responsibilities, upon ratification of the ACHR, under the modern doctrine of "conventionality control." This doctrine, originated by the Inter-American Court,[34] recognizes that domestic officers and authorities must respect both the rule of law in their unique domestic legal system(s) and the international treaties that have been ratified by the state in question, and thus seek to harmonize these competing

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[32] *Id.*

[33] *International Human Rights Treaties: Hearings Before the S. Comm. On Foreign Relations*, 96th Cong. 4 (1979) (statement of Charles Yost, Former U.S. Ambassador to the United Nations).

[34] *See* Almonacid Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 123-25 (Sep. 26, 2006).

priorities.[35] In doing so, domestic judiciaries "at all levels, must exercise *ex officio* a form of 'conventionality control' between domestic legal provisions and [an international treaty, in this case the American Convention], obviously within the framework of their respective competences and the corresponding procedural regulations."[36] Critically, the Inter-American Court has held that domestic judiciaries "must take into account not only the treaty itself, but also the interpretation thereof by the Inter-American Court, which is the ultimate interpreter of the American Convention."[37] This would include the Court's *corpus juris* (or "block of conventionality"), *i.e.*, case law and advisory opinions concerning the ACHR, its protocols, and other international human rights treaties created within the OAS.[38]

Further, in a conventionality-control analysis in cases where the state's judicial bodies may have violated the state's international obligations, the Inter-American Court may be able to engage in a type of review of "the respective domestic procedures to establish their compatibility with the American Convention."[39] However, the Court has clarified that this would not bestow absolute jurisdiction upon the Court to review domestic decisions *ad infinitum*, as such a practice would clearly upset the scope of its international jurisdiction; the Inter-American Court is not a tribunal of fourth

[35] Cabrera García & Montiel Flores v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 225 (Nov. 26, 2010).
[36] *Id.*
[37] *Id.*
[38] *See* Eduardo Ferrer Mac-Gregor, *Conventionality Control The New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93, 97 (2015) [hereinafter *Conventionality Control*]; Cabrera García & Montiel Flores v. Mex., Concurring Opinion of Judge Ferrer Mac-Gregor Poisot, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 26 (Nov. 26, 2010) [hereinafter Concurring Opinion of Judge Ferrer Mac-Gregor].
[39] Concurring Opinion of Judge Ferrer Mac-Gregor, *supra* note 38, ¶ 5 (quoting Gomes Lund et al. ("Guerrilha do Araguala") v. Brazil, Preliminary Objections, Merits, Reparations, and Costs. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 200, ¶ 44 (July 6, 2009). The Inter-American Court does this via the following loosely formed test: "analyz[ing] [the actions of national judges] in light of domestic laws and always having regard to the American Convention…" *Id.*, ¶ 8.

instance or last resort.[40] Rather, the doctrine of conventionality control is tempered by the ever-present requirements of subsidiarity and exhaustion of domestic remedies under Article 46 of the ACHR.[41] In this way and under these constraints, the "convention" that is being "controlled" refers to the practice whereby domestic courts must consider the requirements of international treaties to which the state is party, and the Inter-American Court similarly must take into account domestic norms and legislation.[42]

In the present context of US ratification of the American Convention, this doctrine may manifest as an additional requirement in the ensuing interpretation, post-ratification, of the treaty by US courts. That is, the US would arguably be required to not only limit its interpretation of the Convention to the text of the treaty itself, but also to consider and perhaps even permit itself to be bound by the interpretations made by the Inter-American Court. On the one hand, such a form of deference may further dissuade an already-concerned US, clinging to sovereignty, from ratifying the ACHR or other such human rights treaties.

On the other hand, for a number of reasons, the domestic implications of the doctrine as it would be applied in the US might not be as worrying. First, application of the doctrine may in the immediate future be moot, faced with the more preliminary question of US ratification of the ACHR. While the Inter-American Court in *Cabrera García and Montiel Flores v. Mexico*[43] did not specify whether the doctrine would apply to states that have ratified the ACHR but have not accepted the contentious competence of the Court, *i.e.*, the situation this article advocates, it is perhaps unlikely that it would, as it is inherently a tool of the Inter-American Court. Indeed, as a procedural matter, the only way for the Court to assess conventionality control seems to be in

[40] *Id.*, ¶ 9.
[41] *Id.*
[42] *See id.* at para. 7.
[43] Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 225 (Nov. 26, 2010).

the context of a contentious case.[44] As of 2016, the Court had referenced the doctrine in relation to judgments involving 14 different states, all of which had accepted the Court's contentious jurisdiction.[45]

But questions of mootness aside, the doctrine may still not result in many domestic changes within the US. For example, the "type" of conventionality control, or manner in which it is carried out, is left to individual states.[46] In a nod to state sovereignty, this implies that the state in question will be able to implement the doctrine to the extent feasible within its existing laws and practices. Further, US courts are already familiar with the concept of applying treaty law, as the US Constitution provides that the supreme law of the land includes international treaties,[47] and the ACHR would hardly be the first for US courts.

Rather, the doctrine could manifest certain positive effects in the domestic legal system of the US, leaving much of the current system intact. In effectuating the doctrine, the Inter-American Court plays an erudite and even-handed role in balancing the *ius constitutionale commune*, or constitutionalism of the region, with the primacy of human rights and related values.[48] There is thus the potential for institutional dialogue to develop between US courts and the Inter-American Court, to the benefit of both, leading to increased confidence, and perhaps increasing deference over time, on the part of the Inter-American Court concerning the decisions of US courts. Indeed, as a key concept of the subsidiarity principle inherent to the

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[44] *See* Ferrer Mac-Gregor, *supra* note 38, at 95.

[45] *Id.*; *see ABC of the Inter-American Court, supra* note 7, at 6.

[46] Ferrer Mac-Gregor, *supra* note 38, at 97; Sergio García Ramírez, *The Relationship Between Inter-American Jurisprudence and States (National Systems): Some Pertinent Questions*, 5 NOTRE DAME J. INT'L & COMP. L. 115, 145 (2015) ("The Inter-American Court did not order States to establish regimes of diffuse control, although the Court would probably sympathize with such a regime. The Court left the final decision to States, so long as their solution permits judicial control of conventionality…").

[47] U.S. CONST. art. VI, cl. 2.

[48] *See* García Ramírez, *supra* note 46, at 126. For instance, some values may even mesh as regards, *e.g.*, the US Constitution's emphasis on individual rights and the Inter-American Court's *pro homine* interpretation of the ACHR. *Id.* at 127–30.

Inter-American Court's jurisdiction, "domestic actors are better suited to understand the most effective way to internalize human rights norms in their local context."[49] In this regard, the Court's confidence in US courts may even be a subsidiary issue, due to the robust legal system of the United States. Moreover, US courts could likewise draw on the interpretations of the Inter-American Court, which is comprised of experts on the American Convention and has a respectable body of jurisprudence and guiding materials, instead of having to parse through the Convention's many articles anew. Such an institutional dialogue would be useful from a judicial-economy lens, and it in turn would help to establish uniformity, and therefore predictability, in interpreting the ACHR, thus helping to define and develop human rights in the region more broadly.

Hence, while from the outset the doctrine of conventionality control might be perceived as enflaming already acute qualms over sovereignty and an entrenched sense of US exceptionalism, in practice it might not require terribly intrusive modifications and could actually benefit US courts. In any event, it should not impede the preliminary issue of ratification of the ACHR.

B. Federalism and its Tireless Preservation

Hand-in-hand with the broader question of state sovereignty go US concerns over maintaining the federal-state balance of powers. For much of the 20th century through the present, the US has been a stalwart defender of the idea that human rights are a domestic issue.[50] A concern since the 1950s and '60s has been that international law and the obligatory commitments it engenders would be used to diminish states' rights and therefore undermine the US system of government.[51] It is against this backdrop that the United

[49] Ariel Dulitzky, *An Alternative Approach to the Conventionality Control Doctrine*, 109 AJIL UNBOUND 100, 104 (2015).
[50] Diab, *supra* note 24, at 335.
[51] *Id.*

States has sought to characterize the subject of human rights within the US as beyond the competency of an international tribunal or organ.[52]

A main fear among US states has thus been that ratification by the federal government of not only the American Convention but also other international treaties would legitimize federal interference in subjects that the states understood as under their exclusive jurisdiction.[53] Because one of the distinguishing characteristics of the US system of government is the demarcation of powers between the federal and state governments, one of the distinguishing concerns from the perspective of the US and other federal states[54] is any threat to this system of federalism.

Accordingly, during the drafting of the American Convention the US delegation proposed the incorporation of Article 28,[55] known as the "Federal Clause."[56] The Federal Clause would prevent the ACHR from obligating the US Government to exercise jurisdiction over matters over which it might not otherwise have authority, *i.e.*, the subject matter left to the states under the

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[52] *Id.* at 328.

[53] This fear may have been well-founded; indeed, certain provisions of the ACHR have been argued to interfere with state legislation, particularly with regard to penal codes, which tend to vary widely by state. *Id.* at 328-29. For an example of ongoing concerns regarding the overextension of the federal government into the states' sovereign capacity to regulate themselves, see *U.S. v. Lopez*, 514 U.S. 549, 590 (1995) (Thomas, J., concurring).

[54] Multiple other large states in the region, significantly including Brazil, Colombia, and Mexico, are also federal states. Donald T. Fox, *Convention on Human Rights and Prospects for United States Ratification*, 3 HUM. RTS. 243, 254 (1973).

[55] *Id.*, at 253.

[56] American Convention, art. 28, which provides in part as follows:

> 1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.
>
> 2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

10th Amendment to the US Constitution.[57] The US wanted to ensure that any federal state in the Americas, including itself, would not accept an international obligation that may compel it to submit to jurisdictions other than its federal government.[58] In practice, the Federal Clause achieves the following two principal things: 1) it tends to relieve federal governments of the duty to prevent violations on the part of state governments, and therefore potentially interfere in subjects of state jurisdiction,[59] and 2) it allows federal subdivisions—states, in the US—to retain their laws that are already in force and adopt changes as they see fit.[60]

Thomas Buergenthal, former judge of the Inter-American Court and renowned human rights scholar, notes that a problematic situation might arise in regards to Article 28 if a federal state were also to consider the Convention to be a non-self-executing treaty, as does the US.[61] In such a case, that state's domestic courts may never even get as far as interpreting Article 28, or applying it in light of other provisions of the treaty, due to the fact that it would not be part of the binding law in that country. This would effectively render Article 28 useless.

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[57] Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights*, in ANUARIO JURÍDICO INTERAMERICANO 1, 85-87 (1981).
[58] *Id.* at 86.
[59] Diab, *supra* note 24, at 332. This may be somewhat of a false or constructive relaxation of the federal government's duty, however, as under the doctrine of state responsibility, states are responsible for human rights violations of their constituent units. *See* Peter Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 567 (1997).
[60] *See* Thomas Buergenthal, *The Federal Clause of the American Convention, in* PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS 49-51 (Thomas Buergenthal et al. eds., 3d ed. 1990); *see also* Fox, *supra* note 54, at 253 ("[T]he federal clause which the United States delegation succeeded in obtaining completely disarms any attack which could be made against an international human rights treaty on grounds of 'states rights.'").
[61] Buergenthal, *supra* note 57, at 87.

C. Reservations, Understandings, and Declarations

In the US, the decision to ratify a treaty first rests with the President, as treaty ratification is inherent to the foreign relations power of the executive branch.[62] The proposed treaty is then submitted to the Senate, where it must be passed by a two-thirds supermajority vote.[63] Implementation of treaty obligations is then carried out by both federal and state governments.[64]

As part of the treaty ratifying process in the United States, the President, through the Departments of Justice, State, and others depending on the treaty, often proposes a series of reservations, understandings, and declarations (RUDs) that the Senate must decide whether to adopt when ratifying the treaty.[65] The general purpose of RUDs is to qualify and limit obligations that the state in question might accept that could potentially conflict with domestic law.[66] With regard to the American Convention, as with treaties generally, RUDs must be made at the time of ratification or deposit of the instrument of ratification; otherwise, they have no legal effect.[67] Further, each RUD must have a valid purpose and "maintain inalterable the nature of the convention itself."[68] That is, states can make any reservation or understanding in regard to the ACHR as long as it is not contrary to its object and purpose;[69] the ACHR poses no other restriction on the attachment of

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[62] CONG. RESEARCH SERV., 106TH CONG., STUDY ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, 106-71 at 152 n.33 (Comm. Print 2001).

[63] U.S. CONST.art. II, § 2, cl. 2.

[64] Letter from Harold Hongju Koh, U.S. Legal Adviser, to State and Local Human Rights Commissions (May 3, 2010), *available at https:///2009-2017.state.gov/s/l/releases/222323.htm* [https://perma.cc/MK9K-YW8R].

[65] Eric Chung, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations*, 126 YALE L.J. 170, 172-73, 215 (2016).

[66] *Id.*

[67] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 (AM. LAW INST. 1987); Andrés E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, 16 AM. U. INT'L L. REV. 269, 278 (2001).

[68] Montalvo, *supra* note 67, at 279.

[69] Effect of Reservations on Entry into Force of American Convention on Human Rights (Arts. 75 and 75 American Convention on Human Rights), Advisory Opinion OC-2/82,

RUDs other than that they comply with the provisions of the Vienna Convention on the Law of Treaties.[70]

Under the Vienna Convention, "'reservation' means 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."[71] Although loosely defined, some scholars have attempted to tie more concrete meaning to the terms "reservation," "understanding," and "declaration," respectively.[72] For instance, one attempted distinction between a reservation and a declaration is that the latter is not intended to modify the legal effect of the treaty, while the former clearly is.[73] However, it has also been argued that how a statement is defined is not as important as the nature of its effect.[74] Understood this way, any type of RUD that modifies the treaty, or purports to merely interpret it but effectively modifies its domestic impact—in particular, reservations masked as understandings and declarations—can functionally amount to a reservation.[75] The *Restatement (Third) of the Foreign Relations Law of the*

Inter-Am. Ct. H.R. (ser. A) No. 2, ¶ 22 (Sept. 4, 1982). While there has been limited guidance under international law on what constitutes the "object and purpose" of a treaty, the International Court of Justice has considered such factors as, *e.g.*, the purpose of the treaty and intent of the drafters, the rate and extent of adoption, and the views of signatory states. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 9–15 (May 28); *see* Isabelle Buffard and Karl Zemanek, *The "Object and Purpose" of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT'L & EUR. L. 311 (1998).

[70] American Convention, art. 75.

[71] Vienna Convention on the Law of Treaties, art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331.

[72] *See, e.g.*, Jessica Tillson, *Reservations and the Future of Inter-American Justice*, 6 CHI.-KENT J. INT'L & COMP. L. 82 (2006).

[73] *Id.* at 93.

[74] Chung, *supra* note 65, at 194.

[75] Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 103 (2011).

United States thus further defines "declarations and understandings" in the following way:

> When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify that state's legal obligation. Sometimes, however, a declaration purports to be an "understanding," an interpretation of the agreement in a particular respect. Such an interpretive declaration is not a reservation if it reflects the accepted view of the agreement. But another contracting party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.[76]

As often the ultimate arbiter, when assessing a reservation of a state party, the Inter-American Court has frequently determined the reservation's meaning based on its plain text, even when a state argues for a different understanding.[77]

The US prepared a number of reservations regarding the American Convention when the Carter Administration in 1977 sent the treaty, along with three other human rights treaties, to the Senate for ratification.[78] The RUDs then proposed may be characterized as outdated and unnecessary in today's legal and political climates. For instance, the purported principles behind the Carter Administration's many recommended RUDs were "1) to make sure that [treaty provisions] were consistent with our domestic law; 2) to insure [*sic*] that the Federal-State relationship is preserved; 3) to insure

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[76] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 cmt. g (AM. LAW INST. 1987).

[77] Chung, *supra* note 65, at 202. *See also Hilaire v. Trinidad and Tobago*, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 81, ¶¶ 82, 88 (Sept. 1, 2001) ("Interpreting the Convention in accordance with its object and purpose, the Court must act in a manner that preserves the integrity of the mechanism provided for in Article 62(1) of the Convention.").

[78] *See generally U.S. State Dept. Letter to President Carter, Dec. 17, 1977*, in Message from the President of the United States to the Senate on Four Treaties Pertaining to Human Rights, S. Exec. Doc. No. 29-118 (1978) [hereinafter *Letter to the President*], *available at* https://www.foreign.senate.gov/imo/media/doc/treaty_95-19_95-21.pdf.

that the treaties would not, in effect, become part of our domestic law directly."[79] While the first two stated justifications seem reasonable enough, the third becomes deeply problematic for reasons discussed below. In particular, as the often-criticized implication of RUDs, such language has been used to strategically weaken the effect of the ACHR and human rights treaties in general by effectively precluding domestic claims or recognition of an individual's treaty-based rights.[80] Additionally, such RUDs would effectively cut off US courts and the Inter-American Court from each other: they would not permit the Inter-American Court to interpret and build upon the decisions of US courts that would themselves have been able to interpret the ACHR, or *vice versa*, in order to understand and apply the jurisprudence of each of these courts. RUDs seeking to so isolate US domestic law from regional human rights jurisprudence thus impede the potential for institutional dialogue and jurisprudential development between the Inter-American Court and US courts, to the detriment of human rights development and protection in the region.[81]

While the ability to make reservations is an unquestioned power of the state, the US is often criticized for the frequency with which it employs RUDs in treaties spanning beyond the ACHR. Some critics, for instance, have condemned this US practice as "specious, meretricious, [and] hypocritical,"[82] decrying what they see as the US reaping the benefits of apparent treaty ratification without incurring the accompanying binding obligations.[83]

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[79] *International Human Rights Treaties: Hearings Before the S. Comm. on Foreign Relations*, 96th Cong. 35 (1979) (statement of Jack Goldklang, Att'y Advisor, O.L.C.).
[80] *See* Diab, *supra* note 24, at 333.
[81] *Id.* at 333-34.
[82] Louis Henken, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995).
[83] *Id*. at 344.
(By adhering to human rights conventions subject to these reservations, the United States, it is charged, is pretending to assume international obligations but in fact is undertaking nothing. It is seen as seeking the benefits of participation in the convention … without assuming any obligations or burdens. The United States, it is said, seeks to sit in judgment on others but will not submit its human rights behavior to international judgment. To many,

Despite this, some academics have suggested that the United States' use of RUDs may actually signal a respect for the process of international treaties.[84] For example, it is argued that contrary to authoritarian regimes, which may tend to sign human rights treaties without any reservation or declaration and later violate them with impunity,[85] the US and other liberal democracies are serious in their application and respect for treaties, including their acceptance of human rights obligations:

> It is very easy to sign a human rights treaty without any reservations or understandings. Many authoritarian regimes have done so. . . . [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 . . . 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. 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.[86]

Given the real-world legal effects of RUDs on the treaty process and in the context of human rights, however, such a characterization seems illusory, especially when faced with the prospect that RUDs may prevent individuals from obtaining relief for human rights abuses. Because of this, minimizing the use of RUDs whenever possible, such as limiting the practice to a *ratione*

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the attitude reflected in such reservations is offensive: the conventions are only for other states, not for the United States.).

[84] *See, e.g.,* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale J. Int'l. L. 129 (1999).

[85] *Id.* at 203.

[86] *Id.* at 178 (quoting Arthur Rovine & Jack Goldklang, *Defense of Declarations, Reservations, and Understandings*, in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES, at 54).

temporis understanding with regard to the ACHR as suggested herein, is an important objective.

1. The Continued Presence of the Bricker Amendment

The "Bricker Amendment" of the 1950s engendered many aspects of both RUDs and the US exceptionalism ideology. The climate created by attempts to cling to the ideals of state sovereignty and US superiority led, broadly speaking, to a strong reticence on the part of the US to sign international treaties or submit itself to an international order. A particularly strong motivator in this regard was the fear that its citizens might find themselves under the jurisdiction of some organ outside of the jurisdiction and control of the US.[87]

The Bricker Amendment was comprised of a series of proposals of constitutional amendments, many of which were sponsored by Senator John Bricker between 1951 and 1957.[88] In a display of a conservative and profoundly isolationist perspective, founded in the belief that the subject of human rights should belong to the individual sovereign states and not international tribunals, each proposal attempted to limit the domestic effects of treaties and other international agreements.[89] In essence, the Bricker Amendment had three general objectives: 1) establish all international accords as non-self-executing and as requiring implementing legislation (discussed below); 2) negate *Missouri v. Holland*,[90] in which the Supreme Court held that the 10th Amendment does not apply to legislation that implements treaties because the power to make treaties rests with the federal

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[87] *See* Teresa Young Reeves, *A Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification*, 8 HUM. RTS. BRIEF 15, 16 (2000); *see also* Kaufman & Whiteman, *supra* note 23, at 325-26.

[88] *See generally* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS, Chapter 5(F): "Interpretation, Termination, and 'Unsigning' of Treaties" (2017).

[89] *Id.*

[90] Missouri v. Holland, 252 U.S. 416 (1920).

government;[91] and 3) establish that treaties be subject to the same constitutional limits that demarcate the power of the federal government.[92]

However, there were inherent problems with Senator Bricker's strategy. First, human rights is not an inappropriate subject for treaties to apply domestically: the US Constitution does not restrict the subject matter of international agreements, but rather only requires the approval of the Senate.[93] The Supreme Court has, moreover, upheld treaties that impact domestic subjects,[94] as the American Convention would.

Second, the subject of human rights is not inappropriate under international law either. For example, while the United Nations Charter may limit the jurisdictional authority of the UN in domestic matters,[95] the subject of human rights has always been an exception.[96] Indeed, the idea of human rights must necessarily transcend political borders: it is inherent in treaties such as the American Convention that an international community is necessary to protect and promote human rights, instead of leaving such responsibilities to the whim of fallible state governments that may have incomplete or inadequate internal mechanisms and norms to realize such protection. An integral part of the framework of human rights protection

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[91] Kaufman & Whiteman, *supra* note 23, at 314.

> The difficulty, as Senator Bricker viewed it, was the subsequent decision of the Supreme Court in *Missouri v. Holland*, which left ambiguous the meaning of Article VI, paragraph 2. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.

Id. at 433.

[92] *See id.* at 313-15.

[93] U.S. CONST. art. II, § 2, cl. 2.

[94] *See* Diab, *supra* note 24, at 333-36 (referencing, *e.g., Holland*, supra note 90 (regarding protection of migratory waterfowl) and *De Geofrey v. Riggs*, 133 U.S. 258 (1890) (regarding inheritance of land rights)).

[95] U.N. Charter art. 2, ¶ 7.

[96] *See* Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L. L. 866 (1990).

consists of the capacity of a state to bring to light, or publicly denounce, other states on the world stage for human rights violations.[97] As such, even the principle of domestic nonintervention does not result in states being immune to international scrutiny or even intervention if they torture, assassinate, arbitrarily detain, or commit other human rights abuses on their citizens.[98]

While the Bricker Amendment was fortunately rejected by the Senate, officials in the Eisenhower Administration, notably including Secretary of State John Dulles, adopted the spirit of the Amendment as a policy in part to ensure its defeat in the Congress, and declared that the State Department would not seek ratification of any human rights treaties.[99] Despite policy changes during the Kennedy and Nixon Administrations, this policy created a legacy with wide-ranging political implications that survive today,[100] and almost certainly contribute to the current political climate of general reluctance to sign and ratify international treaties.

2. Non-Self-Executing Treaty Provisions

One of the proposals, and lingering policies, from the Bricker Amendment era was to interpret all human rights treaties as non-self-executing.[101] A non-self-executing treaty provision is one that will not automatically enter into

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[97] *See* Rivera Juaristi, *supra* note 25, at 21 ("Human rights are inherently of concern to the international community.").

[98] Louis Henken, *The Constitution, Treaties and International Human Rights*, 116 U. PA. L. REV. 1012, 1030 (1968) ("Today, human rights are of deep 'international concern' … Human rights in other countries have become, ineluctably, this country's business.").

[99] *See* Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.*, 63 N.Y. CITY L. REV. (1998); *see also* Henkin, *supra* note 98, *passim*.

[100] *See* Fox, *supra* note 54, at 246-48; *see also* David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 38-39, n. 45 (1978).

[101] Henkin, *supra* note 82, at 348 (In its principal version, the Bricker Amendment included the following provision: "A treaty shall become effective in the United States only through legislation which would be valid in the absence of treaty." The clause would have rendered all treaties non-self-executing. It would also have prevented congressional implementation of a treaty by legislation that was not within congressional power apart from the treaty, overruling *Missouri v. Holland.*).

domestic force, but requires additional implementing legislation after ratification.[102] Interpretation of a treaty as non-self-executing is largely up to the judiciary, which will look to the wording of the treaty in light of the ascertained intent of the drafters.[103] The US Supreme Court case of *Foster & Elam v. Neilson*,[104] in which the Court considered a claim to land possessed by Spain and then France in the territory of the current state of Louisiana, is a famous example of this doctrine of treaty interpretation. Although a treaty under the US Constitution becomes the law of the land, akin to a legislative act, the Supreme Court reasoned in *Foster* that when it behaves more like a contract, *i.e.*, one of the parties promises to perform an act, then the treaty orients itself more toward the political realm and less toward the legal.[105] In this way, the Court held that non-self-executing treaties require an implementing legislative act or pronouncement following ratification before they can be applied domestically in the US.[106] This decision has since become a powerful tool in today's world: it is the position of the US government that human rights treaties are not self-executing.[107] That is, human rights treaties do not automatically supersede or complement state or federal laws, or really form part of US law at all, without such activating legislation enacted by Congress.

Follow-up legislation after the ratification of a human rights treaty, then, becomes vital. Yet it is precisely here that the US has garnered intense criticism, as it does not consistently pass legislation to make human rights treaties actionable or enforceable under domestic law.[108] That is, while

[102] *Id.* at 346.
[103] Diab, *supra* note 24, at 329-30.
[104] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 7 L.Ed. 415 (1829), *overruled on other grounds by* U.S. v. Percheman, 32 U.S. (7 Pet.) 51, 8 L.Ed. 604 (1833).
[105] *Id.* at 314-15.
[106] *Id.*
[107] Diab, *supra* note 24, at 330 (citing LOUIS HENKEN, FOREIGN AFFAIRS AND THE CONSTITUTION 159-60 (1972)).
[108] *See* Venetis, *supra* note 75, at 99, 104–110; *see also* Marie Wilken, *U.S. Aversion to International Human Rights Treaties*, GLOBAL JUST. CTR. BLOG (June 22, 2017),

interpreting treaties to be non-self-executing may on its face be a neutral policy, the consistency with which the US attaches a RUD of non-self-execution to a given human rights treaty and then fails to pass implementing legislation is problematic; such an action might, in some cases, even be seen as an excuse in order to prolong the assumption of human rights obligations required by the treaty. Such a systematic approach by the US has led some academics to criticize the practice by decrying understandings of non-self-execution as "the most egregious type of RUD that renders human rights treaties unenforceable."[109] In the human rights context, the pervasive use of non-self-executing RUDs without subsequent implementation thus sends a two-faced message that hearkens back to US exceptionalism and the priority accorded to human rights on the national level.

With respect to the American Convention, it is yet an open question whether the treaty even allows an interpretation that it is non-self-executing.[110] Nevertheless, the US reads in an understanding of non-self-execution to the ACHR as well. It interprets Article 2 as sufficiently flexible to allow each country to implement the Convention consistently with its domestic practices:

> Some countries *may choose* to make the articles of the treaty directly effective as domestic law and this article would permit them to do so.[. . .] In the U.S. we would interpret this article as . . . permit[ting] us to refer, where appropriate, to our Constitution, to our domestic legislation already in existence, to our court decisions and to our administrative practice as carrying out the obligations of the Convention. [. . .] In other words, it is not the intention of the U.S.

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http://globaljusticecenter.net/blog/773-u-s-aversion-to-international-human-rights-treaties [https://perma.cc/3NPA-2DB9].

[109] Venetis, *supra* note 75, at 98.

[110] According to some experts, the plain language of the ACHR "strongly supports an interpretation that it is self-executing." Diab, *supra* note 24, at 330. For instance, Article 2 has been read to imply a simultaneous obligation on the part of states parties to take implementing measures concurrently upon ratification, and thus the argument is that the treaty carries a form of built-in self-execution which states agree to promptly undertake by ratifying it. *See id.*

> to interpret the articles of the treaty in Part I as being self-executing.[111]

In spite of this, some academics urge that it was the intention of the treaty's drafters that states should not be able to simply decide, when it suits them, to defer to their domestic legislation in determining which rights should be incorporated into their domestic law.[112] It is thus argued that provisions of the ACHR were meant to become binding at the time a state becomes a party, and the ratifying state should provide to its citizens, and all individuals within its territory, the rights and liberties guaranteed by the treaty.[113] Such an interpretation is logical, particularly given the spirit of the treaty. This debate has not yet been resolved, and the understanding of human rights treaties as non-self-executing continues as a frequent practice of a US Government that remains concerned that its citizens do not find themselves in front of an international organ it might not be able to influence.

D. Incompatible Articles: US Law and the ACHR

There are additional specific concerns that the US has manifested in relation to articles of the American Convention, explored in more depth in a later section of this article.[114] Briefly, these include Article 4 on the right to life, Article 13 on the freedom of expression, and Article 24 on equality before the law and nondiscrimination.

First, the US has specifically objected to obligations flowing from Article 4 of the ACHR, regarding potential implications around the legal status of abortion and the death penalty. Regarding abortion, any impact of the ACHR's Article 4(1) on the legal status of abortion in the United States would be negligible due to the addition of the phrase "in general," which was

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[111] *Conferencia Especializada Interamericana Sobre Derechos Humanos, San José, Costa Rica, 7-22 de Noviembre 1969, Actas y Documentos*, ii, 146-47, OEA/SER. K/XVI/1.2 (1973) (Declaración del Delegado de Estados Unidos) (emphasis added).
[112] Diab, *supra* note 24, at 331.
[113] *Id.*; American Convention, art. 1.
[114] *See infra* Section III(A).

added to the treaty provision so that it would not interfere with the legal status of abortions in states parties.[115] As such, there is likely little risk to *Roe v. Wade* on this front. Turning to the death penalty, while the American Convention may require increased protections for those at risk of capital punishment, the American Declaration already requires parallel changes that the US, by virtue of being an OAS Member State, is subject to.[116]

As for other articles of the Convention, Article 13, on the freedom of expression, originally permitted more restrictions on speech than are permitted by US law. Restrictions were proposed in drafts of the Convention, for example, on expressions that might result in incitement to "discrimination, hostility or violence."[117] Considering this as too restrictive with respect to the freedom of expression, and inconsistent with the First Amendment to the US Constitution, which does not specify such restrictions,[118] the US delegation opposed such drafts of the ACHR.[119] Today, the final version just limits speech as regards incitement to violence.[120]

In the ambit of equality before the law and nondiscrimination—both rights enshrined in Article 24 of the ACHR—the US delegation had objected to a draft provision that seemed to prohibit both public and private

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[115] Diab, *supra* note 24, at 338; *see infra* Section III(A)(1)(a). Such is the understanding of other states in the region as well, such as Mexico, who declared that "'in general' used in that paragraph does not constitute an obligation to adopt, or keep in force, legislation to protect life 'from the moment of conception,' since this matter falls within the domain reserved to the States." *Declarations/Reservations/Denunciations/Withdraws*, AMERICAN CONVENTION ON HUMAN RIGHTS "PACT OF SAN JOSE, COSTA RICA," Treaty References: B-32, OAS, *available at* http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm [https://perma.cc/K2FH-JSKL] (accessed Nov. 24, 2018).

[116] American Declaration, art. I; *see* Donald Fox, *Current Development: Inter-American Commission on Human Rights Finds United States in Violation*, 82 AM. J. INT'L. L. 601, 601-602 (1988).

[117] THOMAS M. ANTKOWIAK & ALEJANDRA GONZA, THE AMERICAN CONVENTION ON HUMAN RIGHTS: ESSENTIAL RIGHTS 234 (2017).

[118] U.S. CONST., amend. I ("Congress shall make no law … abridging the freedom of speech…").

[119] ANTKOWIAK & GONZA, *supra* note 117, at 234–35.

[120] *Id.* at 235.

discrimination.[121] This was seen as contrary to the 14th Amendment to the U.S. Constitution, which does not explicitly prohibit private discrimination.[122] However, the US approved the final version of Article 24, which it considered to be more limited and therefore more consistent with the 14th Amendment.[123]

II. INTER-AMERICAN INVOLVEMENT IN THE AGE OF TRUMP

Over the past two decades, interactions between the US and the Inter-American System have varied considerably.[124] The Bush Administration often expressed general support but no substantive promise, whereas under President Obama, it seemed that the US might be on the path toward a better relationship with at least the Inter-American Commission.[125] During the Obama Administration, a higher number of representatives, who were better informed and could speak to the merits of the cases in question, attended hearings of the Commission; the US State Department facilitated investigatory missions at juvenile detention centers; and in 2015, the US itself requested a hearing at the Inter-American Commission on the subjects of criminal justice and race.[126]

Since the 2016 presidential election, however, the legacy of the moralistic, overtly human rights-friendly Carter Administration[127] has seemed little more than a whisper. The administration of the self-proclaimed nationalist Donald Trump[128] seems to have catalyzed another change in relations

[121] *Id.* at 36.
[122] *Id.*
[123] *Id.*
[124] For a survey of political support for international human rights more generally under US presidential administrations from Carter through Obama, see Luis da Vinha, *Revisiting the Carter Administration's Human Rights Policy: Understanding Traditional Challenges for Contemporary Foreign Policy*, 7 REVISTA DE PAZ Y CONFLICTOS 99, 108-116 (2014).
[125] Camilleri & Edmonds, *supra* note 14, at 2.
[126] *Id.*
[127] *See* da Vinha, *supra* note 124, at 103–108.
[128] Felicia Sonmez, *Trump: I'm a nationalist and I'm proud of it*, WASH. POST, Oct. 23, 2018, https://www.washingtonpost.com/politics/trump-im-a-nationalist-and-im-proud-of-

between the US and the Inter-American System—this time for the worse. Amidst a widely-reported culture of skepticism, isolationism, and xenophobia, the foreign policy actions and agenda of the Trump Administration have resulted in and may cause as of yet unknown repercussions to US relations around the world—and the Inter-American System has not gone untouched. In March 2017, for instance, representatives of the US Government caused international outcry when they did not attend a hearing of the Inter-American Commission on the Trump Administration's travel ban.[129] This manifested as not only a missed opportunity to demonstrate to the world the sincerity of the US in furthering human rights, but also an international embarrassment, as the outcry was not helped by the fact that the headquarters of the Commission are located in Washington, D.C.

The infamous travel ban itself—deemed by many a "Muslim ban"[130]—has drawn widespread criticism and outraged condemnation as not only adverse to the US Constitution and the values it embodies, but as a manifestation of another failure: a deeper abrogation of human rights by the US.[131] Human

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it/2018/10/23/d9adaae6-d711-11e8-a10f-b51546b10756_story.html?utm_term=.c52c37525385 [https://perma.cc/4JAW-3ZEF].

[129] The official reason that was given was that the US could not attend the hearing while litigation was ongoing on the same issues in US courts. This led to a condemnatory open letter submitted by numerous human rights organizations to Secretary of State Rex Tillerson, noting that the US has previously participated in hearings while litigation was ongoing and such litigation should not impede the US from participating now or in the future. *Id.* at 3. It is also worth mentioning that not attending a hearing does not prevent the Commission from investigating the human rights practices in question; it only prevents the US from being able to present its side. IACHR, *supra* note 17, at 14.

[130] *See* Aaron Blake, *Republicans insist this isn't a 'Muslim ban.' Trump and Giuliani aren't helping their cause at all.*, WASH. POST: THE FIX, Jan. 30, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/01/30/republicans-insist-this-isnt-a-muslim-ban-trump-and-giuliani-arent-helping-them-make-that-case/?utm_term=.1490c3c2c932 [https://perma.cc/ZD2C-CDG9].

[131] *See, e.g., Timeline of the Muslim Ban*, ACLU OF WASH. (Nov. 25, 2018, 10:00 AM), https://www.aclu-wa.org/pages/timeline-muslim-ban [https://perma.cc/XA3B-484C]; *see also* Charlotte Clymer, *HRC Responds to SCOTUS Ruling on Muslim Ban*, HUM. RTS. CAMPAIGN (June 26, 2018), https://www.hrc.org/blog/hrc-responds-to-supreme-court-ruling-on-muslim-ban [https://perma.cc/E7H8-9MBY].

rights experts have even determined that the January 27, 2017 order breached the US's existing international human rights obligations of *non-refoulement* and protection from discrimination based on race, nationality, or religion.[132] And the ban is not the end, nor the worst, of the administration's immigration policies: in the wake of Attorney General Jeff Sessions's May 2018 "zero-tolerance" policy of prosecuting each person caught crossing the border illegally, thousands of families were forcibly separated, often with children being detained in the US and their parents deported.[133] Even after a reunification order was issued by a District Court judge compelling the government to reunite the impacted families, as of late summer 2018, almost 500 children remained in custody.[134] Having drawn international condemnation, this practice led to the Inter-American Commission issuing multiple precautionary measures in August 2018, in which it directed the US to reunite certain families and generally protect the rights of separated immigrant families.[135] Circumstances such as this are a powerful reminder of states' propensity to act in reprehensible manners, and thus of the necessity

[132] *US travel ban: "New policy breaches Washington's human rights obligations" – UN experts*, *UN experts*, UN Off. High Commissioner on Hum. Rts. (Feb. 1, 2017), https://ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21136&LangID=E [https://perma.cc/39K4-A5YA].

[133] Dara Lind, *The Trump administration's separation of families at the border, explained*, VOX (June 15, 2018), https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents [https://perma.cc/K69T-BQXM] ("family separation is an unpardonable atrocity").

[134] Maria Sacchetti, *Still separated: Nearly 500 migrant children taken from their parents remain in U.S. custody*, WASH. POST, Aug. 31, 2018, https://www.washingtonpost.com/local/immigration/still-separated-nearly-500-separated-migrant-children-remain-in-us-custody/2018/08/30/6dbd8278-aa09-11e8-8a0c-70b618c98d3c_story.html?utm_term=.cc59bb26339a [https://perma.cc/4K22-AT6B].

[135] Inter-Am. Comm'n H.R.[IACHR], *Vilma Aracely López Juc de Coc and others regarding the United States of America,* Precautionary Measure No. 505-18, Resolution of Aug. 16, 2018, http://www.oas.org/en/iachr/decisions/pdf/2018/63-18MC505-18-US-en.pdf; Inter-Am. Comm'n H.R. [IACHR] *Migrant Children affected by the "Zero Tolerance" Policy regarding the United States of America*, Precautionary Measure No. 731-18, Resolution of Aug. 16, 2018, http://www.oas.org/en/iachr/decisions/pdf/2018/64-18MC731-18-US-en.pdf [https://perma.cc/HKN6-ES9J].

of survivors' access to justice—here, significantly, including the Inter-American System and the many remedies it can provide.[136]

Moreover, the Trump Administration's response to the large "caravan" of individuals who have traveled from Honduras to Mexico has been alarming.[137] The *New York Times* has characterized the rhetoric coming from the White House as baseless and laden with conspiracy theories, particularly in terms of unfounded allegations about the caravan's origin, size, constitution, and purpose.[138] In November 2018, nearly 5,000 individuals arrived at Tijuana, Mexico, many of whom fled "poverty, corruption, and violence in their home countries."[139] US authorities at one point fired tear gas at the migrants in response to the migrants' throwing rocks at them, and the Trump Administration announced the asylum process would not be easily achieved.[140] As part of these events, journalists and lawyers were interrogated, detained, or blocked at the US-Mexico border by the US

[136] For an insightful commentary on the scope and creativity of remedies the Inter-American System has historically provided, *see* Thomas Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279 (2011).

[137] Jeremy W. Peters, *How Trump-Fed Conspiracy Theories About Migrant Caravan Intersect With Deadly Hatred*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/2018/10/29/us/politics/caravan-trump-shooting-elections.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer [https://perma.cc/ET7V-XJX3].

[138] *Id.*

[139] William Cummings, *Incoming Mexican government now says there is no 'Remain in Mexico' deal on migrants*, USA Today (Nov. 25, 2018), https://www.usatoday.com/story/news/world/2018/11/25/migrant-asylum-seekers-deal/2107726002/ [https://perma.cc/4CWE-ZV23]. As of February 2019, most migrants have left Tijuana, around 3,000 having chosen to wait in line for the slow processing of US asylum petitions, and others choosing to stay in Mexico, return home, or travel to other sections of the border to attempt an illegal crossing or new asylum petition at another port of entry. Daniel González & Rafael Carranza, *What Happened to the migrant caravan that arrived in Tijuana?*, Arizona Republic (Feb. 9, 2019), https://www.azcentral.com/story/news/politics/immigration/2019/02/09/immigration-migrant-caravan-tijuana-mexico-us-border-central-america/2747809002/ [https://perma.cc/Q9B5-LRXY].

[140] Brendan O'Brien, *U.S. officials track migrant caravan activists, journalists: NBC*, REUTERS (Mar. 7, 2019), https://www.reuters.com/article/us-usa-immigration-database/u-s-officials-track-migrant-caravan-activists-journalists-nbc-idUSKCN1QO1YH [https://perma.cc/5XJ5-7KXS].

Department of Homeland Security, which human rights NGOs have called on Congress to investigate.[141] In addition, in the related refugee context, fiscal years 2018, 2019, and 2020 saw progressively the lowest refugee admission caps to date—from 45,000 to 30,000 to 18,000, respectively.[142] While the President has discretion in setting these admissions limits, the respective announcements have been strongly condemned by human rights organizations[143] and have served as yet another distress signal to human rights watchdogs.

Thus, there is need for a political agenda that once again prioritizes human rights, and another treaty-based manner by which to hold the US accountable to honoring such an agenda. Despite the US-Inter-American relationship's apparent state of constant flux, there remain concrete and strategic policy reasons that the US should ratify the American Convention. First, the preceding discussion and current politics notwithstanding, the US has continually held itself out as a global watchdog for human rights, in the sense that the US frequently does not lose any time in criticizing other countries when a human rights violation occurs within their borders.[144] It is possible

[141] HUM. RTS. WATCH, *US Harassing Journalists, Lawyers, Activists at Border: Congressional Investigation Needed*, (Mar. 8, 2019), https://www.hrw.org/news/2019/03/08/us-harassing-journalists-lawyers-activists-border [https://perma.cc/JQ46-979W]; HUM. RTS. WATCH, *Human Rights Watch Urges Congress to Investigate Border Incidents Involving Attorneys, Journalists, and Human Rights Defenders*, (Mar. 8, 2019), https://www.hrw.org/news/2019/03/08/human-rights-watch-urges-congress-investigate-border-incidents-involving-attorneys [https://perma.cc/UR6J-G688].

[142] Jens Manuel Krogstad, *Key facts about refugees to the U.S.*, PEW RESEARCH CTR. (Oct. 7, 2019), https://www.pewresearch.org/fact-tank/2019/10/07/key-facts-about-refugees-to-the-u-s/ [https://perma.cc/C8BJ-M3J4].

[143] *See, e.g., Trump Administration Sets All-Time Low Refugee Cap*, HUMAN RIGHTS FIRST (Sep. 17, 2018), https://www.humanrightsfirst.org/press-release/trump-administration-sets-all-time-low-refugee-cap [https://perma.cc/46J5-UXJ3] ("Today's announcement of the abysmally-low refugee cap set by the Trump Administration is a shameful abdication of our humanity in the face of the worst refugee crisis in history.").

[144] *See generally* Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is it Still Right for the United States?*, 41 CORNELL INT'L L.J. 251, 268-69 (2008); *see also* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices (2016, 2017, 2018).

that the appearance of hypocrisy in this respect will diminish US influence, authority, legitimacy, and prestige in the region. Specifically, the failure of the US to ratify the ACHR while challenging other countries could both be costly in terms of diplomacy and "soft power"[145] and limit the efficacy of human rights dialogue in states that have not ratified the Convention or demonstrated leadership in such issues.[146] Ratification would send a public message of the high priority the US assigns to human rights protection, and would also be an indication of hemispheric integration in furtherance of the spirit of the OAS Charter.[147] Regarding the latter in particular, the United States' limited participation has so far curbed opportunities for a global North-South exchange in reference to distinct experiences in the Americas in terms of progress, challenges, and best practices in the protection of human rights.[148] Ratification would allow the US to come to the table, as it were, and become more honestly involved in such constructive dialogue.[149]

Indeed, simply put, "United States adherence [to the ACHR] is in the national interest and in that of the world community."[150] Some scholars have noted that it would also be smart economic policy for the US to involve itself more in the region in this regard, in order to show an interest in the development of smaller nations with which the US may have future trade relations, and thus create a better climate for business and cultural and political relations with nations that have ratified and adhere to the

[145] Camilleri & Edmonds, *supra* note 14, at 4.
[146] IACHR, *supra* note 17, at 14.
[147] *Id.*
[148] *Id.* at 21.
[149] Such has often been argued in the international criminal law context, particularly with regard to US involvement in the International Criminal Court, but the same reasoning holds in the human rights context. *See, e.g.,* Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INT'L L. 525, 534 (2013) ("Our 'smart power' view is that the way to advance U.S. interests is not to shut ourselves off to those with whom we disagree, but to engage and work for mutually beneficial improvements.").
[150] *Letter to the President*, *supra* note 78, at XXIII.

Convention.[151] In this sense, ratification of the ACHR could contribute to prosperity, stability, and even peace in the region.

Beyond the political realm, ratification would also bring certain legal benefits to individuals within the US. For instance, it would advance the development of human rights jurisprudence in US courts by allowing judges to apply the provisions of the Convention directly, as discussed earlier. This would progress and refine the concept of human rights in the US. Similarly, it would open the door to institutional dialogue between the US courts and Inter-American Court by allowing the two systems to share and more directly build upon the jurisprudence of each other.[152] Further, while ratification of the ACHR could eventually pave the way to a human rights treaty-based right of action in US courts and maybe even access to the Inter-American Court and its remedial powers, it would at least help ensure higher human rights standards and protections for US citizens. To be sure, as history shows, the US is not above mass human rights violations. True protection of its citizens and individuals within its borders thus depends on them having as much access to justice as possible.

III. DOMESTIC EFFECTS OF RATIFYING THE ACHR WITH NO RESERVATIONS

In an era when the *New York Times* has determined that there has been an "abdication on human rights,"[153] the United States should not risk diminishing or losing its diplomatic effectiveness concerning human rights

[151] Richard N. Gardner, *A Costly Anachronism*, 53 A.B.A. J. 907, 908 (1967) ("Peace and security, economic and social development and human rights are the three sides of the triangle of world order."); *see also* Donald Fraser, *Freedom and Foreign Policy*, 25 FOREIGN POL'Y 140 (1977).

[152] Thomas Buergenthal, *The American Convention on Human Rights, in* U.S. RATIFICATION OF HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? 51-52 (Richard B. Lillich ed., 1981); *see infra* Section I(A).

[153] *An Abdication on Human Rights*, N.Y. TIMES (March 27, 2017), https://www.nytimes.com/2017/03/27/opinion/an-abdication-on-human-rights.html [https://perma.cc/9XMT-H63S].

in the region. Faced with a return to "hard power" policies, the promulgation of "America first" *realpolitik*, and political realism over a more inclusive liberalism, the United States should ratify the American Convention on Human Rights with no reservations. Specifically, the US should 1) not propose any reservations related to substantive rights, as doing so would be redundant of US law; 2) not include an understanding of the treaty as non-self-executing as, particularly in the human rights context, such a RUD would abrogate universal values and even thwart the object and purpose of the treaty; and 3) not include any RUDs in reference to the federal-state balance, though it could look to the states for early implementation of the treaty provisions. By ratifying the Convention in this way, the US will take a needed step toward expanding human rights protection and development at home and abroad, lending legitimacy to the Inter-American Human Rights System, increasing its own jurisprudence regarding human rights, and sending a powerful signal that the US takes human rights seriously.

First, this proposal is informed by an overarching theme of avoiding usage of RUDs whenever possible. It has been argued by many a scholar, politician, and human rights expert that overusing RUDs could "risk compromising broader treaty formulation and compliance among states."[154] The use of RUDs by the US has increased since 1960, and this growth continues today.[155] While the US is not alone in the practice of attaching RUDs to treaties, with such increasing usage, more states may be prone to regard the United States' insistence on RUDs with skepticism and even mistrust. Further, this could spark a backlash by treaty drafters, who may start to include no-reservation provisions as boilerplate treaty language.[156] As the name implies, such provisions would proscribe the attachment of RUDs to a given treaty; were a state to try to do so anyway, such an action would not only be a blatant breach of the treaty but may also arguably even violate its

[154] Chung, *supra* note 65, at 177.
[155] *Id.* at 185.
[156] *Id.* at 211.

object and purpose under the Vienna Conventions. Generally speaking, an overreliance on the RUDs by the US, especially faced with the threat of no-reservation treaty provisions, could have detrimental impacts on the corpus of international treaty law and its evolution by effectively excluding the US from multilateral treaty-making processes—or at least make its participation much more stagnant and cumbersome.[157]

It is with this in mind that many human rights scholars have advocated for the inclusion of only a few RUDs by the US in its ratification of treaties going forward.[158] Eric Chung, for instance, has suggested that RUD language go no further than 1) a federalist reservation preserving the federal-state balance of powers in the US; 2) an understanding that any treaty obligations will be fulfilled in a manner consistent with the Constitution and laws of the US; and 3) an understanding that to the extent multiple treaties contain similar or overlapping subject matter, similar provisions will be subject to the same RUDs.[159] As will be explored more below, in the context of the American Convention, Chung's recommendations can be taken further. In sum, a federal-state RUD is unnecessary by virtue of the ACHR's Federal Clause, the second suggested reservation is not needed as it is already impliedly provided for by the US Constitution and domestic courts will always interpret the Constitution as supreme, and the third is redundant if it mirrors the actual practice of RUD attachment as understood by domestic courts.

A. No Reservations on Substantive Rights

In the spirit of including as few RUDs as possible upon ratifying the American Convention, the US should not attach any RUDs on particular articles or substantive rights. Specifically, this amounts to avoiding the use of reservations and understandings concerning Articles 3-26 of the

[157] *Id.*
[158] *See id.* at 215-16.
[159] *Id.*

Convention.[160] During the Senate hearings on ratification of the ACHR in 1979, a legal adviser at the State Department, along with several other officials, emphasized that "the substantive provisions of these four treaties [including the ACHR] do not conflict in any way with basic U.S. law or policy."[161]

Yet, within the Carter Administration's proposal of ratification of the Convention, fifteen RUDs were suggested regarding particular substantive rights.[162] These can be broadly organized into the following three groupings: RUDs that are redundant under the US Constitution and federal law, RUDs that would be superfluous specifically in light of the Supremacy Clause, and instances where the Convention provides greater protection than existing US law.

1. Redundancies under the Constitution and Laws of the United States

First, the proposed reservations and understandings on Article 4,[163] paragraph (4) of Article 8,[164] paragraphs (4) and (5) of Article 17,[165] and paragraph (8) of Article 22[166] are arguably redundant under the Constitution and present US law.

a) Article 4: Right to life

The proposed reservation to Article 4, on the right to life, reads simply as follows: "United States adherence to Article 4 is subject to the Constitution

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[160] *See* American Convention, arts. 3-26.
[161] *International Human Rights Treaties: Hearings Before the Subcomm. on Foreign Relations,* 96th Cong. 24 (1979) (statement of Roberts B. Owen, Legal Advisor, Dept. of State).
[162] *Letter to the President*, *supra* note 78, at XVII-XXIII.
[163] *Id*. at XVIII.
[164] *Id*. at XIX.
[165] *Id*. at XXI.
[166] *Id.*

and other law of the United States."[167] A brief explanatory note submitted along with the recommended reservation implies that, with regard to the right to life in particular, many provisions of the article may not be "in accord with United States law or policy," or implicate "unsettled" areas of the law, and therefore such a broad reservation is necessary.[168] While the ACHR provides for some specific substantive limits to the death penalty not present in US jurisprudence, it leaves intact the current status of abortion in the US; however, this RUD may nevertheless be unnecessary in light of current US law and legal trends.

Starting with the death penalty, as a threshold matter, any change that the Convention may require of the thirty-one US states that still allow the death penalty[169] would parallel changes already required by the American Declaration, an international instrument the US is already subject to.[170] Although the Declaration does not have the binding force of a treaty, the US government is within its reach by virtue of being an OAS Member State. Moreover, domestic attitudes regarding the death penalty have fluctuated greatly over the past several decades.[171] The absence of any reservation on this provision may thus invite the continued development of the law and

[167] *Id.* at XVIII.
[168] *Id.*
[169] *Death Penalty Fast Facts*, CNN (Sep. 4, 2018), https://www.cnn.com/2013/07/19/us/death-penalty-fast-facts/index.html [https://perma.cc/2D38-4G8C].
[170] American Declaration, art. I; *see* Donald Fox, *Current Development: Inter-American Commission on Human Rights Finds United States in Violation*, 82 AM. J. INT'L. L. 601, 601-602 (1988).
[171] This fluctuation of societal opinion can be seen by the following broad pattern: in 1972, the US Supreme Court found the death penalty to be unconstitutional in the landmark case of *Furman v. Georgia*, 408 U.S. 238 (1972); following, 35 states re-drafted their sentencing laws to conform with the Court's note that capital punishment would be permissible if based off of the Model Penal Code, JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 366 (7th ed. 2016). A more recent trend mirroring a global movement disfavoring and even condemning capital punishment has since been embodied in, *e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (holding the death penalty to be unconstitutional as applied to individuals under 18 years of age) and state jurisprudence such as *State v. Gregory*, 192 Wash.2d 1, 427 P.3d 621 (2018) (holding the death penalty as applied to be unconstitutional under the Washington State Constitution).

social values in this context, particularly as to the subject-matter considerations of Article 4 on limitations of the death penalty to "the most serious crimes"[172] excluding political offenses and related common crimes.[173]

As regards the *ratione personae* considerations of Article 4, the US has already undertaken to protect—*i.e.*, prohibit capital punishment for—certain of the populations mentioned in Article 4(5). As it stands, that provision would prohibit application of the death penalty to minors under eighteen, persons older than seventy, and pregnant women.[174] Taking the last first, it is currently illegal under US federal law to impose capital punishment on a pregnant woman.[175] Then, while there is no upper age limit on death-row defendants in US states that allow capital punishment,[176] the US Supreme Court in 2005 struck down the death penalty as applied to persons who were under age eighteen at the time of their crimes, as a violation of the Eighth and Fourteenth Amendments.[177] As such, aside from retaining the ability to apply capital punishment to persons over seventy years old, the US has effectively already abolished the death penalty for two out of the three populations contemplated in Article 4(5), and so minimized the inconsistency between US law and the ACHR in this respect.

With respect to abortion, the specific provision of "from the moment of conception" in Article 4(1) of the ACHR spurs the concern that ratification of the Convention could result in the prohibition of legal abortion in the

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[172] American Convention, art. 4(2). "Most serious crimes" are generally evaluated by level of severity, *i.e.*, crimes that affect the "most important individual and social rights," and have been interpreted to apply in "truly exceptional circumstances only." IACHR, *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OAS/Ser.L/V/II. Doc. 68 (2011), pp. 55-60, *available at* https://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf.

[173] *Id.* art. 4(4).

[174] American Convention, art. 4(5).

[175] 18 U.S.C. § 3596b (1994).

[176] *See, e.g.*, Amnesty International, *The Death Penalty in 2017: Facts and Figures* (Aug. 12, 2018, 3:00 PM), https://www.amnesty.org/en/latest/news/2018/04/death-penalty-facts-and-figures-2017/ (Aug. 12, 2018, 3:00 PM) [https://perma.cc/86NM-9RFS].

[177] Roper v. Simmons, 543 U.S. 551 (2005).

US.[178] Indeed, *Roe v. Wade*,[179] which famously decriminalized abortion in 1973, might be held to violate Article 4 and therefore result in an unfavorable verdict by the Inter-American Court or Commission.[180] At a time when *Roe* seems especially fragile, this is worrisome. In the drafting negotiations, the US, together with Brazil, determined that the subject of abortion should be confined to national legislatures in lieu of being reckoned by the Convention.[181] Therefore, in a nod to states that have legalized abortion, the ACHR currently attempts to compensate for this with the subordinate clause of "in general" just before the clause recognizing life from the moment of conception.[182] That is, the final and present version of the article provides that "[e]very person has the right to have his life respected. This right shall be protected by law and, *in general*, from the moment of conception. No one shall be arbitrarily deprived of his life."[183]

The Inter-American Court has, in its landmark decision *Artavia Murillo et al. v. Costa Rica*, interpreted the clause "in general" to imply that the protection of the right to life is not absolute but rather more nuanced in this respect.[184] In particular, reasoning that the embryo cannot be understood as a person for purposes of Article 4, the Court held that the insertion of "in general" means that exceptions exist to the general rule, and thus that legal understandings of the right to life continue to be developed with the times.[185]

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[178] Diab, *supra* note 24, at 337.
[179] Roe v. Wade, 410 U.S. 113 (1973).
[180] In fact, this has already happened with regard to the American Declaration, in the case White v. U.S., Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (Mar. 6, 1981) (laws that permitted abortion were contested as a violation of the Declaration's Article 1 right to life).
[181] ANTKOWIAK & GONZA, *supra* note 117, at 60.
[182] American Convention, art. 4(1).
[183] *Id.* (emphasis added).
[184] *Artavia Murillo et al. v. Costa Rica*, Preliminary Exceptions, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 175-189, 204-221, 258 (Nov. 28, 2012).
[185] *Id.* at ¶ 264 ("es posible concluir de las palabras 'en general' que la protección del derecho a la vida con arreglo a dicha disposición [que 'el embrión no puede ser entendido como persona para efectos del artículo 4.1'] no es absoluta, sino es gradual e incremental

In a more political nod, academics have similarly inferred that the intention of the Convention's drafters was to protect a right to life that does not interfere with legal abortions in prospective states parties to the Convention.[186]

b) Article 8(4): Double jeopardy

The understanding applied to double jeopardy qualifications vis-à-vis Article 8(4) is redundant due to the established nature of US law in this area. Article 8(4) provides that "[a]n accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause."[187] The accompanying RUD is as follows:

> The United States understands that the prohibition on double jeopardy contained in paragraph (4) is applicable only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, which is seeking a new trial for the same cause.[188]

In the United States, the Supreme Court has recognized a "dual-sovereignty" exception to double jeopardy. That is, the Court has held that the federal government and state governments are independent sovereigns for purposes of double jeopardy, and thus the same offense, if criminal under both federal and state law, can give rise to dual prosecutions under these different governmental units.[189] The reasoning is that an "'offence' is defined by a law, and each law is defined by a sovereign[;] … where there are two sovereigns, there are two laws, and two 'offences.'"[190] Article 8's prohibition

según su desarrollo, debido a que no constituye un deber absoluto e incondicional, sino que implica entender la procedencia de excepciones a la regla general.").

[186] The legislative histories of both the ACHR and American Declaration imply that neither was intended to require that Member States who had legalized abortion change their domestic legislation. Diab, *supra* note 24, at 338.

[187] American Convention, art. 8(4).

[188] *Letter to the President*, *supra* note 78, at XIX.

[189] *See* Gamble v. United States, 139 S.Ct. 1960, 1964 (2019).

[190] *Id.* at 1965.

of double jeopardy, under US law, would therefore be applicable only when the acquittal has been given by a court of one governmental unit and that same governmental unit seeks a new trial for the same cause, *i.e.*, a state court tries the same case on the same merits after a state-level acquittal, or the same with federal courts.

The RUD becomes unnecessary, however, as it does not seem that Article 8(4), without more, would impact this Supreme Court precedent. Instead, the Court and other judicial organs would likely draw upon *Gamble* and others in the long line of "dual-sovereignty" doctrine jurisprudence to interpret this provision as being read and applied with an understanding in line with the above submission by the Carter Administration.

c) Articles 17: Rights of the family

It is unnecessary to include RUD language that refers to an understanding of provisions as goals to be achieved progressively rather than immediately, as was the case with Article 17, on rights of the family.[191] While Articles 1 and 2 require states parties to respect and protect by legislative measures the rights contemplated by the Convention,[192] there is no provision in the Convention that requires states to adopt each article or rights protection *immediately*. More immediate action may be implied by the contrast created by Article 26's "progressive" development of economic, social, and cultural rights,[193] but such a reading would surely be tempered by the procedural considerations, and speed, of domestic legal change. Plus, if US law is

[191] Here the following RUD was recommended: "The United States considers the provisions of paragraphs (4) [on equality of rights and responsibilities of spouses] and (5) [on equal rights of children born out of wedlock with those born in wedlock] of Article 17 as goals to be achieved progressively rather than through immediate implementation." *Id.* at XXI.

[192] *See* American Convention, arts. 1 and 2.

[193] American Convention, art. 26 ("The States Parties undertake to adopt measures, … with a view to achieving progressively … the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States…").

moving, albeit gradually, toward the achievement of such a goal, a RUD to this effect would one day be obsolete.

d) Article 22: Freedom of movement

Finally, if the US is already bound by obligations under other treaties that implicate a right under the ACHR, RUD language signaling that these other treaty obligations constitute compliance is unnecessary. In the context of Article 22 on freedom of movement and residence,[194] for instance, the US declaration considered that "US adherence to the Protocol Relating to the Status of Refugees constitutes compliance with the obligation set forth in paragraph (8) of Article 22."[195] The US, like most states, is under myriad treaty commitments, and complies with these obligations in varying ways. While perhaps a commentary on the necessity of a clause made redundant in light of the Refugee Convention, the US reservation is nevertheless unnecessary. It is a needless exercise to list all or any of the means of compliance within a RUD, and RUD language to this effect would probably not confine US obligations to just the Refugee Convention, if that was the intended result, as parallel obligations would still arise under the American Convention once ratified.

2. Superfluity under the Supremacy Clause

Faced with a conflict between the Constitution and other legal provisions, domestic courts in the United States will always interpret the former as supreme over the latter due to the Supremacy Clause.[196] This is true even though treaties, once ratified, become the law of the land.[197] For example, RUDs by the US to certain provisions of ACHR Article 13, on prior censorship and war propaganda or "advocacy of national, racial, or religious

[194] American Convention, art. 22.
[195] *Letter to the President*, *supra* note 78, at XXI. The relevant provision of Article 22 engenders the *non-refoulement* obligation in refugee law. American Convention, art. 22(8).
[196] U.S. CONST. art. VI, cl. 2.
[197] *Id.*

hatred" constituting incitement to violence or "other similar illegal action," read as follows: "The United States reserves the right to permit prior restraints in strictly defined circumstances where the right to judicial review is immediately available; the United States does not adhere to paragraph (5) of Article 13."[198]

While the State Department has thus interpreted part of Article 13 as raising free-speech questions,[199] under the Supremacy Clause any inconsistency would likely be resolved in the US with deference to the First Amendment. Furthermore, the US has a well-established legal framework against abridging speech, qualified by the famous case of *New York Times v. Sullivan*[200] and similar jurisprudence,[201] and such a level of entrenchment only serves to further diminish the plausibility that a treaty provision like Article 13 would change that. Moreover, on a procedural level, the recommended reservation in regard to this provision—"[t]he United States does not adhere to paragraph (5) of Article 13"[202]—may be fundamentally improper, as it is antithetical to the idea of human rights that states should be able to pick and choose which rights to protect, especially in the context of a regional human rights treaty reaching more than 30 states.[203]

3. Heightened Protections under the ACHR

The protections afforded by such ACHR provisions as Articles 5, 9, and 14 go beyond the protections of existing US law. As this article advocates for the increased development and utilization of human rights law, such expansions are regarded as beneficial and such RUDs should be discouraged. Indeed, political symbolism arguments aside, the essence of the argument for ratification of the ACHR is to spur and inform the development of human

[198] *Letter to the President*, *supra* note 78, at XX.
[199] *Id.*
[200] New York Times v. Sullivan, 376 U.S. 254 (1964).
[201] *See* Fox, *supra* note 54, at 267.
[202] *Letter to the President*, *supra* note 78, at XX.
[203] *See, e.g.*, Diab, *supra* note 24, at 331.

rights in the US and the region. Significantly, that includes increasing human rights protections in the US.[204] Unless the US is willing to hold itself to the same, agreed-upon standards as the rest of the region, ratification of the American Convention, and improving domestic and regional rights, is a hollow act. Thus, reservations such as the following Carter-era proposals should be avoided.

a) Article 5: Right to humane treatment

With respect to Article 5, the following reservation was proposed:

> The United States considers the provisions of paragraphs (4) and (6) of Article 5 as goals to be achieved progressively rather than through immediate implementation, and, with respect to paragraph (5), reserves the right in appropriate cases to subject minors to procedures and penalties applicable to adults.[205]

Paragraph (4) of Article 5 demands the segregation of accused from convicted persons, save in exceptional circumstances,[206] and paragraph (6) contemplates the principle of rehabilitation as an essential aim of the punishment of deprivation of liberty.[207] The issues with a RUD concerning progressive implementation are discussed above with respect to Article 17.[208]

As to the second part of the RUD, however, the text of Article 5, paragraph (5) states that "[m]inors while subject to criminal proceedings shall be

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[204] *See*, *e.g.*, Henkin, *Rights: American and Human*, *supra* note 26, at 423-24 ("The notion that the United States would adhere to an international human rights agreement only insofar as it would require no change in the way we do things seems—to put it mildly—anomalous. One would have thought that the principal purpose of undertaking obligations was to promise to do things one is not yet doing—in this instance, to improve our ways where necessary to conform our behavior to common international standards."); *see also* THE FEDERALIST NO. 22, at 112 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States to have any force at all, must be considered as part of the law of the land.")

[205] *Letter to the President*, *supra* note 78, at XVIII.

[206] American Convention, art. 5(4).

[207] *Id.* art. 5(6).

[208] *See infra* Section III(A)(1)(c).

separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors."[209] While US federal law might not yet meet the standard enshrined in Article 5,[210] strides are continually being made, at least in state courts, to protect juveniles in the criminal context.[211] For example, New York State in 2017 raised the age of criminal responsibility to eighteen years of age, thereby intervening with sixteen- and seventeen-year-old individuals in Youth Part or Family Court and housing such offenders in specialized juvenile detention facilities.[212] Provisions such as Article 5(5) may therefore help more US states to recognize the rights of juveniles in this way.

b) Article 9: Freedom from ex post facto laws

Next, the reservation on Article 9, which protects the freedom from *ex post facto* laws, states that the "United States does not adhere to the third sentence of Article 9,"[213] which contemplates the principle of retroactive amelioration discussed below. As a general matter, refusing adherence to certain rights may be fundamentally improper, as it is antithetical that states should be able to cherry-pick which rights to protect of a human rights treaty.[214] Such a practice further begs the question of how many enumerated rights can be watered down or interpreted out of existence by RUDs before the object and purpose of the Convention is damaged or altogether lost. Indeed, a foreseeable effect of such reservations would be to preserve the possibility that the US could permissibly engage in activity prohibited by the ACHR. This cannot be allowed in keeping with its object-and-purpose obligations.

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[209] American Convention, art. 5(5).
[210] Fox, *supra* note 54, at 265.
[211] Indeed, the goal in paragraph (5) is "realizable" and is not "contrary to stated objectives of the federal criminal law system." *Id.*
[212] Office for Justice Initiatives, *Raise the Age*, NEW YORK STATE UNIFIED COURT SYSTEM (Mar. 5, 2020, 11:20 AM), http://ww2.nycourts.gov/ip/oji/raisetheage.shtml [https://perma.cc/TM4C-S5SQ].
[213] *Letter to the President*, *supra* note 78, at XIX.
[214] *See, e.g.*, Diab, *United States Ratification*, *supra* note 24, at 331.

Notwithstanding the question of general impropriety of this RUD, the sentence of Article 9 in question provides that if a law is amended or appealed, resulting in the imposition of lighter punishment, persons found guilty of crimes prior to the change will benefit retroactively.[215] Current US law generally presumes statutes to operate prospectively, and so disfavors even ameliorative changes, considering them to be inconsistent with the general constitutional prohibition of *ex post facto* legislation.[216] A minority of US jurisdictions allows the application of amendatory acts benefiting a defendant—"retroactive amelioration"—only where the judgment of conviction is not final,[217] but Article 9 would go further, thus providing another instance of increased protections for individuals in the US. Scholars have already argued for expanding retroactive amelioration.[218] Indeed, there is a compelling fairness argument inherent to the doctrine, as the legislative intent behind such a statutory change must have operated to lessen the punishment,[219] thereby re-characterizing the crime, in the eyes of society, as lesser than it had been when it was committed. Justice would therefore call for its even application to all those similarly convicted.

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[215] American Convention, art. 9.

[216] S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 7-8 (2009) [*In with the New, Out with the Old*].

[217] *See, e.g.*, People v. Oliver, 134 N.E.2d 197 (N.Y. 1956); In re Estrada, 408 P.2d 948, 951 (1965) ("The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final."); State v. Coolidge, 282 N.W.2d 511 (Minn. 1979); People v. Schultz, 460 N.W.2d 505 (Mich. 1990).

[218] *See* Mitchell, *In with the New, Out with the Old*, *supra* note 216; Eileen L. Morrison, *Resurrecting the Amelioration Doctrine: A Call to Action for Courts and Legislatures*, 95 B.U. L. REV. 335, 336-337 (2015) (advocating for a baseline presumption of ameliorative retroactivity).

[219] Estrada, 408 P.2d at 951-952.

c) Article 14: Right of reply

The proposed reservation on Article 14, concerning the right of reply, similarly states a refusal to adhere to a provision of that article: "[t]he United States does not adhere to paragraph (1) of Article 14, and understands that paragraph (3) of that Article applies only to non-governmental entities."[220] As noted, it then states an understanding that paragraph (3), which requires that every publisher, newspaper, motion picture, radio, and television company have "a person responsible who is not protected by immunities or special privileges,"[221] applies only to non-governmental entities.[222] Paragraph (3) reveals yet another instance of would-be increased protections, this time with regard to sovereign immunity; under current US tort law, there is no responsible person without immunities or special privileges who can be sued when it is the US government that is the publisher of inaccurate or offensive statements.[223] Yet it is questionable whether enough legitimate reasons exist for governmental immunity to outweigh the societal benefit of an innocent's chance at recovery after the government or state actor publishes statements that might damage an individual due to the statements' inaccuracy or offensiveness. This is especially true when private companies would be liable under the same circumstances. Indeed, "[i]t is not unreasonable or impractical to require government publications to meet the standards of Article 14."[224] As such, excluding such a RUD on Article 14, and thus providing an additional avenue for relief in the US from such government misconduct, can only be a benefit.

Again, with part of the point of ratification of the ACHR being to improve domestic rights and enhance regional cooperation, the US must hold itself out as willing to undertake parallel commitments as the other states of the

[220] *Letter to the President*, *supra* note 78, at XX.
[221] American Convention, art. 14(3).
[222] *Letter to the President*, *supra* note 78, at XX.
[223] Fox, *supra* note 54, at 268-69.
[224] *Id.*

Americas. While these ideas will need to be developed further, it is hoped that this article can act as a general guide in order to help the US assume meaningful rights protections under the Convention and thus play its role in defending human rights in the region.

B. Avoiding Non-Self-Executing RUDs

The US should avoid the attachment of an understanding that the American Convention on Human Rights is non-self-executing. Such RUDs have been construed by courts as barring treaty enforcement by the judiciary, effectively fulfilling the isolationist objective that human rights treaties will not create private causes of action in the US.[225] Particularly in the context of human rights treaties, the automatic use of non-self-executing RUDs by the US, with lack of follow-up implementation, has drawn criticism from other states and human rights scholars, who have taken this phenomenon as another embarrassing example of the US abrogating its commitments to international human rights and universal values.[226] In the international legal context, the overuse of non-self-executing RUDs in tandem with a failure to enact subsequent legislation may be seen to impermissibly postpone the assumption of human rights obligations, and so run afoul of the object and purpose of the treaty. If a state ratifies a human rights treaty but never implements its provisions in a dualist or non-self-executing context, so as to allow its citizens recourse or further contribute to the development of human rights in the region, the effect of that ratification is marginal at best and nominal at worst. Alternatively, such a practice could even be seen as an instance of noncompliance with the treaty, even if not strictly violative of the provisions, by the state ratifying but effectively denying its citizens recourse under the treaty. Such overuse is dangerous to international relations and other treaty law: the prospect of superficial ratifications cuts to the heart of

[225] *See* Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 421-22 (2000).
[226] *See, e.g.,* Sloss, *supra* note 84, at 132-33.

the effectiveness of treaty-making, to the detriment US partnerships and interests abroad.

The power to consent to a treaty on the condition that it has no domestic force without congressional implementation is an implicit tenet of statehood. As discussed above, the US is no stranger to this practice. In fact, it is so entrenched in the US legal system that the Supreme Court has supported a presumption against self-execution in treaties, even when no RUD to this effect has been proposed.[227] To combat this presumption, Professor Penny Venetis has advocated the adoption of universal implementing legislative language that would make the elimination of non-self-executing clauses in treaty recommendations "the only thing that Congress and the President need to do to make a treaty enforceable."[228] As a first step, the US should avoid the Carter Administration's proposed declaration that "the provisions of Articles 1 through 32 of this Convention are not self-executing."[229]

It has also been argued that non-self-executing RUDs are inherently undemocratic as applied in the US, because they channel decision-making away from legislative participation by Congress and toward constitutional adjudication by the Supreme Court, an unelected body.[230] Professor David Sloss, for instance, has advocated for direct application of human rights treaties, in particular the International Covenant on Civil and Political Rights, for that reason:

> If the Supreme Court invalidates a state law on the grounds that the law is unconstitutional, the Court closes the channels of political participation because Congress cannot reverse a constitutional decision of the Supreme Court. Suppose, though, that the Supreme Court invalidated the same state law on the grounds that the law

[227] *See* Medellín v. Texas, 552 U.S. 491, 505–06 (2008) (determining an International Court of Justice decision to not be binding federal law because the UN Charter was not self-executing); Venetis, *supra* note 75, at 111-12.
[228] Venetis, *supra* note 75, at 148.
[229] *Letter to the President*, *supra* note 78, at XVIII.
[230] David Sloss, *Using International Law to Enhance Democracy*, 47 VA. J. INT'L L. 1, 3 (2006).

> conflicted with the International Covenant on Civil and Political Rights (ICCPR), a human rights treaty to which the United States is a party. This would ensure that the channels of political participation remain open, because Congress would retain the power to enact legislation superseding the treaty as a matter of domestic law if Congress disliked the result of the Supreme Court decision. Thus, if courts based their decisions on the ICCPR instead of the Constitution, they could protect fundamental rights in a manner that is consistent with the principle of majority rule.[231]

Treaty-based litigation would thus provide a creative means of human rights development by allowing a legal dialogue or evolution to occur between the Supreme Court and Congress. Participation by one of the political branches in this way is necessary: if a judicial decision based on a human rights treaty were unsatisfactory or grounded in outdated law or societal values, then elected members of Congress could pass superseding legislation. This in turn would help shape not only human rights jurisprudence in terms of interpreting and applying the treaty in question, but would also refine popular and legal conceptions of human rights more fundamentally. Due to the political stature of the US, and implications of US Supreme Court decisions, this could contribute to the development of human rights in the region more broadly. Of course, such treaty-based litigation is greatly hampered or precluded altogether by a determination that the treaty is not self-executing.

Finally, as a political matter, the overuse of non-self-executing RUDs may not only weaken the United States' public reputation as a display of exceptionalism or even hypocrisy, but such actions could also endanger the future effectiveness of treaty-making. Professor Louis Henkin once remarked in regard to a 1978 executive policy, "[w]hat sort of convention would you

[231] Professor Sloss proceeds to recommend legislation that would require courts to avoid constitutional decisions and instead favor direct treaty application, specifically with regard to capital punishment under the ICCPR (although he notes the same scheme could serve as a model for other areas of substantive law). *Id.* While such proposed legislation is beyond the scope of this article, the same or very similar legislation could also be made in reference to the American Convention and its enumerated rights.

have if every country adhered subject to the reservation that it would not make any changes in its laws?"[232] The same warning applies here. Limiting a treaty's domestic effect in such a way is a conspicuous signal to the world that "United States adherence remains essentially empty,"[233] and therefore that the US "does not take such conventions seriously as international obligations."[234] The possibility follows, then, that states around the world may take the US as an example and similarly make non-self-executing reservations, to the detriment of international collaboration and universal protection of human rights. In this way, such functionally superficial ratifications could pose an existential threat to treaty-making in the context of human rights, and perhaps beyond.

C. Federal-State RUDs and the Creativity of State Implementation

Another RUD in common usage by the US seeks to clarify, or qualify, treaties in line with the federal structure of the United States. Language to this effect often states that any obligations assumed by the US will be subject to the Constitution and federal jurisdiction, that no state laws will be superseded by the federal action of ratifying the treaty, or that the federalist system of government will be otherwise preserved.[235] Because federal-state

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[232] Louis Henkin, *The Covenant on Civil and Political Rights, in* U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS?, 20, 22 (Richard E. Lillich ed., 1981) (reprinted in RICHARD E. LILLICH, INTERNATIONAL HUMAN RIGHTS 217, 218 (2d ed. 1991)).

[233] Henkin, *supra* note 82, at 346.

[234] *Id.* at 348.

[235] For example, the following RUD language was proposed in regard to the 1967 Protocol Relating to the Status of Refugees:

> The United States would assume obligations only in respect of matters that come within the legislative jurisdiction of the Federal Government. State laws would not be superseded by any provision of the Convention. With respect to any articles in the Convention that may come within the legislative jurisdiction of the states under our constitutional system, the Federal Government is obligated to bring such articles to the notice of the appropriate state authorities with a favorable recommendation.

RUDs would be superfluous in light of the ACHR's Article 28 (the Federal Clause) and constitutionally redundant in light of the US structure of government,[236] the US should avoid attaching such RUDs to the American Convention.

Interestingly, no federal-state RUD was proposed to the ACHR by the Carter Administration. This was perhaps due to a political shift in viewpoints,[237] or maybe to the presence of the Federal Clause.[238] While the possibility exists that another administration may propose a federal-state RUD, Article 28, which essentially serves as a built-in federal-state RUD, is a strong indication that RUDs on this point would be legally superfluous.

Instead, consistent with the US federal-state balance of power, creative state legislatures could encourage federal ratification by early implementation of the ACHR's provisions. While the states, as units of the federal state, have no power to independently ratify treaties, they can still pass laws that give effect to the same rights delineated by the treaty, consistent with both the federal Constitution and that of the state.[239] Indeed, "treatymakers … [have] express[ed] an understanding that some provisions of the treaties may be implemented by state and local governments rather than by the federal government."[240] Domestic application of treaty law necessarily takes a top-down approach, with the signing by the President, ratification by the Senate, and then implementation by Congress and the

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Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1374-75 (2006) (quoting *Letter of Submittal from Secretary of State Dean Rusk*, U.S. Dep't of State, July 25, 1968).

[236] *See infra* Section I(C).

[237] Fox, *supra* note 54, at 253 ("[I]t can be argued that the viewpoint from which such attacks were made in the 1950s no longer prevails and that the supposed political necessity for such a clause no longer exists.")

[238] As noted earlier, the Federal Clause relieves federal governments from preventing violations on the part of state governments and therefore from interfering in intrastate affairs, and generally allows states to keep control over their existing laws and means of amending them. *See infra* Section I(C).

[239] *See* Bradley, *supra* note 225, at 401.

[240] *Id.*

states. But if states, as "laboratories" of democracy,[241] were to start the process by passing legislation on the same subject matter, effectively implementing the treaty's provisions on their own, such a bottom-up approach may be useful in advocacy efforts to convince the federal government to ratify the human rights treaty in question. In this way, the federal government could observe the legal and social effects of the implementation and enforcement of treaty-protected rights before it ratifies the treaty, and states and human rights activists could coalition-build based on the state-level successes in order to persuasively encourage federal ratification.

While it may then be argued that early state implementation would render treaty ratification unnecessary, such a conclusion does not follow. In the absence of the American Convention, there would be no possibility of Inter-American Court participation, including legal remedies, institutional collaboration, and jurisprudential dialogue between the Inter-American Court and US Supreme Court. That is, as now, Inter-American Court precedent could be invoked only indirectly by the Supreme Court as part of the broader corpus of international law. Moreover, it is not superfluous—rather, it is essential—to have both state and treaty protections. Such a legal schema would further human rights in the US by theoretically providing multiple means of relief, *i.e.*, state-level rights via early implementation of the treaty provisions' contents, and then federal-level law via the treaty itself, upon ratification. In addition, this framework would advance human rights development by freeing federal and state courts to develop and refine human rights jurisprudence domestically.

In the context of the American Convention, there are only a few instances where US law does not already provide the protections enshrined in the

[241] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

ACHR, as evidenced by the Carter Administration's RUD recommendations.[242] It should therefore be relatively straightforward for interested state legislatures to incorporate the substance of at least most of the Convention's provisions into legislation. There is nothing procedurally stopping state legislatures, beyond politics, from incorporating even those protections of the ACHR that go beyond existing US law, too. Doing so would allow state courts the opportunity to interpret and enforce the substance of the treaty provisions, thereby facilitating acceptance of the same level of human rights, and thus the brunt of the treaty, by the federal government.

V. CONCLUSION

It is difficult to leave a good prognostic for prompt ratification of the American Convention, or even for the continued protection and development of human rights by the US, in light of the current domestic political and social climates. The policies and rhetoric coming from the White House in particular have made this goal all but unrealistic during Trump's presidency. Even in the context of past administrations,

> the United States has not been a pillar of human rights, only a "flying buttress"—supporting them from the outside. Human rights have been a kind of "white man's burden"; international human rights have been "for export only." Congress has invoked international human rights standards only as a basis for sanctions against other countries. President Carter has invoked human rights agreements in criticism of others.[243]

Hence, the trek ahead for human rights protection in the US, the region, and the world remains steep. It is hoped that this article may lend a guiding framework to a future administration that is inclined to continue the climb.

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[242] *Letter to the President*, *supra* note 78, at XVIII-XXI.
[243] Henkin, *supra* note 26, at 421.

United States ratification of the American Convention on Human Rights, with no RUDs at all, would be a powerful step in a better direction.