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This paper is one in a series of essays on the natural law and natural rights foundations of internationally recognized human rights. The "First Principles of International Human Rights" essays propose reforms of the human rights movement for the increased protection of the fundamental and inalienable rights of all people.

This paper, in its entirety, can be found at **http://report.heritage.org/sr231**

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Jeremy A. Rabkin, PhD

America was launched with a declaration that, in the words of John Quincy Adams, "constituted a great people" and "laid the foundation of their government upon the unalterable and eternal principles of human rights." It does not follow, however, that Americans should embrace elaborate schemes to codify human rights in international law. Our Founding documents actually suggest the opposite conclusion. The traditional view of the Constitution, if we still attend to it, protects our system against overreaching by contemporary human rights advocates. This both protects Americans against distorting pressures from outside forces and leaves the United States in a better position to focus its international efforts against those governments that are, in American eyes, the worst abusers of human rights.

Americans are bound to care about human rights. Our country was launched, after all, with a declaration invoking human rights to ground our claim for independence. Sixty years later, John Quincy Adams, whose father had helped to draft that declaration, celebrated it as a unique event in world history: "For the first time since the creation of the world, the act, which constituted a great people, laid the foundation of their government upon the unalterable and eternal principles of human rights."[1]

It does not follow, however, that Americans should embrace elaborate schemes to codify human rights in international law. Our Founding documents actually suggest the opposite conclusion.

The perspective of the Founding era still reflects good sense and clear-sighted appreciation of enduring realities—much more so than the thinking behind contemporary human rights law does. The traditional view of the Constitution, if we still attend to it, protects our system against overreaching by contemporary human rights advocates. This both protects Americans against distorting pressures from outside forces and

leaves the United States in a better position to focus its international efforts against those governments that are, in American eyes, the worst abusers of human rights.

Our Law Should Not Rest on Utopian Visions

The Declaration of Independence asserts as "self-evident" that "all men are...endowed by their Creator with certain unalienable rights...." Our most fundamental rights thus come from God or from the logic of nature, not from international conventions.

The Declaration goes on to explain that it is not sufficient to proclaim rights: "to secure these rights, governments are instituted...deriving their just powers from the consent of the governed." It follows, then, that "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it." In other words, the remedy for government abuse of basic rights is a new government.

Our Founders would have rejected the idea of an international code guaranteeing human rights by treaty. For one thing, they would have seen it as utopian. They did not have high expectations for treaties in general. After all, the point of the Constitution was to remedy the defects of the original Articles of Confederation—a treaty among the states. As *The Federalist* warned, history offers an "instructive but afflicting lesson to mankind, how little reliance is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion."[2]

The Federalist looked at confederacies, with members linked only by agreements among the governments, as holdovers from (or counterparts to) feudal institutions, lacking the strength of governments founded in the direct consent of the governed. Publius derided the "Germanic empire" of the time, a surviving relic of the medieval Holy Roman Empire, as still resting on "laws... addressed to sovereigns" (the princely member states) and "a nerveless body, incapable of regulating its own members, insecure against external dangers, and agitated with unceasing fermentations in its own bowels."[3]

It is not that the Framers saw no value in treaties. When they required that treaties be confirmed by a two-thirds majority in the Senate, they expected that this would ensure that international commitments achieve broad support and presumably, as a result, be hard to disregard. President Washington, while advocating "as little political connection as possible" with foreign nations, still admonished that where the United States had "already formed engagements, let them be fulfilled with perfect good faith."[4]

Nevertheless, as the *Federalist* put it, "a treaty is only another name for a bargain"—an agreement between sovereigns.[5] The most general means of enforcement was understood to be withdrawal of promised concessions in retaliation for delinquency by the other party. As *The Federalist* explained, "a breach of any one article is a breach of the whole treaty" and "absolves the others, and authorizes them...to pronounce the compact violated and void."[6]

Clearly, a human rights treaty cannot work in this way. If Saudi Arabia fails to live up to its obligations under the Convention on the Elimination of Discrimination Against Women (CEDAW), Canada cannot retaliate by authorizing Canadians to perpetrate more sex discrimination. The International Court of Justice (ICJ) recognized the point in a 1970 ruling that distinguished between ordinary obligations of a state "vis-à-vis another State" and "obligations of a State towards the international community as a whole...obligations [which] derive, for example, in contemporary international law from outlawing acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person...."[7]

While the U.N. Security Council might mobilize the world's leading powers to confront "acts of aggression,"[8] there is no comparable body or mechanism to punish defiance of "rules concerning the basic rights of the human person." To talk of "obligations towards the international community as a whole" is to assume something like a world government with power to enforce these obligations—except, of course, that such an authority does not exist. The authors of *The Federalist* would have viewed claims about "obligations" in this context as delusional: "If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation."[9]

The Founders would probably have been even warier of the sorts of claims that advocates for "international human rights law" advance to compensate for the weakness of this law. From the outset, there was an effort to endow international human rights law with transcendent moral authority as a quasi-religious creed. This is the inescapable implication of the Universal Declaration of Human Rights (UDHR), which was "proclaimed" by vote of the U.N. General Assembly in 1948.[10]

The UDHR was not actually a treaty, but a template for later treaties. Its claim to "universality" might make it seem a sort of contemporary revelation. According to its preamble, it aims to supply "a common standard of achievement for all peoples" so that "every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching

and education to promote respect for these rights and freedoms...."[11] It is not a set of "bargains" between governments, but a "universal" catechism that "every individual" must "strive" to "respect."[12]

The Founders tried to keep constitutional authority distinct from religious teachings and practices. Accordingly, Article VI of the Constitution requires that state and federal officials be "bound by oath to support this Constitution...." The same clause, after only a semicolon, goes on to prohibit "any religious test for office."[13] The Constitution seeks to assure that our representatives will be loyal to our own governing ground rules, not that they keep a whole catalog of policy aims "constantly in mind."

The UDHR's emphasis is, of course, different from old affirmations of faith. It does not admonish "every individual" to observe fast days or keep the Sabbath, but rather demands that governments secure such benefits as "periodic holidays with pay."[14] But it raises the same question: If government draws its just powers from "the consent of the governed," why should so many practices be settled in advance through a code established by outsiders?

The question has only deepened as the UDHR's initial framework has been further developed in subsequent conventions, each supposed to have the force of law when ratified. In the mid-1960s, the U.N. launched twin "covenants," the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).[15] In later decades, there would be separate conventions on the rights of women, children, racial minorities, people with disabilities, migrant workers, indigenous peoples, and still others. In 2014, Eric Posner, law professor at the University of Chicago, counted more than 300 separate rights guarantees in the accumulated corpus of international human rights conventions.[16]

Advocates may have thought that touching on so many different practices would bring support from a wider coalition of interests and constituents. The more immediate point was to bridge the difference in outlook between different states. Western states might emphasize personal freedom in a private sphere, while Communist regimes demanded unlimited state power to impose socialist ideals. Human rights conventions were supposed somehow to combine or synthesize all their different views into a new global consensus.

In fact, the conventions assume that states can and should exercise very broad powers of control. The Convention on the Elimination of All Forms of Discrimination Against Women, for example, directs states to "eliminate discrimination against women by any person, organization or enterprise"

and "to modify or abolish existing...customs and practices which constitute discrimination against women."[17] It does not recognize exceptions for religious institutions or for any sphere of private life, so it seems to demand (for example) that all religions allow women to exercise the same priestly or clerical functions as men. It also requires states to assure "equal remuneration...in respect of work of equal value"[18]—as if states could judge the "value" of any and every job.

Meanwhile, the conventions tend to minimize or disregard rights that Americans have considered quite fundamental. The UDHR did recognize a right to change one's religion, but that was dropped from the ICCPR.[19] The UDHR offers a vague stipulation that "no one shall be arbitrarily deprived of his property."[20] It says nothing, however, about compensation for nonarbitrary takings (whatever that permissible category might include). Even this questionable guarantee was dropped from the ICESCR and finds no place in any other U.N. "human rights" convention.[21]

The ICESCR does include a "right of every one to the opportunity to gain his living by work which he freely chooses or accepts,"[22] but it does not mention a right to start and maintain a business. It purports to guarantee "the continuous improvement of living conditions" and "the enjoyment of the highest attainable standard of physical and mental health"[23] but never mentions a right to own or sell land or other resources.

If the argument for adhering to international human rights law is that it can make Americans more secure, it is inherently implausible: It is hard to see how we could make our own rights more secure by letting tyrannical governments help to define what they are. If the argument is that it will stabilize rights in the wider world, that is still unlikely. Since there is no enforcement capacity behind the conventions, their implementation must rely on voluntary cooperation. This assumes the very point at issue: that the world already is or soon could be in agreement on what respect for "human rights" requires.[24]

In general, as Posner notes, ratification of U.N. conventions has not brought higher levels of compliance with what Western states might regard as fundamental human rights.[25] It is not surprising. Every effort to emphasize such rights has been rebuffed by international gatherings. Even after the collapse of Communism, the 1993 World Conference on Human Rights emphasized that "[a]ll human rights are universal, indivisible and interdependent and interrelated" and rushed on to emphasize the "right to [economic] development."[26] "Human rights" has been understood by much of the world as a slogan justifying the expansion of government controls.

Even in Europe, which offers the more favorable conditions for human rights protection, experience has not been encouraging. The Council of Europe, established in 1949 by a handful of Western countries, has since expanded to include 47 member nations (nearly half of which are outside the more exclusive and demanding European Union). Members of this grouping subscribe to a European Convention on Human Rights, which made provision for a Court of Human Rights.[27] The court has evolved to offer many elements of genuine judicial process. Individuals may pursue complaints of noncompliance to the European Court of Human Rights, based in Strasbourg, France. The court has the authority to direct states to compensate the victims of human rights abuses.[28]

Western states have often complied with the court's holdings on human rights obligations. Under Prime Minister Tony Blair, the United Kingdom bowed to the court's finding that British parliamentary government—far older and more reliable than counterparts in any other European nation—violated principles of due process because senior judges were given a place in the House of Lords, where they might participate in debate on new legislation. Britain abolished the Law Lords and established a new Supreme Court in a different building. It also agreed to allow convicted felons to vote because the Human Rights Court insisted that Britain was denying human rights by its ancient practice of denying the franchise to criminals. There are now demands in Britain that after withdrawal from the European Union, a newly independent Britain should also withdraw from or retrench its commitment to the European Convention on Human Rights.

There has been little talk, however, that Russia or Turkey might withdraw or be expelled from the European Convention system. The Court of Human Rights has received hundreds of complaints against these increasingly authoritarian governments, but court rulings have done nothing to restrain their descent into arbitrary rule under Vladimir Putin and Recep Tayyip Erdogan.[29] The Court has failed to focus attention on particular failings. It does not even ensure that recalcitrant countries implement particular decisions or pay mandated compensation awards to victims.[30]

The U.N. human rights conventions have much feebler "enforcement." There are monitoring committees, which can offer criticism but do not even claim the authority to order compensation payments. Though committees sometimes refer to their comments as "jurisprudence" and some states may feel pressured by committee admonitions, the conventions do not give legal authority to the monitoring committees to settle the meaning of convention provisions. States naturally—when they bother at all to attend to what they have promised—tend to choose interpretations they deem most convenient.

The most optimistic view is that over time, we will see a hardening of international human rights norms so that their meanings become more generally accepted and their obligations more generally observed. It is unlikely to happen. As Posner says, it is more likely that they will "gradually dissolve into a soup of competing and unresolvable claims" that lack any real substance.[31]

In the meantime, the conventions are available for advocacy groups to interpret as they find most convenient. They use them to press receptive governments to accept their own favored claims as international obligations. The domestic public policy of the United States has not yet been much affected by such claims. We may adopt policies favored by international human rights advocates, but it does not yet seem to be particularly impressive or a matter of particular concern to government decision-makers (let alone public opinion) that such policies are described as international legal obligations. It should not, in fact, matter at all what advocates claim is required by international human rights law.

A Treaty Cannot Make a New Constitution

The United States has ratified a number of major international human rights conventions. This may prompt people to think that we are bound by them because treaties are the "supreme law of the land" according to the Constitution itself.[32] That cannot be correct.

To start with, not all treaties are "self-executing" (immediately binding in U.S. law). The distinction was recognized by Chief Justice John Marshall in the early 19th century and reflects basic realities.[33] Treaties often promise certain results but require legislative action to implement. For example, we promised to pay Russia for the purchase of Alaska, but the payment required Congress to enact an appropriation measure separate from the treaty. A treaty makes a promise to other nations, but the follow-through may require subsequent legislation.

For human rights treaties, the Senate has always taken care to clarify that nothing in these treaties would take direct effect without subsequent legislation. The question, then, is whether Congress has full power under the Constitution to implement anything and everything a treaty may require. Again, the answer must be no.

The ICCPR, for example, recognizes that "Everyone shall have the right to freedom of expression" but then adds a number of qualifications on free speech and imposes contrary obligations on government: "Any propaganda for war shall be prohibited by law" along with "[a]ny advocacy of national,

racial or religious hatred that constitutes incitement to discrimination, hostility or violence....”[34] When the Senate ratified this convention, it insisted on including a reservation clarifying that U.S. consent to the bulk of the treaty should not be taken to require American acceptance of any law or policy “that would restrict the right of free speech and association protected by the Constitution and laws of the United States.”[35] Nevertheless, international authorities might insist that to comply fully with ICCPR obligations, our government must disregard these internal limits on its authority, even though they are set out in our First Amendment and have been emphasized and applied repeatedly by the U.S. Supreme Court.

Does a treaty allow that? That notion has been rejected emphatically in the past. If “the treaty power is boundless,” Thomas Jefferson remarked, “then we have no Constitution.”[36] As Justice Hugo Black observed in a 1956 ruling, “It would be manifestly contrary to the objectives of those who created the Constitution” and “alien to our entire constitutional history and tradition” to say that any “international agreement” can supersede constitutional limits. “In effect, such construction would permit amendment of [the Constitution] in a manner not sanctioned by [the amending provisions in] Article V.”[37]

If that sounds far-fetched, consider that the European Union is an elaborate scheme of authority superior to the governments of the member states. Thus, European law takes precedence even over the national constitutions of the member states—and all by the force of treaties to which the member states have agreed. It is the precise, clear, and unambiguous claim of the EU’s Court of Justice that European law as interpreted by the European Court of Justice is supreme over enactments of national parliaments and pronouncements of national constitutional courts because the European Court interprets the European treaties to require this arrangement.[38]

Could we actually follow that example? In the Virginia ratifying convention, anti-Federalist speakers protested that the treaty power might enable the federal government to do almost anything if a foreign partner agreed. No, said James Madison. He affirmed that “[t]he exercise of the power must be consistent with the objects of the delegation” and then insisted that “[t]he object of treaties is the regulation of intercourse with foreign nations, and is external.”[39] *The Federalist* summarized the concerns relevant to the treaty power as “war, peace, and commerce.”[40] Other figures of the era offered comparable assurances.[41]

Joseph Story, the most learned and influential American jurist in the early 19th century and Chief Justice Marshall’s great ally on the Supreme Court, explained the issue at some length in his *Commentaries on the Constitution*:

> A power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it.... A treaty to change the organization of the government or annihilate its sovereignty, to overturn its republican form or to deprive it of constitutional powers, would be void; because it would destroy, what it was designed merely to fulfill, the will of the people.[42]

Decades later, the Supreme Court reaffirmed this reasoning in *Geofroy v Riggs,* which concluded that:

> [The treaty power must be bound by both] those restraints which are found in that instrument [the Constitution] against the action of the government or its departments [and] those arising from the nature of the government itself.... It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the [federal] government or in that of one of the States....[43]

Human rights treaties do present this challenge. To begin with, they would seem to bring under federal authority a vast range of issues now regarded as reserved to state governments under the Constitution. If Congress has power to implement any treaty with new legislation, treaties of this kind risk overriding any remaining limits on congressional power under the Constitution.

The Supreme Court recently recognized the problem in *Bond v. United States,* which concerned a federal statute purporting to implement the Chemical Weapons Convention.[44] While the United States could commit to prohibiting deployment of chemical weapons for war, the Court held, the implementing legislation could not be stretched so far as to justify prosecution for an isolated local crime, which in this case was an attempted poisoning aimed at one person in a Pennsylvania town. The majority was content to insist that the implementing statute "must be read consistent with principles of federalism inherent in our constitutional structure" and that "the statute's expansive language" not be interpreted "in a way that intrudes on the police power of the States."[45]

Justices Antonin Scalia, Samuel Alito, and Clarence Thomas went further. They insisted that Congress could not claim power to reach into purely local affairs, even for the sake of implementing an otherwise valid treaty. Justice Thomas argued that there must be limits on the reach of treaties. The treaty power was intended to reach "those subjects which in the ordinary intercourse of nations had usually been made subjects of negotiation and

treaty."[46] After reviewing leading cases, Thomas concluded that "[n]othing in our cases, on the other hand, suggests that the Treaty Power conceals a police power over domestic affairs."[47] No justice disputed this claim. No justice endorsed the notion that the treaty power is unlimited in its reach.

Apart from the threat to our federal balance, human rights treaties might threaten the ordinary distribution of power in our constitutional scheme. In the 1990s, the Human Rights Committee, the monitoring body for the ICCPR, asserted its authority to review reservations made by states when ratifying that major human rights convention, which the United States had recently ratified with numerous reservations. The experts (as they are called) on the Human Rights Committee insisted that improper reservations must be treated as having no effect, and the Committee would make authoritative determinations of which reservations were improper.[48] Though based on no actual judicial process or treaty language authorizing definitive decisions, these determinations are called "jurisprudence" by U.N. publications.[49]

If an international body could reliably exercise that sort of authority, U.N. officials could impose obligations on the United States without regard to the Senate's advice and consent. The international body would thus be exercising the treaty-making power of the United States. If its determinations entered into U.S. law, it would arguably be exercising the legislative power assigned by the Constitution to elected Members of Congress or the judicial power vested in judges who, under the Constitution, are supposed to be nominated by the President and confirmed by the Senate.[50] If we eventually did come to accept that human rights conventions could be implemented at the direction of international authorities, that would amount to a scheme to "change the organization of the government or annihilate its sovereignty" or to "overturn its republican form or to deprive it of constitutional powers"—exactly what Justice Story had insisted no treaty can do within the limits of the Constitution.

In fact, the Clinton Administration insisted that it would not recognize such powers in the Human Rights Committee.[51] By the terms of the treaty, the Committee may only "comment," not "decide," let alone "bind."[52] The constitutional challenge can thus be escaped by insisting that the treaty does not really commit us to follow any outside direction, but on that understanding, it is hard to see why it should be recognized as a treaty. We do not actually promise any particular country to do anything, but merely certify to the world our good intentions in the most general way.

Human rights advocates have charged that Senate reservations make American participation meaningless or ratification disingenuous,[53] but

no other country has committed to having U.N. monitors directly resolve disputes about its own law. The U.N.-sponsored conventions have no direct means of enforcement at the international level. In effect, every participant commits to its own interpretation of the conventions, such as they may be, and few states are fussy. Only a handful of states objected when Saudi Arabia subscribed to CEDAW with the reservation that it would comply only to the extent that the convention is consistent with Saudi Arabia's own interpretation of Islamic law.[54]

It is also worth recalling that the United States has often proclaimed general policy aims—often in conjunction with other states—without actually making a formal legal commitment. To take a famous example, in August of 1941, President Franklin Roosevelt met with British Prime Minister Winston Churchill at a naval base in Newfoundland and produced a "joint declaration" of common commitments that came to be called "the Atlantic Charter." Among other things, it pledged to "aid and encourage...practicable measures which will lighten for peace-loving peoples the crushing burden of armaments."[55] No one claimed that it stood in the way of the U.S. military mobilization then underway, or even of the post-war rearmament under NATO. In itself, it was, as historians observed some decades later, merely "a press release."[56]

Since the Second World War, it has become common for American Presidents to meet with other world leaders at conferences of NATO allies, major industrial economies, Western Hemisphere allies in the Organization of American States, partners or sometime adversaries in Asia, and so on. It is common for such "summit" meetings to produce a declaration of some sort. It may be inspirational. It may even prefigure enduring policy commitments by the United States and others. That does not make such pronouncements the counterpart of a federal statute or grant an international commitment the force of a statute.

There are legislative pronouncements as well that, with the support of the House and the Senate and the President, salute some achievement or express sympathy but require no one to take any particular action. They are legislative counterparts of a ceremony or a sermon rather than exercises of the coercive authority usually associated with the term "law."

It is not pedantic to insist that human rights conventions are law only in this ceremonial sense. That is the simplest way to describe their role in our legal system. It would require great metaphysical subtlety to explain how these noncontractual international commitments enter our legal system if they are not emanations of an emerging world government. Someone with sufficient insight to explain that might still find it hard to say what

conventions actually commit us to do or forebear from doing, since their meaning need not turn on what others expect or on what some imaginary world authority demands. The project had elements of the fantastical from the beginning. To acknowledge that is not fanciful; it is a belated nod to sobriety.

Ensuring That International Law Does Not Enter by Back Doors

If one thinks of "human rights law" as the product of treaties, the main safeguard might seem to be in the Senate. So long as the Senate declines to ratify or ratifies only with the stipulation that the treaty is not U.S. law, treaties will not present a challenge to our legal system. Or will they? There are several back doors into the U.S. legal system, and none has been slammed shut. It is therefore important to remain alert to the associated dangers.

The first is the doctrine that courts may enforce "customary international law." This is not a modern innovation. At the time of the Founding, it was a familiar notion that Anglo–American courts would take notice of basic norms of international comity such as the immunity of foreign diplomats to local prosecution. As the Founders were well aware, the practice was discussed (and sanctioned) in William Blackstone's *Commentaries on the Laws of England*, the foremost authority on English common law in that era.[57] Until the advent of codifying treaties in the 20th century, most of international law (or "the law of nations" as it was still known in the 18th century) was customary law.[58]

What counts as customary international law today? In its 1980 ruling in *Filartiga v. Peña-Irala*, a federal appeals court in New York was persuaded to allow a lawsuit by a Paraguayan family against a Paraguayan official for torture of their relative back in Paraguay.[59] The court claimed to derive authority from a 1789 enactment known as the Alien Tort Statute (ATS), which granted federal courts jurisdiction over torts "committed in violation of the law of nations."[60] The court then decided that this could apply to perpetrators of torture on the ground that torture had come to be considered a violation of international human rights law—even though this was years before the ratification (or even drafting) of a formal international convention against torture.[61] The ruling unleashed a cascade of lawsuits that quickly came to focus on American corporations for alleged involvement with human rights abuses in foreign countries.

The U.S. Supreme Court did not pronounce on the issue for a quarter of a century. Its 2004 ruling in *Sosa v. Alvarez-Machain* held that the ATS could

be applied only to claims as well grounded in customary law as diplomatic immunity had been in 1789 but left open the possibility that new claims could achieve this status over time. Justice Scalia, joined by Chief Justice William Rehnquist and Justice Thomas, adamantly opposed such an open-ended doctrine. At the time of the Founding, Justice Scalia explained:

> [T]he law of nations was understood to refer to the accepted practice of nations in their dealings with one another.... The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates.... The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty...could be judicially nullified because of the disapproving views of foreigners.[62]

The Supreme Court subsequently ruled that the ATS did not apply outside the United States and did not apply to corporations.[63] That has put a stop to most ATS litigation and has dispelled interest in invoking customary international law through that vehicle. However, there has not been a majority opinion of the Supreme Court confirming the Scalia view that courts should not treat customary international law as extending to human rights treaties.

How can courts know what is customary law? It was once assumed that courts could assess the question on their own (for the narrow range of issues where it was relevant). In recent decades, it has been asserted that it is the President who should determine when the United States recognizes that the government should be bound by customary standards.[64] There are many situations in which this has become almost routine. For example, the Defense Department holds that many provisions in treaties on humanitarian protections in war have become part of customary law, even though the relevant treaties have not been ratified by the Senate.[65] Similarly, President Ronald Reagan endorsed, as statements of customary law, various provisions of the U.N. Convention on the Law of the Sea, claiming that while the convention as a whole had not been ratified by the Senate, these provisions would be acknowledged as legally binding on the United States.[66]

Could the executive try to give this status to the customary international law of human rights? In 1980, the Second Circuit Court of Appeals seems to have been swayed by Justice Department briefs arguing that prohibitions on torture were already part of customary international law.[67] What if a

future President offered a more dramatic end run around Senate ratification by stipulating that several major human rights treaties should henceforth be considered customary law, binding on the United States and treated as such by U.S. courts?

The present Supreme Court seems unlikely to accept the notion that Presidents can make law for the U.S. legal system by such unilateral proclamations. During the first term of President George W. Bush, the Court was faced with a case in which Texas state courts refused to heed a directive from the International Court of Justice. Foreign nationals convicted of murder had argued that they had been deprived of the chance to consult with consulates of their home countries, a right guaranteed by the Vienna Convention on Consular Relations, which the U.S. has signed and ratified.[68] The International Court of Justice, in a suit by Mexico against the United States, ruled that courts must allow new trials if the right to consultation with a defendant's consulate had not been observed.

In *Medellin v. Texas*, the Supreme Court held that the Convention on Consular Relations was merely a diplomatic promise, not self-executing (in other words, not law directly applicable in the U.S. legal system) and that the ruling of the ICJ had the same status.[69] The justices also concluded that President Bush did not have constitutional authority to direct state courts to heed the convention, since the President's powers do not extend to changing the status of a treaty that the Senate seemed to regard as not self-executing. It would seem to follow from *Medellin* that the President cannot make international human rights treaties binding in domestic law.

It is true that the Supreme Court has recognized that the United States can sometimes be bound by an executive agreement (an exchange of promises between a President and a foreign leader). The Court has even acknowledged that such measures may have binding force within the U.S. legal system, but it has endorsed such agreements only when authorized by prior statute or subsequent legislation or when initiated in connection with recognition of a new foreign government. The last time the Supreme Court addressed the issue, in *Dames & Moore v. Regan*, it endorsed certain commitments made to the new Iranian regime (in return for release of U.S. hostages) but with cautions against inferring any general power of the President to change U.S. law by an agreement with a foreign leader that was not authorized or approved by Congress.[70]

This reasoning seems to have been taken to heart. President Barack Obama did claim to commit the United States to the Paris Climate Agreement on his own say-so, knowing there was no chance for Senate confirmation of a formal treaty, but the agreement was written in such a

way that U.S. signature did not of itself impose restrictions on carbon emissions within the United States.[71] The Obama Administration did not dare to claim that an elaborate regulatory scheme could be imposed on American industry by nothing more than a presidential signature on a political statement that also happened to be signed by foreign leaders. President Donald Trump rescinded even that signature. Still, we cannot yet be sure where another Administration might try to go in committing the U.S. to international regulatory ventures without congressional approval.

There remains another way, however, in which international human rights norms might affect American law even without prompting from the President. A long tradition dating to Chief Justice Marshall holds that statutes should be interpreted to avoid conflict with international law.[72] In Marshall's day (and for long after), as Justice Scalia observed, international law was much more modest, but contemporary courts have sometimes shown willingness to embrace much more adventurous views, and a few courts have invoked international human rights norms to interpret federal statutes.[73]

Some commentators even claim that courts should interpret the Constitution itself to avoid conflicts with international law.[74] To take a clear example, many countries (even democratic countries) hold that guarantees of free speech should not extend to "hate speech" that insults or disparages particular ethnic or religious groups. As noted earlier, the ICCPR codifies this view, making restrictions on such speech obligatory for signatories to the convention. The U.S. Supreme Court has insisted on a more robust scope for the protection of free speech under the First Amendment. We do not know whether an appeal to international practice would persuade the Court to change its past commitments to free speech, but advocates seem to be urging such a course.

The Court has already embraced an approach that comes close to this in several cases interpreting the Eighth Amendment guarantee against "cruel and unusual punishment." Most notably, the Court has held in two cases that capital punishment should be regarded as unconstitutional for perpetrators of murder judged to be of subnormal intelligence and for perpetrators who were under 18 when the crime was committed.[75] One reason the Court gave was that capital punishment in such situations was excluded by law in most other countries and could thus be regarded as "overwhelmingly disapproved" by "the world community" or rejected by the "opinion of the world community."[76]

These rulings did not claim that the results were required by international law. Rather, they argued that foreign practice or provisions of

international conventions not actually ratified by the U.S. (for example, the Convention on the Rights of the Child) could illustrate "evolving views" that might inform judicial assessments, though not as binding precedent. The majority also adduced other, domestic reasons for the rulings, so the weight to be accorded international practice was left uncertain. Nevertheless, Justice Scalia, along with fellow conservatives Thomas, Alito, Rehnquist, and (in the later of the two cases) Chief Justice John Roberts, objected strongly even to this attenuated appeal to foreign examples.[77] Similarly, Justice Scalia objected to Justice Anthony Kennedy's citing a decision of the European Court of Human Rights in deciding whether the U.S. Constitution affords the right to engage in homosexual conduct.[78] So far, no decision of the Court has settled the question of when or whether the U.S. Constitution should be reinterpreted to harmonize with foreign practice.

In academic debates, supporters have pointed out that recognition of foreign practice is not a novel departure. It is quite true that 19th century courts took note of foreign practices. In the Legal Tender Cases after the Civil War, for example, the Court pointed out that the federal statute requiring acceptance of paper money in payment of debts was similar to laws in effect in major European countries.[79] But the argument there was that foreign countries had adopted paper currency because they found it useful to do so, thereby lending weight to the claim that it was "necessary and proper" for the U.S. Congress to adopt a similar law. No one argued that the United States was under some sort of moral obligation, let alone legal duty, to coordinate its currency law with European nations.

With respect to capital punishment, there has been an international campaign by the Council of Europe and the European Union to lobby states to abolish the practice. They have submitted amicus briefs to the U.S. Supreme Court in these cases. Meanwhile, it has become regular practice for judges (very much including U.S. judges) to visit with foreign counterparts and share opinions or at least attitudes. Ann-Marie Slaughter, subsequently a top aide to Secretary of State Hillary Clinton, published a book in which she touted such international networks as the means to coordinate international standards on a wide range of issues: "[J]udges around the world are coming together in various ways that are achieving many of the goals of a formal [global] legal system."[80]

More recently, Justice Stephen Breyer published a book in which he dismissed concerns about "a single rule of law for the whole world" and predicted that "cross-referencing [of decisions and laws from different countries] will speed the development of 'clusters' or 'pockets' of legally like-minded nations whose judges learn things from one another...."[81] The

argument assumes there is no serious objection to judges pulling America toward, say, European norms on issues that we still debate at home but that have been settled for Europeans by their judges. It assumes, in other words, that the United States needs to feel some self-doubt about going its own way on domestic law regarding issues like gun rights, capital punishment, respect for the rights of religious minorities, or a range of labor protections favored by European authorities but not by American legislatures.

Advocates for the practice note that mere judicial notice of foreign authority does not make it binding in American law, so courts can refer to principles enshrined in treaties or international agreements even when the U.S. is not a party without claiming that these establish binding domestic law for us. Judges may even invoke hortatory resolutions at international conferences, not to give direct legal effect to such pronouncements, but to recognize support for a conclusion already grounded on other arguments.

As it happens, Justice Breyer has expressed openness to the possibility that judges would invoke international conference resolutions to adjust U.S. domestic law (for example, on environmental policy) so that the United States could "remain an active participant in worldwide efforts" to deal with global environmental threats.[82] By a similar principle, European governments accept as binding law what gatherings of government ministers or commissioners in Brussels elaborate from treaty commitments to which governments have agreed. Justice Breyer has also suggested that our understanding of U.S. constitutional law on federalism might be improved by attending to what Germany, Switzerland, and the European Union think about federalism.[83]

The risk is that what enters legal debate as a mere point of reference will evolve in time into something more. Academic commentators on international law sometimes speak of international conferences as generating "soft law," defined as something that prompts, encourages, or induces without having the full authority to compel. But the whole point of noticing soft law is that it may become hard (real) law over time if it continues to be invoked in legal analysis. So judicial appeal to foreign or international precedent may push understandings toward a sense of legal obligation without treaty ratification or some other formal process of commitment.

Safeguarding Judgment and Discretion in Foreign Policy

Some critics dismiss talk of human rights in foreign policy on the grounds that our own government should stay focused on protecting the rights of our own people. Sometimes they even bolster that claim by citing a famous

statement of that view by John Quincy Adams: America "goes not abroad in search of monsters to destroy. She is the well-wisher to the freedom and independence of all [nations]. She is the champion and vindicator only of her own."[84]

Yet the issue is not that simple. The Declaration of Independence, in its recital of grievances, protests against British legislation "abolishing the free system of English Laws in a neighbouring Province [Quebec] establishing therein an Arbitrary government...so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies." What happens next door can be a threat to our own security. Governments that abuse their own people are unlikely to be scrupulous about the rights of other peoples.

Adams himself well understood the point. As Secretary of State, he crafted the part of President Monroe's 1823 Annual Message that announced the policy known to later generations as the Monroe Doctrine.[85] The United States put European powers on notice that it would view as hostile, hence potentially war-provoking, any attempt to recolonize nations in the Western Hemisphere and reimpose monarchical government. The defensive zone that this entailed went far beyond immediate neighbors and far beyond what America then had the military capacity to enforce: Buenos Aires in Argentina is further from Washington, D.C., than St. Petersburg, then capital of the Russian Empire.

Nor was this an idiosyncratic American approach. Treatises on international law emphasized the duty not to interfere in the domestic affairs of others but acknowledged exceptions for self-defense. Beyond that, there might be some threshold required for ordinary friendly relations. A leading English commentator in the late 19th century put it this way: The internal practices of "despotic states" cannot provide "adequate guarantees for the international trustworthiness of [those] states...." Normal diplomatic relations presume some common principles of justice. Other nations could not be expected to retain friendly dealings with governments founded on principles against all order: "Communism and Nihilism are thus forbidden by the law of nations."[86]

Judging whether a foreign government can be a reliable partner or needs to be regarded as dangerous is like judging the character of an individual with a questionable personal history: It is not something that can readily be reduced to a checklist of considerations. *The Federalist* offered a general warning: "No government, any more than an individual, will long be respected without being truly respectable...."[87] Whatever might be true in the long term, immediate assessments often depend on context and comparisons.

During the Cold War, the United States tried to rally as many nations as possible to an anti-Communist coalition sometimes called "the Free World." There were quite a few authoritarian governments in the coalition, and it was charitable to link them with genuine democracies. Nevertheless, the rhetoric of that era captured the essential point: Countries that were opposed to Communism did share some important common political premises with the United States.

Advocacy for "international human rights" in the sense of fidelity to a list of rights set out in international conventions did not gain momentum within U.S. foreign policy until the late 1970s, when President Jimmy Carter insisted it should be a principal theme of U.S. foreign policy. Carter's rhetoric may have helped to undermine U.S. allies like the Shah of Iran without at all threatening tyranny behind the Iron Curtain. Some leading human rights organizations seemed to be more eager to use human rights advocacy to attack authoritarian U.S. allies than to criticize America's Communist and totalitarian adversaries during the Cold War. Amnesty International, founded in the 1960s to advocate against torture, declined to report on Khmer Rouge atrocities in Cambodia in the mid-1970s and did not issue a critical report on the Soviet Union until the late 1970s.[88]

The Reagan Administration was often successful in pressuring Latin dictatorships to make transitions to democracy or to better versions of democracy, but it did so by leveraging U.S. assistance, including military assistance to the governments of Guatemala and El Salvador in their fights against Communist-supported insurgencies. Reagan also challenged the Soviet Union to relax its repression and to "tear down this wall" in Berlin. Years before he went to Berlin, Reagan adopted a directive to U.S. government agencies insisting that "U.S. policy must have an ideological thrust which clearly affirms the superiority of U.S. and Western values of individual dignity and freedom, a free press, free trade unions, free enterprise, and political democracy over the repressive features of Soviet Communism."[89]

The Reagan Administration's embrace of human rights advocacy reflected a general U.S. foreign policy strategy aimed at strengthening the confidence of free nations. It did not treat protection of human rights as a program devised and supervised by the United Nations without regard to U.S. geopolitical priorities.

A legalistic view of human rights risks undermining the strategic aims of our foreign policy in several ways. The dangers are already on display.

First, if we accept the premise that all nations are engaged in the same effort because all nations can (and mostly have) subscribed to international human rights treaties, all nations seem to stand on the same ground. All

governments alike are subject to the same higher law. In fact, the most oppressive governments have proved eager to serve on human rights forums both to fend off attacks on themselves and to use human rights slogans to further their own enmities and priorities.

The original United Nations Commission on Human Rights became so discredited by its obsession with denunciations of Israel and other vices that even U.N. Secretary General Kofi Annan urged reform. Under President George W. Bush, the United States urged that countries with poor human rights records should not be eligible to participate in the new body. That was rejected. Unsurprisingly, the Human Rights Council, which replaced the commission, regularly includes Russia, China, Cuba, Venezuela, Saudi Arabia, and a rogues' gallery of extreme human rights abusers. Frequently, countries arrange to eliminate competition for seats by offering the same number of candidates as there are open seats. Since seats are allotted by region, this means that Latin American nations are prepared to subordinate human rights concerns to political maneuvers in voting for Cuba and Venezuela, while African and Asian nations do the same when allowing states like Libya or Syria or Saudi Arabia to secure seats on the council.

A second problem has developed partly in response to this first problem. If states cannot be trusted, it might seem attractive to focus on what nonstate actors say. If one thinks there can be law for humanity or for the international community as a whole, one might even think mere eloquence or fervor could induce governments to improve their behavior. So nongovernmental organizations have played a larger role in human rights forums and a much larger role in publicizing—and therewith interpreting—what international human rights "law" requires. Most people hear about international standards from organizations like Human Rights Watch or Amnesty International rather than from U.N. delegates or officials.

Inevitably, then, what is defined as "human rights" is strongly influenced by the priorities of advocacy groups. Their concerns may appeal to donors or political activists in Western countries but can be inappropriate for American foreign policy. Advocates, for example, have placed much emphasis on issues like abortion rights and recognition of sexual choice in other areas, which are likely to provoke hostility in traditional cultures in ways that may undermine respect for the general principles of liberty and law that the U.S. should be seeking to promote.[90]

A third bad effect is that human rights talk has become a principal driver of ideas about regulation of armed conflict. For centuries, Western states have embraced the general notion that armies should try to "diminish the evils of war, as far as military requirements permit" (to quote the 1899 Hague

Convention on Land Warfare).[91] But the primary means of enforcing agreed restraints was by reprisal: retaliation in kind. Armies often deployed more destructive tactics against enemies that did not accept common restraints (as the Hague Convention allowed). In the Second World War, the Western Allies deployed unusually brutal tactics, such as bombing of cities and food blockade by sea, when so much seemed at stake. We still threaten nuclear retaliation against a nuclear attack.

If the world can be governed by a law that humanity gives itself, it seems plausible that outside judges, judging for humanity, can judge the military actions of all states. The European Court of Human Rights thus concluded that British military forces in Iraq following the 2003 invasion were accountable to the court for the use of lethal force against suspected truck bombs at roadblocks—which judges presumed to second-guess despite extensive internal review within the British military command.[92] Under pressure from earlier rulings of the European Court of Human Rights, Britain funded a human rights advocacy program to pursue claims of excessive force in security operations against terrorists in Northern Ireland and elsewhere—even decades after the disputed incidents and after actual terrorists in Northern Ireland were given a general amnesty. Senior military officials have protested the program as harassment of soldiers into their retirement.[93]

Critics, citing international humanitarian law, have also been quick to denounce American military actions. Most recently, such critics warned that the targeted strike on Iranian terrorist master Qassem Soleimani may well have violated international law—even though the argument for this conclusion draws on a treaty the U.S. has not ratified and a U.N. report the U.S. has not endorsed.[94] Viewing armed conflict from their perspective, human rights advocates find it entirely reasonable to invoke international humanitarian norms as a moral shield for a notorious international terrorist who for decades directed attacks in foreign states such as the attack on the Jewish community center in Buenos Aires in 1994. They regard restraints in war not as dependent on actual agreements on mutual limitation of force when actually maintained, but as abstract moral imperatives adumbrated by supposed international experts on behalf of the world at large and limiting force even against those who themselves respect no limits on force.

This sort of legalistic scolding might seem entirely futile. What gives it some weight is the existence of the International Criminal Court, an ongoing monument to such thinking in world affairs. The court was established in 1998 by a U.N.-sponsored conference. Human rights advocacy groups played a large role in this conference (though ostensibly from the sidelines)

and later mobilized political support for ratification by national governments. The inescapable premise is that enforcing proper safeguards on the conduct of war is more important than who wins. It is not a premise that will provide much inspiration—or perhaps do much to advance the cause of human rights—in wars with terrorist insurgencies or with states that have no regard for human rights or restraints in war.

This law will never apply equally. A democratic government has to fear the stigma of terms like "war crimes." Terrorist networks glory in their brutality: ISIS used sadistic murder videos as a recruitment tool. Potential allies may shrink from practices that are stigmatized by institutions like the ICC. Terrorist networks or militias with covert or ambiguous support from authoritarian powers do not worry about that. It is doubtful that authoritarian regimes in rival states will be much cowed by the ICC either.[95]

Meanwhile, the ICC claims the right to second-guess disputable military judgments made in the heat of action. Its charter (the Rome Statute) allows judges to order prosecutors to pursue a case even when the prosecutor has determined that it would not be appropriate. The charter also directs the court to focus on "the most serious crimes of concern to the international community."[96]

The court has twice insisted that the prosecutor look at Israeli action against a ship trying to violate the blockade on Gaza, where nine people died in a fight between an Israel Defense Forces landing party and armed resisters, the judges reasoning that the incident must be adequately serious because resolutions of the U.N. Human Rights Council proved the international "concern caused by the events at issue."[97] The judges provoked fury among human rights advocates when they decided not to authorize the prosecutor to pursue investigation of U.S. actions in Afghanistan. The judges expressed doubts that relevant facts could be compiled amid continued fighting in Afghanistan. Then—over American protests—this ruling was overturned on appeal.[98] Meanwhile, the prosecutor offered critics the satisfaction of initiating a new investigation of Israeli "war crimes," this time in response to rocket attacks and human wave assaults on Israel's land border with Gaza.[99]

The ICC is not just poorly functioning international machinery. It is a potential weapon mobilized by hostile regimes against nations that actually do try to defend human freedom. The ICC is not naturally on the side of defenders of freedom: There is not a word in its charter to indicate that democratic governments are more to be trusted to exercise force responsibly than are nondemocratic governments.

The same could be said of human rights law in general. It is not aimed at nondemocratic regimes and does not actually accord any deference to

elected governments or governments with long-established traditions of respect for law and individual rights. It is focused more on establishing international authority over states than on protecting people who are actually in danger.

How to Protect U.S. Law and Policy Discretion

When the U.N. first began to work on human rights conventions, critics worried that they would undermine our existing constitutional system. One response was a constitutional amendment that came to be known by its principal sponsor, Senator John Bricker (R–OH). The Bricker Amendment would have stipulated that treaties in conflict with the Constitution would be "without force or effect," that all treaties would require implementing legislation to have direct effect in U.S. law, and that Congress could enact such legislation only if already authorized to enact such measures under its enumerated powers in Article I. In 1954, it fell only one vote short of the required two-thirds support in the Senate. The Eisenhower Administration managed to deflect some support by promising not to submit any U.N. human rights treaties for ratification.[100]

That inhibition was relaxed at the end of the Cold War. The U.S. has still ratified only a handful of international human rights conventions and always with reservations to limit their reach. To date, there has been no very clear or significant harm, so it would be very hard today to mobilize support for a constitutional amendment akin to Senator Bricker's proposal. It is and should be hard to change the text of our Constitution.

Beyond that difficulty, it is not clear that such an amendment by itself would solve the problem. Drafters would have to use language that excluded one set of treaty commitments without entirely disabling the United States from entering into treaties to facilitate, for example, trade or investment across borders or cooperation on environmental threats across borders. Judges eager to accommodate the project of codifying international standards on human rights might well interpret new constitutional restrictions in ways that minimize their effects.

A mere statute would be much easier to enact. One Congress cannot stop a successor from approving or implementing treaties, but a statute might be helpful in limiting the legal effect of executive agreements. At present, there is no statute clarifying congressional expectations in this area.[101] Congress could indicate that it expects agreements that purport to change or take effect in domestic law to have some immediate statutory authorization or subsequent approval.

It is not completely certain whether Congress has constitutional authority to impose a total prohibition on such executive agreements (that is, those having the force of law in our legal system). In practice, Presidents have been cautious about claiming domestic legal effect for executive agreements. Since Congress has not attempted to codify restrictions, there are no court cases. There is an instructive opinion by Justice Robert Jackson, however, frequently cited in more recent cases, which holds that where Congress has enacted limits on executive action, presidential power is at its "lowest ebb," meaning that appeals to inherent presidential authority in this situation deserve the least deference from courts.[102] Merely by giving serious attention to a proposal of this kind, Congress might induce the President to acknowledge limits to presidential authority in this area, which would make it easier for courts to endorse such limits. Whether finally enacted or not, this might be a useful preventive measure.

It may also be helpful to raise questions about the authority of foreign law or practice in judicial confirmation proceedings. Any sort of discussion can be a reminder for future judges that there is enduring skepticism and concern about the practice. At the same time, however, we must recognize that nominees are not always forthright about their views, and what they say at a confirmation hearing is not a commitment that stops them from changing their approach once they are on the bench.[103]

The challenge, then, is to nurture a broader understanding about the limits of what America can commit itself to do. The current Administration has a commission to report on "unalienable rights."[104] That may be helpful in providing a focal point for skeptical views about the current overreaching of international rights law. It cannot, of course, prevent the next Administration from announcing different priorities, but it might help to inform and fortify opinion in opposition to thoughtless new commitments, which might itself give pause to subsequent Administrations.

The most useful precaution may be to encourage Americans to appreciate what is at stake. We need to recover the spirit of Washington's Farewell Address: "The unity of government which constitutes you one people is also now dear to you" as "a main pillar in the edifice of your real independence" and "of that very Liberty which you so highly prize."[105] What holds us together is our common Constitution, and our Constitution is the safeguard of our freedom. That has been true to a considerable degree for most of our history. It has never been true that international human rights law has held the diverse powers of the world together and rarely true that it has safeguarded freedom against regimes that suppressed it.

Washington's Farewell Address is famous for its warnings against factional divisions: "[T]he spirit of Party...serves always to distract the Public Councils and enfeeble the Public administration" while it "agitates the Community with ill-founded jealousies and false alarms...." The speech immediately goes on to warn that such division "opens the door to foreign influence and corruption" and that entangling our own political deliberations with foreign loyalties "gives to ambitious, corrupted or deluded citizens...facility to betray or sacrifice the interests of their own country without odium, sometimes even with popularity...."[106]

It is by no means an anachronistic thought. Critics of President Trump have sounded alarms on a vast range of supposed legal or moral offenses but finally focused their indignation (and impeachment charges) on the claim that he had "colluded" with foreign powers to influence U.S. elections. The fact that such charges had little factual basis shows their emotional resonance: It is the most fundamental betrayal to move U.S. political decisions away from the freely concluded opinions of our citizens into currents churned by murky bargains with foreign powers.

Exactly that sort of charge will be at hand if government officials—whether they be legislators, administrators, or judges—invoke the vague admonitions in human rights treaties to change U.S. law or practice. In effect, political advocates on one side would appeal for foreign support for the policy they think should prevail. If they prevailed, the "views of the international community" might be accorded enough weight to nullify contrary convictions or opinions of American citizens. If we are going to go beyond current election rolls, why give weight to foreign diplomats or international bureaucrats rather than previous generations of Americans stretching back to the Founders? To disregard our own heritage in the name of some artificial international consensus is to undermine the foundations of our own Constitution.

It can be disabling abroad as at home if we come to believe that the United States must have an approved international escort before it condemns abuses by foreign states. Of course we ought to summon support from other nations when they agree with us, and it may be worth making compromises to achieve a common statement in particular situations. But to hold our foreign policy hostage to agreement from some international consensus is to compromise our independence. While we continue to endorse freedom for individuals at home, we should also insist on our national freedom in international affairs.

That does not mean we must abandon talk about human rights or humanity. Early American statesmen sought to avoid getting drawn into domestic

disputes in other countries, partly because they recognized the relative weakness of their young nation. By the mid-20th century, the United States had emerged as the wealthiest and (by several measures) militarily strongest power in the world. We have vastly more capacity to influence what happens outside our borders, and greater power confers more extended responsibility as other peoples look for American protection and assistance.

Conclusion

It is not mere altruism that should prompt our concerns about severe oppression in other countries. Foreign dictators have a natural tendency to oppose the United States and join with its enemies in order to divert their own oppressed people from responding to the appeal of freedom. A world in which freedom is more widely respected will be a safer world.

American Presidents will find it much easier to rally American support against foreign tyrants, however, if such efforts do not require the United States to submit to a checklist of what foreign diplomats define as "human rights." Foreign governments may also find it easier to move their societies toward freedom if that does not commit them to submitting to ongoing international supervision and control.

The United States should certainly remain an advocate for freedom. We can even embrace the term "human rights." But we should not let the meaning of this term be defined for us by international bodies, by foreign governments, or by political activists. We have an honorable tradition as champions of freedom, but sharing a vocabulary does not mean we should share our own governing authority with outside powers.

Endnotes

1 John Quincy Adams, "Speech on Independence Day," July 4, 1837, https://teachingamericanhistory.org/library/document/speech-on-independence-day-2/ (accessed March 13, 2020). The statesmen of the Founding era generally spoke of "natural rights," which might imply that these rights are fixed in their reach by nature (or the authority described in the Declaration as "Nature's God"), but Adams uses "human rights" interchangeably with "natural rights."

2. Alexander Hamilton, *The Federalist* No. 15, https://avalon.law.yale.edu/18th_century/fed15.asp (accessed March 13, 2020).

3. Alexander Hamilton and James Madison, *The Federalist* No. 19, https://avalon.law.yale.edu/18th_century/fed19.asp (accessed March 13, 2020).

4. George Washington, "Farewell Address," September 19, 1796, in *Washington: Writings* (New York: Library of America, 1997), p. 974.

5. John Jay, *The Federalist* No. 64, https://avalon.law.yale.edu/18th_century/fed64.asp (accessed March 13, 2020).

6. James Madison, *The Federalist* No. 43, https://avalon.law.yale.edu/18th_century/fed43.asp (accessed March 13, 2020).

7. *Belgium v. Spain* (Case Concerning Barcelona Traction, Light and Power Co.), 1970 ICJ 3, paras. 33 and 34.

8. Most of the time, of course, the Security Council is stymied by the exercise of (or threat to exercise) a veto, which the five permanent members (the United States, the United Kingdom, France, Russia, and China) all possess. The council has authorized military response to aggression only against North Korea in 1950, Saddam Hussein's Iraq in 1990, and Al-Qaeda in Afghanistan in 2001. It did authorize a humanitarian intervention against the threat of mass murder in Libya in 2011 but has not done so since then. The U.N. Charter authorizes the Security Council to act against "aggression" and "threats to the peace" but not against violations of human rights.

9. Hamilton, *The Federalist*, No. 15.

10. Universal Declaration of Human Rights, proclaimed in Paris, France, by the U.N. General Assembly as General Assembly Resolution 217 A, December 10, 1948, https://www.un.org/en/universal-declaration-human-rights/ (accessed March 13, 2020).

11. Ibid. The language invites comparison with its biblical precursor, *Deuteronomy* 6:6: "thou shalt teach [these words] diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way…."

12. The quasi-religious awe promoted by many human rights activists was criticized by Michael Ignatieff, a human rights advocate himself (and Liberal Party leader in Canada before Justin Trudeau), in *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001).

13. Constitution of the United States, Art. VI, cl. 3.

14. Universal Declaration of Human Rights, Art. 24.

15. International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI), December 16, 1966, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed March 13, 2010), and International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI), December 16, 1966, https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (accessed March 13, 2020).

16. Eric A. Posner, *The Twilight of Human Rights Law* (New York: Oxford University Press, 2014), p. 92. But Posner sensibly acknowledges that it is hard to determine a precise count because many treaty provisions are duplicative or overlapping or might be seen as covering multiple claims (as they are elsewhere defined). Ibid., p. 151.

17. Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the U.N. General Assembly on December 18, 1979, Art. 2, paras. (e) and (f), https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx (accessed March 13, 2020).

18. Ibid., Art 11, para. 1(d).

19. Universal Declaration of Human Rights, Art 18; International Covenant on Civil and Political Rights, Art 18.

20. Universal Declaration of Human Rights, Art. 17, para. 2.

21. For incisive commentary on this remarkable omission (compared to historic Western bills of rights), see Jacob Mchangama, "The Right to Property in Global Human Rights Law," Cato Institute *Policy Report*, May/June 2011, https://www.cato.org/policy-report/mayjune-2011/right-property-global-human-rights-law (accessed March 13, 2020).

22. International Covenant on Economic, Social and Cultural Rights, Art. 6, para. 1.

23. Ibid., Art. 11, para. 1; Art. 12, para. 1.

24. Samuel Moyn, in *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press of Harvard University Press, 2012), emphasizes that the project began to gain wide support among Western commentators and even activists only after the collapse of the Soviet Union (and the previous "utopia" envisioned by socialism) during the period in which serious authors wrote books with titles like *The End of History*.

25. "Some evidence suggests that certain authoritarian regimes actually engaged in more violations after ratifying human rights treaties; other evidence suggests that certain subcategories of state—such as democratic states with strong NGOs—improved their performance after ratifying human rights treaties…. The overall picture at the aggregate level is that human rights treaties do not systematically improve human rights outcomes." Posner, *The Twilight of Human Rights Law*, pp. 76–77.

26. Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna, June 25, 1993, Part I, paras. 5 and 10, https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx (accessed March 18, 2020).
27. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), opened for signature in Rome November 4, 1950, entered into force 1953, https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed March 22, 2020).
28. Ibid., Art. 41 ("the Court shall, if necessary, afford just satisfaction to the injured party").
29. See, for example, Human Rights Watch, *World Report 2020: Events of 2019*, p. 472 ("The human rights situation in Russia continued to deteriorate in 2019") and p. 573 ("Turkey has been experiencing a deepening human rights crisis over the past four years with a dramatic erosion of its rule of law and democracy framework"), https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2020_0.pdf (accessed March 14, 2020).
30. George Stafford, "The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think–Part 2: The Hole in the Roof," *EJIL: Talk!,* October 8, 2019 (nearly half of the ECHR's "leading judgments" remain "pending" five years after having been decided), https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/ (accessed March 14, 2020); "Russia Leads by Number of Unfulfilled Decisions of European Court of Human Rights," UAWire, April 6, 2019. The pattern was not different in the past. See Helen Keller and Alec Stone Sweet, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (New York: Oxford University Press, 2008), p. 522 ("the climate in Turkey is not conducive to independent human rights bodies") and p. 667 ("the non-execution of [human rights legal] judgments or the disregard of final judgments [in Russia] is very wide-spread").
31. Posner, *The Twilight of Human Rights Law*, p. 140.
32. Constitution of the United States, Art VI, cl. 2.
33. *Foster v. Neilson*, 27 U.S. 253 (1829) (treaty provisions on land grants from the king of Spain require congressional implementing legislation to support ownership claims).
34. International Covenant on Civil and Political Rights, Arts. 19 and 20.
35. Samuel Moyn, "U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01," last updated August 1, 2016, https://h2o.law.harvard.edu/text_blocks/28885 (accessed March 16, 2020).
36. Thomas Jefferson, Letter to Wilson Cary Nicholas, September 7, 1803, in *Thomas Jefferson: Writings* (New York: Library of America, 1984), p. 1140; *The Papers of Thomas Jefferson*, Vol. 41, ed. Barbara B. Oberg (Princeton, NJ: Princeton University Press, 2014), p. 346.
37. *Reid v. Covert*, 354 U.S. 1, 17 (1956).
38. *Internationale Handelsgesellschaft mbH* v. *Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11-70 (1970) (European Court of Justice holding that European Commission regulations on agricultural policy must take priority over constitutional objections to the regulations voiced by the German Constitutional Court), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61970CJ0011&from=EN (accessed March 16, 2020). For context and background, see Karen J. Alter, *Establishing the Supremacy of EU Law: The Making of an International Rule of Law in Europe* (New York: Oxford University Press, 2001). European governments have accepted this arrangement for fear of losing the economic benefits of membership and perhaps also because the EU has attained prestige with national elites, neither of which is likely to influence most countries to accept comparable authority for international human rights bodies.
39. Jonathan Elliott, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2d. ed., Vol. 3 (New York: Burt Franklin, reprinted 1974), p. 514, http://oll-resources.s3.amazonaws.com/titles/1907/1314.03_Bk.pdf (accessed March 16, 2020).
40. Jay, *The Federalist* No. 64.
41. Thomas Jefferson's *Manual of Parliamentary Practice* stipulated that treaties must "concern the foreign nation, party to the contract" and address "only those objects which are usually regulated by treaty." For examples from Founding era and 19th century treatises, see Curtis A. Bradley, "The Treaty Power and American Federalism," *Michigan Law Review*, Vol. 97, No. 2 (November 1998), pp. 390–461, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3725&context=mlr (accessed March 16, 2020).
42. Joseph Story, *Commentaries on the Constitution of the United States*, 3rd ed. (Boston: Little, Brown, 1858, reprinted by Lawbook Exchange 2001), §1508, Vol. II, p. 376. The first edition appeared in 1833, when John Marshall was still Chief Justice.
43. *Geofroy v Riggs*, 133 U.S. 258 (1890).
44. *Bond v. United States*, 572 U.S. 844 (2014); 134 S.Ct. 2077 (2014).
45. *Bond*, 134 S.Ct. at 2088, 2090 (Sec. III and Sec. IIIA in Roberts opinion for the Court).
46. Thomas opinion, 134 S.Ct. at 2108 (Sec. III in Thomas opinion); initial quotation ("those subjects in ordinary intercourse of nations") from *Holmes v Jennison*, 39 U.S. 540, 569 (1840).
47. Thomas opinion, 134 S.Ct. 2109 (Sec. III in Thomas opinion).
48. U.N. Human Rights Committee, "CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant," CCPR/C/21/Rev. 1/Add.6, November 4, 1994, https://www.refworld.org/docid/453883fc11.html (accessed March 16, 2020).

49. According to the Office of the U.N. High Commissioner for Human Rights, for example: "A general comment now reads as a general statement of law that expresses the Committee's conceptual understanding of the content of a particular provision.... This function enables the Committee to permit the Covenant to speak to modern circumstances, in which understandings and perceptions of language and practice may have evolved substantially since the Covenant was adopted. In this sense, the Covenant is a living instrument that remains as relevant to the contemporary challenges of today as it was when it was adopted. These comments thus continue to guide States parties in applying the provisions of the Covenant, as well as in preparing their reports." Office of the United Nations High Commissioner for Human Rights, "Civil and Political Rights: The Human Rights Committee," *Fact Sheet* No. 15 (Rev. 1), May 2005, p. 24, https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf (accessed March 16, 2020).
50. In *NRDC v. EPA*, 464 F.3d 1 (2006), the U.S. Court of Appeals for the D.C. Circuit held that a provision in the Clean Air Act Amendments referring to the Montreal Protocol (an international treaty) could not—without "rais[ing] serious constitutional questions"—be interpreted to mean that the statute changed its meaning, or that U.S. commitments under the Montreal Protocol changed their meaning, due to international conference resolutions aimed at changing the terms of the treaty but without subsequent action by the U.S. Senate.
51. See *Human Rights Law Journal*, Vol. 16 (1995), p. 422, arguing, among other things, that since the Senate had only ratified the treaty as a package with accompanying reservations, if "any one or more of the US reservations were ineffective, the consequence would be that the ratification as a whole could thereby be nullified and the United States would not be a party to the Covenant."
52. "The Committee...shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties," and States Parties "may submit to the Committee observations on any comments that may be made...." International Covenant on Civil and Political Rights, Art. 40, paras. 4 and 5. This is not language describing a judicial process or any kind of formal proceeding or even implying greater authority in the committee than the "States Parties" as to correct interpretations of the convention.
53. Notably, Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," *American Journal of International Law*, Vol. 89, No. 2 (April 1995), pp. 341–350.
54. According to one account, only Denmark and Norway protested that Saudi Arabia's reservation to its CEDAW accession, which exempted anything contrary to Sharia law as interpreted by Saudi Arabia, effectively nullified its ratification and violated the provision in the Vienna Convention on the Law of Treaties prohibiting reservations that are "incompatible with the object and purpose of the treaty." See Belinda Clark, "The Vienna Convention Reservations Regime and the Convention on Sex Discrimination," *American Journal of International Law*, Vol. 85, No. 2 (April 1991), pp. 281–321, and Vienna Convention on the Law of Treaties, May 23, 1969, Art. 19(c), https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (accessed March 16, 2020).
55. The Atlantic Charter, August 14, 1941, https://www.nato.int/cps/en/natohq/official_texts_16912.htm (accessed March 23, 2020).
56. Specifically, the Atlantic Charter was "technically no more than a press release, of which there was no official copy, signed or sealed." William L. Langer and S. Everett Gleason, *The Undeclared War*, *1940–41: The World Crisis and American Foreign Policy* (New York: Harper and Brothers, 1953), p. 688.
57. William Blackstone, *Commentaries on the Laws of England*, Book IV (1769), Ch. 5, "Offences Against the Law of Nations" (discussing interference with foreign ambassadors, interference with foreign visitors protected by "safe conducts or passports," piracy on the high seas).
58. Anthony J. Belia Jr. and Bradford J. Clark, *The Law of Nations and the United States Constitution* (New York: Oxford University Press, 2017).
59. *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir., 1980).
60. 28 U.S.C. §1350.
61. The court invoked a "declaration" against torture, endorsed by a vote of the U.N. General Assembly. If a vote of the U.N. General Assembly can create "international law," the body can be viewed as a world legislature, and if there had been a word in the text of the U.N. Charter indicating that status for the General Assembly, it is highly doubtful that the Charter would have been approved by a two-thirds majority of the Senate in 1945.
62. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Scalia concurrence, end of Sec. III). Emphasis in original.
63. *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013) (no application abroad); *Jesner v. Arab Bank*, 584 U.S. ____ (2018) (no application to corporations).
64. For a review of competing claims and a defense of the primacy of presidential determinations in this area, see "Presidents and Customary International Law," Ch. 5 in Julian Ku and John Yoo, *Taming Globalization: International Law, the U.S. Constitution, and the New World Order* (New York: Oxford University Press, 2012), pp. 113–150.
65. U.S. Department of Defense, Office of General Counsel, *Department of Defense Law of War Manual*, June 2015, Ch. 1, Sec. 8, §1, p. 31, https://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf (accessed March 16, 2020).
66. "[T]he convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice...." Ronald Reagan, "Statement on United States Oceans Policy," March 10, 1983, https://www.jag.navy.mil/organization/documents/Reagan%20Ocean%20Policy%20Statement.pdf (accessed March 16, 2020).
67. See the chapter on *Filartiga* in John E. Noyes, Laura A. Dickinson, and Mark W. Janis, *International Law Stories* (New York: Foundation Press, 2007).
68. Vienna Convention on Consular Relations, done at Vienna April 24, 1963, entered into force March 19, 1967, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3 (accessed March 25, 2020).

69. *Medellin v. Texas*, 552 U.S. 491 (2008).
70. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).
71. The Paris Agreement, adopted December 12, 2015, https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf (accessed March 25, 2020).
72. *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) (status of ship owned by presumptive foreign national).
73. *Ma v Reno*, 208 F. 3d 815 (9th Cir., 2000) (regarding detention of Chinese national following conviction for murder).
74. Martin S. Flaherty, *Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs* (Princeton, NJ: Princeton University Press, 2019), p. 245 (arguing for "application of a Charming Betsy rule to the Constitution" at least "when global practice reflected the type of international consensus that raises a norm to international custom.").
75. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).
76. *Atkins*, 536 U.S. at 316–17, fn. 21; *Roper*, 543 U.S. at 578.
77. *Roper*, 543 U.S. at 608 (Scalia, J., dissenting) ("I do not believe that the meaning of our Eighth Amendment...should be determined by the subjective views of five Members of this Court and like-minded foreigners.").
78. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) ("The court's discussion of these foreign views...is therefore meaningless [and dangerous] dicta.").
79. *Legal Tender Cases*, 79 U.S. 457 (1870).
80. Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004), p. 102.
81. Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (New York: Alfred A. Knopf, 2015), p. 245.
82. Ibid., p. 232 (commenting on *NRDC v. EPA*, discussed in note 50, *supra*).
83. *Printz v. United States*, 521 U.S. 898, 976 (1997).
84. Adams, "Address Celebrating the Declaration of Independence," July 4, 1821.
85. James Monroe, "Seventh Annual Message," December 2, 1823, https://www.presidency.ucsb.edu/documents/seventh-annual-message-1 (accessed March 26, 2020).
86. James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Edinburgh and London: William Blackwood and Sons, 1883), p. 159, https://ia802607.us.archive.org/22/items/instituteslawna03lorigoog/instituteslawna03lorigoog.pdf (accessed March 13, 2020). Lorimer argued on such grounds that Britain would be justified in withdrawing diplomatic recognition from the Czarist government of Russia in response to anti-Jewish pogroms and against any state "ruled as an absolute autarchy or absolute exclusive class system." See ibid., p. 160 and Chapter XIV).
87. Alexander Hamilton or James Madison, *The Federalist* No. 62, https://avalon.law.yale.edu/18th_century/fed62.asp (accessed March 13, 2020).
88. On Amnesty's reluctance to associate itself with "conservative opinions" warning of genocide in Cambodia as late as 1977, see Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Basic Books, 2002), pp. 114–115 On AI's "striking" failure to criticize Soviet repression, see William Korey, *NGOs and the Universal Declaration of Human Rights: "A Curious Grapevine"* (New York: Palgrave Macmillan, 1998), p. 169.
89. National Security Decision Directive No. 75, "U.S. Relations with the U.S.S.R.," January 17, 1983, https://fas.org/irp/offdocs/nsdd/nsdd-75.pdf (accessed March 16, 2020). See also Christopher Hemmer, *American Pendulum: Recurring Debates in U.S. Grand Strategy* (Ithaca, NY: Cornell University Press, 2015), p. 100.
90. Douglas A. Sylva and Susan Yoshihara, "Rights by Stealth: The Role of the UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion," International Organizations Research Group *White Paper* No. 8, July 1, 2007, https://c-fam.org/wp-content/uploads/IORG-W-Paper-Number8.pdf (accessed March 16, 2020). This "campaign" culminated in a finding by the Human Rights Committee that there is a right to abortion within the ICCPR. See U.N. Human Rights Committee, "General Comment No. 36: Article 6: Right to Life," CCPR/C/GC/35, September 3, 2019, https://www.refworld.org/docid/5e5e75e04.html (accessed March 16, 2020). The "Committee" speaks for "experts" who serve on it, so its comments do not have to be approved by governments. For recent resistance, see Grace Melton, "Pro-Life Nations Reject UN's Cultural Colonialism on Abortion, Population Control," Heritage Foundation *Commentary*, November 20, 2019, https://www.heritage.org/life/commentary/pro-life-nations-reject-uns-cultural-colonialism-abortion-population-control.
91. Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, July 29, 1899, http://www.opbw.org/int_inst/sec_docs/1899HC-TEXT.pdf (accessed March 27, 2020).
92. *Al Skeini and Others v. United Kingdom*, Grand Chamber, European Court of Human Rights, July 7, 2011 (App. 55721/07).
93. Nadeem Badshah, "Former UK Army Chief Supports Veterans' Protection from Prosecution," *The Guardian*, October 12, 2019, https://www.theguardian.com/uk-news/2019/oct/12/former-uk-army-chief-supports-veterans-protection-from-prosecution (accessed March 17, 2020) (reporting on criticism by former General Richard Dannatt that veterans continue to be subject to human rights investigations for past incidents and urging that the U.K. consider withdrawal from the European Convention on Human Rights to end such practices).
94. See, for example, Agnes Callamard, "The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters," *Just Security*, January 8, 2020, https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/ (accessed March 17, 2020).

95. By the terms of the Rome Statute, which created the ICC, the court can claim jurisdiction because the perpetrators belong to a state that has ratified or because it takes place on the territory of a state that has ratified or because the U.N. Security Council has conferred jurisdiction for a situation of special concern. See Rome Statute of the International Criminal Court, adopted in Rome July 17, 1998, in force July 1, 2002, Arts. 12 and 13, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf (accessed March 17, 2020). Merely internal abuses by nonparty states like Russia or China will escape jurisdiction, while U.S. forces operating in Afghanistan could be prosecuted (without requiring subsequent agreement from these states, as the ICC seems disposed to disregard side agreements between such states and the U.S.). The prosecutor has recently held that the ICC may have jurisdiction over nonparty state Israel because Palestine, though not recognized as an independent state by much of the world or admitted to membership in the U.N., is a "state" with territory that is sufficiently defined (even though no international instrument defines its borders) for the court to derive territorial jurisdiction. International Criminal Court, "Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Rule on the Scope of the Court's Territorial Jurisdiction," December 20, 2019, https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine (accessed March 30, 2020).
96. Rome Statute of the International Criminal Court, Art. 5, para. 1.
97. International Criminal Court, Appeals Chamber, "Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia," dismissal of prosecutor's appeal, November 6, 2015, https://www.icc-cpi.int/CourtRecords/CR2015_20965.PDF (accessed March 18, 2020); Jeremy Rabkin, "Meanwhile, at the Hague," *The Weekly Standard*, Vol. 20, No. 44 (August 3, 2015), pp. 9–12, https://www.washingtonexaminer.com/weekly-standard/meanwhile-at-the-hague (accessed March 17, 2020).
98. International Criminal Court, Pre-Trial Chamber II, "Situation in the Islamic Republic of Afghanistan," April 12, 2019, https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF (accessed March 18, 2020); Marlise Simons, Rick Gladstone, and Carol Rosenberg, "Hague Court Abandons Afghanistan War Crimes Inquiry," *The New York Times*, April 12, 2019, https://www.nytimes.com/2019/04/12/world/asia/icc-afghanistan-.html (accessed March 18, 2020); Elian Peltier and Fatima Faizi, "I.C.C. Allows Afghanistan War Crimes Inquiry to Proceed, Angering U.S.," *The New York Times*, March 5, 2020, https://www.nytimes.com/2020/03/05/world/europe/afghanistan-war-crimes-icc.html (accessed March 30, 2020).
99. International Criminal Court, "Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine," December 20, 2019.
100. For a contemporary account, see George Finch, "The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits," *American Journal of International Law*, Vol. 48, No. 1 (January 1954), pp. 57–82. See also Frank Holman, *The Year of Victory* (Argus Press, 1955), p. 4, warning against proposals to use "the treaty process as a lawmaking process to change the domestic law and even Government of the United States… along socialistic lines."
101. The only relevant statute dates from 1972 (now codified at 1 U.S.C. §112b) and requires the President to notify the Senate within 60 days after concluding an executive agreement—but not to satisfy any preconditions or steer clear of any prescribed limitations.
102. *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, 637 (1952).
103. See, for example, Ed Whelan, "Sonia Sotomayor's Foreign Deceptions," *National Review*, Bench Memos Blog, July 30, 2009, https://www.nationalreview.com/bench-memos/sonia-sotomayors-foreign-deceptions-ed-whelan/ (accessed March 17, 2020).
104. U.S. Department of State, "Department of State Commission on Unalienable Rights," *Federal Register*, Vol. 84, No. 104 (May 30, 2019), p. 25109, https://www.govinfo.gov/content/pkg/FR-2019-05-30/pdf/2019-11300.pdf (accessed March 27, 2020).
105. *Washington: Writings*, p. 964.
106. Ibid., pp. 970, 973–974.

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