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The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations

ABSTRACT. The United States often ratifies multilateral treaties by relying on what are commonly referred to as reservations, understandings, and declarations (RUDs). RUDs limit the domestic effect of treaties and confine provisions to particular meanings consistent with the United States' practices. In recent years, during and after the U.S. Supreme Court's consideration of *Bond v. United States*, some government officials have become increasingly concerned that RUDs could be unenforceable in courts, thereby exposing the United States to unintended treaty commitments and liabilities. Remarkably, the legal literature does not contain a comprehensive account of the extent to which RUDs are enforceable in courts of law. Such an understanding may influence domestic and international perspectives on ratifying future treaties, including the pending Convention on the Rights of Persons with Disabilities and the United Nations Convention on the Law of the Sea. Consequently, this Note provides an original, searching review of the jurisprudence of RUDs in U.S. and international courts. It finds that U.S. courts and international courts consistently enforce RUDs, except for international courts reviewing treaties that expressly prohibit their use. Such findings should offer solace to those worried about the possibility that RUDs are inadequate to protect against unintended domestic effects of treaties. At the same time, they also reveal that the real concern over RUDs is not their insufficient drafting, but rather their overuse. There is a risk that treaties may increasingly prohibit RUDs, and that international courts will readily enforce these prohibitions. Given that there is no threat of the domestic invalidity of RUDs, this Note argues that the United States and other states should refrain from overusing RUDs and consequently risking broader treaty formulation and compliance.

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INTRODUCTION

In 2014, as the U.S. Senate debated advice and consent to ratify the Convention on the Rights of Persons with Disabilities, the U.S. Supreme Court heard oral arguments in *Bond v. United States*,¹ a peculiar case involving a domestic application of the International Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. The Third Circuit had held that the prohibitions of the Convention, and of the accompanying Chemical Weapons Convention Implementation Act of 1998, applied to a domestic defendant who had tried to get revenge for an extramarital affair by spreading small amounts of toxic chemicals on the plaintiff's property. Ultimately reversed by the Court later that year, the case nonetheless alarmed many who expected that the Chemical Weapons Convention could not possibly regulate local criminal activity. That the Disabilities Convention could be similarly construed was not lost on senators during hearings on that Convention.²

Bond reignited national interest in reservations, understandings, and declarations, or RUDs, despite not addressing such provisions directly. RUDs are often used by the U.S. Senate in an effort to prevent unintended consequences stemming from treaty ratification. Loosely defined, RUDs are attachments on international treaties made by a ratifying state that alter or clarify the legal effect of treaty provisions.³ In the United States, they are generally adopted by

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1. 134 S. Ct. 2077 (2014).
 2. See, e.g., S. COMM. ON FOREIGN RELATIONS, CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, S. EXEC. REP. NO. 113-12, at 40-42 (2014) [hereinafter HEARING ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES] (statement of Sen. Bob Corker) (“Whenever a bill or a treaty is passed, there are some unintended consequences Just today, there is a Supreme Court hearing that is taking place. Arguments are being argued over a lady in Pennsylvania named Bond, who, unbelievably, was convicted of a law under the Chemical Weapons Treaty that we put in place back in 1997. And so, sometimes when people raise concerns, they are actually legitimate.”).
 3. Some scholars have recognized as many as twelve types of conditions (i.e., amendments, conditions, declarations, exceptions, exclusions, explanations, interpretations, provisos, recommendations, reservations, statements, and understandings). See Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT’L & COMP. L.J. 89, 99-122 (1996). With minor exceptions and variations, however, RUDs have become a standard category for capturing the various conditions adopted at the time of treaty advice and consent or ratification. See, e.g., Jack Goldsmith, *The Unexceptional U.S. Human Rights RUDs*, 3 U. St. Thomas L.J. 311 (2005) (discussing RUDs as a category of conditions); Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 346 (1995) (same); cf. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 405 (2000) (“For

the Senate when it is giving its advice and consent to a treaty, and they must be included should the President decide to ratify the treaty. RUDs have allowed the United States to ratify treaties without assuming international obligations that might conflict with domestic obligations or otherwise place the government in a difficult legal or political position.⁴ Non-self-executing RUDs,⁵ including the one involved in *Bond*, keep international treaties and their standards from having domestic effects, including from being enforceable in domestic courts.⁶ For these reasons, the United States has both commonly and increasingly employed RUDs, as have many other states.⁷

The concern that treaties could have unintended domestic effects disquieted senators and other government officials who wondered to what extent they could rely on this practice for limiting the effects of treaties.⁸ For example, during a congressional panel on the Disabilities Convention, one senator inquired whether RUDs could be inadequate and unenforceable:

purposes of this Article, the three most important forms of conditional consent, whatever their labels, have been the power not to consent to particular treaty terms, the power to consent to a treaty on the condition that it has no domestic force in the absence of congressional implementation, and the power to take account of the United States'[] federal structure in negotiating and implementing a treaty.”).

4. For instance, the United States ratified the Genocide Convention, the Convention Against Torture, the International Covenant on Civil and Political Rights, and the Convention To Eliminate All Forms of Racial Discrimination using RUDs. See Goldsmith, *supra* note 3, at 311, 320-27.
5. While non-self-executing reservations (also referred to as declarations) are sometimes discussed separately from the larger category of RUDs, they are similar to reservations and are included as RUDs in this Note. See Henkin, *supra* note 3, at 346 (“The U.S. practice of declaring human rights conventions non-self-executing is commonly seen as of a piece with the other RUDs.”).
6. See Bradley & Goldsmith, *supra* note 3, at 416 (“RUDs are designed to harmonize the treaties with existing requirements of U.S. law and to leave domestic implementation of the treaties to Congress.”); Henkin, *supra* note 3, at 346 (“As the reservations designed to deny international obligations serve to immunize the United States from external judgment, the declaration that a convention shall be non-self-executing is designed to keep its own judges from judging the human rights conditions in the United States by international standards.”).
7. See, e.g., John King Gamble, Jr., *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT’L L. 372, 392 (1980) (estimating, since World War II, an average of one reservation per state every five years on a multilateral treaty); Goldsmith, *supra* note 3, at 312-18 (observing that the U.S. practice of RUDs is common among liberal democracies).
8. See, e.g., *Hearing on the Convention on the Rights of Persons with Disabilities*, *supra* note 2, at 41 (“And I think it is our obligation to look at the effects that a treaty like this could have on domestic law. I am not one of those folks who thinks there is somebody behind every woodpile trying to do something. I just want to make sure that we, in fact, pass a treaty and it has the relevant RUDs.”).

Is there a way, in your opinion, to write RUDs, on the front end of a treaty, that would absolutely ensure that there is no way for this treaty to affect either the federalism issues that we have to deal with or to cause a court to look to the treaty to actually affect the individual lives of citizens here in the country? Is there a way of us coming together and writing RUDs in that way?⁹

While *Bond* fueled these worries, shared by many senators,¹⁰ they are not new. Rather, these concerns have persisted and resurfaced many times over the last few decades as government officials questioned the judicial enforceability of RUDs.¹¹ Whether RUDs are enforceable raises deep questions regarding the effectiveness and robustness of treaty-making and its future. Depending on their enforceability, the use of RUDs implicates the entire constitutional system of treaty-making and whether and how the United States ratifies treaties.¹² And in turn, if courts will enforce RUDs, should that change how they are drafted? What are the legal effects of using certain RUDs over others?

These questions are of particular import domestically and internationally as treaty-making risks being substituted by alternatives such as congressional-

9. *Id.* at 88.

10. *See, e.g., id.* at 42-43 (statement of Sen. Kelly Ayotte) (“When this treaty came before the Senate last year, it fell just five votes short of passage. In debating the treaty’s merits, treaty opponents expressed concern that the [Disabilities Convention] would diminish American sovereignty, that, through U.S. ratification, the United Nations would somehow be able to supersede U.S. law, even by interfering with American parents’ right to homeschool their children. Along with Senator John McCain, Secretary John Kerry, and others, I could not disagree more strongly with this view. This treaty contains reservations, understandings, and declarations, otherwise known as RUDs, that explicitly describe how the treaty will, and will not, apply to the United States.”).

11. *See, e.g.,* S. COMM. ON FOREIGN RELATIONS, INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, S. EXEC. REP. NO. 92-6, at 16 (1971) (“A related concern that the Supreme Court would disregard the proposed understandings, reverts to the allegation that the understandings contravene the explicit language of the convention despite the committee’s expressed view to the contrary. The Supreme Court can be expected to give full weight to the view of the committee and the negotiating history of the convention in any matter that might come before the Court in connection with the treaty.”); Charles H. Dearborn, III, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233, 244 (1979) (“The State Department and the Senate Foreign Relations Committee apparently disagree on the domestic effect of declarations and understandings. The State Department agrees . . . that any statement attached by the Senate is a condition of ratification and is therefore binding on the courts. The Foreign Relations Committee is less confident.”).

12. *See* Henkin, *supra* note 3, at 348 (“There is more at issue in the United States RUDs than their effect on a particular treaty; at stake in United States human rights reservation policy is the integrity of the constitutional system for concluding treaties.”).

executive agreements.¹³ As of now, treaties remain the most frequent, if not exclusive, instruments for agreements in a number of areas, including arms control, dispute settlement, and human rights.¹⁴ With them, RUDs remain central tools in the ratification process. As of June 2016, there were thirty-eight treaties pending before the Senate, including the Disabilities Convention and the United Nations Convention on the Law of the Sea (UNCLOS),¹⁵ and questions over the enforceability and effects of RUDs are paramount to whether these treaties could ultimately be ratified by the United States. Alternately, the invalidation of RUDs could be devastating. Not only would the United States face the type of domestic lawsuits presented in *Bond*, but it could also be forced into a variety of international disputes and into rescissions of its conditional consent.¹⁶

But so far, despite their significance, legal scholars and U.S. government officials assessing RUDs have mainly spoken past each other. Senators and presidential administrations have mostly worried about actual enforceability, while legal scholars have instead presumed that RUDs will be enforceable. These scholars often argue over the optimal level of RUD usage, and they primarily debate about whether the practice of RUDs is good law and good policy. These perspectives are important in their own right, but they are informed by and benefit from being joined together. Namely, before exploring the domestic and international effects of RUDs, and how the Senate and other government

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13. See, e.g., Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Law-making in the United States*, 117 *YALE L.J.* 1236, 1239 (2008) (documenting the increasing use of congressional-executive agreements); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 *TEX. L. REV.* 961, 965 (2001) (same).
 14. Hathaway, *supra* note 13, at 1261-62 (observing that human rights, arms control, dispute settlement, aviation, the environment, labor, consular relations, taxation, and telecommunications are still areas generally reserved for Article II treaties); Spiro, *supra* note 13, at 996 (observing that arms control agreements, mutual security pacts, and human rights conventions are exclusively conducted through treaties, in contrast to multilateral trade and other international economic undertakings, which have been conducted through congressional-executive agreements); see also Spiro, *supra* note 13, at 1000 ("Human rights conventions have been submitted to the legislative branch only in the form of treaties. It does not even appear to have been suggested that they be submitted as congressional-executive agreements.").
 15. Office of the Assistant Legal Adviser for Treaty Affairs, *Treaties Pending in the Senate*, U.S. DEP'T ST. (June 20, 2016), <http://www.state.gov/s/l/treaty/pending> [<http://perma.cc/QGN8-C8QX>].
 16. See, e.g., William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 *BROOK. J. INT'L L.* 277 (1995) (discussing how the United States could be violating international obligations or might no longer be a party if reservations are found invalid).

institutions could determine their optimal use, the scope of RUDs' enforceability needs to be understood. Once that picture is clear, arguments over the proper scope of RUDs can be brought into focus.

This Note embarks on that task. It explores two major questions. First, are RUDs enforceable in courts of law? Second, if RUDs are enforceable, what is their optimal use in the treaty ratification process? To answer these questions, this Note bases both its positive and normative components on a searching analysis of case law discussing the judicial enforceability of RUDs in both U.S. and international courts.¹⁷ The analysis includes forty-seven U.S. cases discussing RUDs as a general category and twenty-six U.S. cases discussing interpretative understandings and declarations, out of approximately 650 reviewed cases. The analysis also includes fourteen cases from international courts, out of approximately 300 reviewed cases, including cases from the International Court of Justice (ICJ), the UNCLOS tribunal and arbitral bodies, the European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights.

Ultimately, this Note finds that U.S. courts and international courts consistently enforce RUDs, except for international courts reviewing treaties that expressly prohibit their use. These findings should offer solace to those worried about the inadequacies of RUDs, and they provide a compelling reason for revisiting the concerns over their use. This Note argues that based on this case law, the real concerns for the United States and other states should be the legal effects of RUDs on an international order that seeks to encourage genuine and full treaty participation, rather than their ability to mitigate unintended domestic effects. Without a viable threat to the domestic validity of RUDs, this Note reasons that the United States and other states should refrain from overusing RUDs and consequently jeopardizing broader treaty formulation and compliance.

The Note is organized in four major parts. Part I begins by providing background about the use of RUDs and traditional rationales both for and against their use. While some proponents have argued that RUDs allow for more states, including the United States, to participate in the ratification of multilateral treaties, others are more critical and argue that RUDs contribute to superficial ratifications. While legal scholars have documented the history, motivations, scope, and effects of RUDs, particularly as they relate to the Vienna Convention on the Law of Treaties (VCLT), the judicial enforceability of RUDs

17. Appendix A reviews the case review methodology in detail. While the search is not exhaustive of all cases that discuss RUDs, it is intended to be representative of the major, governing case law on RUDs.

has not yet been comprehensively examined. The issue of enforceability is nonetheless an important piece of this normative debate because it provides a more realistic picture of what legal effects RUDs could have, if any at all.

Parts II and III take up this question about enforceability. Part II describes how, in U.S. courts, RUDs are nearly always recognized as valid. U.S. courts have only questioned the validity of RUDs when they were not properly communicated to other state parties, when their text did not support an argued interpretation, or when they focused on issues of wholly domestic concern. A few judges have published dissents arguing against the validity of RUDs, but these opinions were not controlling. Part III, in turn, describes how, with few exceptions, international courts also usually defer to RUDs. The ICJ has indicated that it can invalidate a reservation as incompatible with the object and purpose of a treaty pursuant to Article 19 of the VCLT. Yet the ICJ has only invalidated a RUD where the treaty in question expressly prohibited such a RUD. Rules stipulated by a treaty may also shape how other courts review RUDs. The ECtHR, for instance, applies treaty rules to invalidate RUDs that are of a general character or fail to include a statement of the law concerned.

Finally, Part IV draws lessons from this account of the judicial enforceability of RUDs and argues for certain treaty practices based on those lessons. First, the case analysis indicates that U.S. officials can take solace in the fact that RUDs will continue to have the force of law in domestic and international courts; every indication therefore seems to suggest that RUDs are here to stay. But some of the traditional concerns over RUDs could and should be revisited, including what RUDs signal about treaty formulation and compliance, and the risk that RUDs increasingly could be prohibited in treaties altogether. For that reason, this Note concludes that the real risk with respect to RUDs is not their insufficient drafting, but rather their overuse. Given little threat of the domestic invalidity of RUDs, the United States should not overuse RUDs and risk compromising broader treaty formulation and compliance among states.

I. BACKGROUND ON THE USE OF AND CONCERNS OVER RUDS

The origins of RUDs and their important role in supporting the United States' treaty ratification efforts date back to the early 1950s when U.S. Senator John Bricker proposed a constitutional amendment to make all treaties non-self-executing.¹⁸ When that amendment failed by one vote,¹⁹ senators turned

18. For a history of the Bricker Amendment and the concerns of senators who wanted to limit international interference with domestic laws and rights, see Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J.

to RUDs as an alternative means by which to ratify treaties while preserving sovereignty, federalism, and other apparent American concerns.²⁰ The United States' participation in human rights treaties, which only took off in the 1970s, has relied on the use of RUDs for these purposes ever since.²¹

But while U.S. senators have mainly sought to draft RUDs so that they will be unassailable in courts, legal scholars have mostly focused on theoretical discussions of their effects, particularly with respect to how RUDs will influence international treaty formulation and compliance.²² Some have supported the value of RUDs in allowing states, including the United States, to participate more actively in treaty-making.²³ Along these lines, scholars have defended the practice of RUDs as a valid exercise of the Senate's powers,²⁴ and, more broad-

1564, 1606-12 (2006); and Nelson Richards, *The Bricker Amendment and Congress's Failure To Check the Inflation of the Executive's Foreign Affairs Powers, 1951-1954*, 94 CALIF. L. REV. 175, 184-206 (2006). See also *infra* Section IV.A.1 (discussing the Bricker Amendment and subsequent changes in RUD practice).

19. Richards, *supra* note 18, at 205.
20. See, e.g., Henkin, *supra* note 3, at 341 ("United States adherence to human rights conventions, after decades of resistance, should please all who support the international human rights movement. In fact, many are not pleased. For the United States has attached to each of its ratifications a 'package' of reservations, understandings and declarations (RUDs) . . .").
21. See, e.g., HEARING ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 150 (statement of John F. Kerry, Sec'y of State) ("I would just start off by saying we are 100 percent prepared, as we have been, to work through what are known as RUDs, or the reservations, understandings, and declarations, in order to pass this treaty. That is our goal."); Bradley & Goldsmith, *supra* note 3, at 400-01 ("Beginning in the 1970s, the treaty-makers crafted a way to commit the United States to human rights treaties in the international arena while accommodating domestic concerns. They achieved these dual aims by ratifying the treaties with a set of conditions. These conditions take the form of reservations, understandings, and declarations – collectively, 'RUDs' – to U.S. ratification.").
22. See, e.g., Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEGAL STUD. 397, 398 (2007) ("Scholars of international law and international relations are deeply divided in their views of the role RUDs play, their legitimacy, and their consequences for the international human rights regime . . ."); see also Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307, 307 (2006) ("Reservations are, perennially and by acclamation, one of the most complex and controversial parts of treaty law.").
23. See, e.g., Bradley & Goldsmith, *supra* note 3, at 457 ("[I]t is virtually impossible to reach agreement on a treaty text that is acceptable to all nations. This is why, as was recognized in the early days of the human rights movement, conditional consent is so important."); Swaine, *supra* note 22, at 311 ("Treaty reservations not only increase the breadth of treaty participation, as they were certainly intended to do, but also permit agreement on deeper commitments than would otherwise be possible.").
24. See, e.g., Bradley & Goldsmith, *supra* note 3, at 405 ("Since the 1790s, this greater power to withhold consent altogether has been viewed as including the lesser power to consent to

ly, as a legitimate function of states that are serious about adopting treaty obligations.²⁵ Furthermore, some scholars have suggested that RUDs may lead to more honest reflections of the positions of reserving states²⁶ and can provide a starting point for engaging with and eventually internalizing particular norms.²⁷

Critics meanwhile have condemned the practice of RUDs on both legal and functional grounds,²⁸ accusing RUDs of leading to a “specious, meretricious, [and] hypocritical” process of ratification,²⁹ through which the United States reaps the benefits of treaty participation while never assuming any obligations.³⁰ More specifically, some have criticized RUDs as detracting from the United States’ moral commitments to human rights, including, for example, those contained in the International Covenant on Civil and Political Rights (ICCPR).³¹ Similarly, within the broader international community, RUDs have

some provisions of the treaty but not others.”); *see also* Goldsmith, *supra* note 3 (describing and countering both domestic and international legal arguments against the validity of RUDs).

25. *See, e.g.*, Neumayer, *supra* note 22, at 398 (“From one perspective . . . [r]eservations, understandings, and declarations are set up by those countries that take human rights seriously, foremost the liberal democracies, while other countries need not bother because they have no intention of complying anyway.”).
26. *See, e.g.*, Swaine, *supra* note 22, at 311 (“Reservations further help establish an information-forcing mechanism that communicates significant information about the risks and benefits of contracting with reserving states.”).
27. *See, e.g.*, Judith Resnik, *Comparative (In)equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production*, 10 INT’L J. CONST. L. 531, 533 (2012) (“RUDs offers paths to connections that, as one can see from their later withdrawals by some countries, enable a dynamic interaction as domestic legal regimes change over time.”); *id.* at 546 (“RUDs are not necessarily static; they can provide a means of beginning conversations about equality obligations.”).
28. *See, e.g.*, Henkin, *supra* note 3, at 341 (observing that the United States’ RUDs have “evoked criticism abroad and dismayed supporters of ratification in the United States”).
29. *Id.*
30. *See* Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515, 518 (1991) (“[T]he trend toward non-self-executing treaty declarations is unfortunate and should be resisted. Domestic judicial application of international treaties should be encouraged in the interests of effective enforcement of international law as well as the development of a body of jurisprudence under the treaties.”); Henkin, *supra* note 3, at 344 (“By adhering to human rights conventions subject to . . . reservations, the United States, it is charged, is pretending to assume international obligations but in fact is undertaking nothing. It is seen as seeking the benefits of participation in the convention . . . without assuming any obligations or burdens.” (footnote omitted)).
31. *See, e.g.*, M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1179 (1993) (ar-

been criticized as abrogating the universal values and commitments signaled by human rights treaties³² and destroying any semblance of treaties as contracts.³³ Furthermore, RUDs risk contravening the VCLT by violating Article 19's prohibition against reservations that are "incompatible with the object and purpose of the treaty"³⁴ and Article 27's restriction on citing domestic law to avoid treaty obligations.³⁵

Both proponents and critics of RUDs acknowledge that there is an unavoidable tradeoff between protecting the rights and consent of non-reserving states that anticipate compliance with treaties in their entirety and the rights and consent of reserving states that expect to have their RUDs honored, with the VCLT³⁶ tilted toward protecting the rights of the latter.³⁷ Yet before concluding where the law *should* stand on allowing or limiting RUDs, more needs to be known about what the law already provides about their enforceability. This is after all the major concern of senators deciding whether to ratify treaties with RUDs. In other words, whether RUDs are already limited in courts of law is a practical reality that has demanded the attention of government officials and should inform any normative consideration of their use.

guing that the United States' RUDs to the ICCPR violate its good faith obligations to the treaty commitments); Kristina Ash, Note, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, NW. J. INT'L HUM. RTS., Spring 2005, ¶ 46 (discussing specific RUDs that the United States should withdraw from the ICCPR).

32. See, e.g., Neumayer, *supra* note 22, at 398 ("From the competing second account, however, RUDs are regarded with great concern, if not hostility. This is because of the supposed character of human rights as universally applicable, which is seen as being undermined if countries can opt out of their obligations.").
33. See, e.g., Bassiouni, *supra* note 31, at 1180 ("No treaty, contract, or legal obligation can be binding on all parties if one party can opt out of any provision at will and also change positions in time, alternatively considering itself bound and then not bound by a given provision.").
34. Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].
35. *Id.* art. 27, 1155 U.N.T.S. at 339 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").
36. The VCLT establishes guidelines on when RUDs should be used and will be discussed in more detail in Part III.
37. See Swaine, *supra* note 22, at 310 ("[T]here is wide agreement about the character of existing law: namely, that there is a sharp tradeoff between honoring the consent of non-reserving states (who, with respect to another state's reservation, would for those limited purposes take the treaty as originally negotiated) and respecting the conditioned consent of reserving states, and that the Vienna Convention decisively favors the latter, upsetting an intended balance between them." (footnotes omitted)).

Remarkably, the legal literature does not contain a comprehensive answer to the persistent questions over the judicial enforceability of RUDs. In the limited instances where the issue has been considered, RUDs have generally been summarily presumed to be valid in courts of law.³⁸ The positive account of RUDs has focused on exploring their possible rules and limitations based on the VCLT's provisions on reservations or on the effect of one state's objections on another state's RUD.³⁹ Several early works were devoted to studying the history, motivations, scope, and effects of RUDs across states and treaties, particularly by comparing and connecting them to the principles set forth in the VCLT.⁴⁰ Others have explored how parties should be bound if RUDs are inval-

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38. The closest and most helpful account engaging with this question is an article from the turn of the century, Bradley & Goldsmith, *supra* note 3, which focused on defending RUDs rather than reviewing their treatment by courts. Citing a few early U.S. court cases, the authors presumed that no court has ever invalidated Senate conditions. *Id.* at 410. The authors did not, however, focus on an in-depth analysis of domestic or international jurisprudence on RUDs; they assumed that RUDs would be justified in a similar way to the dualistic approach taken for other legal questions. *Id.* at 440 (“U.S. courts follow a dualist approach to the relationship between international law and domestic law: They treat international and domestic law as distinct, they rely on domestic law to determine international law’s status within the U.S. legal system, and, in case of a conflict, they generally give domestic law primacy over international law. Consistent with this dualistic approach, U.S. courts are likely to judge the legal validity of the RUDs ultimately by reference to domestic constitutional law.”).
39. See, e.g., Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT’L L. 531, 531 (2002) (exploring potential legal remedies in cases where RUDs are found to be invalid under the VCLT); Jan Klabbbers, *Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties*, 69 NORDIC J. INT’L L. 179, 192 (2000) (discussing the VCLT’s and Nordic practice of objecting to the reservations of other states); Roslyn Moloney, *Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent*, 5 MELB. J. INT’L L. 155, 158–62 (2004) (exploring the potential consequences and use of severability if RUDs are found to be invalid under the VCLT); Swaine, *supra* note 22, at 307–08 (discussing how to interpret the VCLT’s effects on RUDs, including especially how they relate to non-reserving states’ interests); Edward F. Sherman, Jr., Note, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT’L L.J. 69, 71 (1994) (discussing the United States’ capital punishment reservation and the VCLT’s “object and purpose” requirement).
40. See, e.g., FRANK HORN, RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES (1988); LIESBETH LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? (1994); Henry J. Bourguignon, *The Belilos Case: New Light on Reservations to Multilateral Treaties*, 29 VA. J. INT’L L. 347 (1989); Massimo Coccia, *Reservations to Multilateral Treaties on Human Rights*, 15 CAL. W. INT’L L.J. 1 (1985); Richard W. Edwards, Jr., *Reservations to Treaties*, 10 MICH. J. INT’L L. 362 (1989); Jean Kyongun Koh, Comment, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT’L L.J. 71 (1982).

idated.⁴¹ But scholars studying these VCLT provisions and the broader law surrounding RUDs, which many consider to be unclear,⁴² do not provide consistent guidance as to how courts will treat RUDs. Additionally, the United States has not ratified the VCLT, and except among scholars who consider the VCLT customary international law, it is not clear if the VCLT binds the United States.⁴³

As the Introduction suggests, an account of the depth and breadth of this enforceability is all the more pressing as it may influence the likelihood that the United States will ratify further treaties. More broadly, such an account may address the longstanding concerns of senators and other government officials and allow them to engage more fully with the question of the optimal scope of RUDs that has long been the focus of legal scholars. This Note endeavors to fill this gap by providing an original and searching account of how courts enforce, and do not enforce, RUDs.

II. THE ENFORCEABILITY OF RUDS IN U.S. COURTS

Article II of the Constitution governs the treatymaking process in the United States.⁴⁴ This process generally begins with the President's administration negotiating the terms of a treaty with foreign states, followed by a signature and transmission to the Senate for its advice and consent.⁴⁵ The Senate can provide its advice and consent by approving the treaty through a two-thirds vote and a resolution sending the treaty back to the President, or it can keep the treaty pending. As part of its advice and consent, the Senate can condition its

41. See, e.g., Roberto Baratta, *Should Invalid Reservations to Human Rights Treaties Be Disregarded?*, 11 EUR. J. INT'L L. 413, 421-25 (2000) (proposing possibilities for how states should or should not still be bound if a RUD is invalidated); Goodman, *supra* note 39 (same).

42. See, e.g., Bradley & Goldsmith, *supra* note 3, at 424 ("Unfortunately, the provisions of the Vienna Convention relating to reservations are vaguely worded and have provoked disagreement among commentators and inconsistent national interpretations.").

43. See Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 307-08 (2007) (discussing how the United States is not a party to the Vienna Convention but that some scholars consider it to be bound by some provisions they consider to be customary international law).

44. U.S. CONST. art. II, § 2 ("The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

45. See CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 117-45 (Comm. Print 2001) [hereinafter CRS REPORT ON TREATIES] (outlining the U.S. treatymaking process, including RUDs as conditions proposed by the Senate and binding on the President).

approval by adopting RUDs in its approving resolution. The President can then either choose to ratify the treaty with the RUDs becoming a part of the United States' agreement⁴⁶ or refuse to ratify the treaty altogether.⁴⁷ It is largely understood among states that in bilateral treaties, consent to the RUDs by the other state party is required before the RUDs can go into effect; in multilateral treaties, consent by each state party is generally not required unless the treaty appears to require it.⁴⁸

While RUDs can take many forms, they can generally be characterized in one of three ways.⁴⁹ Reservations qualify U.S. obligations without necessarily changing the treaty's text.⁵⁰ They are often used to except the United States from certain problematic treaty provisions, to avoid conflicts between treaty provisions and the U.S. Constitution, or to escape obligations where there are political or policy disagreements.⁵¹ Meanwhile, understandings clarify or elaborate provisions but do not change them.⁵² They are used to explain the United States' interpretation of certain treaty terms and to clarify its consent to a particular provision.⁵³ Finally, declarations express the Senate's position on matters relating to issues raised by the treaty as a whole.⁵⁴ A common declaration is

46. While the President may propose conditions, the Senate usually does so. Bradley & Goldsmith, *supra* note 3, at 404 (“Usually the Senate has proposed . . . conditions, but sometimes the President has as well.”).

47. CRS REPORT ON TREATIES, *supra* note 45, at 150 (“The option of resubmitting the entire treaty permits the flexibility of delaying ratification of a treaty if, for example, the President expects an imminent change in the fundamental circumstances which gave rise to the agreement. It also permits him, in instances in which the Senate has rejected a treaty or attached reservations he opposed to a treaty, to wait for more favorable circumstances and resubmit the treaty. The President may also resubmit a treaty in a renegotiated form should a Senate understanding, declaration, or reservation alter or restrict its meaning to such a degree that it was unacceptable to him or to the other party to the agreement.”).

48. See, e.g., VCLT, *supra* note 34, art. 20, 1155 U.N.T.S. at 337 (“A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.”).

49. See Gamble, Jr., *supra* note 7, at 373 (“This matter of a definition, while relatively simple in the abstract, can be difficult in practice. However, there is considerable consistency among authoritative sources that have grappled with the problem.”).

50. CRS REPORT ON TREATIES, *supra* note 45, at 11.

51. Bradley & Goldsmith, *supra* note 3, at 417-18 (describing substantive reservations).

52. CRS REPORT ON TREATIES, *supra* note 45, at 11.

53. Bradley & Goldsmith, *supra* note 3, at 418-19 (describing interpretative conditions).

54. CRS REPORT ON TREATIES, *supra* note 45, at 11.

one that declares the treaty to be non-self-executing or nonenforceable in U.S. courts as long as there is no implementing domestic legislation.⁵⁵

For example, the Senate provided its advice and consent for the ICCPR while adopting several RUDs, including the following:

- a reservation that “the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws, permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age”;⁵⁶
- an understanding that the “Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant”;⁵⁷ and
- a declaration that “the provisions of Articles 1 through 27 of the Covenant are not self-executing.”⁵⁸

According to a quantitative analysis of RUDs documenting 200 years of the United States’ treaty-making up until 1996, the United States entered into 1,286 treaties pursuant to Article II, including 195 (or fifteen percent) with RUDs

55. See Bradley & Goldsmith, *supra* note 3, at 419-22 (describing non-self-executing declarations). There is also a considerable amount of literature and case law on treaties that are on their own terms non-self-executing, but that legal inquiry has so far been separate and not involved with the enforceability of RUDs. See, e.g., *Medellin v. Texas*, 552 U.S. 491 (2008) (considering treaties that are by their own terms non-self-executing); Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540 (2008) (same).

56. 138 CONG. REC. 8070 (1992). The ICCPR restricts capital punishment for crimes committed by persons under eighteen years of age. International Covenant on Civil and Political Rights art. 6(5), Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171, 175 (“Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”).

57. 138 CONG. REC. 8071 (1992).

58. *Id.*

adopted during the Senate’s advice and consent process.⁵⁹ A more recent analysis reviewing 400 multilateral treaties ratified between 1960 and 2009 suggests that the United States’ use of RUDs has increased and continues to increase over time.⁶⁰ But even while RUDs have become a standard feature of modern treaty-making practice, their actual enforceability in courts has largely been presumed. Scholars have not looked in depth into the range of court cases reviewing the use of RUDs.

In this Part, I analyze U.S. case law to determine the enforceability of RUDs in U.S. courts. To construct a comprehensive set of U.S. court cases directly engaging with the enforceability of RUDs, I conducted a search for all federal cases containing the term “RUDs” (a common term in public international law and among courts), which returned twenty-seven cases. I then conducted a second search using the search string “reservations, understandings, and declarations,” which returned 393 cases, which, upon review, included twenty unique cases that engaged with the question of the legal validity of RUDs. To capture cases that may not refer to this grouping, I conducted a third search using a more general search string in order to locate interpretative understandings and declarations and reviewed the most relevant 250 cases returned.⁶¹

The remainder of this Part describes the prevailing view in U.S. case law that RUDs are valid and enforceable in U.S. courts. It then discusses the few instances in which the validity of RUDs has been questioned.

A. *Valid and Enforceable RUDs in U.S. Courts*

In the cases reviewed, U.S. courts consistently recognize the validity and enforceability of RUDs and consider them to be legally binding as a condition of the Senate’s advice and consent.⁶² If the Senate conditions its approval of a

59. Kennedy, *supra* note 3, at 91.

60. Cindy Galway Buys, *Conditions in U.S. Treaty Practice: New Data and Insights on a Growing Phenomenon*, 14 SANTA CLARA J. INT’L L. 363, 377 (2016) (“[I]n the 1960s and 1970s, the United States only added conditions to its multilateral treaties 11-12% of the time. That percentage rose to 21-26% during the 1980s and 1990s. More recently, the United States has added conditions to its treaties at an even higher rate. By the 2000s, the United States added conditions to the multilateral treaties it ratified 34% of the time.”).

61. Appendix A describes the methodology for this search, and Appendix B contains a complete list of the cases reviewed and deemed to be relevant to RUD practice.

62. RUDs are usually the product of the Senate’s treaty approval process but can also be introduced by the President. See, e.g., CRS REPORT ON TREATIES, *supra* note 45, at 124 (“The Foreign Relations Committee may recommend that the Senate approve treaties conditionally, granting its advice and consent only subject to certain stipulations that the President must accept before proceeding to ratification. The President, of course, also may propose, at the

treaty upon certain RUDs, the President can ratify the treaty only with those RUDs. This has been the longtime understanding of the constitutional arrangement.⁶³

1. U.S. Supreme Court Case Law

The U.S. Supreme Court has never expressly ruled on the validity of RUDs, but it has implicitly recognized their validity by enforcing them in a number of cases. Most prominently, in *Sosa v. Alvarez-Machain*, a Mexican national sued the Drug Enforcement Administration for an arbitrary arrest.⁶⁴ Among several claims, the plaintiff argued that the arrest violated his rights under Article 9 of the ICCPR.⁶⁵ The Court recognized the ICCPR's non-self-executing declaration as dispositive for rejecting that claim, explaining that the Senate granted its advice and consent to the ICCPR with a reservation providing that the treaty "was not self-executing and so did not itself create obligations enforceable in the federal courts."⁶⁶

time of a treaty's transmission to the Senate or during the Senate's consideration of it, that the Senate attach certain conditions or stipulations in the course of giving its advice and consent."); Bradley & Goldsmith, *supra* note 3, at 404 ("Usually the Senate has proposed these conditions, but sometimes the President has as well.").

63. Kennedy, *supra* note 3, at 94-95; *see also* United States v. Stuart, 489 U.S. 353, 374-75 (1989) (Scalia, J., concurring) ("Of course the Senate has unquestioned power to enforce its own understanding of treaties. It may, in the form of a resolution, give its consent on the basis of conditions. If these are agreed to by the President and accepted by the other contracting parties, they become part of the treaty and of the law of the United States If they are not agreed to by the President, his only constitutionally permissible course is to decline to ratify the treaty, and his ratification without the conditions would presumably provide the basis for impeachment."). The mandatory and binding nature of RUDs is also consistent with and endorsed by the Third Restatement of the Foreign Relations Law of the United States. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 (AM. LAW. INST. 1987) ("(1) When the Senate of the United States gives its advice and consent to a treaty on condition that the United States enter a reservation, the President, if he makes the treaty, must include the reservation in the instrument of ratification or accession, or otherwise manifest that the adherence of the United States is subject to the reservation. (2) When the Senate gives its advice and consent to a treaty on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate's understanding.").
64. 542 U.S. 692, 735 (2004).
65. International Covenant on Civil and Political Rights, *supra* note 56, art. 9, cl. 1, 999 U.N.T.S. at 175 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.").
66. *Sosa*, 542 U.S. at 735.

Expressly recognizing the existence of RUDs, the Court observed that “[s]everal times . . . the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the [ICCPR] declared that the substantive provisions of the document were not self-executing.”⁶⁷ Furthermore, the Court held that although the United States was bound by the ICCPR, “the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”⁶⁸ The Court denied the argument that the Universal Declaration of Human Rights and the ICCPR could themselves constitute the relevant and applicable rules of international law.⁶⁹ While not commenting on the validity and enforceability of RUDs in general, the Court recognized a specific non-self-executing declaration, a reservation with arguably some of the most significant legal effects among RUDs,⁷⁰ as valid and enforceable.

The Court has also weighed in at least twice on interpretative understandings and declarations, although apparently only in cases concerning bilateral treaties. In 1853, the Court held in *Doe v. Braden* that written declarations interpreting ambiguous language that are then ratified by the other party become a part of the treaty and are therefore obligatory.⁷¹ Almost a century later, the Court recognized a declaration “providing that nothing in the treaty should be

67. *Id.* at 728.

68. *Id.* at 735 (citation omitted).

69. *Id.*

70. Note that judges and scholars often refer to non-self-executing provisions as both reservations and declarations. The distinguishing factor is mainly one of definition: “Whether the non-self-execution declaration is a reservation or not depends on the definition of non-self-execution being used. When the President (or Senate) defined the non-self-execution declaration in the sense that the U.S.’ obligations under [the] ICCPR would provide no further substantive rights protection, this definition clearly would make the declaration a reservation. On the other hand, when the declaration is defined in the sense that the U.S.’ obligations under the ICCPR would not create new private causes of action, the declaration is not a reservation.” FRANCISCO FORREST MARTIN ET AL., *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES, AND ANALYSIS* 226 n.30 (2006).

71. 57 U.S. 635, 656 (1853) (“For it is too plain for argument that where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged—the declaration thus annexed is part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged.”).

construed to” have any meaning beyond what the qualification specified.⁷² Although the Court referred to the declaration as an amendment, the language suggests that the qualifier was in fact a RUD.⁷³ These two cases provide the most persuasive authority that interpretative understandings and declarations constitute a part of the treaty and should therefore be enforced as part of the treaty obligation, at least insofar as the RUD has received bilateral assent.

2. District and Circuit Court Case Law

Following the Supreme Court’s guidance in *Sosa*, lower courts have consistently upheld RUDs, often in even more direct terms. For example, lower courts have repeatedly upheld reservations and declarations stating that certain treaties or treaty provisions are non-self-executing, most prominently in cases involving the ICCPR.⁷⁴ In *Igartúa v. United States*, for instance, the First Circuit expressly recited the holding in *Sosa* that recognized the ICCPR as non-self-executing given the Senate’s condition at the time of advice and consent.⁷⁵ The Second Circuit was even more explicit, denying a claim under the ICCPR by reasoning that “[t]he only ratified treaty cited . . . by [the plaintiff], the ICCPR, came with attached RUDs declaring that the ICCPR is not self-executing. This declaration means that the provisions of the ICCPR do not create a private right of action nor separate form of relief enforceable in United States courts.”⁷⁶ In addition to enforcing the non-self-executing declaration, lower courts have consistently upheld the reservation to the ICCPR that retains

72. *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 368 (1945).

73. *Id.* at 368-69 (“To four [treaties], including the Box Elder Treaty, the Senate added an amendment providing that nothing in the treaty should be construed to admit ‘any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.’ . . . Whatever may have been the complexities of the Mexican cession title situation as described in the opinion of this Court, the Senate by this amendment clearly indicated that it understood each treaty to constitute a recognition of Indian title to the land claimed, at least as to lands outside the Mexican cession. Had the Senate been under the impression that no title rights were involved in the treaties it would have been meaningless to add this amendment.”).

74. *See, e.g.,* *Igartúa v. United States*, 626 F.3d 592 (1st Cir. 2010) (upholding non-self-executing status of ICCPR); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121 (2d Cir. 2005) (accepting ICCPR as non-self-executing by way of RUDs).

75. *Igartúa*, 626 F.3d at 604-05.

76. *Guaylupo-Moya*, 423 F.3d at 137.

the right of the United States to impose capital punishment on juveniles under eighteen years of age, even though the ICCPR prohibits this practice.⁷⁷

With regard to interpretative understandings and declarations, most case law comes from interpretations of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which has been implicated indirectly through litigation under the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).⁷⁸ In *Auguste v. Ridge*, the Third Circuit applied the United States' "understanding" that torture must include a specific intent element.⁷⁹ The Second Circuit cited *Auguste* in reaching the same conclusion two years later.⁸⁰ The Ninth Circuit has similarly upheld interpretations of Article 3's "substantial grounds for believing that he would be in danger," which is the risk threshold above which a state cannot force refugees or

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77. See, e.g., *Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002) (upholding Senate reservations of right to impose capital punishment on juvenile offenders); *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001) (same). The U.S. Supreme Court later held in *Roper v. Simmons* that it is unconstitutional, under the Eighth Amendment, to impose capital punishment for crimes committed by individuals under the age of eighteen. 543 U.S. 551, 578 (2005). The majority did not find the reservation persuasive as evidence against a national consensus on juvenile executions. *Id.* at 567 ("The reservation to Article 6(5) of the ICCPR provides minimal evidence that there is not now a national consensus against juvenile executions."). The dissent, on the other hand, cited the reservation as evidence that there was no national consensus. *Id.* at 622-23 (Scalia, J., dissenting) ("That the Senate and the President—those actors our Constitution empowers to enter into treaties, see Art. II, § 2—have declined to join and ratify treaties prohibiting execution of under-18 offenders can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. That the reservation to the ICCPR was made in 1992 does not suggest otherwise, since the reservation still remains in place today.").
78. The Senate ratified the CAT with a number of understandings, which were then mirrored in FARRA. Act of Oct. 21, 1998, Pub. L. No. 105-277, div. G, 112 Stat. 2681, 2681-2761 (codified as amended in scattered sections of 8 U.S.C.). Essentially, FARRA made the CAT's terms enforceable in U.S. courts, which in turn required U.S. courts to interpret the CAT's understandings.
79. 395 F.3d 123, 142 (3d Cir. 2005) ("Thus, we are presented with a situation where both the President and the Senate, the two institutions of the federal government with constitutional roles in the treaty-making process, agreed during the ratification stage that their understanding of the definition of torture contained in Article 1 of the [CAT] included a specific intent requirement. In our view, this is enough to require that the understanding accompanying the United States' ratification of the [CAT] be given domestic legal effect, regardless of any contention that the understanding may be invalid under international norms governing the formation of treaties or the terms of the [CAT] itself.").
80. *Pierre v. Gonzales*, 502 F.3d 109, 120 (2d Cir. 2007) ("By announcing its understandings, the Senate implicitly recognized that the treaty wording would benefit from clarification. Those understandings are the indispensable premise for the implementation of the CAT as domestic law. The agency is bound by them, and we defer to the agency's reasonable interpretation of them . . .").

asylum seekers to return to the country they fled, to mean “if it is more likely than not that he would be tortured.”⁸¹ Such a definition is critical for determining whether a state has a legal obligation not to deport certain refugees or asylum seekers. While in each of these cases the courts were applying FARRA, the courts’ unquestioning treatment of the CAT’s understandings as legally dispositive of FARRA’s meaning suggests that the CAT’s understandings are indeed valid.

Courts interpreting and enforcing other prominent multilateral treaties have also cited interpretative understandings and declarations in their decisions. Most of these cases do not expressly rely on the RUDs in their ultimate holdings, but a few have. The U.S. District Court for the Eastern District of New York, for example, held that the use of herbicides did not constitute genocide in part by referring to the U.S. interpretative understanding that specific intent is required for genocide to be committed under the Genocide Convention.⁸² Similarly, in 1928, the U.S. District Court for the District of Maryland recognized that an interpretative understanding did not have to be a reservation to be binding.⁸³ The court found that bilateral assent to the interpretative understanding was sufficient.⁸⁴ The court did not discuss what would happen if the interpretative understanding was only a unilateral understanding, as discussed next.

B. Limitations of the Enforceability of RUDs in U.S. Courts

RUDs are therefore almost always enforced by U.S. courts. But there have been a few discrete instances in which courts have questioned their use in spe-

81. *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 985 (9th Cir. 2012) (“The Senate ratified [the] CAT with the understanding that the phrase, *where there are substantial grounds for believing that he would be in danger of being subjected to torture*, would be understood to mean *if it is more likely than not that he would be tortured*.” (emphases added)). Such understandings have also been applied by the district courts. See, e.g., *Thelemaque v. Ashcroft*, 363 F. Supp. 2d 198, 208-09 (D. Conn. 2005) (finding that the applicant bore the burden of proving that “he would ‘more likely than not [] suffer intentionally-inflicted cruel and inhumane treatment’” in order to obtain relief under the CAT).

82. *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

83. *Gen. Elec. Co. v. Robertson*, 25 F.2d 146 (D. Md. 1928), *rev’d on other grounds*, 32 F.2d 495 (4th Cir. 1929).

84. *Id.* at 154 (“[T]he plaintiffs very properly point out that the language quoted from the Senate Resolution is not, strictly speaking, a reservation on the part of the Senate, but an interpretation of the meaning of the treaty, and that, subsequent to the Senate’s action, the President ratified the treaty, subject to the understanding recited, and thereafter the treaty was ratified by Germany.”).

cific contexts. The significance of these few cases should not be overstated, however, given that none of these cases invalidated a recognized RUD. The only opinions not giving effect to a RUD occurred where (1) the treaty condition was never communicated to other treaty parties or (2) the reservation only addressed matters of domestic concern (although the case on this point is not binding precedent, as it was vacated on other grounds). Two judges on the First Circuit have questioned the validity of RUDs practice as a whole, but only in dissenting opinions.

First, lower courts have raised questions about treaty conditions that were not communicated to other parties and about subsequent interpretations not supported by the treaty's text. For instance, the Federal Circuit and the Court of Federal Claims both reasoned in separate decisions that a "Technical Explanation" in a treaty could not be controlling where it appeared that only the United States had been privy to the documents.⁸⁵ Furthermore, the Court of Federal Claims determined that it was unlikely that "at the time of Treaty ratification" the United States contemplated the situation that had since occurred.⁸⁶ It therefore found that the government's proposed interpretation could not be read into the treaty, thereby in effect finding the purported RUD invalid and unenforceable.⁸⁷

Second, in *Power Authority v. Federal Power Commission*, the D.C. Circuit reviewed a purported RUD attached to a treaty with Canada.⁸⁸ In that RUD, the United States reserved the right to develop its share of the Niagara River through an act of Congress and prohibited redevelopment projects until otherwise authorized through congressional enactment.⁸⁹ The court did not give effect to the reservation, holding that a reservation needed to reach an issue of

85. *Xerox Corp. v. United States*, 41 F.3d 647, 656 (Fed. Cir. 1994) ("The government refers to the affidavit of a Treasury employee and member of the United States negotiating team, Steven P. Hannes, who stated that 'copies of the Technical Explanation would have been sent to the U.K. negotiators.' No evidence of such 'sending' was provided, and it must be assumed that the Treasury's files contained no such support. On this extremely one-sided record, it would violate any reasonable canon of construction to infer mutual assent by the signatories to the position taken by the Treasury."); *Nat'l Westminster Bank, PLC v. United States*, 58 Fed. Cl. 491, 499 (Fed. Cl. Ct. 2003) ("[E]ven if the court were to read these statements more broadly, the unilateral views of the U.S. are not controlling. As noted above, the court must give meaning to the intent of the treaty partners, not simply the views of the U.S.").

86. *Nat'l Westminster Bank, PLC*, 58 Fed. Cl. at 499.

87. *Id.*

88. *Power Auth. v. Fed. Power Comm'n*, 247 F.2d 538, 538-42, 544 (D.C. Cir. 1957), *vacated as moot sub. nom. Am. Pub. Power Ass'n v. Power Auth.*, 355 U.S. 64 (1957) (per curiam).

89. *Id.* at 539.

international concern.⁹⁰ The Supreme Court ultimately vacated the judgment, remanding the decision “with directions to dismiss the petition on the ground that the cause is moot.”⁹¹ The D.C. Circuit’s decision is therefore not valid precedent, and other courts have not since followed its logic. However, though vacated, *Power Authority* may provide insight into the potential skepticism of courts toward a reservation that does not pertain to relations with other states or that otherwise alters the effect of the treaty with regard to any other party.⁹² The D.C. Circuit held that, in such instances, what appeared to be a reservation was not in fact a formal reservation, given that it addressed issues of wholly domestic concern.⁹³

Finally, in *Igartúa-de la Rosa v. United States*,⁹⁴ two dissenting judges argued that RUDs ought to be invalidated in light of the Supremacy Clause, which expressly establishes the priority of the Constitution, federal laws, and treaties made under the “Authority of the United States” over other laws and legal instruments.⁹⁵ Judge Torruella wrote, “[T]he United States is not in compliance with the binding obligations it undertook by signing and ratifying the ICCPR. The majority does not and cannot refute this undeniable fact, and . . . the potentially non-self-executing nature of the ICCPR does not preclude our ability to make a declaration to that effect”⁹⁶ Therefore, Judge Torruella would have found that the United States’ commitment to the treaty, as a supreme law, takes priority over any reservation withholding obligations under the treaty.

Also dissenting, Judge Howard wrote that “separation of powers considerations prevent a court from relying exclusively on the Senate’s declaration The Supremacy Clause and Article III require a court to examine independently the intentions of the treatymakers to decide if a treaty, by its own force, creates

90. *Id.* at 542.

91. *Am. Pub. Power Ass’n*, 355 U.S. at 64.

92. *Power Auth.*, 247 F.2d at 542. The court’s reasoning in *Power Authority* suggests that a treaty could be considered valid and enforceable even after a reservation was invalidated. The majority in *Power Authority* cited *New York Indians v. United States*, 170 U.S. 1 (1898), for the proposition that a treaty could still bind the United States even if a reservation had been invalidated, though how much such a holding could also apply beyond treaties with Native American tribes remained unaddressed. *Power Auth.*, 247 F.2d at 543-44.

93. *Power Auth.*, 247 F.2d at 542.

94. 417 F.3d 145 (1st Cir. 2005) (en banc).

95. U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

96. *Igartúa-de la Rosa*, 417 F.3d at 175 (Torruella, J., dissenting).

individually enforceable rights.”⁹⁷ Judge Torruella expressed the same viewpoint again five years later.⁹⁸

These continue to be minority viewpoints and have not been endorsed in any binding decision by the First Circuit or any other U.S. court. Overall, the isolation of these views in the case law indicates the robustness of RUDs in U.S. courts. RUDs today are made public and communicated to other parties. Neither *Power Authority* nor the dissenting opinions in the First Circuit constitute binding law. The cases reviewed in this Section are therefore the exceptions, rather than the rule. U.S. courts can be expected to treat RUDs as valid and enforceable.

III. THE ENFORCEABILITY OF RUDS IN INTERNATIONAL COURTS

The equivalents of RUDs, which are primarily discussed as a conglomerate in U.S. contexts, in international law are reservations and interpretative declarations. The International Law Commission’s (ILC) *Guide to Practice on Reservations to Treaties* provides helpful definitions that parallel those previously discussed in Part II. It defines a reservation as

a unilateral statement . . . made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.⁹⁹

Meanwhile, an interpretative declaration is a unilateral statement “made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.”¹⁰⁰

97. *Id.* at 185-86 (Howard, J., dissenting).

98. *Igartúa v. United States*, 626 F.3d 592, 625 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (“The Senate’s declaration that the ICCPR is non-self-executing is *ultra vires* with respect to the ratification process and as such that declaration is not binding on the courts, who are required to exercise their independent judicial power under the Supremacy Clause in interpreting the meaning and import of all treaties entered into by the United States.”).

99. Int’l Law Comm’n, Rep. of the Int’l Law Comm’n, § 1.1, U.N. Doc. A/66/10/Add.1 (2011). ILC documents are not legally binding but are frequently treated as helpful interpretive tools.

100. *Id.* § 1.2.

For the purposes of distinguishing between these types, whether a statement is formally titled a reservation or a declaration is less important than how it operates. According to the ILC, “[t]he character of a unilateral statement as a reservation or as an interpretative declaration is determined by the legal effect that its author purports to produce,” which should be determined by interpreting the statement “in good faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying therefrom the intention of its author, in light of the treaty to which it refers.”¹⁰¹ Moreover, the abstract definitions might not prove particularly helpful, given that the guidance essentially involves a circular logic distinguishing the two terms using their own definitions.

In this Part, I analyze international case law to determine the judicial enforceability of RUDs, namely reservations and interpretative declarations, in international courts. To locate international cases engaging with RUDs, I conducted searches using terms including “reservations,” “declarations,” and “interpretative declarations.”¹⁰² In total, approximately two dozen cases out of 300 cases reviewed were found to be relevant, and fourteen of those directly engaged with the question of RUDs.¹⁰³ I considered advisory opinions where the principles discussed were directly relevant to RUDs, but I focused largely on judgments given their binding authority.¹⁰⁴

The international case law demonstrates that courts have also generally enforced RUDs. At the same time, international courts have warned that RUDs could be invalidated where they fail the VCLT’s “object and purpose” test, and these courts have stopped short of enforcing certain RUDs where the relevant

101. *Id.* §§ 1.3-1.3.1; see also Edward T. Swaine, *Treaty Reservations*, in *THE OXFORD GUIDE TO TREATIES* 277, 279 (Duncan B. Hollis ed., 2012) (“Reservations are classified by their attempted effect rather than their billing; in the words of the [VCLT], a reservation ‘purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’. Reservations are thus distinguishable from two other devices that States frequently deploy in consenting to treaties: (i) interpretative declarations (or ‘understandings’) and (ii) (other) unilateral statements.” (quoting VCLT, *supra* note 34, art. 2(1)(d), 1155 U.N.T.S. at 333).

102. The general term “RUDs” does not work in international court cases given that such a grouping has not become a standard term outside of the United States.

103. Appendix A describes the methodology for this search, and Appendix B contains a complete list of the cases reviewed and deemed relevant to the RUDs practice.

104. This Note restricted its review to binding court case law and therefore also did not place weight on the opinions of the U.N. Human Rights Committee, which provides helpful but nonbinding advisory guidance including General Comment 24 on issues relating to reservations made upon ratification or accession to treaties. General Comment 24 is discussed *infra* Section IV.A.2. Human Rights Comm., Gen. Comment 24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994) [hereinafter General Comment 24].

treaties expressly limited their use. The ICJ cases, which are arguably most prominent in discussing reservations and interpretative declarations, are discussed first, followed by cases from other international courts. Court decisions that directly engaged with the question of RUDs were included in the case review, although any case that involved RUDs was considered in the analysis. This Part concludes with a discussion of the legal effect of objections by treaty parties to RUDs adopted by other parties.

A. *International Court of Justice (ICJ) Jurisprudence*

According to Article 19 of the VCLT, reservations to treaties are permissible with a few exceptions:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) [t]he reservation is prohibited by the treaty; (b) [t]he treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) . . . the reservation is incompatible with the object and purpose of the treaty.¹⁰⁵

The first two exceptions apply to specific treaty provisions, while the third is generally applicable to all treaties and involves a court determination.¹⁰⁶ Applying the third exception, international courts typically ask whether reservations to treaties, where otherwise not prohibited, are compatible “with the object and purpose of the treaty.”¹⁰⁷ If the reservation is compatible, it is presumably valid and should be upheld, and if it is not compatible, the reservation violates Article 19 and is presumably invalid.

ICJ’s early advisory opinion on reservations to the Genocide Convention adopted this “object and purpose” compatibility test for determining the validity of RUDs and established procedures for objections that would later be codified in the VCLT.¹⁰⁸ Since that opinion, the ICJ has established a number of

^{105.} VCLT, *supra* note 34, at 336-37.

^{106.} For a general history of how these conditions developed and the logic behind them, see Christian Tomuschat, *Admissibility and Legal Effects of Reservations to Multilateral Treaties: Comments on Arts. 16 and 17 of the ILC’s 1966 Draft Articles on the Law of Treaties*, 27 HEIDELBERG J. INT’L L. 463 (1967) (Ger.).

^{107.} VCLT, *supra* note 34, at 336-37.

^{108.} Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28) (“It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State

principles on RUDs through binding judgments. In *Fisheries Jurisdiction*, the ICJ explained that it will interpret a reservation in a “natural and reasonable” way with regard to the intention of the reserving state when it ratified the treaty.¹⁰⁹ In *Border and Transborder Armed Actions*, the ICJ illustrated that a reservation can be distinguished from an interpretative declaration. In that case, the ICJ cited a U.S. reservation to the Pact of Bogotá limiting the ICJ’s jurisdiction as an indication that the Pact otherwise gave the court compulsory jurisdiction over the case.¹¹⁰ Honduras, arguing that the Pact did not provide for compulsory jurisdiction, attempted to suggest that the U.S. reservation was merely an interpretative declaration and not reflective of the Pact’s legal effect absent the alleged declaration.¹¹¹ The ICJ disagreed, holding that the United States’ express limitation on the court’s jurisdiction was intended as a reservation, was valid, and served as an indication that jurisdiction was otherwise compulsory.¹¹² The ICJ has since applied the object and purpose test to uphold a number

in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.”).

109. *Fisheries Jurisdiction (Spain v. Can.)*, Judgment, 1998 I.C.J. 432, ¶ 49 (Dec. 4) (“The Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.”).
110. *Border and Transborder Armed Actions (Nicar. v. Hond.)*, Judgment, Jurisdiction and Admissibility, 1988 I.C.J. 69, ¶ 38 (Dec. 20) (“[T]he United States, when signing the Pact, made a reservation to the effect that: ‘The acceptance by the United States of the jurisdiction of the International Court of Justice as compulsory *ipso facto* and without special agreement, as provided in this Treaty, is limited by any jurisdictional or other limitations contained in any Declaration deposited by the United States under Article 36, paragraph 4, of the Statute of the Court, and in force at the time of the submission of any case.’”).
111. *Id.* (“It is common ground between the Parties that if the Honduran interpretation of Article XXXI of the Pact be correct, this reservation would not modify the legal situation created by that Article, and therefore would not be necessary; Honduras argues however that it was not a true reservation, but merely an interpretative declaration.”).
112. *Id.* ¶ 39 (“[Honduras’s] argument is inconsistent with the report, published by the United States Department of State, of the delegation of that country to the Conference of Bogotá, which stated that Article XXXI ‘does not take into account the fact that various States in previous acceptances of the Court’s jurisdiction under Article 36, paragraph 2, of the Statute, have found it necessary to place certain limitations upon the jurisdiction thus accepted. This was the case in respect to the United States, and since the terms of its declaration had, in addition, received the previous advice and consent of the Senate, the delegation found it necessary to interpose a reservation to the effect that the acceptance of the jurisdiction of the Court as compulsory *ipso facto* and without special agreement is limited by any jurisdictional

of reservations limiting jurisdiction of the court under the Genocide Convention. In *Armed Activities*, the ICJ held that Rwanda could make a reservation to Article IX of the Genocide Convention limiting the ICJ's jurisdiction.¹¹³ The ICJ relied on two preceding cases, *Yugoslavia v. Spain* and *Yugoslavia v. United States*, in which the court had held as valid similar reservations by Spain and the United States.¹¹⁴

While these holdings provide robust case law on the validity and enforceability of reservations within the ICJ's jurisprudence, some judges within the court have argued in dissents that reservations that are compatible with the object and purpose of a treaty may nonetheless be invalidated for other reasons. In his dissent to *Armed Activities*, for example, Judge Koroma argued that reservations that are incompatible with the *raison d'être* of a treaty should be invalid.¹¹⁵ Similarly, in *Yugoslavia v. United States*, Judge Kreća dissented to argue that *jus cogens* norms can and must override inconsistent reservations.¹¹⁶ Judge

or other limitations contained in any declaration deposited by the United States under Article 36, paragraph 4, of the Statute of the Court in force at the time of the submission of any case.” (quoting U.S. DEP'T OF STATE, NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, BOGOTÁ, COLOMBIA, MARCH 30-MAY 2, 1948: REPORT OF THE DELEGATION OF THE UNITED STATES OF AMERICA WITH RELATED DOCUMENTS 48 (1948)); see Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 1060.

113. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, Judgment, Jurisdiction and Admissibility, 2006 I.C.J. 6, ¶ 67 (Feb. 3) (“Rwanda’s reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.”).
114. *Legality of Use of Force (Yugoslavia v. Spain)*, Order, 1999 I.C.J. 761, ¶¶ 32-33 (June 2); *Legality of Use of Force (Yugoslavia v. U.S.)*, Order, 1999 I.C.J. 916, ¶¶ 24-25 (June 2).
115. *Armed Activities*, 2006 I.C.J. at 57, ¶ 11 (Koroma, J., dissenting) (“While a reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, it is incompatible if the provision to which the reservation relates constitutes the *raison d'être* of the treaty.” (citation omitted)).
116. *Legality of Use of Force (Yugoslavia v. U.S.)*, 1999 I.C.J. at 963-65, ¶¶ 9-10 (Kreća, J., dissenting) (“Therefore, to the extent that any reservations to the Genocide Convention purport to derogate from the scope or nature of any State’s obligations in respect of genocide, as set out in the core provisions of the Genocide Convention, those reservations would be void under the *jus cogens* doctrine.’ . . . The norms of *jus cogens* are of an overriding character; thus, they make null and void any act, be it unilateral, bilateral or multilateral, which is not in accordance with them.” (quoting Martin M. Sychold, *Ratification of the Genocide Convention: The Legal Effects in Light of Reservations and Objections*, 4 SWISS REV. INT’L & EUR. L. 533, 551 (1998))).

Kreća clarified that he believed no difference exists between reservations and understandings in such an inquiry.¹¹⁷

Generally, the ICJ has found that interpretative declarations are also valid, at least to the extent they were agreed upon by the other parties to the treaty. In the *Ambatielos Case*, the ICJ recognized an interpretative declaration as binding.¹¹⁸ The court reasoned that it could be understood either by the instrument of ratification or by necessary implication that the declaration must be considered provisions of the treaty.¹¹⁹ Judge Carneiro, writing an individual opinion in that case, referred explicitly to the declaration as an interpretative declaration and explained that it was a binding component of the treaty.¹²⁰

But one other case suggests that interpretative declarations can be challenged, at least when they act as reservations and are prohibited by treaties. In *Maritime Delimitation in the Black Sea*, the ICJ cast aside an interpretative declaration.¹²¹ In that case, the ICJ was asked to consider a RUD adopted by Romania when it ratified the United Nations Convention on the Law of the Sea (UNCLOS), a treaty that prohibits most reservations but allows certain inter-

117. *Id.*

118. *Ambatielos Case (Greece v. U.K.)*, Judgment, Preliminary Objection, 1952 I.C.J. 28, 44 (July 1) (“The intention of the Declaration was to prevent the new Treaty from being interpreted as coming into full force in this sweeping manner and thus prejudicing claims based on the older Treaty or the remedies provided for them. It follows that, for the proper interpretation or application of the provisions of the Treaty of 1926, some such words as ‘Save as provided in the Declaration annexed to this Treaty’ have to be read into Article 32 before the words ‘It shall come into force’. Thus, the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty, even if this was not stated in terms. For these reasons, the Court holds that either expressly (by virtue of the United Kingdom’s own instrument of ratification) or by necessary implication (from the very nature of the Declaration) the provisions of the Declaration are provisions of the Treaty within the meaning of Article 29.”).

119. *Id.*

120. *Id.* at 52-53 (opinion of Carneiro, J.) (“There is, however, I suppose, some doctrinal interest in emphasizing the juridical nature of this Declaration. It is—it must be so described—according to a current expression, an ‘interpretative declaration’. Declarations of this sort are often made by one of the parties concerned to define the attitude adopted towards a given treaty, a method of executing it. In the *British Year Book of International Law*, Mr. A. B. Lyons, referring to a declaration by the French Government on the most-favoured-nation clause, observed that the competent court had ‘held that the interpretative declaration must be read with and deemed to form part of the text of the treaty and was binding on the courts’. The Declaration of 1926, which has been referred to, was signed by the same representatives of the two Governments who were signatories of the Treaty of the same date. It has the significance of an authentic interpretation, embodied in the Treaty itself. The Treaty consists of three parts—Articles, Customs Schedule and Declaration.” (citations omitted)).

121 *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, Judgment, 2009 I.C.J. 61 (Feb. 3).

pretative declarations as long as they do not purport to exclude or modify the legal effect of the convention.¹²² Romania had issued an interpretative declaration regarding Article 121,¹²³ which establishes the definition of an island as “a naturally formed area of land, surrounded by water, which is above water at high tide” and distinguishes rocks that cannot sustain human habitation or economic life of their own in Article 121(3) as not having an exclusive economic zone or continental shelf.¹²⁴ The interpretative declaration allowed for a more preferable delimiting boundary by not considering rocks as part of the delimitation of maritime spaces. In a highly unfavorable decision for Romania, the ICJ held that the declaration could not modify the legal effect of the UNCLOS provisions.¹²⁵

At work in *Black Sea* and the invalidation of the alleged interpretative declaration were two related provisions of UNCLOS: a prohibition on reservations unless expressly permitted elsewhere in the treaty and the allowance of declarations or statements as long as they do not exclude or modify the legal effect of UNCLOS’s provisions. It can be inferred that the latter provision ensures that interpretative declarations will not simply masquerade as reservations; in this instance, the ICJ explicitly relied on the latter in dismissing Romania’s declaration, plausibly doing so because it regarded the interpretative declaration as an effort to evade that treaty’s prohibition on reservations. In any case, while in-

122. United Nations Convention on the Law of the Sea art. 309, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (“No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.”); *id.* art. 310 (“Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.”).

123. *Maritime Delimitation in the Black Sea*, 2009 I.C.J. at 76, ¶ 35 (“Romania states that according to the requirements of equity—as it results from Articles 74 and 83 of the Convention on the Law of the Sea—the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States.” (quoting Romania’s declaration)).

124. UNCLOS, *supra* note 122, art. 121.

125. *Maritime Delimitation in the Black Sea*, 2009 I.C.J. at 78, ¶ 42 (“Finally, regarding Romania’s declaration . . . the Court observes that under Article 310 of UNCLOS, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of UNCLOS in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of UNCLOS as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania’s declaration as such has no bearing on the Court’s interpretation.”).

interpretative declarations might be subject to greater scrutiny for enforceability than reservations, the *Ambatielos Case* is likely to be more representative of the legal effect of interpretative declarations when they are not otherwise limited. But *Black Sea* stands for the important principle that a treaty *can* restrict reservations and interpretative declarations and thereby make them unenforceable in international courts.

B. Other International Court Jurisprudence

With a few limited exceptions, other international courts have also found reservations to be valid. But again, in a similar vein to *Black Sea*, courts make exceptions when treaties include express limitations against certain types of reservations. The various human rights courts, for instance, provide insight into the use of reservations and declarations under the authority of specific human rights treaties with particular requirements.¹²⁶ In the case law of these courts, reservations that appear to violate the internal rules of the relevant treaty, as well as understandings and declarations that appear to sidestep these limitations, are invalidated and rendered unenforceable. For example, consistent with *Black Sea*, an arbitral tribunal held that a Russian declaration excluding certain disputes from court jurisdiction could be recognized but was limited by the treaty's express description of which declarations would be permissible.¹²⁷

The European Court of Human Rights (ECtHR), a court with particularly express case law in this area, has invalidated reservations that do not conform to the requirements of the European Convention on Human Rights (ECHR). Article 64 of the ECHR prohibits “[r]eservations of a general character” and requires “a brief statement of the law concerned” for any reservation.¹²⁸ The ECtHR Grand Chamber explained that the Article limits the ability of States to make reservations excluding areas of law from supervision by “Convention institutions,” explaining that such prohibitions are necessary to ensure equality

126. For this reason, it is also important not to generalize or overemphasize the practices of human rights courts, which operate under particular treaties, to international court practice as a whole.

127. *In re Arctic Sunrise Arbitration* (Neth. v. Russ.), Case No. 2014-02, Award on Jurisdiction, ¶ 72 (Perm. Ct. Arb. 2014), <http://www.pcacases.com/web/sendAttach/1325> [<http://perma.cc/52SA-DV4R>] (“Russia’s Declaration cannot create an exclusion that is wider in scope than what is permitted by article 298(1)(b).”).

128. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 64, Nov. 4, 1950, 213 U.N.T.S. 221.

and unity among parties to maintain and recognize human rights.¹²⁹ Relying on this Article, the ECtHR has invalidated two Swiss reservations: one for not conforming to the requirement to append a brief statement of the law concerned,¹³⁰ and one about the meaning of a fair trial for being a reservation of a general character.¹³¹ In both cases, the ECtHR held that Switzerland was still bound to the Convention.

Meanwhile, the Inter-American Court of Human Rights (IACtHR) conducts a similar inquiry examining whether challenged reservations are compatible with the American Convention on Human Rights, which allows reservations that are in conformity with the VCLT.¹³² Accordingly, the IACtHR has invalidated reservations deemed to be incompatible with the Convention, although its inquiry appears to be less searching than ECtHR's review.¹³³ Scruti-

129. *Loizidou v. Turkey*, Preliminary Objections, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) ¶ 77 (1995) (“In the Court’s view, the existence of such a restrictive clause governing reservations suggests that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their ‘jurisdiction’ from supervision by the Convention institutions. The inequality between Contracting States which the permissibility of such qualified acceptances might create would, moreover, run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realisation of human rights.”).

130. *Weber v. Switzerland*, App. No. 11034/84, 170 Eur. Ct. H.R. (ser. A) ¶ 38 (1990) (“Clearly [the reservation] does not fulfil one of [the requirements of Article 64], as the Swiss Government did not append ‘a brief statement of the law [or laws] concerned’ to it. . . . Disregarding it is a breach not of ‘a purely formal requirement’ but of ‘a condition of substance.’ The material reservation by Switzerland must accordingly be regarded as invalid.” (citation omitted)).

131. *Belilos v. Switzerland*, App. No. 10328/83, 132 Eur. Ct. H.R. (ser. A) ¶¶ 55, 60 (1988) (“The words ‘ultimate control by the judiciary over the acts or decisions of the public authorities relating to [civil] rights or obligations or the determination of [a criminal] charge’ do not make it possible for the scope of the undertaking by Switzerland to be ascertained exactly, in particular as to which categories of dispute are included and as to whether or not the ‘ultimate control by the judiciary’ takes in the facts of the case. They can therefore be interpreted in different ways, whereas Article 64 § 1 (art. 64-1) requires precision and clarity. In short, they fall foul of the rule that reservations must not be of a general character. . . . In short, the declaration in question does not satisfy two of the requirements of Article 64 (art. 64) of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration.”).

132. Organization of American States, American Convention on Human Rights art. 75, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.”).

133. See *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No.

nized reservations appear to be those that are “general in scope, which completely subordinate[] the application of the American Convention to the internal legislation of [a state] as decided by its courts.”¹³⁴ When assessing a reservation, the IACtHR has determined the reservation’s meaning based on its text, even when a state argues for a different understanding.¹³⁵ The ECtHR and IACtHR have therefore endorsed the principle that treaties may place express limitations on reservations and interpretative declarations, thereby invalidating them at least when challenged before the specific courts tasked with enforcing those conventions.

C. Formal Objections by a State to Another State’s RUDs

Although not prominent in the case law, understanding RUDs in an international context also benefits from a brief mention of formal objections by a state to another state’s RUDs. In addition to establishing rules on when RUDs are permissible, the VCLT provides procedures for these objections. Article 20 establishes that, under certain conditions, consent by all parties to a given reservation is not always required for a treaty to enter into force, such as when the treaty expressly authorizes reservations. It notes that “[a] reservation expressly authorized by a treaty does not require any subsequent acceptance by the other

2, ¶ 37 (Sept. 24, 1982) (“Having concluded that reservations expressly authorized by Article 75, that is, reservations compatible with the object and purpose of the Convention, do not require acceptance by the States Parties, the Court is of the opinion that the instruments of ratification or adherence containing them enter into force, pursuant to Article 74, as of the moment of their deposit.”).

134. *Hilaire v. Trinidad and Tobago*, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 81, ¶¶ 82, 88 (Sept. 1, 2001) (“Interpreting the Convention in accordance with its object and purpose, the Court must act in a manner that preserves the integrity of the mechanism provided for in Article 62(1) of the Convention. It would be unacceptable to subordinate the said mechanism to restrictions that would render the system for the protection of human rights established in the Convention and, as a result, the Court’s jurisdictional role, inoperative.”).

135. *Boyce v. Barbados*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 169, ¶ 17 (Nov. 20, 2007) (“The Court has previously considered that ‘a State reserves no more than what is contained in the text of the reservation itself.’ In this case, the text of the reservation does not explicitly state whether a sentence of death is mandatory for the crime of murder, nor does it address whether other possible methods of execution or sentences are available under Barbadian law for such a crime. Accordingly, the Court finds that a textual interpretation of the reservation entered by Barbados at the time of ratification of the American Convention clearly indicates that this reservation was not intended to exclude from the jurisdiction of this Court neither the mandatory nature of the death penalty nor the particular form of execution by hanging. Thus the State may not avail itself of this reservation to that effect.” (footnote omitted)).

contracting States unless the treaty so provides.”¹³⁶ Furthermore, there is generally a twelve-month period for objecting to a reservation, after which other parties’ tacit acceptance to a reservation will be assumed.¹³⁷ Article 21 lays out the conditions under which reservations and objections to reservations will have legal effect. When a state objects to another state’s reservation but otherwise does not object to the treaty entering into force, the provisions to which the reservation relates will not apply between the two State parties to the extent of the reservation.¹³⁸

While rare, states do object to other states’ reservations. A small but not insignificant number of states have objected to U.S. reservations to multilateral treaties, including objections from three states to U.S. reservations to the CAT.¹³⁹ The Netherlands, for instance, objected to the U.S. reservation to Article 16 of the CAT as incompatible with the CAT’s object and purpose and to the U.S. interpretation of “torture” under Article 1 as invalid.¹⁴⁰ Similarly, eleven states objected to U.S. reservations to the ICCPR.¹⁴¹ Germany, for instance, objected to the U.S. reservation to Article 6, which allows capital punishment for those under the age of eighteen.¹⁴²

There is no indication in the reviewed case law that any U.S. or international court has ever cited a documented objection by another state as a dispositive factor in invalidating a RUD. Litigants have raised other states’ objections to U.S. RUDs in U.S. courts,¹⁴³ but these objections have not been treated

^{136.} VCLT, *supra* note 34, art. 20, 1155 U.N.T.S. at 337.

^{137.} *Id.* (“[A] reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.”).

^{138.} *Id.* art. 21 (“When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.”).

^{139.} Finland, the Netherlands, and Sweden objected. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION 8-21, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf> [<http://perma.cc/4RMJ-VG38>].

^{140.} *Id.* at 15.

^{141.} Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, and Sweden objected. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION 14-33, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> [<http://perma.cc/M33T-5QVK>].

^{142.} *Id.* at 21.

^{143.} See, e.g., *Auguste v. Ridge*, 395 F.3d 123, 140-41 (3d Cir. 2005) (“Auguste also contends more generally that an understanding ‘that conflicts with those of other signatory states [is] of lit-

as a basis for rejecting a RUD. The issue has not arisen for the United States in the international court cases reviewed, leaving unsettled exactly how much legal force these objections have.

IV. REVISITING THE USE OF AND CONCERNS OVER RUDS

The case analysis presented in these preceding two Parts offers an important point of reference to the recurring debate and concerns introduced at the outset of this Note: RUDs are usually held to be valid and enforceable in courts of law. They are likely only to be vulnerable when international courts consider treaties that limit their use. These findings suggest that the dominant concern in United States treaty-making over the domestic legal effects of RUDs is in fact misguided. The overwhelming attention that has been paid to ensuring that RUDs will be enforceable to prevent unintended domestic consequences should instead be devoted to concerns over the international effects, ones that this case analysis suggests are rooted in preventing RUDs that undermine treaty obligations. Granted, the robustness of RUDs in U.S. courts indicates that they are not going anywhere any time soon; if they are enforceable, there is little reason to think that the United States, or other states, will stop using them. But these findings encourage reorienting the concerns over the effects of using RUDs and determining their optimal scope in the treaty-making process.

More specifically, both legal scholars and government officials can now address one another's concerns with the added benefit of a better understanding of actual RUDs enforceability, as provided by this Note's case analysis. As this Part argues, legal scholars should consider and address the concerns over domestic legal effects of RUDs that the U.S. government has raised, as this case analysis attempted to initiate, and the U.S. government should consider the real concerns that legal scholars have raised about the international effects, informed by their consistent enforceability in domestic courts and the limited exceptions to enforceability in international courts. Section IV.A encourages recasting the U.S. perspective and priorities on RUDs, namely to focus on the international instead of the domestic effects of these instruments, and Section IV.B presents recommendations based on this reorientation.

tle weight,' suggesting at one point that the fact that the Netherlands objected to the United States' understanding as overly restrictive should weigh in this Court's analysis.").

A. Recasting the U.S. Perspective and Priorities on RUDs

In light of the preceding case analysis, U.S. senators and other government officials should take solace in the fact that RUDs have and will most likely continue to have the force of law, at least in U.S. courts and in most instances in international courts. If RUDs are enforceable, the United States and other states have little reason to stop using them. But that fact alone should not discourage those who are skeptical about the extensive use of RUDs. Rather, it is this awareness of the robust enforceability of RUDs that encourages a reexamination of the optimal scope of RUDs. The question is no longer whether RUDs are enforceable, but rather when RUDs are adopted, what is their ideal usage?

More specifically, the questions raised by senators over the Disabilities Convention should be reformulated. Rather than question whether RUDs can be drafted to insulate the United States from certain treaty obligations—they can, and they do—we should ask whether RUDs will be sustainable in a treaty-making system that is increasingly wary of treaty ratification using RUDs. The effects of RUDs usage are both domestic and international, and yet they have not been considered in detail. This Section begins by exploring the domestic effects of RUDs' enforceability and then pivots to the international effects, namely their undermining of the treaty-making process and the possible risk of the proliferation of no-reservation treaty provisions.

1. Reorienting from the Domestic Effects of RUDs

U.S. senators have long been concerned about the possibility that treaty ratification could create domestic responsibilities and liabilities that impinge on the United States' sovereignty and ability to determine its own obligations through domestic legislation. To that end, the use of RUDs to promote treaty ratification has been significant, especially in multilateral treaties, such as the various international human rights treaties that have been considered in the post-World War II era. In the 1950s, Senator Bricker proposed a constitutional amendment that would make “[a] treaty . . . effective in the United States only through legislation which would be valid in the absence of [a] treaty,” effectively placing a permanent RUD on all treaties that would render every one of them non-self-executing.¹⁴⁴ The amendment eventually failed, but not without a significant cost to treaty ratification: acquiescing to the political forces backing the Bricker Amendment, the Eisenhower Administration essentially

¹⁴⁴. Henkin, *supra* note 3, at 348.

pledged to steer the United States away from human rights treaties.¹⁴⁵ Since then, the most prominent multilateral treaties, including the CAT and the IC-CPR, have only been ratified through RUDs, including non-self-executing declarations akin to that proposed in Senator Bricker's amendment.

The United States did not always focus exclusively on unintended domestic effects. For instance, when the Senate debated ratification of the Genocide Convention in the 1980s, some senators challenged a reservation that recognized the supremacy of the Constitution. The senators noted that there was no evidence that the Convention would conflict with the Constitution, that the Constitution in any case would be supreme over a treaty, that it was "disturbing to our allies who have undertaken an unqualified acceptance of the treaty's obligations," and that the "self-serving nature of the reservation suggested that the United States 'was not ratifying the . . . Convention in good faith.'"¹⁴⁶ The senators concluded:

[The] reservation . . . will seriously compromise the political and moral prestige the United States can otherwise attain in the world community by unqualified ratification of the Genocide Convention. It will hand our adversaries a propaganda tool to use against the United States and invite other nations to attach similar self-judging reservations that could be used to undermine treaty commitments.¹⁴⁷

145. *Hearings Before Subcomm. of the S. Comm. on the Judiciary on S.J. Res. 1 Proposing an Amendment to the Constitution of the United States Relative to the Making of Treaties and Executive Agreements and S.J. Res. 43 Proposing an Amendment to the Constitution of the United States Relating to the Legal Effect of Certain Treaties*, 83d Cong. 825 (1953) (statement of John Foster Dulles, Sec'y of State); Hathaway, *supra* note 13, at 1303 ("The Amendment was ultimately defeated by a margin of only a single vote, largely thanks to a vigorous campaign against it by President Dwight Eisenhower. Yet Eisenhower paid a price for this success. He agreed not to accede to the emerging human rights conventions."); *see also* Hathaway, *supra*, at 1302 ("Why the backlash against the Treaty Clause? There were several reasons—the emergence of the Cold War, the growing hegemony of the United States, and rising isolationism, among others. Yet even more central than the geopolitical backdrop was an emerging backlash against the human rights revolution that had been led by the United States—a backlash that continues to inspire opposition to international law in the United States even today." (footnote omitted)).

146. CRS REPORT ON TREATIES, *supra* note 45, at 132 (documenting disagreements in the Senate Foreign Relations Committee deliberations in 1985 on ratification conditions to the Genocide Convention) (quoting S. COMM. ON FOREIGN RELATIONS, INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, S. EXEC. REP. NO. 99-2, at 4 (1985)).

147. S. COMM. ON FOREIGN RELATIONS, INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, S. EXEC. REP. NO. 99-2, at 31 (1985).

Notwithstanding this criticism, the reservation ultimately passed the Senate by a vote of 83-11 on February 19, 1986.¹⁴⁸

This focus on the international effects of RUDs has not won out. Since that contentious battle, the concerns over the possible unintended domestic effects of treaty ratification without RUDs continue to overshadow the concerns over their international effects. As the various ratified and non-ratified treaties discussed here illustrate, the United States has mostly confined itself to one of two approaches: (1) ratify a treaty with RUDs or (2) not ratify treaties at all. Neither is objectively preferable.¹⁴⁹

Indeed, if one extreme is using RUDs for a much more conditional, arguably substance-less ratification, and the other extreme is restricting the practice of RUDs and inevitably limiting participation in multilateral treaties altogether,¹⁵⁰ the United States has been at both extremes but rarely between them. Fueling the United States' practices at the extremes appears to be a general lack of any real consideration of the effect that RUDs would have on the United States' relations with other states and the wider international community. Senators have mostly concerned themselves with whether the treaty would have the domestic implications they seek (e.g., will the RUD be enforced?), thereby forgoing an analysis of the costs and benefits of using RUDs (e.g., could the United States be hindering commitments to human rights by providing such detached, conditional consent to international treaties?).

But this Note's case analysis suggests that the United States *should* be operating in the middle. Concerns over the unintended domestic effects of treaties are exaggerated. Domestic courts will enforce RUDs. They have done so consistently over the years, and there is no indication that they will cease to do so. The United States government should therefore be concerned with the international implications of placing reservations on treaty provisions, both for the sake of international appearance and the effects on the behavior of other states. It should consider the international court jurisprudence, which might shape the contours of treaty enforcement in international law. Moreover, the United States should take into account how the drafting of treaties could be changing over time.

148. CRS REPORT ON TREATIES, *supra* note 45, at 133.

149. For instance, some treaty supporters have wished the United States never ratified certain treaties at all because of the RUDs that it had attached. *See, e.g.*, Bassiouni, *supra* note 31, at 1181 ("ICCPR supporters include those who because of the reservations attached to it, would have preferred that the United States not ratify it.").

150. *See generally* CRS REPORT ON TREATIES, *supra* note 45, at 42 ("A major challenge was the pressure to approve a multilateral treaty without reservation because of the large number of nations that had been involved and the difficulty of renegotiation.").

2. Reorienting Toward the International Effects of RUDs

In short, the more pressing concerns are the international effects of RUDs. Indeed, while certainly not the only country to use RUDs,¹⁵¹ the United States has been the target of intense criticism from the international community for its use of RUDs, particularly in human rights treaties.¹⁵² Again, a generous reading of the United States' use of RUDs is that the United States aims for authenticity in its treaty-making process by only ratifying treaties in forms in which the United States would actually abide by them, while a less generous reading argues that the RUDs are a sign of arrogance.¹⁵³ Some scholars suspect the latter to be more likely.¹⁵⁴ The reality, accepted even by proponents of RUDs, is that RUDs at the very least influence perceptions that can have significant consequences in international relations.¹⁵⁵ States may face backlash for

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151. See Gamble, Jr., *supra* note 7, at 377 tbl.1, 381-83 tbl.4 (documenting 691 reservations made to treaty commitments between 1919 and 1971 and listing over fifty states with reservations to treaties for the same period).
152. See, e.g., David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 177 (1999) ("Human rights advocates have consistently criticized the practice of attaching numerous RUDs to U.S. instruments of ratification for human rights treaties, claiming that the conditional nature of U.S. adherence demonstrates that the United States does not take its treaty obligations seriously." (footnote omitted)).
153. See, e.g., Brad R. Roth, *Understanding the "Understanding": Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891, 909-10 (2001) ("Whether the RUDs represent due regard for time-tested and authentically American institutions and practices, or merely the arrogance of a superpower that exempts itself from the accommodation of international sensibilities that it demands of other states, will long be debated. Either way, examination of the RUDs might well cause one to reflect on the possibility that the foreigners whom we routinely criticize for human rights shortcomings are no more doggedly attached to their institutions and practices than we are to our own.").
154. See, e.g., Yogesh Tyagi, *The Conflict of Law and Policy on Reservations to Human Rights Treaties*, 71 BRITISH Y.B. INT'L L. 181, 256 (2000) ("To promote their universalization, human rights treaties will continue to have uncomfortable alliances with reservations; and human rights bodies will remain suspicious of reservations. This paradox does not pose any serious problem as long as human rights treaties tolerate reservations and the latter do not damage the integrity of the former. But States have not always respected the integrity of treaties; some of their reservations offend certain non-derogable rights, customary rules, or peremptory norms of international law. Invariably, reservations reduce the rights of individuals, weaken the shield available against errant State authorities and check the growth of human rights law. By their conditional acceptance of treaty obligations, the reserving States tend to develop a false sense of security at the cost of their international image and the best interests of their citizens.").
155. See, e.g., Bradley & Goldsmith, *supra* note 3, at 418-19 ("We cannot, and do not, claim that the U.S. RUDs practice has *no effect* whatsoever on international affairs. If nothing else,

their practices, and the aspiration of securing an international order that respects treaty commitments may falter.

Indeed, various international movements have arisen out of frustration with the United States and other states' practices of using RUDs. One prominent example is General Comment 24, which was promulgated by the United Nations Human Rights Committee (UNHRC) in 1994.¹⁵⁶ Recognizing that forty-six states had entered 150 reservations to the ICCPR, the UNHRC expressed concern that the reservations' "content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties."¹⁵⁷ In that comment and thereafter, the UNHRC assumed a duty to determine whether specific reservations to the ICCPR are permissible by reviewing them under the VCLT's "object and purpose" test. While the comment was a forceful reaction to RUDs, the UNHRC does not have any enforcement authority for its decisions and therefore can only have a limited impact in curtailing the use of RUDs.¹⁵⁸

A more direct, potentially fomenting international movement suggested by the case analysis is a pattern of treaty drafters expressly banning RUDs in part or altogether. While scholars have rarely discussed them,¹⁵⁹ no-reservation clauses—and related treaty provisions limiting RUDs—first appeared on the U.S. Senate's radar decades ago.¹⁶⁰ Over the years, they elicited concerns in the United States,¹⁶¹ particularly in the area of environmental treaties,¹⁶² but they

RUDs probably feed the suspicion in some circles that the United States is an arrogant superpower that disdains international law. We have tried to show that the premise of this complaint—that the U.S. RUDs practice shows disrespect for international law—is much less warranted than conventional wisdom suggests. Perceptions do, however, matter in international relations and this perception, warranted or not, might influence the international human rights movement.”).

156. General Comment 24, *supra* note 104.

157. *Id.* ¶ 1.

158. See, e.g., Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277 (1999) (reviewing the history and scope of General Comment 24).

159. One exception is Swaine, who provides a brief discussion of their efficacy for negotiating treaties. Swaine, *supra* note 22, at 332.

160. See, e.g., CRS REPORT ON TREATIES, *supra* note 45, at 175 (“A related practice that has begun to occur with increasing frequency is the inclusion in some multilateral agreements of provisions barring reservations. The Senate Committee on Foreign Relations has protested that no-reservation clauses intrude on the Senate’s constitutional prerogatives but, nonetheless, has given its advice and consent to a number of such treaties.” (footnotes omitted)).

161. *Id.* at 42 (quoting S. COMM. ON FOREIGN RELATIONS, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, S. EXEC. REP. NO. 102-55, at 15 (1992)) (“Some multilateral treaties have contained an article prohibiting conditions. The Senate Foreign Relations

have mostly been underestimated. In the 1990s, three environmental treaties – the Basel Convention, the Environmental Protocol to the Antarctic Treaty, and the United Nations Framework Convention on Climate Change – all prohibited reservations, eliciting concerns from members of the Senate.¹⁶³ Senators who provided advice and consent for these treaties emphasized their concern over no-reservation clauses,¹⁶⁴ and they clarified that their approval should not be construed as precedent for consenting to such clauses in future agreements.¹⁶⁵ If more treaties feature these no-reservation clauses, these past events suggest that the United States will increasingly find it difficult to sign onto other treaties, even those it finds particularly important.

And it does appear that more treaties are featuring these no-reservation clauses.¹⁶⁶ The Statute of the International Criminal Court, Comprehensive

Committee has said that its approval of these treaties should not be construed as a precedent for such clauses in future treaties. In the committee's view, 'The President's agreement to such a prohibition can not constrain the Senate's constitutional right and obligation to give its advice and consent to a treaty subject to any reservation it might determine is required by the national interest.'"); *see also id.* at 175 (citing the Senate's objections to no-reservation clauses including when providing advice and consent to the Inter-American Convention on Sea Turtles and the United Nations Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks).

162. *Id.* at 15 ("Although supportive of environmental cooperation treaties, the Senate Foreign Relations Committee has expressed concern about articles prohibiting reservations and has cautioned that consent to three multilateral environmental treaties containing such articles should not be construed as a precedent.").

163. *Id.* at 274.

164. *See, e.g., id.* at 275 ("On August 11, 1992, the Senate gave its advice and consent to the Basel Convention with four understandings requested by the administration. In presenting the treaty to the Senate, the chairman of the Foreign Relations Committee, Claiborne Pell, stated his concern about including in treaties a provision which has the effect of inhibiting the Senate from attaching reservations deemed necessary or of preventing the Senate from exercising its right to give its advice and consent to all treaty commitments before they can have a binding effect. He said the Senate's approval of these treaties 'should not be construed as a precedent for such clauses in future agreements with other nations requiring the Senate's advice and consent.'" (footnote omitted)).

165. *Id.* at 16 ("Some multilateral treaties have contained an article prohibiting reservations. The Senate Foreign Relations Committee has taken the position that the executive branch negotiators should not agree to this prohibition. The Senate has given its advice and consent to a few treaties containing the prohibition, but the committee has stated that approval of these treaties should not be construed as a precedent for such clauses in future treaties. It has further stated that the President's agreement to such a clause could not constrain the Senate's right and obligation to attach reservations to its advice and consent.").

166. *See, e.g.,* Frederic L. Kirgis, *Reservations to Treaties and United States Practice*, ASIL INSIGHTS (May 4, 2003), <http://www.asil.org/insights/volume/8/issue/11/reservations-treaties-and>

Nuclear-Test-Ban Treaty, Chemical Weapons Convention, and Anti-Personnel Mines Convention, along with a number of environmental treaties, including the Montreal Protocol, Kyoto Protocol, Rotterdam Convention, Stockholm Convention, and Cartagena Protocol, all ban reservations.¹⁶⁷ Indeed, more recent treaties may be drafted using the language in UNCLOS, such as the Rome Statute of the International Criminal Court and the World Health Organization's proposed Framework Convention for Tobacco Control.¹⁶⁸ Some have explained that no-reservation clauses, including for UNCLOS, are meant to protect "package deals" where there are so many compromises that any reservation on particular clauses or the entire treaty could unhinge the agreement.¹⁶⁹ Since they are written into the treaties themselves, they very well might take precedent over a RUD, as *Black Sea* and the cases from the ECtHR and IACtHR suggest. Indeed, one of the reasons the United States has not ratified UNCLOS is because of the provisions on deep seabed mining that could not be avoided through the use of RUDs.¹⁷⁰

What could this portend for the United States? If states begin to find the United States' use of RUDs in important treaties more inappropriate and its ratification less important, treaty drafters may be more likely to pass no-reservation provisions that limit the use of RUDs, thereby leaving the United States behind in the treaty-making process. In other words, if the United States unnecessarily concerns itself with the enforceability of its RUDs, other members of the international community could meanwhile continue to design RUDs-limiting treaties that risk foreclosing U.S. participation. Indeed, even as the United States ratifies fewer treaties, other states continue to sign and ratify

-united-states-practice [<http://perma.cc/2CRR-MFJY>] ("In recent years, several important multilateral conventions have prohibited most or all reservations.").

167. See Bradford C. Smith, *Reservations and Declaration: Training Materials Delivered in Monrovia, Liberia*, UNITED NATIONS TREATY COLLECTION (July 11-14, 2006), http://treaties.un.org/doc/source/training/regional/2006/10_12-14July-2006/reservations_and_declarations.ppt [<http://perma.cc/QKR8-ED3S>].

168. Rome Statute of the International Criminal Court art. 120, July 1, 2002, 2187 U.N.T.S. 90 ("No reservations may be made to this Statute."); World Health Org. [WHO], WHO Framework Convention on Tobacco Control art. 30 (2003) (entered into force Feb. 27, 2005), http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf [<http://perma.cc/QCK7-2PGA>] ("No reservations may be made to this Convention.").

169. See, e.g., Laurence R. Helfer, Response, *Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L. 367 (2006) (explaining how treaty-makers could determine which provisions should be subject to reservations); Swaine, *supra* note 22, at 332-33 (explaining how no-reservation clauses are a product of "package deals").

170. Kirgis, *supra* note 166 ("The United States is not a party to [UNCLOS], largely because of the provisions on deep seabed mining to which reservations could not be made.").

contemporary multilateral treaties, with UNCLOS (168 parties)¹⁷¹ and the Disabilities Convention (167 parties)¹⁷² among them.

Scholars and government officials have downplayed these concerns in a variety of ways. One common response is that many of these concerns of outward appearance are exaggerated because the United States helps draft treaties and already ends up following the general framework of many treaties even if it decides not to ratify them.¹⁷³ There is indeed a significant debate over whether treaty ratification makes a difference in compliance and whether other methods may be more effective in leading to change.¹⁷⁴ Regardless of where one stands on the efficacy of the treaty regime as a whole, the reality is that key areas of international law remain solely under the purview of treaties, and the United States has shown enough interest to continue treaty deliberations for many treaties. Its dance around certain treaties and their provisions at the ratification stage therefore undermines what appears to be its supposedly genuine commitment to many treaties' principles. The robust domestic court jurisprudence discussed here indicates that this dance is unnecessary and self-defeating. Because the United States will in almost all circumstances be bound insofar as it intends to be for any ratified treaty, the benefits of formally joining the international community in supporting the treaty's principles it already aims to follow is likely to outweigh the costs of not doing so.

Another response is that no-reservation clauses and their potential to be enforced in international courts are irrelevant because the United States is not be-

171. *United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION 1, <http://treaties.un.org/doc/Publication/MTDSDG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf> [<http://perma.cc/2GVJ-37UZ>].

172. *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS TREATY COLLECTION 1, <http://treaties.un.org/doc/Publication/MTDSDG/Volume%20I/Chapter%20IV/IV-15.en.pdf> [<http://perma.cc/TTN2-PB9T>].

173. *See, e.g.*, HEARING ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 37 (statement of Sen. Jeff Flake, Member, S. Comm. on Foreign Relations) ("I am persuaded that the adoption of strong reservations, understandings, and declarations could address sovereignty concerns that have been raised with regard to United Nations Convention on the Rights of Persons with Disabilities. I am not, however, persuaded that the ratification of this treaty would provide the United States with a moral high ground that we currently lack. As the United States is the leader on disabilities policy in the world, I'm not certain higher ground is even a possibility.").

174. *See, e.g.*, Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (discussing methods of coercion, persuasion, and acculturation whereby states might influence the behavior of other states); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (conducting a quantitative analysis of whether ratifying human rights treaties leads to more or less compliance).

holden to the judgments of international courts. Indeed, the United States has continued to refuse the compulsory jurisdiction of international courts, including the ICJ,¹⁷⁵ and any change to this trajectory does not appear to be forthcoming.¹⁷⁶ But not recognizing the jurisdiction of international courts does not absolve the United States from considering how those court decisions may influence the actions and positions of other states and treaty drafters. Furthermore, these international court decisions may also increasingly be considered or reflect customary international law, including decisions relating to the scope and expectations of the VCLT. If the United States cannot act within the bounds of accepted international law when ratifying treaties, its stature in the fields of arms control, human rights, and other areas relying upon multilateral treaties risks being diminished.

In short, rather than invite backlash from the international community, and even apart from the many other possible benefits of supporting a robust international order of treaty-making, the United States can and should aspire toward more substantive participation in the ratification process. This shift is especially imperative given the lack of any significant domestic tradeoffs. Whether the United States can continue to hold off from multilateral treaties without risking unwanted exclusion is simply an unnecessary gamble. The United States would be wise to limit its RUDs to the extent they are absolutely necessary and to otherwise avoid their overuse given that there are few upsides for any alternative. The next Section elaborates on these recommendations.

B. Navigating the Effects of RUDs by Limiting Their Overuse

Considering an optimal use of RUDs is an important step to ensuring their sustainability and effectiveness. Members of the ILC, for instance, have contin-

175. Facing a lawsuit that was eventually decided against the United States in *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 (June 27), the United States terminated its compulsory jurisdiction under the ICJ. See also Letter from George P. Shultz, Sec'y of State, to Javier Perez de Cuellar, Sec'y-Gen., United Nations, United States: Department of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction (Oct. 7, 1985), reprinted in 24 I.L.M. 1742 (1985).

176. See, e.g., Henkin, *supra* note 3, at 345 (“To date, there has been no new declaration by the United States accepting the compulsory jurisdiction of the Court. The executive branch has repeatedly denied that it fears impartial judgment and is hostile to the Court, noting that the United States has accepted the Court’s jurisdiction in more than seventy treaties; but the United States has now repeatedly refused to add to that number the few human rights conventions that contain an ICJ clause.”).

ued to debate how RUDs should be addressed,¹⁷⁷ including by publishing a guide explaining reservations in 2011.¹⁷⁸ The guide was drafted with the intention of assisting practitioners and therefore consists of nonbinding recommendations rather than peremptory norms.¹⁷⁹ Like the ILC, the United States should take these concerns into account and develop a more systematic method for determining when RUDs are appropriate. Turning first to some general principles for the United States, this Section then proposes two major recommendations: (1) limiting the scope of RUDs and (2) limiting the use of RUDs.

At the outset, the United States should recognize as illustrated by this Note's case analysis that any limitation to the use of RUDs will not come from U.S. courts, where deference to the U.S. Senate and its RUDs practice remains strong. With the judicial branch largely out of the picture and the President bound to RUDs adopted by the Senate, the Senate holds the keys to the future of RUDs practice. Second, as the Senate ponders its practice, it should note the potential pushback from treaty drafters, who may increasingly limit RUDs, and international courts, which appear willing to enforce these limitations. As previously discussed, given the limited benefits and significant costs associated with RUDs, the United States should avoid overplaying its hand and refrain from overusing them.

The Disabilities Convention provides a helpful illustration. As the Senate Foreign Relations Committee noted in its report, the Disabilities Convention permits reservations, "provided that they are not incompatible with the object and purpose of the Convention."¹⁸⁰ Accordingly, when U.S. senators debated the advice and consent of the Convention in the Senate Foreign Relations

177. See, e.g., Jan Klabbers, *On Human Rights Treaties, Contractual Conceptions and Reservations*, in *RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME* 149, 151 (Ineta Ziemele ed., 2004) ("[M]ore than once has the idea been proclaimed that somehow[] the Vienna Convention's regime on reservations ought to be reconsidered, reworked and rethought. Since the mid-1990s, this is indeed what has happened and is happening. The ILC itself has re-opened the discussion by placing the topic of reservations back on its agenda." (footnote omitted)).

178. See Int'l Law Comm'n, *supra* note 99.

179. See Alain Pellet, *The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur*, 24 EUR. J. INT'L L. 1061 (2013). The ILC Guide has been the subject of some criticism for not having had any real effect on changing RUDs practice. See, e.g., Kasey L. McCall-Smith, *Mind the Gaps: The ILC Guide to Practice on Reservations to Human Rights Treaties*, 16 INT'L COMMUNITY L. REV. 263, 264 (2014) ("However, following the 2011 publication of the ILC Guide to Practice on Reservations to Treaties . . . it is apparent that despite several progressive guidelines, little has changed in the context of reservations to human rights treaties.").

180. HEARING ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 21.

Committee, they proposed several RUDs. The reservations were summarized in the report under three areas:

Federalism. The first reservation addresses federalism issues. Article 4(1) of the Convention states that the provisions of the Convention “shall extend to all parts of federal States without any limitations or exceptions.” Because certain provisions of the treaty concern matters traditionally governed by state law rather than federal law, and because in very limited instances some state and local standards are less vigorous than the convention would require, a reservation is required to preserve the existing balance between federal and state jurisdiction over these matters.

Non-Regulation of Private Conduct. The second reservation concerns the extent of the United States obligations under the Convention with regard to private conduct. Although the United States generally and broadly applies nondiscrimination laws to private entities with respect to operation in public spheres of life, some laws set a threshold before their protections are triggered. . . . Accordingly, a reservation is required to make clear that the United States does not accept any obligation under the Convention to enact legislation or take any other measures with respect to private conduct except as mandated by the Constitution and laws of the United States. The committee notes that in a written response for the record, the Department of State and the Department of Justice confirmed that in light of this reservation, ratification of the Disabilities Convention would not impose any new requirements on employers exempted by the Americans with Disabilities Act.

Torture, Cruel, Inhumane or Degrading Treatment. The third reservation concerns the extent of the United States obligations under Article 15 (Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment). As Article 15 of the Convention covers the same subject matter as Articles 2 and 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 7 of the International Covenant on Civil and Political Rights, the third reservation makes clear that the obligations of the United States under Article 15 of the Convention shall be subject to the

same reservations and understandings that apply to U.S. ratification of those two treaties.¹⁸¹

All three reservations stem from the concerns that were raised in *Bond* about the overreach of a treaty, and the second reservation in essence leaves the Disabilities Convention to have the same effect as the Americans with Disabilities Act,¹⁸² a federal statute aimed at protecting persons with disabilities against discrimination. These are not unusual reservations, and consistent with the cases reviewed in Parts II and III, they are likely to be enforced in a domestic or international court.

The RUDs should go no further. Given what this Note uncovers about the jurisprudence of RUDs, whether the drafting of RUDs will preserve their enforcement should not be the limiting factor on a treaty's ratification. The Disabilities Convention should be considered on its own merits, and the focus should be on whether the RUDs fulfill the United States' mission to protect persons with disabilities rather than whether domestic courts will enforce them as drafted. Focusing on whether an overly limited RUD will cause improper enforcement of a treaty distracts from the real issue at hand—whether the United States is truly committed to the provisions of the Convention.

But if the Disabilities Convention is an obvious example of a case where U.S. senators should relax their approach to RUDs, UNCLOS provides an illustration of the limits of that reassurance. Perhaps an implicit reaction to the weakness of the “object and purpose” prohibition found and circumvented in many treaties, UNCLOS goes further than the standard VCLT limitation. The Convention provides that “[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.”¹⁸³ Reservations are essentially off the table.

As the preceding Section explained, the real threat to ongoing RUDs practice stems not from the courts but from treaty drafters who might increasingly push for RUD-restrictive provisions. Such reactionary measures may not immediately risk U.S. interests, given the American refusal to sign on to the jurisdiction of international courts and the uncertainty that U.S. courts would ever enforce a treaty provision that restricts RUDs. But as previously discussed, the longer-term effects of overreliance on RUDs remain unknown. The overuse of RUDs might contribute to further restrictions over time, whether through treaty provisions or within international courts, and the U.S. Senate may be

181. *Id.* at 21-22.

182. 42 U.S.C. §§ 12101-213 (2012).

183. UNCLOS, *supra* note 122, art. 309.

forced to ratify fewer treaties unless it changes its RUDs practice. Expanding upon the Disabilities Convention example, this Section proposes two general recommendations for addressing the role of RUDs in the United States' treaty-making process: (1) limiting the scope of RUDs and (2) limiting the use of RUDs.

1. *Limiting the Scope of RUDs*

Again, this Note's case analysis indicates that the possible threat of unintended treaty consequences in domestic courts is minimal: in almost every instance, domestic courts will not challenge RUDs. Given the lack of any domestic threat to their invalidation, the U.S. Senate would be wise to consider how RUDs could be limited to instances in which they are necessary and where they optimize the benefits of treaty ratification.

As discussed in Part II, this Note has recognized a number of latent limitations on RUDs enforceability under domestic law: (1) the condition must have some relationship to the treaty; (2) the Senate cannot use its conditional consent power to alter pre-existing federal law; and (3) the Senate's conditional consent power should be limited to the extent that it unduly impinges on the prerogatives of the other branches of the federal government. These limitations, while important to note, are focused on ensuring that the United States does not create conflicts for itself. The first and second, for instance, are limitations designed to avoid the situation in *Power Authority*, where a possible RUD was invalidated because it only addressed matters of domestic concern. The third is included so that the Senate does not override the power of the U.S. House of Representatives or the President in unilaterally passing domestic legislation through the use of RUDs.

Further limitations should look outward at how the United States can avoid conflicts with other states and the international community at large. Toward that goal, RUDs should be avoided except where absolutely necessary to remain consistent with what the United States could legitimately sign onto given its own domestic laws. If the United States decides that it wishes to ratify a treaty, then it should only do so after changing those domestic laws, or otherwise with only the RUDs that are absolutely necessary.¹⁸⁴ Encouraging states to

¹⁸⁴ See, e.g., David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1205-06 (1993) (“[T]he most common criticisms of the specific elements of the . . . [RUDs package for ICCPR ratification] have been that they were not legally necessary and that the United States should have conformed its laws and practices to the international standards reflected in the Covenant.”).

find boundaries on their use of RUDs already exists as an enterprise.¹⁸⁵ The following principles aim to revive and revise past suggestions, which include recommendations made by scholars proposing looser grounds for RUDs usage.¹⁸⁶ In each instance, the proposed principle adheres to the limitation that the RUD does not violate the “object and purpose” of the treaty, an overarching limitation discussed in more detail in the next Section.

First, some have suggested that RUDs are necessary when ratifying treaties that would otherwise create obligations for the United States that would violate provisions of the U.S. Constitution.¹⁸⁷ A general RUD that reminds that the Constitution has supremacy over a treaty might demonstrate to treaty partners the limit of the U.S. government’s legal authority given the U.S. Constitution. Such a principle is already well-accepted in constitutional law,¹⁸⁸ and albeit unnecessary, the clarification seems relatively benign as long as the RUD is not intended to shield specific treaty provisions that are obviously in conflict with the Constitution. Second, where the United States has to prevent a conflict among U.S. states or existing legislation that already governs and adequately addresses treaty obligations, RUDs can clarify the distinction and boundaries, including whether new legislation would need to be implemented for further legal effects.

But federal and state law in many cases often already “meets or exceeds the requirements” of a particular treaty the United States is considering—the RUDs are therefore intended as an additional protection but are actually not

185. See, e.g., *id.* at 1207 (“The task, therefore, is, first, to identify any provisions of the treaty which conflict with or raise significant questions about U.S. law, and, second, to determine whether a change to the relevant U.S. law is possible and desirable or whether an appropriate reservation, understanding, or declaration must be taken to condition U.S. obligations under the instrument.”); Tyagi, *supra* note 154, at 258 (“To develop a new policy perspective on reservations, it is essential to focus on the basic premise of human rights law. Each State party to a human rights treaty has a duty to overcome difficulties in the implementation of treaty obligations and, if those difficulties have assumed the form of reservations, the reserving State is expected to take measures to minimize the effect of reservations Thus, unlike some controversial responses at the international level, the domestic approach to reservations may produce rich dividends with minimum friction and maximum comfort in the long run. Indeed, it can be a useful complement to the international legal controls of reservations.”).

186. See, e.g., Stewart, *supra* note 184, at 1207 (“Where the treaty provision is inferior, there is no reason for the United States to adhere to it, even if that could be done constitutionally.”).

187. See, e.g., Henkin, *supra* note 3, at 342 (“[A] reservation to avoid an obligation that the United States could not carry out because of constitutional limitations is appropriate, indeed necessary.”).

188. See, e.g., *Reid v. Covert*, 354 U.S. 1, 16 (1957) (recognizing the supremacy of the Constitution over a treaty).

necessary to protect U.S. interests.¹⁸⁹ These RUDs should therefore be used to help clarify positions, but not to eschew obligations. Non-self-executing declarations are prime examples of RUDs that avoid obligations; they should therefore be minimized.¹⁹⁰ In other words, the United States should not opt for a non-self-executing declaration to avoid its otherwise lack of readiness to abide by certain obligations of a treaty domestically and internationally. Instead, it should determine where the gaps are and attempt to rectify them prior to ratification, and only as necessary, to use specific, narrow RUDs to address the few issues where the United States has a particular concern. Finally, the United States should consider an understanding or a declaration in lieu of reservations, even where a reservation is permitted.¹⁹¹ As the international case law and practice of no-reservation clauses reflect, altering the legal effect of a treaty that has been negotiated and ratified by other states through reservations is a risky practice that should be avoided when a simpler clarification would suffice.¹⁹²

These recommendations are meant to be consistent with U.S. court jurisprudence that has readily upheld RUDs in many different forms. The main point is to suggest that there is little reason to overuse RUDs when they could be costly from an international perspective and do not have much added value from a domestic perspective. These are not exhaustive recommendations, nor can they apply with equal force in every situation. At the same time, part of the U.S. Senate's advice and consent process is for the institution to use its best judgment in determining the appropriate role for RUDs. Hopefully, members of the Senate and others involved in the treaty-making process will consider

189. HEARING ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 2, at 7 (“In the vast majority of cases, existing federal and state law meets or exceeds the requirements of the Convention. The recommended reservations in the resolution of advice and consent . . . make clear that the United States will limit its obligations under the Convention to exclude the narrow circumstances in which implementation of the Convention could otherwise implicate federalism or private conduct concerns. Ratification of the Convention with the recommended reservations will not alter the balance of power between the federal government and the states. No additional implementing legislation is necessary with respect to the Convention.”).

190. See Henkin, *supra* note 3, at 347 (“In any event, declaring a treaty—here a human rights convention—non-self-executing achieves the worst of both systems. A human rights convention, like other treaties, goes to the Senate for its consent, where—‘undemocratically’—a third of the members (plus one) can reject the convention.”).

191. See, e.g., *id.* at 342 (suggesting that the United States could have more narrowly entered an understanding rather than a reservation to limit the ICCPR's more expansive prohibitions on freedom of speech, including forbidding war propaganda and racial hate speech).

192. See Ash, *supra* note 31, ¶ 27 (“[I]t is not necessary for the U.S. to eliminate all of its RUDs. Instead, the U.S. need merely reexamine its RUDs and determine whether they undermine U.S. goals.”).

these limitations, and RUDs that are tailored to respond to the international community rather than overestimated domestic concerns will prevail in treaty negotiations.

2. *Limiting the Use of RUDs*

In cases where appropriately limited RUDs are not possible, such as where a treaty would be inconsistent with the Constitution or other domestic laws and practices, the United States should not ratify the treaty at all. At that point, it should instead first direct its attention to revising these domestic conditions if it genuinely supports a particular treaty. This determination of whether to ratify at all is crucial for avoiding the broad overuse of RUDs. As the case analysis suggests, the determinative factor should be whether the proposed RUDs would violate the “object and purpose” of the treaty. This is the approach already adopted by the VCLT and could be used as a threshold within a state itself for its own deliberations. Note again that the lesson learned from this case analysis is that the choice of whether to ratify should not hinge on the sufficiency or insufficiency of RUDs. Domestic courts will consistently enforce RUDs, and the United States should not refrain from ratifying a treaty because it fears that its RUDs will be found insufficient in domestic courts.

But the United States should refrain from ratifying a treaty if it believes that it is avoiding the treaty’s “object and purpose” by creating RUDs that detract from the treaty’s aims. The aforementioned Senators who raised the concerns over the reservations regarding the Genocide Convention were not only raising a moral argument about the adoption of RUDs. They appealed to the preservation of the international community’s confidence that the United States will meet its treaty obligations and warned about the consequences of encouraging other states to similarly avoid obligations by using RUDs.

Additionally, some scholars argue that a treaty might have one primary “object and purpose,” or might protect a “single, overwhelmingly important right,”¹⁹³ making RUDs problematic, whereas RUDs attached to treaties involving multiple rights are less likely to sustain such a challenge. Being selective about when to include RUDs depending on the nature of the treaty may therefore also mitigate concerns about their overuse. More broadly, being selective about RUDs in certain treaties may also protect interests for future treaties.

193. Bradley & Goldsmith, *supra* note 3, at 434 (“When a treaty protects manifold rights and declines to prohibit reservations, it is difficult to conclude that reservations to a few of the treaty’s rights violate its object and purpose. By contrast, the Genocide and Torture Conventions are both designed to protect a single, overwhelmingly important right.” (citation omitted)).

Treaties are not ratified in a vacuum, and the defeat of one treaty or the attachment of RUDs may end up affecting the leeway to negotiate another, arguably more important treaty.¹⁹⁴ If RUDs are used too prolifically, their effects could become meaningless due to reactionary, no-reservation clauses adopted in future treaties.

As previously acknowledged, the VCLT admittedly provides little guidance about how to define the “object and purpose” requirement, and the United States has not subscribed to it. But again, asking whether a RUD meets the “object and purpose” does not only have to be a VCLT-oriented or international law inquiry; it can be an internal, domestic dialogue that should already be happening in Senate hearings over treaties, but often is not, as other questions about the unintended domestic consequences take precedence. The inquiry is a means to directly engage with the concerns discussed in Section IV.A.

Lastly, it is worth noting that there is no guarantee that the domestic case law will continue its favorable treatment of RUDs if more treaties expressly limit RUDs and international courts increasingly invalidate RUDs. If international courts begin invalidating more RUDs, whether under the “object and purpose” requirement or other treaty provisions, it will likely place more pressure on U.S. courts to at the very least consider these objections from other states and parties. Of course, it is quite possible given the robust domestic jurisprudence in U.S. courts that even these treaties’ RUDs will be honored, but rather than bank on this possibility, the United States would be wise to focus on trying to develop a sustainable RUDs practice.

CONCLUSION

The question of whether RUDs are and will remain valid and enforceable remains central to the future of treaty-making. If courts of law will enforce them, RUDs could remain a primary, if not necessary, tool for treaty participation. If they will not, states (including the United States) are left to more drastic alternatives, including not ratifying treaties at all. These concerns over the sufficiency and, in turn, the sustainability of RUDs are important dimensions of scholarly and policy debates. While some scholars have long defended the practice of RUDs as valid exercises of the U.S. Senate’s powers, the use of RUDs has also long been a target of criticism. This Note adds a new dimension

194. See, e.g., Kennedy, *supra* note 3, at 125 (“Whether or not treaties are fungible involves value judgments regarding the importance of one type of treaty over another. That judgment in turn will determine whether an unconditional approval of one type of treaty offsets the conditional approval of another type.”).

to that debate: U.S. and international court enforcement of RUDs appears to be robust, except for international courts invalidating RUDs that conflict with express treaty limitations. Consequently, the Senate's current prioritization of the domestic unintended consequences is misguided and risks undesirable consequences, including encouraging more treaties that limit RUDs and constraining the United States from participating in treaty-making in the future.

Rather, if RUDs are enforceable, recent jurisprudence points more to the costs of overusing RUDs than to their benefits. The United States and other states should therefore avoid drafting elaborate RUDs that are more likely to attract negative attention within international courts and the international community. As this Note has attempted to illustrate, the biggest threat to RUDs is not their insufficient drafting, but rather their overuse. The limited benefits to drafting stronger RUDs hardly outweigh the significant costs associated with adopting those RUDs.

The future of RUDs is in the hands of the United States and its fellow states. Without any significant risks to the domestic invalidation of RUDs, there is no need for the United States to overuse RUDs and risk broader treaty formulation and compliance among states. RUDs that go further than the necessary bounds in which they have so far been sustained might lead to their own demise. Instead, the United States has the ability to help lead a reoriented effort to sustain limited RUDs, and in turn, to sustain the values of treaty-making.

APPENDIX A: METHODOLOGY

The case survey relied upon for this Note began with an initial search using LexisNexis to find all federal court cases that included all three words “reservations, understandings, and declarations” or the term “RUDs.” “RUDs” has become a common phrase in public international law and among courts over the last three decades. The reasoning was that courts commenting on these practices in a case would likely do so with the term “RUDs.” The method was expected to provide a starting foundation for understanding how many courts have addressed the issue.

Documenting decisions by the U.S. courts of appeals was a first priority given that these courts are more likely to comment doctrinally on and provide the most persuasive authority about RUDs’ status domestically. The search uncovered twenty-seven cases from the circuit courts. The cases mostly commented on reservations, but a few also considered interpretative understandings and declarations. The search was then repeated for RUDs in all U.S. courts using the same LexisNexis search for cases that referenced all three words “reservations, understandings, and declarations.” This search returned 393 cases, and after a review of them, twenty cases of particular relevance. A new search string was then used to find cases on interpretative understandings and declarations as distinct from reservations. Given that interpretative understandings and declarations might be presented in cases without the RUDs term, the search was broadened to consist of all federal court cases in LexisNexis with the following general search string:

“Treaty declar interpret understand senate ratif”

The general search string returned over 10,000 results. Many of the cases were not relevant, so only the first 250 cases of the search were examined as the highest ranked in terms of relevance by the search algorithm. Of all the cases examined, only approximately five percent include a treatment of declarations and understandings. For the first fifty cases, any discussion concerning methods of treaty interpretation was reviewed, even where there may not have been a readily available interpretative declaration or understanding. Within these decisions, there was considerable language regarding how the treaty was to be interpreted and whether the parties’ interpretations should be granted weight beyond the strict language of the text. These cases, especially a few from the U.S. Supreme Court, were important for grounding this analysis. For the remaining 200 cases, only those that had interpretative understandings and declarations were pulled and used for synthesizing general principles.

For the international case law, searches were conducted on both Westlaw and the Oxford Public International Law database using combinations of the search terms “reservations,” “declarations,” and “interpretative declarations.” In

total, approximately two dozen cases out of approximately 300 reviewed were found to be relevant. Of those, fourteen were most germane to the question of validity and enforceability of RUDs and discussed reservations and interpretative declarations in specific detail.

APPENDIX B: CASES REVIEWED

U.S. COURT CASES ON RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS

#	Case	Citation	Year	Court	Treaty	Treaty/Issue Background	Treatment of RUDs
1	Igartúa v. United States	86 F. Supp. 3d 50	2015	D.P.R.	International Covenant on Civil and Political Rights	Plaintiffs argued that the U.S. Constitution, international treaties (including the ICCPR), and customary international law compelled Defendants to take the necessary steps for the apportionment of congressional districts in Puerto Rico	Recognizes that no reservation was made excluding U.S. citizen-residents of Puerto Rico on basis of island's commonwealth status and therefore legal obligation had not been modified; reasons that the First Circuit would need to find the ICCPR self-executing before plaintiffs can allege a violation of a legally protected right
2	Patterson v. Wagner	785 F.3d 1277	2015	9th Cir.	U.S.-S. Kor. Extradition Treaty	Individual argued that evidence from the treaty's drafting and negotiating history demonstrated that Article 6 of the Extradition Treaty was intended to be a mandatory bar to untimely extradition requests	Text is only the beginning of an interpretation, and "executive branch's interpretation of the issue, views of other contracting states, and the treaty's negotiation and drafting history in order to ensure interpretation of text is not contradicted by other evidence of intent," 785 F.3d at 1282
3	United States v. Ramirez	38 F. Supp. 3d 818	2014	S.D. Tex.	Convention Against Torture	Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Recognizes FARRA language including RUDs; does not comment on the validity of RUDs
4	Alaska v. Kerry	972 F. Supp. 2d 1111	2013	D. Alaska	International Convention for the Prevention of Pollution from Ships	Annex VI designated emission control areas, defined in the Convention	Explains that Senate approved treaty with understanding that further amendments would be prospectively approved

5	Lebron v. Rumsfeld	670 F.3d 540	2012	4th Cir.	Convention Against Torture	U.S. citizen captured within the United States argued that he was unconstitutionally designated as an enemy combatant and alleged a range of constitutional violations stemming from his ensuing military detention (does not refer to any specific treaty provision)	Quotes the Detainee Treatment Act of 2005, Pub. L. No. 109-366, 120 Stat. 2600, as mentioning that no individual shall be subject to cruel, inhuman or degrading treatment or punishment as defined by RUDs to the CAT
6	Trinidad y Garcia v. Thomas	683 F.3d 952	2012	9th Cir.	Convention Against Torture	Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Mentions RUDs in FARRA but does not conduct any independent analysis
7	Sarei v. Rio Tinto, PLC	671 F.3d 736	2011	9th Cir.	Convention on the Elimination of All Forms of Racial Discrimination	Declaration that the Convention is not self-executing	Upholds a non-self-executing declaration: "This declaration indicates that the treaty alone does not establish a norm sufficiently specific, universal, and obligatory to give rise to a cause of action under the [Alien Tort Statute], because the treaty provisions are not enforceable in our courts," 671 F.3d at 768-69 (Note on subsequent history: The case was vacated and remanded by the U.S. Supreme Court in light of its decision in <i>Kiobel v. Royal Dutch Petroleum Co.</i> , 133 S. Ct. 1659 (2013), but the Ninth Circuit sitting en banc came to the same decision on remand, 722 F.3d 1109 (9th Cir. 2013))
8	Loggins v. Thomas	654 F.3d 1204	2011	11th Cir.	International Covenant on Civil and Political Rights	Reservation on treating juveniles as adults in exceptional circumstances	Expressly recognizes RUDs reserving right, in exceptional circumstances, to treat juveniles as adults; reasons that "[a] murder, especially one as vicious as the one in this case, is an exceptional circumstance justifying treatment of the juvenile as an adult," 654 F.3d at 1227

9	Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.	801 F. Supp. 2d 383	2011	D. Md.	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property	Reservation on the right of the United States to determine whether or not to impose export controls over cultural property	Recognizing one reservation and six understandings, including the reservation of the right to determine whether or not to impose export controls over cultural property; recognized non-self-executing status of the Convention
10	Igartúa v. United States	626 F.3d 592	2010	1st Cir.	International Covenant on Civil and Political Rights	Declaration that the Convention is not self-executing	Upholds non-self-executing status, but concurrence and dissent say that this is for courts to read and decide
11	Cherichel v. Holder	591 F.3d 1002	2010	8th Cir.	Convention Against Torture	Understanding to the CAT, Articles 1 and 3: definitions of actual intent, acquiescence, and substantial grounds	Interprets the understandings from Senate ratification for the definition of torture with intentional infliction as the definition
12	Edu v. Holder	624 F.3d 1137	2010	9th Cir.	Convention Against Torture	Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Cites RUD interpreting “substantial grounds for believing” to mean “if it is more likely than not that he would be tortured,” 624 F.3d at 1144 (quoting 136 CONG. REC. S17,486, S17,491-92 (daily ed. Oct. 27, 1990))
13	United States v. Belfast	611 F.3d 783	2010	11th Cir.	Convention Against Torture	Implementation of U.S. obligations under the Convention Against Torture in the Torture Act	Recognizes the valid adoption of the Convention Against Torture and acknowledges RUDs in the Convention
14	Garcia v. Benov	715 F. Supp. 2d 974	2009	C.D. Cal.	Convention Against Torture	Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Recognizes FARRA language including RUDs; does not comment on the validity of RUDs
15	Pierre v. Att’y Gen. of the U.S.	528 F.3d 180	2008	3d Cir.	Convention Against Torture	Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Acknowledges RUDs in the CAT and that the Convention is not self-executing per RUDs in the Senate resolution to ratify

16	<i>Khouzam v. Att’y Gen. of the U.S.</i>	549 F.3d 235	2008	3d Cir.	Convention Against Torture	Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Cites RUDs in footnote including non-self-executing status and understandings for Article 3
17	<i>Villegas v. Mukasey</i>	523 F.3d 984	2008	9th Cir.	Convention Against Torture	Understanding that an act must be specifically intended to inflict severe physical or mental pain or suffering in order to constitute torture	Reaffirms <i>Zheng v. Ashcroft</i> , 332 F.3d 1186 (9th Cir. 2003), and specifies that torture must require specific intent
18	<i>Khouzam v. Hogan</i>	529 F. Supp. 2d 543	2008	M.D. Pa.	Convention Against Torture	Declaration that Articles 1 through 16 of the CAT are not self-executing; Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Recognizes RUDs in Senate ratification of the CAT (Note on subsequent history: This case was heard on appeal by the Third Circuit, see <i>Khouzam v. Att’y Gen. of the U.S.</i> , 549 F.3d 235 (3d Cir. 2008))
19	<i>Bisson v. United Nations</i>	2008 U.S. Dist. LEXIS 9723	2008	S.D.N.Y.	International Covenant on Civil and Political Rights	Declaration that the Covenant is not self-executing	Recognizes ICCPR as non-self-executing
20	<i>Medellín v. Texas</i>	552 U.S. 491	2008	Supreme Court	UN Charter Post-ratification Treaty	Presumption of non-self-executing status in the absence of text to the contrary	Explains that the ICJ’s judgment in <i>Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)</i> , 2004 I.C.J. 12 (Mar. 31), is not domestically binding because the Optional Protocol of the UN Charter was non-self-executing
21	<i>Pierre v. Gonzales</i>	502 F.3d 109	2007	2d Cir.	Convention Against Torture	Understanding to the CAT, Articles 1 and 3: actual intent, acquiescence, and substantial grounds definitions	Explains that Congress passed FARRA to recognize RUDs and reasons that the Department of Justice is bound by them; recognizes the RUDs
22	<i>Silva-Rengifo v. Att’y Gen. of the U.S.</i>	473 F.3d 58	2007	3d Cir.	Convention Against Torture	Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Explains that the Convention and its accompanying regulations must be read in conjunction with understandings prescribed by the Senate
23	<i>Jaramillo-Mertinez v. Att’y Gen. of the U.S.</i>	249 Fed. App’x 933	2007	3d Cir.	Convention Against Torture	Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Describes the history of ratification and the ultimate RUD to determine the standard for awareness of torture under the CAT

24	United States v. Emmanuel	2007 U.S. Dist. LEXIS 48510	2007	S.D. Fla.	Convention Against Torture	Interpretation of the Torture Act and whether it implements the CAT	Recognizes RUDs in the Senate ratification of the CAT, cites <i>Auguste v. Ridge</i> , 395 F.3d 123 (3d Cir. 2005), and accepts understandings as “incorporated into legislative scheme that effectuated [the Convention],” 2007 U.S. Dist. LEXIS 48510, at *19
25	Pierre v. Gonzales	502 F.3d 109	2007	2d Cir.	Convention Against Torture	U.S. Senate understanding that an act must be specifically intended to inflict severe physical or mental pain or suffering in order to constitute torture	Upholds the Senate’s understanding for the purposes of interpreting FARRA and the CAT
26	San Chung Jo v. Gonzales	458 F.3d 104	2006	2d Cir.	Convention Against Torture	Understanding that to constitute torture, the act must be directed against a person and that the person must be in the offender’s custody or control	Accepts FARRA’s definition of torture, which defers to the RUDs
27	Filja v. Gonzales	447 F.3d 241	2006	3d Cir.	Convention Against Torture	Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Cites <i>Auguste v. Ridge</i> , 395 F.3d 123 (3d Cir. 2005), for the detailed account of the UN’s adoption of the CAT and its ratification by the United States
28	Aldana v. Del Monte Fresh Produce, N.A., Inc.	452 F.3d 1284	2006	11th Cir.	Convention Against Torture	Debate over whether there is a cause of action for a claim of cruel, inhuman, or degrading treatment or punishment under the Alien Tort Claims Act	While this case is not focused on RUDs in particular, a dissent from denial of rehearing en banc recognizes RUDs and argues that international law, as stated in <i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004), creates “universal, definable, and obligatory prohibition against cruel, inhuman, or degrading treatment or punishment, which is therefore actionable under the [Alien Tort Claims Act],” 452 F.3d at 1285
29	Oluwa v. Sec’y of Cal.	2006 U.S. Dist. LEXIS 79853	2006	E.D. Cal.	International Covenant on Civil and Political Rights	Declaration that the Covenant is not self-executing	Recognizes ICCPR as non-self-executing

30	<i>In re Gambino</i>	421 F. Supp. 2d 283	2006	D. Mass.	1983 Extradition Treaty with Italy	Defendant sought to bar extradition based on treaty's <i>non bis in idem</i> clause	Reasons that history of the treaty, negotiations, and practical construction adopted by the parties can be used when there is no clear or single interpretation of the treaty based on the text
31	Nat. Res. Def. Council v. EPA	464 F.3d 1	2006	D.C. Cir.	Montreal Protocol on Substances That Deplete the Ozone Layer	Consideration of whether decisions under the protocol are law	Holds that post-ratification decisions/agreements are not binding as law
32	Guaylupo-Moya v. Gonzales	423 F.3d 121	2005	2d Cir.	International Covenant on Civil and Political Rights	Declaration that the Convention is not self-executing	Accepts ICCPR as non-self-executing per RUDs declaring that it is not self-executing
33	Skokomish Indian Tribe v. United States	401 F.3d 979	2005	9th Cir.	Treaty of Point No Point	Tribe sought monetary damages against the City of Tacoma and Tacoma Public Utilities for alleged treaty violations	Recognizes that the Treaty of Point No Point and similar treaties are "self-enforcing" and do not require implementing legislation to form the basis of a lawsuit; looks at language common to the treaties and language saying treaties shall be obligatory on contracting parties as soon as they are ratified, but the City of Tacoma and Tacoma Public Utilities are not contracting parties
34	Thelemaque v. Ashcroft	363 F. Supp. 2d 198	2005	D. Conn	Convention Against Torture	Understanding that an act must be specifically intended to inflict severe physical or mental pain or suffering in order to constitute torture	Recognizes RUDs in the Senate ratification of the CAT and acknowledges the Justice Department's regulations as based on those RUDs
35	Auguste v. Ridge	395 F.3d 123	2005	3d Cir.	Convention Against Torture	Senate understanding that an act, to constitute torture, must be specifically intended to inflict severe physical or mental pain or suffering; and understanding that substantial grounds for believing that he would be in danger of being tortured to mean more likely than not that he would be tortured	Explains that the U.S. Senate and President agreeing during ratification stage of an interpretative understanding of torture is enough to give the understanding domestic legal effect
36	<i>In re "Agent Orange" Prod. Liab. Litig.</i>	373 F. Supp. 2d 7	2005	E.D.N.Y.	Genocide Convention	Senate understanding that genocide requires intent to destroy	Holds that herbicide was not genocide per the U.S. understanding defining genocide as requiring intent

37	<i>Khouzam v. Ashcroft</i>	361 F.3d 161	2004	2d Cir.	Convention Against Torture	Article 3 of the CAT prohibits the return of any person to a country in which it is more likely than not that he or she will be in danger of being subjected to torture; United States ratified the CAT with the understanding that acquiescence, which is in the CAT's definition of torture, requires awareness on the part of the public official in order to constitute torture	Supports Ninth Circuit's decision in <i>Zheng v. Ashcroft</i> , 332 F.3d 1186 (9th Cir. 2003), holding that Congress had spoken clearly on its definition of torture
38	<i>Kane v. Winn</i>	319 F. Supp. 2d 162	2004	D. Mass.	Convention Against Torture	Prisoner complaints about deprivations that implicated the CAT	Refrains from deciding what effect RUDs have on relevant treaties and cites Henkin's article criticizing the practice; determines that "[r]egardless of whether and to what extent treaties or customary law can provide an implied cause of action, courts must approach prisoner cases under domestic law with an appreciation for the United States' international obligations," 319 F. Supp. 2d at 202
39	<i>Sosa v. Alvarez-Machain</i>	542 U.S. 692	2004	Supreme Court	International Covenant on Civil and Political Rights	Declaration that ICCPR is not self-executing	Accepts ICCPR as non-self-executing based on RUDs declaring that it is not self-executing
40	<i>Ogbudimkpa v. Ashcroft</i>	342 F.3d 207	2003	3d Cir.	Convention Against Torture	Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Acknowledges the RUDs and non-self-executing provision in CAT; reasons that in analyzing whether FARRA deprives the district court of habeas jurisdiction, whether CAT is not self-executing is irrelevant because of existence of FARRA
41	<i>Zheng v. Ashcroft</i>	332 F.3d 1186	2003	9th Cir.	Convention Against Torture	Implementation of Article 3 of the CAT (prohibition on refoulement where there are substantial grounds for believing the individual would be in danger of torture)	Adopts the Senate's understanding that acquiescence under the ratified CAT required only a public official's awareness, not a public official's knowledge

42	<i>In re</i> Extradition of Atuar	300 F. Supp. 2d 418	2003	S.D.W.V.	Convention Against Torture	Declaration that the United States declares that provisions of Articles 1 through 16 of the Convention are not self-executing	Recognizes RUDs in Senate ratification of the CAT and FARRA incorporating Senate's declarations, including non-self-executing status
43	Reyes-Sanchez v. Ashcroft	261 F. Supp. 2d 276	2003	S.D.N.Y.	Convention Against Torture	Understandings at the time of ratification: actual intent and substantial ground interpretations	Recognizes RUDs in Senate ratification of the CAT and FARRA and finding implementing regulations of the CAT to be consistent with the reservations present; recognizes the CAT as non-self-executing
44	<i>In re</i> Comm'r's Subpoenas	325 F.3d 1287	2003	11th Cir.	Treaty Between the United States and Canada on Mutual Legal Assistance in Criminal Matters	Article VII, ¶ 2 of the Treaty provided that "[a] request shall be executed in accordance with the law of the Requested State and, to the extent not prohibited by the law of the Requested State"	Holds that treaty is ambiguous, so the court must turn to the history of the treaty, the negotiations, and the practical construction adopted by the parties; ultimately chooses one construction as the most plausible
45	Nat'l Westminster Bank, PLC. v. United States	58 Fed. Cl. 491	2003	Fed. Cl.	U.S.-U.K. Convention for the Avoidance of Double Taxation	Technical explanation of how profits of a permanent establishment are to be established	Refuses to read statement as suggesting that the United States contemplated a certain argument being litigated and that the unilateral views of the U.S. are not controlling even if the courts read the statement broadly
46	Hain v. Gibson	287 F.3d 1224	2002	10th Cir.	International Covenant on Civil and Political Rights	Reservation on the right to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below age eighteen	Expressly upholds the RUDs as valid for imposing capital punishment even to those below age eighteen; also upholds non-self-executing provision
47	Beharry v. Reno	183 F. Supp. 2d 584	2002	E.D.N.Y.	International Covenant on Civil and Political Rights	Declaration that the Convention was not self-executing	Recognizes that RUDs are controversial and that they have either been upheld or given some domestic effect even if found in non-self-executing treaties

48	Beazley v. Johnson	242 F.3d 248	2001	5th Cir.	International Covenant on Civil and Political Rights	Reservation on the right to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below age eighteen	Expressly upholds Senate reservations of right to impose a capital punishment on juvenile offenders and cites Supreme Courts of Alabama and Nevada
49	Patterson v. Johnson	2001 U.S. Dist. LEXIS 14159	2001	N.D. Tex.	International Covenant on Civil and Political Rights	Reservation on the right to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below age eighteen	Cites the Fifth Circuit's decision in <i>Beazley v. Johnson</i> , 242 F.3d 248 (5th Cir. 2001) upholding the reservation as valid
50	Rivera v. Warden	2001 U.S. Dist. LEXIS 24344	2001	M.D. Pa.	International Covenant on Civil and Political Rights	Declaration that the Covenant is not self-executing	Recognizes that ICCPR was ratified with certain RUDs
51	Mu-Xing Wang v. Ashcroft	2001 U.S. Dist. LEXIS 21245	2001	D. Conn.	Convention Against Torture	Declaration that the Convention is not self-executing	Recognizes RUDs language in a footnote as part of Senate's resolution ratifying the CAT
52	Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.	268 F.3d 103	2001	2d Cir.	Various tax treaties	Senate understanding on distribution of tax benefits	Does not consider validity of understandings but acknowledges them in analyzing treaty policy and practice
53	United States v. Duarte-Acero	208 F.3d 1282	2000	11th Cir.	International Covenant on Civil and Political Rights	Criminal defendant claimed prosecution violated the ICCPR's double jeopardy provision	Recognizes existence of RUDs and consent to ICCPR based on a non-self-executing declaration and therefore no bar to prosecution
54	United States <i>ex rel.</i> Dearmas v. INS	2000 U.S. Dist. LEXIS 9456	2000	S.D.N.Y.	Convention Against Torture	Petitioner moved to amend his habeas petition to add claims that he was entitled to asylum pursuant to the CAT	Does not comment on the validity of RUDs but cites them
55	Sandhu v. Burke	2000 U.S. Dist. LEXIS 3584	2000	S.D.N.Y.	Convention Against Torture	Declaration that the Convention is not self-executing	Recognizes RUDs language in a footnote as part of Senate's resolution ratifying the CAT

56	Elcock v. United States	80 F. Supp. 2d 70	2000	E.D.N.Y.	Treaty Between the United States of America and the Federal Republic of Germany Concerning Extradition	Defendant sought to bar extradition based on a treaty provision	Begins with the language of the treaty itself and identifies Senate pre-ratification debates and reports as instructive
57	Iwanowa v. Ford Motor Co.	67 F. Supp. 2d 424	1999	D.N.J.	Paris Reparations Treaty	Considered Article 2A of the treaty, which covers certain claims against the former German government	Conducts a review of the plain text of the Treaty's provisions
58	United Mexican States v. Woods	126 F.3d 1220	1997	9th Cir.	International Covenant on Civil and Political Rights	Mexico contended treaty right violations including the failure of Arizona officials to notify Martinez-Villareal of his rights under international law	Acknowledges in footnote "some question about the extent to which the specific language of Covenant binds the United States," 126 F.3d at 1223 n.1, given RUDs, but overall cites Eleventh Amendment as providing immunity to a state from suit by a foreign government in federal court
59	United States v. Lui Kin-Hong	110 F.3d 103	1997	1st Cir.	Extradition Treaty Between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland	Criminal defendant argued that the reversion of Hong Kong to the People's Republic of China would result in illegal extradition	Conducts a review of the plain text of the Treaty and Supplementary Treaty
60	Xuncax v. Gramajo	886 F. Supp. 162	1995	D. Mass.	Convention Against Torture	Senate reservation that Article 16's prohibition on cruel, inhuman or degrading treatment or punishment applied only insofar as prohibited by the Fifth, Eighth, and/or Fourteenth Amendment	Recognizes a reservation that ties the content of the abstract standard "cruel, inhuman, or degrading treatment" to domestic law, which tends to cut against the idea of an international law universal norm

61	Xerox Corp. v. United States	41 F.3d 647	1994	Fed. Cir.	U.K.-U.S. Income Tax Treaty	Considered whether Xerox was entitled to an indirect foreign tax credit	Holds that treaty's meaning is plain and unambiguous and can be harmonized with the U.S. statute in question; construes statute against how government would see it
62	United States v. Alvarez-Machain	504 U.S. 655	1992	Supreme Court	Extradition Treaty Between the United States and Mexico	Reviewed Article 9 of the Extradition Treaty Between the United States and Mexico	While there is no interpretative understanding or declaration, interprets text as clear and considers one interpretation (the government's) valid based on text and history
63	Rainbow Navigation, Inc. v. Dep't of Navy	911 F.2d 797	1990	D.C. Cir.	Ice.-U.S. Treaty on Allocation of Military Cargo Trade	District court determination that "the treaty vested [certain] rights in the 'current carrier,' . . . "based upon statements made by officials of the Executive Branch during ratification proceedings in the Senate," 911 F.2d at 798	Assumes arguendo that executive statements are relevant guides, but ambiguous ratification history cannot obscure clear treaty language
64	United States v. Stuart	489 U.S. 353	1989	Supreme Court	1942 Convention Respecting Double Taxation	Noted that Articles XIX and XXI of the Convention obliged the United States to obtain and convey certain information to Canadian tax authorities	Reasons that "[t]he clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories," 489 U.S. at 365-66 (internal quotation omitted)
65	Absentee Shawnee Tribe of Indians v. Kansas	862 F.2d 1415	1988	10th Cir.	1854 Treaty between Shawnees and the United States	Reviewed the delineations of Native American land versus public land under the treaty	Reasons that treaty is a contract between two sovereign nations and interpretation must go to intention of the tribe and intention of government both; the terms of the Treaty, therefore, were understood by both parties to contemplate that the mission property was "public land," and not land that was "reserved" to the Shawnees as Native American land in a technical sense, 862 F.2d at 1419-20
66	Xerox Corp. v. United States	14 Cl. Ct. 455	1988	Cl. Ct.	U.S.-U.K. Income Tax Treaty	Considered Technical Explanation revealing intent of Treasury about the meaning of an advance corporation tax	Construes the Technical Explanation as a valid showing of the Senate and United Kingdom's interpretation of the Treaty

67	Coplin v. United States	6 Cl. Ct. 115	1984	Cl. Ct.	Panama Canal Treaty and Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal	United States argued that Article XV of an Implementation Agreement only exempted Panama from taxing Panama Canal Commission employees rather than both Panama and the United States	States that it would be “entirely inappropriate,” 6 Cl. Ct. at 145, to modify RUDs that were put in place at time of ratification and recognizes a long history of reservations; cites as fundamental that no state is bound in international law without its consent to the treaty; finds against the United States that the Implementation Agreement does in fact require exemption for taxes (Note on procedural history: The case was reversed by the Federal Circuit Court of Appeals in <i>Coplin v. United States</i> , 761 F.2d 688 (Fed. Cir. 1985), after both parties to the treaty agreed that paragraph 2 did not exempt domestic taxation)
68	Coplin v. United States	6 Cl. Ct. 115	1984	Cl. Ct.	Agreement in Implementation of Article III of the Panama Canal Treaty (Executive Agreement)	United States argued that Article XV of the agreement was meant to bar only Panama and not the United States from taxing Commission employees	Finds that the Senate should have followed the standard practice of adding a formal understanding so that both states could sign on; the plain text is otherwise contrary to the government’s position
69	Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n	443 U.S. 658	1979	Supreme Court	Treaty of Medicine Creek	Considered the nature of a right to take fish in a treaty between the United States government and several Native American tribes	Reasons that “it is the intention of the parties, and not simply that of the superior side, that must control any attempt to interpret treaties,” 443 U.S. at 658; construing the treaty to mean that Native Americans secured the right to take a share of each run of fish
70	United States v. Kiowa, Comanche & Apache Tribes of Indians	479 F.2d 1369	1973	Ct. Cl.	Treaty of October 18, 1865	Reviewed claimed titles to certain lands resting on the language of the treaty	Explains that unambiguous words of a treaty are binding, and otherwise interpretation is done narrowly per the rule in <i>Northwestern Bands of Shoshone Indians</i> , 324 U.S. 335 (1945)
71	Nw. Bands of Shoshone Indians v. United States	324 U.S. 335	1945	Supreme Court	Box Elder Treaty	Reviewed claimed titles to certain lands resting on the treaty	Refers to what appears to be an interpretative declaration as an “amendment” at the time of ratification and includes it as dispositive for the meaning of the Box Elder Treaty, 324 U.S. at 351

72	Gen. Elec. Co. v. Robertson	25 F.2d 146	1928	D. Md.	Treaty of Berlin	Senate understanding regarding the extension of rights to U.S. nationals under the Berlin Treaty's Joint Resolution	Recognizes that the interpretation of the treaty was not a reservation, but still controlling as it was ratified by both countries
73	Doe v. Braden	57 U.S. 635	1854	Supreme Court	Treaty To Cede Florida to the United States	Senate understanding that three grants of land in Florida would be annulled at the time of ratification of a treaty ceding Spanish territory of Florida to the United States	Finds that a written declaration explaining ambiguous language in the instrument or adding new and distinct stipulation becomes part of the treaty and is binding

INTERNATIONAL COURT CASES ON RESERVATIONS AND INTERPRETATIVE DECLARATIONS

#	Case	Citation	Date	Court	Treaty	Treaty/Issue Background	Treatment of RUDs
74	<i>In re Arctic Sunrise</i> Arbitration (Neth. v. Russ.)	PCA Case Repository No. 2014-02	Nov. 26, 2014	Permanent Court of Arbitration	United Nations Convention on the Law of the Sea	Russian declaration that rejected procedures for binding disputes involving law enforcement activities	Explains that Russia's Declaration cannot create an exclusion that is wider in scope than what is permitted by article 298(1)(b)
75	Mar. Delimitation in the Black Sea (Rom. v. Ukr.)	2009 I.C.J. 62	Feb. 3, 2009	International Court of Justice	United Nations Convention on the Law of the Sea	Romanian interpretative declaration that "uninhabited islands without economic life can in no way affect the delimitation of . . . maritime spaces belonging to the mainland coasts of the coastal States," 2009 I.C.J. at 81	Holds that the interpretative declaration cannot modify the legal effect of the treaty where reservations are prohibited by the treaty
76	Boyce v. Barbados, Preliminary Objection, Merits, Reparations and Costs, Judgment	Inter-Am. Ct. H.R. (ser. C) No. 169	Nov. 20, 2007	Inter-American Court of Human Rights	Inter-American Convention on Human Rights	Barbados argued that its reservation to Article 4 of the Convention precluded the Court's consideration of issues regarding capital punishment	A textual interpretation of Barbados' reservation shows that the State did not intend to exclude from the jurisdiction of the Court consideration of the mandatory nature of capital punishment or the method of execution by hanging
77	Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)	2006 I.C.J. 6	Feb. 3, 2006	International Court of Justice	Genocide Convention	Rwanda's reservation to Article IX of the Genocide Convention allowing ICJ jurisdiction	Upholds Rwanda's reservation as being permissible unless incompatible with the object and purpose of the Convention and rejects Democratic Republic of the Congo's contention that the reservation is in conflict with a peremptory norm of general international law; Judge Koroma dissented to argue that a reservation may still be against the <i>raison d'être</i> of a treaty and invalidated even if not incompatible with the object and purpose of the treaty

78	Benjamin v. Trinidad and Tobago, Preliminary Objections, Judgment	Inter-Am. Ct. H.R. (ser. C) No. 81	Sept. 1, 2001	Inter-American Court of Human Rights	Inter-American Convention on Human Rights	Trinidad and Tobago included a limitation in its declaration accepting the Court's jurisdiction that precluded the Court from hearing the case; if that limitation were to be declared invalid, the entire declaration would have been invalid	Deems reservation incompatible with the Convention and therefore invalid; cites to Court's authority to interpret its own jurisdiction to uphold efficacy of mechanisms established to preserve human rights
79	Legality of Use of Force (Yugo. v. U.S.), Order	1999 I.C.J. 916	June 2, 1999	International Court of Justice	Genocide Convention	United States' reservation to Article IX of the Genocide Convention, which requires "the specific consent of the United States . . . in each case," 1999 I.C.J. at 923, before "the United States . . . may be submitted to the jurisdiction of the [ICJ]," <i>id.</i>	Upholds U.S. reservation; Judge Kreća dissents to argue that <i>jus cogens</i> norms can and must override an inconsistent reservation such as this one
80	Fisheries Jurisdiction (Spain v. Can.)	1998 I.C.J. 432	Dec. 4, 1998	International Court of Justice	Northwest Atlantic Fisheries Organization Convention; Statute of the International Court of the Justice	Canadian reservation on the ICJ's jurisdiction	After interpreting the reservation, "finds that the use of force authorized by the Canadian legislation and regulations falls within the ambit of what is commonly understood as enforcement of conservation and management measures and thus falls under the provisions of paragraph 2 (<i>d</i>) of Canada's declaration," 1998 I.C.J. at 439
81	Loizidou v. Turkey	310 Eur. Ct. H.R. (ser. A) at 1	Mar. 23, 1995	European Court of Human Rights	European Convention on Human Rights	Turkish declarations regarding acceptance of competence of the European Commission of Human Rights	Explains that the Convention restricts the ability of Contracting Parties to enter reservations and prohibits "reservations of a general nature," so "States could not qualify their acceptance of the optional clauses[,] thereby effectively excluding areas of their law and practice within their 'jurisdiction' from supervision by the Convention institutions," 310 Eur. Ct. H.R. (ser. A) at 23
82	Weber v. Switzerland	1990 Eur. Ct. H.R. 13	May 22, 1990	European Court of Human Rights	European Convention on Human Rights	Switzerland's reservation to Article 6(1) retaining the right to conduct proceedings in private in certain cases	Holds that Switzerland had not complied with the requirement to include a brief statement of the law and therefore the reservation was invalid

83	Border & Transborder Armed Actions (Nicar. v. Hond.)	1988 I.C.J. 69	Dec. 20, 1988	International Court of Justice	Pact of Bogotá/Statute of the Court of International Justice	U.S. reservation to the Pact of Bogotá deferring to its reservation to Article XXXVI of the Statute of the Court of ICJ limiting jurisdiction	Cites U.S. reservation to the Pact as a valid reservation and an indication of the ICJ's otherwise compulsory jurisdiction under the Pact
84	Belilos v. Switzerland	132 Eur. Ct. H.R. (ser. A) at 1	Apr. 29, 1988	European Court of Human Rights	European Convention on Human Rights	Switzerland's reservation to Article 6(1): "The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1 . . . in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge." ¹³² Eur. Ct. H.R. (ser. A.) at 11	Holds that the reservation was indeed a reservation but was of a general character and therefore invalid; additionally, it was invalid for failure to append a "brief statement of the law concerned," 132 Eur. Ct. H.R. (ser. A.) at 21; Switzerland agreed that it was still bound by the Convention irrespective of the validity of the reservation
85	The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)	Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2	Sept. 24, 1982	Inter-American Court of Human Rights	Inter-American Convention on Human Rights	Advisory opinion on reservations	Holds that reservations are permissible as long as they are compatible with the object and purpose of Inter-American Convention on Human Rights
86	Ambatielos Case (Greece v. U.K.)	1952 I.C.J. 28	July 1, 1952	International Court of Justice	Anglo-Greek Agreements	Whether some words, such as "[s]ave as provided in the Declaration annexed to this Treaty," have to be read into Article 32 before the words "[i]t shall come into force," 1952 I.C.J. at 44	Includes interpretative declaration as part of the treaty

87	Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion	1951 I.C.J. 15	May 28, 1951	International Court of Justice	Genocide Convention	Advisory opinion on the legal effect of objections to reservations; whether a State can be a party to a Convention while maintaining its reservation	Explains that states are still members to a treaty even if reservations are objected to unless they are against the "object and purpose" of the treaty, 1951 I.C.J. at 24
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