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The ICCPR, Non-Self-Execution, and DACA Recipients' Right to Remain in the United States

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TABLE OF CONTENTS

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INTRODUCTION

On June 15, 2012, the United States Secretary of Homeland Security (DHS), Janet Napolitano, issued a departmental memorandum announcing the Obama administration's intention to refrain from deporting "certain young people who were brought to this country as children and know only this country as home."[1] This program became known as Deferred Action on Childhood Arrivals, or DACA, for short. The DACA Program provided that American immigration authorities would refrain, at least temporarily, from pursuing and removing certain "low priority" unlawfully present immigrants, specifically teenagers and young adults who arrived in the United States as children, spent a considerable number of years in the United States, had no criminal record, and posed no threat to national security or public safety.[2] Once registered with the U.S. Citizenship and Immigration Services, these immigrants were deemed "lawfully present" in the United States,[3] and were assured that, at least temporarily, they would not be deported.[4] They also became eligible to

1. Memorandum from Janet Napolitano, Sec'y of Dep't Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot.; Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs.; John Morton, Dir., U.S. Immigration & Customs Enf't, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012) [hereinafter *DACA Memorandum*].

2. *Id.* at 1–2 (explaining the criteria to qualify for DACA).

3. For an articulation of the difference between holding a "legal [immigration] status" and being "lawfully present," see Secretary of Department of Homeland Security Jeh Charles Johnson Memorandum for León Rodriquez, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, issued November 20, 2014 [hereinafter *Expanded DACA Memorandum*].

4. Under the DACA program, the DHS would exercise "prosecutorial discretion" and defer any deportation action against DACA registrants. The DACA Memorandum emphasizes that it "confers no substantive rights [or] immigration status." Expanded DACA Memorandum, *supra* note 3; *see also* USCIS,

work and receive other benefits.[5] Approximately 793,000 people successfully registered for DACA,[6] and as of April 30, 2019, 669,080 people were still registered.[7]

The DACA program was implemented after several failed attempts by the Obama administration and earlier administrations to regularize the immigration status of undocumented immigrants who grew up in the United States.[8] These immigrants are popularly known as Dreamers, a name adopted from the Development, Relief, and Education for Alien Minors (DREAM) Act, the first of many bills introduced in Congress over the past twenty years to regularize the immigration status of such persons.[9] Although they are not citizens, because of their acculturation, language skills, education, and social circles, they are – in a word – Americans.

The Obama administration justified the implementation of DACA on the basis of both resource allocation,[10] and humanitarian concerns. In fact, DACA's champions praised it as a "step in the right direction,"[11] by allowing people to "come out of the shadows,"[12] and making the immigration system "more just."[13] When announcing DACA, President Obama declared, "We are a better nation than one that expels innocent young kids."[14]

Instructions for Consideration of Deferred Action for Childhood Arrivals Form I-821D, OMB No. 1615-0124, at p. 1 ("Individuals who receive deferred action will not be placed into removal proceedings or removed from the United States for a specified period of time, unless the Department of Homeland Security (DHS) chooses to terminate the deferral.").

5. DACA Memorandum, *supra* note 1, at 3.

6. USCIS, Form I-821D, *available at* https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr2.pdf.

7. *Id.*

8. *See* President Barack Obama, Remarks by the President on Immigration (June 15, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration (describing the latest failed attempt to pass the DREAM Act) [hereinafter *Remarks*]; American Immigration Council, *infra* note 9; Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 267–72 (2013) (summarizing DACA implementation).

9. DREAM Act, S.1291 (2001) (explaining that the term "Dreamers" only applies to law-abiding young people); *see also* American Immigration Council, "The Dream Act, DACA, and Other Policies Designed to Help Dreamers," Aug. 2019, https://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_daca_and_other_policies_designed_to_protect_dreamers.pdf (listing numerous dream acts that have been introduced in Congress since 2001).

10. *See* DACA Memorandum, *supra* note 1, at 1.

11. *See* Sabena Auyeung, *A Broken American Dream: The Current State of U.S. Immigration Laws and Its Adverse Effect on Students, Education, and the Economy*, 18 PUB. INTEREST L. REPR. 84, 86 (2012).

12. Julia Preston, *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 15, 2012, https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html. *See also* Juan Escalante, *DREAMers Like Me Have Flourished under DACA. Trump Might Take It All Away*, VOX.COM, Aug. 31, 2017, https://www.vox.com/first-person/2017/8/29/16220680/daca-trump-dreamers-undocumented-immigrants.

13. Obama, Remarks, *supra* note 8.

14. *Id.*

DACA's opponents, however, have derided the program as an example of unconstitutional executive overreach. Since the Immigration and Nationality Act (INA) states that unlawfully present aliens are subject to deportation, opponents of DACA argue, among other things, that the President failed to adhere to his constitutional obligation to "take care that the laws be faithfully executed,"[15] and that DACA violates the separation of powers since it explicitly contradicts the intent of Congress.[16] Opponents also argue that DACA violates both procedural and substantive requirements of the Administrative Procedure Act (APA).[17]

In September 2017, the Trump administration, pursuant to a memorandum by the then-Acting Secretary of DHS, Elaine Duke, announced that it would rescind the program altogether.[18] This announcement was met with public outrage and triggered several lawsuits against the Trump administration and DHS. States, counties, cities, universities, unions, non-profit organizations, and DACA recipients themselves sued the Trump administration and DHS arguing that the proposed rescission would, among other things, violate the Fifth Amendment's Due Process Clause, the APA, and principles of equitable estoppel.[19] As a result of these lawsuits, several lower courts ordered DHS to maintain the DACA program for people who had been successfully registered as of September 5, 2017.[20] The Supreme Court heard oral arguments in these consolidated DACA cases in November 2019.[21] At the time of publication of this Article, those injunctions are still in place.

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15. U.S. Const. art. II, § 3.

16. *E.g.*, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigrations Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 858 (2013); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195 (2014).

17. *E.g.*, Brief for the States of Texas, et al. as Amici Curiae Supporting Petitioners at 18–22, Dep't Homeland Sec. v. Regents of the Univ. of Ca. (No. 18-587) (2019).

18. Memorandum from Elaine C. Duke, Acting Sec'y of the Dep't of Homeland Sec., to James W. McCament, Acting Dir. U.S. Citizenship & Immigration Servs., et al., *Re Rescission of the June 12, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"* (Sept. 5, 2017) [hereinafter *DACA Rescission Memorandum*].

19. Regents of the U. Cal. v. Dep't Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal 2018) (issuing a nation-wide preliminary injunction); NAACP v. Trump, 298 F. Supp. 3d 209 (D.DC 2018) (issuing a final judgment); *American Civil Liberties Union, Written Statement Submitted to the Inter-American Commission on Human Rights, Ex-Officio Hearing on the Human Rights Situation of Person Affected by the Cancellation of Temporary Protected Status and DACA in the United States*, Feb. 27, 2018, https://www.aclu.org/sites/default/files/field_document/aclu.iachr_.submission_on_daca_2.23.2018.final_.pdf (explaining that despite these orders, DHS is permitted to stop registering new applicants and is no longer required to entertain international travel requests (advance parole) from DACA registrants. Additionally, despite these orders, the DHS is still permitted to revoke DACA protection on an individualized basis as it deems appropriate. Since President Trump took office, many DACA recipients have been arrested, detained, and/or had their DACA status revoked).

20. *See supra* note 19 and accompanying text.

21. *See generally* Julie Rheinstrom, *Deferred Dreams Denied: A Study of What Comes Next Following the Supreme Court's Historic Tie on DACA and DAPA*, 31 GEO. IMMIGR. L.J. 135 (2016).

A cursory study of the public debate surrounding DACA reveals the existence of two camps. One is sympathetic to, and frames its arguments around, the plight of Dreamers. The other, though not unsympathetic to Dreamers, asserts the rule of law, emphasizes the limits on executive authority, and highlights the alleged costs citizens and other permanent residents might incur as a result of DACA, particularly the alleged increased public expenditures and job competition.[22]

Among the courts and the academic literature, most of the debate surrounding DACA has focused on one of two issues. First, whether the Obama Administration had the constitutional or statutory authority to implement DACA,[23] and second, whether the Trump administration has properly exercised its constitutional and statutory authority to rescind it.[24] What has not been discussed with any degree of detail, however, is the possibility that deporting DACA recipients might violate the United States' international human rights obligations,[25] specifically the United States' legal obligations under Article 12.4 of the International Covenant on Civil and Political Rights (ICCPR).[26] This Article undertakes that discussion and encourages the public, academics, courts, Congress, and the executive branch to incorporate this particular human rights dimension into their analyses, judgments, and prescriptions.

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22. *See, e.g.*, Christopher Rugaber, Trump's Harsh Message to Immigrants Could Drag on Economy, apnews.com, September 6, 2017, https://www.apnews.com/70d54a71362e4d90ad1959c8d33266ac (quoting Trump administration Attorney General Jeff Session saying that DACA "denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens.").

23. For arguments that the implementation of DACA is within the prerogatives of the executive branch, see, e.g., The Department of Homeland Security, *The Department of Homeland Security's Authority to Prioritize the Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. (Nov. 19, 2014), https://www.justice.gov/file/179206/download; Expanded DACA Memorandum, *supra* note 3; Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59 (2012); Gilbert, *supra* note 8; Brief for Amicus Curiae Immigration Law Scholars Supporting Respondents, Dep't Homeland Sec v. Regents of the Univ. of Ca. (No. 18-587) (2019); *see also* Leti Volpp, *Immigrants Outside the Law: President Obama, Discretionary Executive Power, and Regime Change*, 3 CRIT. ANALYSIS L. 385 (2016). For arguments that the implementation of DACA was unconstitutional and/or prohibited by federal statute, *see, e.g.*, Brief for Texas, *supra* note 17, at 17–23; Delahunty & Yoo, *supra* note 16; Love & Garg, *supra* note 16.

24. For argument that the rescission of DACA is within the constitutional and statutory authority of the executive branch, see, e.g, Brief for Texas, *supra* note 17, at 5–17; *NAACP, et al. v. Trump*, *supra* note 20 (concluding that the attempt to rescind DACA was "arbitrary and capricious" in violation of the APA); *Regents of U. Cal. v. DHS*, *supra* note 20; DHS, *Memorandum from Secretary of DHS Kirstjen M. Nielsen* (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf. For arguments that the Trump administration's attempt to rescind DACA would violate the Constitution and/or the APA, *see, e.g., Regents of the U. Cal. supra* note 20; *See also NAACP, supra* note 20.

25. *But see*, David B. Thronson, *Closing the Gap: DACA, DAPA and U.S. Compliance with International Human Rights Law*, 48 CASE. W. RES. J. INT'L L. 127 (2016); William Thomas Worster, *Deporting Dreamers as a Crime against Humanity*, 33 EMORY INT'L L. REV. 367 (2019). *See also* David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627 (2006) (advocating some of the same statutory and constitutional interpretation strategies I present in Parts III.C, III.D, and IV of this Article).

26. International Covenant on Civil and Political Rights, U.N. DOC. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *acceded to by the United States of America* 8 Jun. 1992, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#top [hereinafter ICCPR] (citing Article 12.4).

Article 12.4 of the ICCPR states, "No one shall be arbitrarily deprived of the right to enter his own country." The right to enter one's own country includes the right not to be exiled, banished, or deported from one's own country.[27] Upon first reading, it may appear this right is clear-cut and uncontroversial, but the scope of one's "own country" is actually quite broad. Customary treaty interpretation methods, including an analysis of the negotiation history (preparatory works) of the ICCPR, demonstrate that people who are not citizens or nationals of a country may enjoy the right to stay in that country. In the context of ICCPR Article 12.4, one's "own country" may be a country of which they are *not* citizens or nationals. Whether or not a country is one's "own country" is a function of a person's attachments to a country – familial attachments, cultural attachments, social attachments, language attachments, educational attachments, professional attachments – and the relative lack of such attachments to any other country, including one's country of origin. For many DACA recipients, the United States is their own country. As such, the government may not deport them. Or, in other words, since deportation from one's own country is typically referred to as banishment or exile,[28] the government may not banish or exile them, at least not "arbitrarily."

The ICCPR does permit non-arbitrary banishment.[29] Immediately one wonders how a banishment can be non-arbitrary. To expel someone from one's own country and prohibit them from reentering is so far removed from our modern societal norms that it is hard to imagine what would qualify as a non-arbitrary banishment. It is, in fact, unconstitutional to banish citizens from the United States.[30] Justice Warren described banishment as "a fate

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27. It is axiomatic that the right to enter one's country necessarily entails the right not to be deported, exiled, banished, or expelled from one's own country. Numerous commentators have asserted the same. *E.g.*, Human Rights Committee, Communication No. 538/1993, *Stewart v. Canada* (views adopted on November 1, 1996), U.N. DOC. CCPR/C/58/D/538/1993 [hereinafter HRC *Stewart*], at Individual opinion by Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco José Aguilar Urbina (*dissenting*) ("If a State party is under an obligation to allow entry of a person, it is prohibited from deporting that person."); *Id.* at Individual opinion by Prafullachandra Bhagwati (*dissenting*) ("[A]rticle 12, paragraph 4, protects everyone against arbitrary deportation from his own country . . ."). Although these were dissenting opinions, the Human Rights Committee has never questioned the assertion that the right to enter one's own country entails the right not to be deported from one's country. *See also*, U.N. GAOR, 14th Sess., 954-59th mtgs., U.N. DOCS. A/C.3/SR.954 through A/C.3/SR.959 (1959) (making it abundantly clear that the states negotiating the ICCPR contemplated that Article 12.4 would include a prohibition against deportation (exile). There is nothing in the preparatory works to suggest that the reason for Article 12.4 is merely to ensure that aliens who are deported from a host country have another country to go to, i.e., the country of their citizenship. For a discussion of the preparatory works of Article 12.4, see infra Parts I.A.2 and I.B.2. *See also*, Fang Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile . . . .").

28. BLACK'S LAW DICTIONARY (8th ed. 2004), defines *banishment* and *exile* as synonyms. *Exile* is defined as "Expulsion from a country, esp. from the country of one's origin or longtime residence; banishment."

29. ICCPR, *supra* note 26, at art. 12.4.

30. Trop v. Dulles, 356 U.S. 86, 101–03 (1958) (announcing that denationalization and the threat of banishment violate the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment).

universally decried by civilized people."[31] He declared denationalization to be "a form of punishment more primitive than torture"[32] in large part because it could lead to banishment.[33] Denationalization, he wrote,

> is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discrimination may be established against him, what proscription be directed against him, and when and for what cause his existence in his native land may be terminated.[34]

But when framed in the context of immigration law when the person being expelled from the country is an immigrant (and let's imagine an *undocumented* immigrant at that), banishment might seem less offensive, more acceptable. But why? After all, a Dreamer is in almost the exact same precarious position as an American stripped of his citizenship. A Dreamer lacks status in the national community. Her very existence is at the sufferance of the United States, and she is subject to a fate of ever-increasing fear and distress. As Justice Brandeis recognized a century ago, when anyone is deported, their removal may result in "loss of both property and life, or all that makes life worth living."[35]

One might argue that banishment of a Dreamer is acceptable in modern society since she has another country to go to, the country of her citizenship.[36] But she is likely to feel the pain of banishment just as much as a denaturalized person would, especially if she is unfamiliar with the country of her citizenship. And her lived experience while in the United States might even be worse than that of the denationalized person since she is undocumented and thus constantly fearful of being discovered.

One might also argue that the banishment of a Dreamer is acceptable because she is in the country "unlawfully." After all, a country has a right to enforce its immigration laws, doesn't it? But if someone has a right to be in her own country, how can it also make sense to banish her on the basis that she did not have express permission to be there? Someone with a right does not need permission. Furthermore, to assert that it would not be arbitrary to

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31. *Id.* at 102.
32. *Id.* at 101–03.
33. *Id.*
34. *Id.* at 101–02.
35. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). Justice Frankfurter would repeat this lament three decades later. Galvan v. Press, 347 U.S. 522, 350 (1954). *See also* Fong Yue Ting v. United States, 149 U.S. 698, 759 (1893) (Field, J., dissenting) ("The punishment [of deportation] is beyond all reason in its severity . . . As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family and business there contracted.").
36. It is not always the case that someone facing deportation or who has been deported has a country of citizenship. *See, e.g.*, Human Rights Committee, Communication No. 2264/2013, *Budlakoti v. Canada* (views adopted on April 6, 2018) U.N. DOC. CCPR/C/122/D/2264/2013, ¶ 9.4 [hereinafter HRC *Budlakoti*]; Human Rights Committee, Communication No. 1559/2010, *Warsame v. Canada* (views adopted on July 21, 2011), U.N. DOC. CCPR/C/102/D/1559/2010, ¶ 8.6 [hereinafter HRC *Warsame*].

banish an undocumented American for the simple reason that his or her entry and or continued residence within the country was never expressly permitted – that is to say, to deny someone permission to remain in the country for the simple reason that she does not have permission to be in the country – is tautological. And indeed, the Human Rights Committee has stated in the context of deporting illegal aliens in violation of other ICCPR rights that "it is incumbent on [a] State party to demonstrate additional factors ... that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness."[37] In other words, a State party is not permitted to enforce its municipal[38] immigration laws if those municipal immigration laws violate the ICCPR. Just because a deportation is "lawful" under some municipal law does not necessarily make it non-arbitrary or in accord with human rights law. Quite simply, the ICCPR limits a country's ability to enact or enforce certain immigration laws.[39]

Both the context of Article 12.4 within the ICCPR and the ICCPR's negotiation history clearly show that "arbitrarily" as used in Article 12.4 is an exceedingly strict standard. Many negotiating states did not want to provide any legal exception to the prohibition against depriving people of their right to be in their own country. In fact, the negotiating states deliberately wrote Article 12.4 to exclude exceptions for "national security, public order and public health or morals." As a result, on at least three occasions the Human Rights Committee has decided that even the deportation of alien-criminals was a violation of their human rights since they were being banished "arbitrarily" from their own countries. After all, we do not banish citizens who are recidivist violent criminals. Such banishment would seem wholly unjust.

This Article focuses on the plight of DACA recipients and other Dreamers and has been asserting, somewhat casually, that they all have an international

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37. *See infra* note 255.

38. A country's law, formally, includes international law. "Municipal" law, or what many people including courts and scholars refer to as "internal" law or, imprecisely, as "domestic" law, is that set of a country's laws that does not include customary international law, general principles of international law, or treaties in force to which the country is a party (except to the extent treaties are self-executing). BLACK'S, *supra* note 28, defines "municipal law" as "the internal law of a nation, as opposed to international law" and has no definition at all for "domestic law." "Domestic" is defined as "of or relating to one's own country," implying that the "domestic law" of the United States includes its treaties, especially considering that treaties are part of the law of the land pursuant to the Supremacy Clause. U.S. CONST. art. VI, cl. 2. For a discussion of how international law, including treaties, are part of American law, see *The Paquete Habana*, "International law is part of our law . . . ." 175 U.S. 677, 700 (1900). *See also*, RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, *infra* note 55, at § 301(1) ("Treaties made under the authority of the United States are part of the laws of the United States . . . ."); Hilton v. Guyot, 159 U.S. 113, 163 (1895) ("International law, in its widest and most comprehensive sense ... is part of our law. . . The most certain guide [for courts] ... is a treaty or a statute of this country."); Young, *infra* note 49, at 92, 94 ("The Supremacy Clause plainly makes treaties "part of our law ... [T]he Supremacy Clause explicitly recognizes treaties as supreme federal law."). It is regrettable that the phrase "municipal law" seems to have fallen out of use. It is very useful and contributes to analytical clarity. This Article will often use the phrase "municipal law" in that strict meaning. So although the ICCPR is American *domestic* law, it is not American *municipal* law except to the extent it is self-executing. *See infra* Part III.A–B.

39. *See also*, ICCPR, *supra* note 26, at art.13 (providing due process rights to aliens facing deportation proceedings); *infra* Part IV (presenting other ICCPR provisions that restrict the deportation of aliens).

right to stay in the United States. This is a generalization made in part for rhetorical ease and in part for rhetorical resonance. DACA recipients and Dreamers as a class constitute a highly sympathetic group of people, but, of course, it is likely that there are some DACA recipients and some Dreamers for whom the United States is not their "own country." These peoples' ties to the United States may be weak enough (and their ties to other countries strong enough) that the United States has not become their "own country" within the meaning of ICCPR Article 12.4. By the same token, however, there are certainly many other aliens – both documented and undocumented – in the United States who were not DACA-eligible and would not be considered Dreamers but who nonetheless can rightfully claim the United States as their own country. I will refer to all aliens who can claim the United States as their own county pursuant to the terms of ICCPR Article 12.4 as "non-citizen Americans." This Article will nonetheless focus on DACA recipients and Dreamers. By using a class of highly sympathetic migrants as a focal point, I intend to highlight how it can be that some aliens, even undocumented ones, should be able to enjoy the benefits of ICCPR's Article 12.4 and stay in the United States even against the U.S. government's wishes, an assertion that some might find, at first blush, preposterous or imprudent.[40]

Every time the United States arbitrarily deports a non-citizen American, it violates an international legal obligation that the United States owes to the other 172 ICCPR States parties. However, U.S. courts have invariably deemed the ICCPR to be "non-self-executing" (NSE); that is to say, they have deemed the ICCPR to lack some degree of municipal legal force. In fact, some might conclude that the ICCPR's NSE status renders it domestically irrelevant and incapable of protecting non-citizen Americans. But this conclusion would be premature and overstates the ICCPR's lack of legal significance.[41]

As an initial matter, it must be highlighted that the ICCPR's NSE status does not alter or diminish the United States' international legal obligation to adhere to its terms.[42] The U.S. has an obligation to implement the terms of the ICCPR to the extent it has not already done so. Given Article 12.4, then, the U.S. is under an international obligation to refrain from deporting people like DACA recipients. Somehow, someway, the legal or administrative

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40. The argument presented in this Article is a legal one, one premised on the interpretation of Article 12.4 of the ICCPR and the status of Article 12.4 within the municipal law of the United States. Although this Article hints at moral arguments for refraining from deporting DACA recipients, Dreamers, and other long-term resident aliens, it is beyond the scope of this Article to present any comprehensive moral argument. For a moral argument that jibes with the legal argument presented herein and the principles that apparently animate the ICCPR, see Joseph H. Carens, *Global Justice: Who Gets the Right Stay?*, BOSTON REV., Jan. 23, 2018, http://bostonreview.net/global-justice/joseph-h-carens-who-gets-right-stay, ("[T]he moral right of states to apprehend and deport irregular migrants erodes with the passage of time" and suggesting that a right to stay vests after only ten years); Joseph H. Carens, IMMIGRANTS AND THE RIGHT TO STAY (2010).

41. *See infra* Part III.

42. *See infra* notes 290–296 and accompanying text.

machinery of the U.S. must implement this obligation. The most obvious implementation avenue would be for Congress to pass legislation providing a right for DACA recipients, Dreamers, and other non-citizen Americans to remain in the United States permanently. This has not happened, and in the absence of such congressional implementation, the NSE status of the ICCPR does hamper its implementation and enforcement.[43] The question, however, is: How exactly is enforcement hampered and what avenues of implementation remain?

As a ratified American treaty, the ICCPR not only constitutes an international obligation of the United States, it also constitutes a "supreme Law of the Land" pursuant to the Supremacy Clause.[44] The ICCPR's NSE status does not change that fact. The other laws of the land – the Constitution and federal statutes – bind the President and the states and can be enforced by courts in the usual ways. If the ICCPR were fully self-executing, it would function like a federal statute. It would bind the President, it would bind the States, and it could be enforced by courts. If the ICCPR were fully non-self-executing, the President and the states would be free of its demands and the courts could not enforce it. With that understanding, a more specific set of questions arises: To what extent is the ICCPR non-self-executing? To what extent is the President and the executive branch free of its demands? To what extent are the states free of its demands? And to what extent can courts enforce its provisions?

The ICCPR is only non-self-executing to the extent the U.S. treaty makers – the Senate that consented to its ratification and the President who ratified it – intended. A careful study of the debates surrounding the ratification of the ICCPR reveals that the U.S. treaty makers intended that the ICCPR not create any private causes of action. It is possible they also intended that courts refrain from directly enforcing it at all. The U.S. treaty makers did not intend, however, to prohibit the executive branch from implementing the ICCPR, nor did the U.S. treaty makers shield the executive branch from the ICCPR's international legal obligations.[45]

If this analysis is correct, then, the executive branch is obligated – on the *municipal* plane – to implement and enforce the terms of the ICCPR, including, of course, Article's 12.4's obligation to refrain from deporting DACA recipients, Dreamers, and other non-citizen American (at least to the extent a later-in-time federal statute does not conflict with Article 12.4). And there appears to be no doubt that the ICCPR's NSE status does not deprive the executive branch of any freedom to choose to exercise its prosecutorial discretion and refrain from deporting such immigrants.[46]

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43. There is little doubt that the ICCPR is non-self-executing in the United States. *See infra* Parts II. C, III.A, and III.B. *But see infra* note 311 for a list of scholars have expressed such doubt.

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

45. *See infra* Part III.B.

46. *See infra* Part III.C.

If it is indeed the case that the ICCPR is non-self-executing with regard to the judicial branch only to the extent that the ICCPR does not create any private causes of action, then an alien facing removal proceedings should be able invoke his ICCPR treaty rights in his defense. However, if the U.S. treaty makers intended the ICCPR's NSE status to extend to the point that the courts may not directly enforce the ICCPR at all, aliens could not depend on the direct judicial enforcement of their treaty rights. If this is the case, however, there might be avenues for indirect enforcement by the judiciary. Courts could use the *Charming Betsy* canon to interpret ambiguous terms in the INA in light of the United States' international legal obligations.[47] Courts could thus interpret the INA in such a way that the INA either does not provide the Attorney General or the Department of Homeland Security with the authority to banish people (including DACA recipients and Dreamers) or creates particular protections for DACA recipients and Dreamers. In both cases, the court would not be enforcing the ICCPR directly at all. In the first case, the courts would merely be failing to find authorization anywhere within federal law that allows the government to banish people, including non-citizen Americans. In the second case, the courts would directly be applying protective provisions of the INA. The ICCPR would be in the background, hovering as a supreme law of the land with some domestic force – even though it cannot be directly enforced by the courts. Additionally, I briefly suggest that the Fifth Amendment's Due Process clause might permit immigrants facing banishment to appeal to their individual treaty rights in order to protect themselves. If this suggestion is correct, any intent on the part of the U.S. treaty makers to make the ICCPR impotent in such cases would be unconstitutional. I also briefly suggest that the ICCPR can be used to help interpret certain constitutional provisions themselves, including the Fifth and Ninth Amendments.[48]

In conducting this analysis on the relevance of the ICCPR's NSE status, I have pulled together the work of many international and constitutional law scholars who have considered the issue of treaty self-execution and those who have carefully reviewed the Senate debates surrounding the ratification of the ICCPR. Over the last three decades, the scholarship of treaty self-execution has been particularly fruitful.[49] Although differences of opinion

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47. The *Charming Betsy* canon of interpretation states that where possible, courts should construe federal statutes to avoid a conflict with treaty provisions. For a fuller discussion of the *Charming Betsy* canon, *see infra* Part III.D.2.

48. *See infra* Part III.D.3.

49. *See, e.g.*, (in reverse chronological order) Jean Galbraith, *Making Treaty Implementation More Like Statutory Implementation*, 115 MICH. L. REV. 1306 (2017); David L. Sloss, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE (2016) [hereinafter Sloss, THE DEATH OF TREATY SUPREMACY]; Carlos Manuel Vázquez, *Four Problems with the Draft Restatements of Treaty Self-Execution* 2015 BYU L. REV. 1747 (2015) [hereinafter Vázquez, *Four Problems*]; David L. Sloss, *Taming Madison's Monster*, 2015 BYU L. REV. 1691 (2015) [hereinafter Sloss, *Taming Madison's Monster*]; Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Executing*, 2015 BYU L. REV. 1639 (2015); John Quigley, *A Tragi-Comedy of Errors Erodes Self-Execution of Treaties:* Medellín v. Texas *and Beyond*, 45 CASE W. RESERVE J. INT'L L. 403 (2012) [hereinafter Quigley, *A Tragi-Comedy*];

exist among scholars on the exact nature of treaty self-execution, I draw only upon conclusions I find the most persuasive and, to an extent, those that provide plausible avenues for successfully enhancing the implementation of the ICCPR in general and of Article 12.4 in particular.[50] As a result of this synthesis, this Article provides a model for approaching other individual rights provided in the ICCPR that are not already provided in the Constitution or a federal statute.[51]

Part I of this Article interprets Article 12.4 of the ICCPR. I use the customary method of treaty interpretation as articulated in the Vienna Convention on the Law of Treaties, focusing primarily on the ordinary meaning of the words in their context in light of the object and purpose of the ICCPR. I examine the preparatory works of the ICCPR in order to further illuminate

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David H. Moore, *Do U.S. Courts Discriminate against Treaties? Equivalence, Duality and Non-Self-Execution*, 110 COLUM. L. REV. 2228 (2010) [hereinafter Moore, *Equivalence, Duality and NSE*]; Ernest A. Young, *Treaties as "Part of Our Law"*, 88 TEX. L. REV. 91 (2009); David Sloss, *The Constitutional Right to a Treaty Preemption Defense*, 240 U. TOL. L. REV. 971 (2009) [hereinafter Sloss, *Treaty Preemption Defense*]; David H. Moore, *Law(makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. 32 (2009) [hereinafter Moore, *Law(makers) of the Land*]; Laura Moranchek Hussain, *Enforcing the Treaty Rights of Aliens*, 117 YALE. L. J. 680 (2008); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008) [hereinafter Vázquez, *Treaties as Law of the Land*]; Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331 (2008); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131 (2008) [hereinafter Bradley, *Treaty Duality*]; Curtis Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540 (2008) [hereinafter Bradley, *Intent, Presumptions*]; Aya Gruber, *Sending the Self-Execution Doctrine to the Executioner*, 3 FIU L. REV. 57 (2007); Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571 (2007); Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J. L. & PUB. POL'Y, 30 (2006); David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue* in Hamdan *and* Sanchez-Llamas, 45 COLUM. J. TRANSNAT'L L. 20 (2006) [hereinafter Sloss, *Treaties and Individually Enforceable Rights*]; Ann Woolhandler, *Treaties, Self-Execution, and the Public Model*, 42 VA. J. INT'L L. 757 (2002); Ann Althouse, *A Response to Professor Woolhandler's "Treaties, Self-Execution, and the Public Law Model"*, 42 VA. J. INT'L L. 789 (2002); Caleb Nelson, *The Treaty Power and Self-Execution: A Comment on Professor Woolhandler's Article*, 42 VA. J. INT'L L. 801 (2002); Curtis A. Bradley & Jack A. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399 (2000); John Yoo, T*reaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) [hereinafter Yoo, *Treaties and Public Law Making*]; David Sloss, *The Domestication of International Human Rights: Non-Self Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999) [hereinafter Sloss, *The Domestication of IHR*]; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter Yoo, *Globalism and the Constitution*]; Martin S. Flaherty, *History Rights? Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) [hereinafter Vázquez, *Laughing at Treaties*]; Carlos Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695 (1995) [hereinafter Vázquez, *The Four Doctrines*]; Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993) [hereinafter Paust, *Avoiding "Fraudulent" Executive Policy*]; Jordan Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) [hereinafter Paust, *Self-Executing Treaties*]; Yuji Isasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986).

50. I have gone to great lengths to cite all the relevant works of these various scholars and attribute their insights to them. I have also vigilantly tried to include a large set of scholarship that presents opposing or alternative views. All of those citations can be found in Part III, but here I want to highlight three scholars upon whose work I most relied for this project: Professors Curtis Bradley, David Sloss, and Carlos Manuel Vázquez.

51. *See* Sloss, *The Domestication of IHR*, *supra* note 49 (characterizing such rights as "non-frivolous, non-redundant" rights).

the meaning of Article 12.4. I also discuss how Article 12.4 has been interpreted and applied by the Human Rights Committee. In Part II, I discuss the relevance of the Reservations, Understandings and Declarations (RUDs) the United States made when it ratified the ICCPR. In particular, I show that the United States did not make any reservations regarding Article 12.4. In Part III, I discuss the non-self-executing nature of the ICCPR and sketch several ways that Article 12.4 is nonetheless legally relevant. In Part IV, I make some brief additional observations, including suggesting that some other provisions of the ICCPR might protect certain aliens from deportation. The conclusion includes an acknowledgment that the domestic implementation of any of these ICCPR provisions might result in a political backlash in the form of harsh enforcement of current immigration laws and/or the passage of particularly ungenerous immigration laws.

I. THE INTERPRETATION OF ARTICLE 12.4 OF THE ICCPR

The United States ratified the International Covenant on Civil and Political Rights in June 1992, two months after the Senate gave its consent to ratification.[52] The Convention went into force for the United States three months later.[53]

Article 12, paragraph 4, of the International Covenant on Civil and Political Rights states, "No one shall be arbitrarily deprived of the right to enter his own country."[54] There are, at least for our purposes, two terms that are ambiguous and require interpretation. The first is "own country" (or "his own country"). When is a country one's "own country"? The second term is "arbitrarily." What does it mean for one to be "arbitrarily" deprived of the right to enter his own country? When is such a deprivation not "arbitrary"? To interpret these terms, we turn to the treaty interpretation provisions of the Vienna Convention on the Law of Treaties (VCLT).[55]

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52. ICCPR, Accession, Succession, Ratification Table, United States of America, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec [hereinafter U.N. Status of Treaties]; Resolution of Advice and Consent to Ratification as Reported by the Committee on Foreign Relations and Approved by the Senate, Treaty Document 95-20, *available at* https://www.congress.gov/treaty-document/95th-congress/20/resolution-text.

53. ICCPR, *supra* note 26, at art. 49.2; U.S. Dep't of State, 1992 Treaties and Agreements, ICCPR, https://www.state.gov/92-908/.

54. ICCPR, *supra* note 26, at art. 12.4. There are no exceptions to this rule except for the ICCPR's general derogation provision, which can only be triggered "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." *Compare* ICCPR, *supra* note 26, at art. 4.1. *with* G.A. Res. 217 (III), Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to leave any country, including his own, and to return to his country.").

55. VIENNA CONVENTION ON THE LAW OF TREATIES, 1155 U.N.T.S. 331 [hereinafter VCLT]. The United States has signed the VCLT but has not ratified it and thus is not bound by its terms. However, it is well understood and accepted that most of the substantive provisions of the VCLT are generally codifications of customary international law (CIL) and general principles of international law. As such, these rules are binding on the United States independently of the VCLT. The treaty interpretation rules contained in VCLT Articles 31 and 32 are considered codifications of CIL. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 306 [hereinafter RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW] (repeating the relevant portions of VCLT Articles 31 and 32 verbatim). *See also* Letter of Submittal from William P. Rogers, U.S. Sec'y of State to President Richard M. Nixon (Oct. 18, 1971),

The VCLT states that treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[56] This rule of interpretation, therefore, takes into account three considerations: the ordinary meaning of the words being interpreted, the context in which they are used, and the object and purpose of the treaty itself. The VCLT permits recourse to additional means of treaty interpretation if the application of the primary treaty interpretation rule yields a meaning that is "ambiguous or obscure" or "manifestly absurd or unreasonable."[57] Such supplemental means of interpretation include analysis of the preparatory works associated with the treaty's negation and adoption and, more generally, the circumstances of the text's adoption.[58]

A. *The Interpretation of One's "Own Country"*

The customary methods of treaty interpretation, including examination of the preparatory works, along with an examination of the jurisprudence of the Human Rights Committee, strongly suggest that a country is someone's "own country" if their ties to that country are strong enough. Consequently, a country can be an alien's own country, even when the alien is undocumented.

1. *Customary Law of Treaty Interpretation*

The meaning of "country" is plain enough and requires no elaboration. However, searching for and determining the ordinary meaning of a word as amorphous as the word "own," at least in the context of "one's own country," can easily devolve into an exercise in confirmation bias. Indeed, dictionary definitions are numerous, and the definitions are typically as vague as the word "own" itself. Nevertheless, that is where we must start.[59]

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reprinted in S. Exec. Doc. L, 1 (1971) (noting that the substantive provisions of the VCLT are "already generally recognized as the authoritative guide to current treaty law and practice"); U.S. Dep't of State, Vienna Convention on the Law of Treaties, https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm (last visited July 19, 2019) ("The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties."). The U.S. Supreme Court has used treaty interpretation methods that mirror those required by the VCLT. E.g., Sanchez-Llamas v. Oregon, 548 U.S. 331, 346 (2006); Air France v. Saks, 470 U.S. 392, 397 (1985). The Founders seem to have fully intended U.S. courts to interpret treaties according to customary international norms. *See* 4 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS 332 (Boston, Thomas B. Wait 1821). *See also*, RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, § 306 cmt. g ("Although the courts have the final authority to interpret a treaty for purposes of applying it as law in the United States . . . the Supreme Court has stated that it gives 'great weight' to the executive branch's interpretation of a treaty."). I have not been able to find an instance where the executive branch has interpreted ICCPR Article 12.4 regarding its applicability or non-applicability to aliens. *See generally* Evan J. Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431 (2004).

56. VCLT, *supra* note 55, at art. 31.1.

57. *Id.* at art. 32.

58. *Id.*

59. The Chinese, French, Russian, and Spanish versions of the ICCPR are as "equally authentic" as the English version. ICCPR, *supra* note 26, at art. 53.1. The Chinese version of article 12.4 is "人人进入其本国之权, 不得无理褫夺." The French, "Nul ne peut être arbitrairement privé du droit d'entrer dans son propre pays." The Russian, "Никт не мжет быт ивлн лишен ава на въед в св сбственну стану."

A relevant definition of the word "own" is "of, relating to, or belonging to oneself or itself (usually used after a possessive to emphasize the idea of ownership, interest, or relation conveyed by the possessive.)"[60] Of course, one cannot possess a country like one can possess a car or a house, but a person can be "of" a country, or can have a "relationship to" a country or an "interest" in a country. And there is nothing inherent in the word "own" that would limit its applicability to citizens of a country.

What about the ordinary meaning of the entire phrase "his own country"?[61] It seems possible that in addition to one's country of citizenship,[62] a country could also be one's "own" if a person has strong and intimate connections to that country, especially if they do not have such connections to another country. Factors to consider in order to determine if a country is one's own might include the length of one's residence, family connections, friends and other social ties, professional relationships (including credentials earned and recognized in the country), ability to speak the language(s) of the country, acculturation in the country, intention to remain in the country, and so on.

On the assumption that everyone has a country,[63] what would be the common understanding of "one's own country" regarding someone like a Dreamer, a young adult who has resided in the United States since early childhood and has not lived anywhere else since, who is culturally American, who is a native speaker of American English, whose friends and family are in the United States, and who identifies as American? If the person feels a sense of attachment and belonging to the United States and has little or no sense of attachment or belonging to any other country, including their country of origin or citizenship, it certainly seems, in the ordinary use of the phrase, that the United States is that person's "own country."

With regard to the context of the phrase "his own country," it is particularly notable that Article 12.4 does not use the word "citizen" or "national."

And the Spanish, "Nadie podrá ser arbitrariamente privado del derecho a entrar en su propio país." It is beyond the scope of this Article to independently interpret the non-English versions.

60. *Own*, DICTIONARY.COM, https://www.dictionary.com/browse/own. Merriam-Webster provides a similar definition: "belonging to oneself or itself." Merriam-Webster on-line dictionary, https://www.merriam-webster.com/dictionary/own.

61. It is curious that Article 12.4 does not refer to "one's country," but rather refers to "one's *own* country." Any attempt to discern relevance in this observation, however, would seem to be an exercise in futility at best and an exercise in confirmation bias or, worst, manipulation.

62. It seems wholly possible, however, that someone might not have any particularly intimate ties or special links to the country of one's citizenship such that that country would not constitute his "own country" within the meaning of Article 12.4. This Article is largely agnostic regarding any possibility of interpreting Article 12.4 in such a way that a person might not have the right to enter the country of his or her citizenship. However, if a person always has the right to enter the country of his or her citizenship, most non-citizen Americans, by virtue of their right to be in the United States, would have at least two "own countries."

63. It seems appropriate to avoid interpreting the ICCPR in a way that would render some people without a country. Although it is possible that one can have no country, the words of Article 12.4 seems to suggest that everyone has or should have (at least) one country that can be identified as his or her own. *See also* The Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, at preamble (announcing the States parties' desire to reduce statelessness); G.A. Res. 896, *Elimination or reduction of future statelessness* (Dec. 4, 1954).

It does not speak of "the country of which he is a citizen" or "the country of which he is a national." Additionally, the subject of Article 12.4 is "no one" – not "no citizen" or "no national." Indeed, Article 12.4 conspicuously avoids the terms "citizen" and "national." The relevance of these observations becomes more apparent when we see that that the ICCPR refers to "citizens" and "nationals" in other provisions, thus strongly suggesting that when the countries drafting the ICCPR meant to limit certain rights to citizens or to nationals, they did so. For example, the ICCPR grants the right to "take part in the conduct of public affairs, directly or through freely chosen representatives," only to citizens.[64] It grants the right "to vote and to be elected" for public office only to citizens.[65] And it grants "access ... to public service" only to citizens. Likewise, although the ICCPR does not limit any human right expressly to a country's "nationals," it limits the composition of the Human Right Committee to the "nationals" of States parties.[66] Thus, it appears that the right to enter a country is a right that non-citizens and non-nationals may be able to enjoy, provided, of course, that such country is that alien's own country.

It might be argued that ICCPR Article 13 somehow limits the scope of Article 12.4 to non-aliens. Article 13 states, "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law. . . ," and provides some other procedural safeguards.[67] Some might argue that since the ICCPR provides a process for expelling aliens, an alien cannot possibly have the right to remain in a host country.[68] This conclusion, however, is not at all dictated by Article 13. Article 13 simply demands that certain due process protections be applied before a country can expel an alien who is lawfully present in its territory, not that any and all aliens can be expelled provided such protections are afforded.[69] Pursuant to this interpretation of Article 13, aliens are entitled to these due process protections provided they are "lawfully" within the country *and* are entitled to remain in their host countries provided those host countries are or have become their own.[70] Indeed, the process of providing

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64. ICCPR, *supra* note 26, at art. 25(a).

65. *Id.* at art. 25(b).

66. *Id.* at art. 28(2). *See also*, *id.* at art. 29(2) (stating that persons nominated to the Human Rights Committee "shall be nationals of the nominating State"); *Id.* at art. 31(1) ("The Committee may not include more than one national of the same State.").

67. *Id.* at art. 13.

68. *See, e.g.*, HRC *Stewart*, *supra* note 27, ¶ 12.3.

69. *See* Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of Congo), Judgment, 2010 I.C.J. Rep. 639, ¶ 65 (Nov. 2010) ("[I]t is clear that while 'accordance with law' ... is a necessary condition for compliance with [art. 13], it is not the sufficient condition ...[T]he applicable domestic law must itself be compatible with the other requirements of the [ICCPR].") [hereinafter ICJ Diallo].

70. *But see*, HRC *Stewart*, *supra* note 27 (arguing that an alien either qualifies for art. 12.4 treatment or for Article 13 treatment, but never both). *But see id.* at Individual opinion by Eckart Klein (*concurring*) ("[A]rticle 13 applies in all cases where an alien is to be expelled. Article 13 deals with the procedure of expelling aliens, while Article 12, paragraph 4 ... may bar deportation for substantive reasons."); *Id.* at Individual opinion by Elizabeth Evatt and Ceclia Medina Quiroga, co-signed by Francisco José Aguilar Urbina (*dissenting*) ("[T]here is nothing in the language of Article 13 which suggests that it is intended to

due process protections should reveal facts that could enable an administrative or judicial body considering expulsion of an alien to conclude that the host country has become that alien's own country.[71] Such a determination would foreclose the possibility of expulsion.

The interpretation of "his own country" must also be done "in light of the object and purpose" of the ICCPR. Its object and purpose can be understood from its preamble which states that it is to enhance "freedom, justice and peace in the world" through the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."[72] These rights are understood to "derive from the inherent dignity of the human person."[73] More concretely, the object and purpose of the ICCPR is to restrict states from impinging on the freedoms of human individuals and, in some cases, to obligate states to provide certain services to people so that their freedoms and dignity can be better realized.[74] But this does not provide much direct interpretive guidance since states are certainly free to act in all sorts of ways to restrict the human individual. The ICCPR does not render states impotent. However, given that the focus of the ICCPR is the protection of people, typically in their capacity as human individuals, and the corresponding restrictions on state behavior it demands, it would seem reasonable to interpret ambiguous terms and phrases within the ICCPR in a way that favors the human individual and disfavors state restrictions on freedoms of the human individual.[75] As the HRC's Prafullachandra Bhagwati stated in his

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be the exclusive source of rights for aliens, or that an alien who is lawfully within the territory of a State may not also claim the protection of Article 12, paragraph 4, if he or she can establish that it is his/her own country."). The three HRC members who authored the two other dissenting individual opinions in *Stewart* concurred with the Evan and Medina Quioga dissenting opinion. In practice, however, the adoption of the interpretation of either the Views of the Committee, on one hand, or the Klein concurring opinion and the individual dissenting opinions, on the other, would protect an alien whose host country is his or her own country from being deported since that alien would qualify for Article 12.4 treatment. *See also infra* notes 124–149 and accompanying text (describing *Stewart's* misguided Article 12.4 interpretation).

71. More precisely, only aliens "lawfully in the territory of a State Party" are entitled to due process protections, whereas Article 12.4 applies to everyone, both lawfully present aliens and unlawfully present ones. It might seem curious at first blush that unlawfully present aliens are not explicitly entitled to due process protections but yet may be entitled to a more valuable right, the right to remain in a country, but the more valuable or fundamental a right, the more important it is to award to everyone. And, regardless, once identified as an alien whose host country has become his own country, such an alien becomes, by virtue of Article 12.4, lawfully within the territory of the country.

72. ICCPR, *supra* note 26, at pmbl.

73. *Id.*

74. *See generally* Burns H. Weston, *Human Rights*, 6 HUM. RTS. Q. 257 (1984); THE OXFORD HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW (Dinah Shelton, ed., 2013).

75. The *pro homine* principle encourages the interpretation of human rights treaties that increases the protection of the human person as opposed to interpretations that protect state sovereignty. Valerio de Oliveira Mazzouli & Dilton Riberio, *The* Pro Homine *Principle as an Enshrined Feature of International Human Rights Law*, 3 INDON. J. INT'L & COMP. L. 77 (2016). *See also* Asakura v. City of Seattle, 265 U.S. 332, 342 (1924) ("Treaties are to construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights which may be claimed under it and the other favorable to them, the latter is to be preferred."); Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 581 (1908) ("[T]reaties should be liberally interpreted with a view to protecting the citizens of the representative countries in rights thereby secured.").

dissent in *Stewart v. Canada*, the human rights in the ICCPR are "rights of the individual against the State; they are protections against the State and they must therefore be construed broadly and liberally."[76] If our question, whether or not a country can be a non-citizen's own country, is somewhat ambiguous even at this point in our analysis, a broad and liberal interpretation, one motivated for the protection of the individual, must yield the answer "Yes."[77]

2. *Preparatory Works*

As stated earlier, the Vienna Convention on the Law of Treaties permits recourse to additional means of treaty interpretation if the application of the primary method of treaty interpretation yields a meaning that is "ambiguous or obscure" or "manifestly absurd or unreasonable."[78] And, indeed, it is likely that some people may consider it manifestly absurd and/or unreasonable that any alien would be entitled to maintain permanent residence in his host country despite the host country's wishes. Certainly, others would see no absurdity or unreasonableness at all in such an interpretation. It may be fair to observe that the exact meaning of ICCPR Article 12.4 – that is to say, the exact contours of its scope in general, and, in particular, whether an alien can enjoy Article 12.4 rights – remains somewhat ambiguous even after the application of the primary method of treaty interpretation. The use of additional means of interpretation, therefore, seems wholly appropriate.[79]

The supplemental means of interpretation consist essentially of an examination of the preparatory works (*travaux préparatoires*)[80] associated with the treaty's negotiation and adoption and, more generally, the circumstances of

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76. HRC *Stewart, supra* note 27, at Individual opinion by Prafullachandra Bhagwati (*dissenting*).

77. *See also* Session v. Morales-Santana, 137 S.Ct. 1678, 1700 (2017) (citing Rogers v. Bellei, 401 U.S. 815, 834 (1971)) (in a case concerning citizenship requirements under the Immigration and Nationality Act, recognizing that Congress considers "the importance of *residence in this country* as the talisman of dedicated attachment") (emphasis added); Atle Grahl-Madsen, THE STATUS OF REFUGEES IN INTERNATIONAL LAW, Vol. II, 442 (1972) ("[I]t has never been envisioned that there should be any group of underprivileged refugees, subject to the whims of the authorities . . . [A]s a state would not dream of expelling its own nationals . . . there is hardly any reason for a state to press too hard for the expulsion of refugees[, and therefore,] after a period of *some three years*, the interests of the refugee in remaining where he is, must normally be held to override any other consideration.") (emphasis added).

78. VCLT, *supra* note 55.

79. The VCLT also allows the use of additional interpretation methods in order to "confirm the meaning" resulting from the application of the primary interpretation method. VCLT, *supra* note 55, at art. 32. Thus, even if we were to conclude that the meaning generated solely from the primary method of interpretation – here, at this point, that at least some aliens enjoy Article 12.4 rights – is neither manifestly absurd, manifestly obscure, ambiguous or obscure, it is a worthwhile exercise to examine the preparatory works associated with Article 12.4 and the circumstances of its negotiation.

80. It has been suggested that giving considerable weight to negotiation history in the context of a multilateral treaty is somewhat problematic since not all treaty parties participate in the treaty negotiations and because resort to legislative history is contrary to the legal traditions of many states. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 (1987), Reporters Note 1. *But see* International Law Commission, Draft Articles on the Law of Treaties with commentaries (1966) at 233, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf (observing that states considering accession to a treaty have access to its *travaux préparatoires*).

the text's adoption.[81] The preparatory works appear to confirm the interpretation above.

The ICCPR was negotiated under the auspices of the United Nations starting in the years immediately after World War II. It was heavily negotiated. Its text was concluded in December 1966.[82] The preparatory works associated with Article 12.4 do shed some light on its meaning. Most significantly, perhaps, is the fact that in November 1959, a few days prior to the adoption of the current form of Article 12.4, Canada, at a meeting of the General Assembly, formally proposed to amend the draft of the text of what would become Article 12.4 to state that no one could be deprived of the right to enter "the country of which he is a citizen."[83] Such language would clearly exclude

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81. VCLT, *supra* note 55, at art. 32.

82. U.N. Status of Treaties, *supra* note 52.

83. U.N. GAOR, 14th Sess., 954th mtg. at 231–32, U.N. DOC. A/C.3/SR.954, ¶ 25 (Nov. 12, 1959) [hereinafter ICCPR Preparatory Works SR.954]. The draft of Article 12 submitted for the General Assembly's consideration in November 1959 was as follows:

> 1. Subject to any general law of the State concerned which provides for such reasonable restrictions as may be necessary to protect national security, public safety, health or morals or the rights and freedoms of others, consistent with the other rights recognized in this Covenant:
>   a. Everyone legally within the territory of a State shall, within that territory, have the right to (i) liberty of movement and (ii) freedom to choose his residence;
>   b Everyone shall be free to leave any country, including his own.
> 2.
>   a. No one shall be subjected to arbitrary exile.
>   b. Subject to the preceding sub-paragraph, anyone shall be free to enter his own country.

Int'l Covenants on Human Rights, *Draft*, Rep. of the Third Comm., U.N. DOC. A/4299, ¶ 3 (Dec. 3, 1959). Lebanon was the state that first formally introduced the idea of including a right to return to a country. ECOSOC Comm. on Human Rights, 5th Sess., Draft Int'l Covenant on Human Rights, Lebanon: Amendments to art. 11 U.N. DOC. E/CN.4/215 (May 20, 1949) (proposing " . . . every one has the right . . . [t]o leave any country, including his own, and to return to his country"). The Commission on Human Rights would instead adopt a counter-proposal by France providing that " . . .every person is free to return to the country of which he is a national." ECOSOC, Comm. on Human Rights, 5th Sess., at 10 (June 8, 1949). A year later, Australia proposed using the phrase "his own country." U.N. DOC. E/CN.4/353/Add.10, *cited in* Commission on Human Rights, 6th Sess., UN Doc. E/1681 (May 29, 1950). Australia argued that the right to return to a country should extend to people who "had established a home in [a] country" or who "had long resided in a country and might be said to have settled there, although they might still retain the nationality of some other country." U.N., Econ. & Soc. Council, Commission on Human Rights, 6th Sess., at 12–13, U.N. DOC. E/CN.4/SR.151 (April 19, 1950). Australia's amendment was rejected by a vote of 7 to 6 with 1 abstention. *Id.* at 16. Australia persisted, however, and two years later, in 1952, Australia proposed replacing "the country of which he is a national" in the then-current version of what would become paragraph 2(b) above with "his own country." Draft Int'l Covenant on Human Rights and Measures of Implementation, Australia: Revised amendment to art. 8, U.N. DOC. E/CN.4/L.189/Rev.1, (May 29, 1952). Australia argued that the right should extend to people who have a "permanent residence" in a country, and the expressions "citizen" and "national" were inadequate to cover all such people. ECOSOC Commission on Human Rights, 8th Sess., Summary Record of the Three Hundred and Fifteenth Meeting U.N. DOC. E/CN.4/SR.315 (May 29, 1952). This time the Commission on Human Rights adopted Australia's proposal by a vote of 10 to 2 with 6 abstentions. ECOSOC Commission on Human Rights, Eighth Session, U.N. DOC. E/CN.4/SR.316 (May 29, 1952). This Eighth Session of ECOSOC's Comm. on Human Rights adopted the language reprinted above, the language that would be submitted to the General Assembly in 1959 for its consideration. *See also* Marc J. Bossuyt, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 260–65 (1987).

aliens from the benefit of the right to enter and to remain in his or her host country. This proposal, however, was met with relatively widespread opposition from other state members of the General Assembly.[84]

The Canadian proposal did not trigger lengthy debate. Some countries opposed limiting the right of entry because a state can manipulate who is and who is not a citizen. It was observed that any state that wanted to exile a citizen could simply withdraw citizenship and thus avoid the obligations of Article 12.4.[85] Curiously, no state proposed language that would both limit the scope of Article 12.4 to citizens while providing an exception to this limitation in the event of state manipulation.

After receiving only limited support, Canada withdrew its proposed amendment.[86] It is not apparent otherwise to what extent the negotiating states contemplated or intended Article 12.4 to encompass aliens (let alone undocumented aliens). Many states acknowledged that the language "his own country" was vague.[87] Of the sixty or so states that participated in these negotiations, four declared for the record, either after Canada withdrew its proposal or in contemplation of such a withdrawal, that they understood Article 12.4 to be limited to either citizens or nationals: Canada,[88] Czechoslovakia,[89] Japan,[90] and the United Kingdom.[91] One state, Saudi Arabia, declared an

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84. U.N. GAOR, 14th Sess. 957th. mtg. at 241, U.N. DOC. A/C.3/SR.957, ¶ 1 (Nov. 16, 1959) [hereinafter ICCPR Preparatory Works SR.957].

85. *See, e.g.*, Summary Statement of Italy, ICCPR Preparatory Works SR.954, *supra* note 83, ¶ 35. Or, framed another way, a state could choose who *not* to give citizenship to, thus denying those persons the rights associated with citizenship. States have an almost unrestricted sovereign right to decide for themselves who is and is not their citizens, despite the fact that such decisions may be discriminatory or ungenerous. *See generally* Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694 (2011) (acknowledging this fact but suggesting that it might be changing).

86. Summary Statement of Canada, ICCPR Preparatory Works SR.957, *supra* note 84, ¶ 1.

87. *E.g.*, Summary Statement of India, *Id.* ¶ 13; Summary Statement of the United Kingdom, *id.* ¶ 19.

88. Summary Statement of Canada, *id.* ¶ 1.

89. Summary Statement of Czechoslovakia, U.N. GAOR, 14th Sess., 958th mtg. at 245, U.N. DOC. A/C.3/SR.958, ¶ 5 (Nov. 17, 1959) [hereinafter ICCPR Preparatory Works SR.958] (declaring that Czechoslovakia understands Article 12.4 as articulating a right to enter a country "whose citizenship had been bestowed upon the person in question in accordance with that State's laws and regulations"). Czechoslovakia's statement seems distastefully self-serving, however, since it seems largely motivated by Czechoslovakia's desire not to be held liable to or for any of the 2.5 million ethnic Germans forcefully expelled by Czechoslovakia from Czechoslovak territory in the immediate aftermath of World War II in an Allied-sanctioned ethnic cleansing process that Czechoslovak President Edvard Beneš referred to as "the final solution of the German question." *Id.* ("Those [Sudeten] Germans were not Czechoslovak citizens and Czechoslovakia was not their own country."). Hundreds of thousands of ethnic Germans were killed or died from hunger, illness, and suicide during the expulsion campaigns in Czechoslovakia and elsewhere in Eastern Europe. R.M. Douglas, ORDERLY AND HUMANE: THE EXPULSION OF THE GERMANS AFTER THE SECOND WORLD WAR (2012).

90. Summary Statement of Japan, U.N. GAOR, 14th Sess., 956th mtg. at 239, U.N. DOC. A/C.3/SR.956, ¶ 30 (Nov. 13, 1959) [hereinafter ICCPR Preparatory Works SR.956] (declaring that Japan understands Article 12.4 as articulating a right to enter a country of which a person is a "national").

91. Summary Statement of the United Kingdom, ICCPR Preparatory Works SR.957, *supra* note 84, ¶ 19. Additionally, the delegate from Pakistan stated that in order to take advantage of Article 12.4, a person "should always be able to prove, in accordance with the law of the country concerned, that he was a national of the country." Summary Statement of Pakistan, ICCPR Preparatory Works SR.956, *supra* note 90, ¶ 1; Summary Statement of Pakistan, ICCPR Preparatory Works SR.954, *supra* note 83, ¶ 36. The delegate from Yugoslavia formally thanked Canada for withdrawing its amendment, which it considered "superfluous." Summary Statement of Yugoslavia, ICCPR Preparatory Works, SR.957, *supra* note 84, ¶ 7.

opposing sentiment, observing that "it would be dangerous to make the right of everyone to enter his own country dependent on the fact of being a national. To include that idea of being a national would open the way to arbitrary action and help to increase the number of refugees."[92] No country remarked upon the Saudi statement.[93] The United States delegate made no remarks about whether Article 12.4 was or should be limited to citizens or nationals.

Although an analysis of the preparatory works does not yield a perfectly conclusive understanding of whether or not the negotiating countries intended the scope of Article 12.4 to include aliens,[94] the following observations are warranted. First, an amendment to explicitly limit the scope of Article 12.4 to citizens was roundly rejected. Second, the States parties knew that "his own country" was vague and yet were comfortable enough to adopt this language. These two observations alone strongly suggest that the right contained in Article 12.4 is not limited to citizens (or nationals) of a state. And, third, absent a reservation, a state's declared understanding made during the process of negotiations of what a treaty provision should mean is not dispositive as to that provision's meaning, even with regard to the provision's application to that particular state.

3. *Jurisprudence of the Human Rights Committee*

The ICCPR established an eighteen-person body known as the Human Rights Committee (HRC).[95] The HRC is tasked with evaluating the implementation of the ICCPR by the States parties and with making general comments regarding the interpretation and application of the ICCPR.[96] In addition, many States parties have recognized the competency of the HRC to receive and consider complaints from other States parties who believe that the first State party is in violation of the ICCPR.[97] The United States has declared that it recognizes this competency.[98] Further, pursuant to the first Optional Protocol of the ICCPR, several States parties have recognized the competency of the HRC to receive and consider complaints from individuals who believe that one or more of their ICCPR rights are being, or are about to

92. Summary Statement of Saudi Arabia, ICCPR Preparatory Works SR.957, *supra* note 84, ¶ 25.

93. Afghanistan formally thanked Canada for withdrawing its amendment since that amendment could "give rise to restrictive interpretations." Summary Statement of Afghanistan, *id.* ¶ 15. It is not evident what Afghanistan was specifically contemplating. Italy also formally thanked Canada for withdrawing its amendment. Summary Statement of Italy, *id.* ¶ 28.

94. For a discussion of how the debate on the inclusion of the word "arbitrarily" and, more particularly, the meaning of the word "exile" shed some light on this issue, *see infra* Part I.B.2.

95. ICCPR, *supra* note 26, at art. 28.

96. *Id.* at art. 40.4.

97. *Id.* at art. 41. As of July 2019, forty-nine States parties, including the United States, have recognized this competency. U.N. Status of Treaties, ICCPR, *supra* note 52.

98. *Id.*

be, violated by that State party.[99] The United States has not recognized this competency.[100]

The States parties have not, however, designated the HRC as the authoritative interpretive body of the ICCPR. In fact, there is no institution, judicial or otherwise, designated with the authority to definitively interpret the ICCPR for all parties.[101] Nevertheless, the HRC has interpreted and applied the ICCPR's human rights provisions far more than any other institution. Its reports, comments, and adopted views are particularly considered and should inform our understanding of the meaning of the ICCPR.[102] Ideally, all parties to the ICCPR, as with any treaty, should understand and interpret the ICCPR uniformly. The HRC can be significantly influential in bringing about a harmonized understanding of the ICCPR.[103]

The HRC has been asked to interpret and apply the meaning of ICCPR Article 12.4 several times and has invariably stated that the phrase "his own country" is "broader than the concept 'country of his nationality.'"[104] Its published analysis is based largely on the ordinary meaning of the text of Article 12.4,[105] the fact that the provision is not expressly

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99. Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 19, 1966). As of July 2019, 116 states have recognized this competency. U.N. Status of Treaties, Optional Protocol to the ICCPR, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en.

100. *Id.*

101. For a discussion of what interpretive bodies have (and do not have) the authority to interpret treaties, *see* Young, *supra* note 49, at 95–107. *See also* Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE. L. J. 1762 (2009) (asserting that most supranational bodies lack of authority to definitely interpret treaties).

102. *See generally* ICJ Diallo, *supra* note 69, ¶ 66 (asserting that the ICJ "should ascribe great weight" to the interpretations adopted by the HRC, in large part in order "to achieve the necessary clarity and the essential consistency of international law"); Sandy Ghandhi, *Human Rights and the International Court of Justice: The* Ahmadou Sadio Diallo *Case*, 11 HUM. RIGHTS L. REV. 527, 535 (acknowledging that although the HRC's General Comments "are not in themselves strictly speaking binding . . ., they constitute an authoritative guidance and interpretation of [the ICCPR]").

103. Even Justice Antonin Scalia was a proponent of uniform interpretation of multilateral treaty provisions and respecting others' reasonable interpretations. *See* Justice Antonin Scalia, Speech to the American Enterprise Institute (Feb. 21, 2006), https://www.tmcnet.com/usubmit/2006/02/22/1397738.htm ("The object of a treaty is to have nations agree on a particular course of action. And if I'm interpreting a provision of the treaty that has already been interpreted by several other signatories, I am inclined to follow the interpretation taken by those other signatories so long as it's within the realm of reasonableness . . . where [their interpretations are] within the bounds of the ambiguity contained in the text, I think it's a good practice to look to what other signatories to the treaty have said. Otherwise, you're going to have a treaty that's interpreted different ways by different countries, and that's certainly not the object of the exercise."). *See* Int'l Law Comm'n, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, U.N. DOC. No. A/CN.4/L.682 (Apr. 13, 2006); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002) (discussing the fragmentation of international law, including the challenge of divergent interpretations of individual treaties by different adjudicatory bodies).

104. *See e.g.*, Human Rights Committee, General Comment 27 on Freedom of Movement, CCPR/C/21/Rev.1/Add.9, ¶ 20 (1999) (continuing that the scope of "his own country" is "not limited to nationality in the formal sense, that is, nationality acquired at birth or by conferral"); HRC *Budlakoti, supra* note 36, ¶ 9.2; HRC *Stewart, supra* note 27, ¶ 12.3; Human Rights Committee, Communic'n No. 1557/2007, *Nystrom v. Australia*, CCPR/C/102/D/1557/2007, ¶ 7.4 (2011) [hereinafter HRC *Nystrom*]; HRC *Warsame, supra* note 36, ¶ 8.4.

105. HRC General Comment 27, *supra* note 104, ¶ 20; HRC Stewart, *supra* note 27, ¶ 12.4.

limited to "nationals,"[106] and the fact that the negotiating states rejected a proposal to limit reentry rights to citizens.[107] The HRC has repeatedly elaborated upon its interpretation saying Article 12.4 "embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered a mere alien."[108] Additionally,

> there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words "his own country" invite consideration of such matters as long-standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.[109]

The HRC has interpreted and applied Article 12.4 in response to six individual communications from non-citizens facing deportation from their host states. The first such communication was in 1996. Each was a dispute about whether or not the State party in question had the right to deport a non-citizen, even though the non-citizen had lived in the country for a long time. The HRC's analysis and application of Article 12.4 have evolved since 1996. In the first three cases, *Stewart* (1996),[110] *Canepa* (1997),[111] and *Madafferi* (2004),[112] the HRC concluded that the country in question was not the immigrant's own country. However, their analysis was deeply flawed, and this flawed reasoning was recognized by the various dissenting members of the HRC. By the time the HRC considered its fourth and fifth Article 12.4 cases in 2011, the flawed analyses in *Stewart*, *Canepa* and *Madafferi* was abandoned in favor of more sound reasoning. In the last three cases, *Nystrom* (2011),[113] *Warsame* (2011),[114] and *Budlakoti* (2018),[115] the HRC deemed each of the countries in question to be the non-citizen's "own country." What follows is a discussion of each of these six cases, in chronological order, and a description of how the HRC interpreted and applied the phrase "his own country."

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106. HRC General Comment 27, *supra* note 104, ¶ 20; HRC Stewart, *supra* note 27, ¶ 12.4.
107. HRC *Stewart, supra* note 27, ¶ 12.5.
108. *See e.g., id.* ¶ 12.4; HRC *Nystrom, supra* note 104, ¶ 7.4; HRC *Warsame, supra* note 36, ¶ 8.4; HRC *Budlakoti, supra* note 36, ¶ 9.2.
109. HRC *Nystrom, supra* note 104, ¶ 7.4; HRC *Warsame, supra* note 36, ¶ 8.4; HRC *Budlakoti, supra* note 36, ¶ 9.2. *See also*, HRC General Comment 27, *supra* note 104, ¶ 20.
110. HRC *Stewart, supra* note 27.
111. Human Rights Committee, Communication No. 558/1993, *Canepa v. Canada*, CCPR/C/59/D/558/1993 (April 3, 1997) [hereinafter HRC *Canepa*].
112. Human Rights Committee, Communication No. 1011/2001, *Madafferi v. Australia*, CCPR/C/81/D/1011/2001 (July 26, 2004) [hereinafter HRC *Madafferi*].
113. HRC *Nystrom, supra* note 104.
114. HRC *Warsame, supra* note 36.
115. HRC *Budlakoti, supra* note 36.

The HRC's decision in *Stewart v. Canada* was issued in 1996.[116] It was the first case in which the HRC interpreted and applied Article 12.4 of the ICCPR in the context of a deportation. The HRC concluded that a 34-year-old British man who had lived in Canada since he was seven years old could not claim Canada as his own country.[117] Charles Stewart had lawfully entered Canada with his family and had been a lawful permanent resident until Canada revoked his visa.[118] He had married a Canadian woman and had two young children, both of whom had been born in Canada and were Canadian citizens.[119] Except for an older brother who had earlier been deported, all of his closest relatives lived in Canada.[120] However, he had divorced his wife after an eight-year marriage, and it appears that he had had little or no contact with his ex-wife and his children.[121] He lived with his brother and mother and was 30 years old at the time the Canadian authorities decided to deport him.[122] Stewart claimed that for most of his life he believed that he was a Canadian citizen until it was discovered during a criminal prosecution that he was not.[123]

Even though Mr. Stewart's ties with Canada were numerous and significant, the HRC concluded that Canada was not Stewart's "own country" for the simple – and perplexing – reason that Stewart had not attempted to acquire Canadian citizenship.[124] The HRC in *Stewart* adopted a very narrow interpretation of "his own country." Citizens of a country, of course, could call the country of their citizenship their own, but aliens almost never could.[125] The *Stewart* majority justified this narrow interpretation on the

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116. HRC *Stewart, supra* note 27.
117. *Id.* ¶ 12.9.
118. *Id.* ¶¶ 2.1, 2.2.
119. *Id.* ¶ 2.1.
120. *Id.*
121. *Id.* ¶ 4.2.
122. *Id.* ¶¶ 2.1, 2.4.
123. *Id.* ¶ 2.2.
124. *Id.* ¶¶ 12.2–12.9.
125. The *Stewart* majority listed some examples of non-citizens it would include within the scope of Article 12.4. These examples were the following: (i) "nationals of a country who have there be [sic] stripped of their nationality in violation of international law;" (ii) "individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them;" and (iii) "stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence." HRC *Stewart, supra* note 27, ¶ 12.4. Although it is abundantly clear that this list was merely illustrative and non-exhaustive – and, indeed, it is a list of situations to which the application of Article 12.4 seems wholly unobjectionable – a handful of committee members in *Nystrom* and *Warsame*, cases examined fifteen years later, would cling to the *Stewart* interpretation and strongly suggest that this *Stewart* list comprised the only categories of aliens who enjoy Article 12.4 rights. *E.g.*, HRC *Nystrom, supra* note 104, at Individual Opinion of Committee members, Sir Nigel Rodley, Ms. Helen Keller and Mr. Michael O'Flaherty (*dissenting*); HRC *Warsame, supra* note 36, at Individual Opinion of Committee member, Sir Nigel Rodley. Notably, the *Nystrom* and *Warsame* committee members who seem to suggest that this list is exhaustive were nationals of developed, immigrant-receiving states – Hellen Keller (Switzerland); Gerald Newman (USA); Michael O'Flaherty (Ireland); Yuji Owasawa (Japan); Nigel Rodley (UK); and Kirster Thelin (Sweden). For the committee members and their nationalities, *see* Rep. of the Human Rights Comm., at Vol/ 1, U.N. DOC. A/66/40 (2011). In the recently decided *Budlakoti* case (2018), however, not a single committee member who participated in the examination of Mr. Budlakoti's communication – including the participating committee members from immigrant-destination states (e.g.,

assertion that if an alien had lived in country for so many years, as Mr. Stewart had done with Canada, that country had a "right" to expect the alien to apply for citizenship and to consequently be burdened with all the obligations of citizenship.[126] Since Mr. Stewart did not apply and was not a Canadian citizen, Canada could not be deemed his own country. The fact that any citizenship application Mr. Stewart might have submitted would likely have been denied on account of his criminal record did not trouble the *Stewart* majority since such "disability was of his own making."[127]

Note the internal tension in the HRC's reasoning in *Stewart*. It is the length of time that an alien has been in a country that warrants that country's right to expect that alien to apply for (and, presumably, receive) citizenship, but that same length of time and the (presumed) eligibility to obtain citizenship is not in itself enough to qualify that same country to be that alien's own. For some reason, the alien must take the administrative steps necessary to apply for and receive citizenship in order to enjoy the right not to be exiled as provided in Article 12.4.[128] This appears to be contrary to the HRC's repeated assertions elsewhere that Article 12.4 can be enjoyed by both citizens and non-citizens. As stated above, the *Stewart* majority seems to justify this conclusion on the belief that long-term non-citizens are somehow escaping the obligations of citizenship. The *Stewart* majority, however, does not state what those obligations are. Indeed, it challenging to think of a list of obligations that are not only triggered only after one becomes a citizen[129] but are also so burdensome

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France, Israel, Italy, South Africa, and the United States) – maintained the limited interpretation of Article 12.4 asserted by the *Stewart* majority. HRC *Budlakoti, supra* note 36. For the committee members and their nationalities, see Rep. of the Human Rights Comm., 120th session, 121st session, 122nd session, at 13, U.N. DOC. A/73/40, (2018). *See also*, HRC General Comment 27, *supra* note 104, ¶ 20 (making it clear that other factors besides those listed in *Stewart* "may in certain circumstances result in the establishment of close and enduring connections between a person and a country").

126. HRC *Stewart, supra* note 27, ¶ 12.8 ("Countries like Canada, which enable immigrants to become nationals after a reasonable period of residence, have a right to expect that such immigrants will in due course acquire all the rights and assume all the obligations that nationality entails. Individuals who do not take advantage of this opportunity and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada. They have every right to do so, but must also bear the consequences . . . . Individuals in these situations must be distinguished from the categories of persons described in [Article 12.4].").

127. HRC *Stewart, supra* note 27, ¶ 12.6. The fact that Mr. Stewart thought for so long that he was a Canadian citizen and thus would have no need to apply for Canadian naturalization likewise did not concern the *Stewart* majority. *Id.* ¶ 2.2.

128. The HRC acknowledged that there would be an exception when the host country placed "unreasonable impediments on the acquiring of nationality." HRC *Stewart, supra* note 27, ¶ 12.5 *But see id.* at Individual opinion by Prafullachandra Bhagwati (*dissenting*) (objecting generally to the narrow interpretation of the majority arguing, in part, that "it is the sovereign right of a State to determine under what conditions it will grant nationality to a non-national. It is not for the Committee to pass judgment whether the conditions are reasonable or not and whether the conditions are such as to impose unreasonable impediments on the acquisition of nationality by a new immigrant nor is the Committee competent to enquire whether the action of the State in rejecting the application of a new immigrant for nationality is reasonable or not.").

129. It is a struggle to think of an extensive list of obligations that burden only citizens, as opposed to permanent resident aliens or any other category of aliens for that matter. Some counties might impose on citizens an obligation of national service (including registering for such service), the obligation to pay taxes on income earned while living and working abroad, and/or the obligation to make themselves available for jury duty. In the United States, all male immigrants, whether documented or undocumented,

that they serve as the *quid pro quo* for the right not to be banished from your own country.

Further undermining the *Stewart* majority's interpretation are the following observations. First, its interpretation does not seem to be supported by the text or context of Article 12.4 or the object and purpose of the ICCPR.[130] Second, its interpretation is not supported by the preparatory works of the ICCPR.[131] For these and other reasons, the majority's narrow interpretation in *Stewart* of "his own country" triggered vigorous dissenting individual opinions by six committee members.[132]

Nevertheless, five months later, in April 1997, in *Canepa v. Canada*, the HRC would follow the *Stewart* interpretation. In *Canepa*, the HRC concluded that an Italian citizen could not claim Canada as his own country even though he had arrived (lawfully) with his family at age five, was raised continuously in Canada and was still living in Canada at age twenty-three when he received his first deportation order.[133] The HRC, citing *Stewart*, said Canada was not Mr. Canepa's own country because Mr. Canepa did not try to acquire Canadian citizenship and was otherwise ineligible for Canadian citizenship because of his criminality.[134] Several HRC members issued individual opinions rejecting this analysis as flawed, some citing to their earlier dissents in *Stewart*.[135]

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between the ages of eighteen and twenty-five are required to register for the selective service, and all resident aliens are required to pay foreign earned income tax; these are not burdens imposed only on citizens. Selective Service System, Who Must Register, available at https://www.sss.gov/Registration-Info/Who-Registration; 50 U.S.C. § 3802; IRS Publication 519 (2018), US Tax Guide for Aliens, https://www.irs.gov/publications/p519.

130. *See* Part I.A.1.

131. *See* Part I.A.2.

132. *See, e.g.*, HRC *Stewart, supra* note 27, at Individual opinion by Elizabeth Evatt and Ceclia Medina Quiroga, co-signed by Francisco José Aguilar Urbina (*dissenting*) ("Individuals cannot be deprived of the right to enter 'their own country' because it is deemed unacceptable to deprive any person of close contact with his family, or his friends or, put in general terms, with the web of relationships that form his or her social environment . . . . For the rights set forth in Article 12, the existence of a formal link to the State is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it. This is what Article 12, paragraph 4, protects."); *id.* at Individual opinion by Prafullachandra Bhagwati (*dissenting*) (arguing that the consequence of not becoming a citizen cannot be the forfeiture of an ICCPR right, and observing, "it is because the author is not a Canadian national that the question has arisen[,] and it is begging the question to say that Canada could not be regarded as 'his own country' because he did not or could not acquire Canadian nationality."); *id.* at Individual opinion by Laurel B. Francis (concurring) (opining that Canada, at some point in time, had been Mr. Stewart's "own country"). Manfred Nowak, a scholar who served as the U.N. Special Rapporteur on Torture from 2004 to 2010, referred to the *Stewart* rationale as "controversial" and "unfortunate" and characterized the dissenting opinions as "more convincing." Manfred Nowak, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY, 285–86, (2d rev. ed. 2005).

133. HRC *Canepa, supra* note 111, ¶¶ 2.1–2.3.

134. *Id.* ¶ 11.3.

135. HRC *Canepa, supra* note 111, at Individual opinion by Elizabeth Evatt and Cecelia Medina Quiroga (*dissenting*); *Id.* at Individual opinion by Committee member Martin Scheinin; *Id.* at Individual opinion by Christine Chanet (dissenting) ("The deliberate use of [the] vaguer and hence broader term ["his own country"] indicates that the drafters of the Covenant did not wish to limit the scope of the text in the manner decided by the Committee.").

Seven years later, in 2004, in the Committee's next case implicating Article 12.4, *Madafferi v. Australia*,[136] the HRC applied the *Stewart* interpretation again. The HRC concluded that an Italian citizen who had arrived in Australia at age twenty-eight on a six-month tourist visa and then overstayed his visa could not claim Australia as his own country.[137] However, since arriving in Australia, he had married an Australian citizen, had four Australian citizen children, and started a retail fruit business that had employees, paid taxes, and was still operating at the time of his first deportation order.[138] He had brothers and a sister in Australia, all of whom had all renounced their Italian citizenship,[139] but he still had three sisters in Italy.[140] His bonds with his wife and children were strong.[141] He claimed that he had first assumed that marrying an Australian made him automatically entitled to remain in Australia.[142] Later, he tried to apply for a spouse visa but was denied because of criminal activity in Italy as a younger man.[143] Madafferi was about forty years old and had been in Australia for approximately eleven years at the time Australian authorities first decided to deport him.[144]

Although one might conclude that Australia was not Mr. Madafferi's own country since he both arrived in Australia as a full-grown adult and lived in Australia for only eleven years,[145] the HRC gave a different justification. Citing *Stewart*, and otherwise not elaborating, the HRC deemed Australia not to be Mr. Madafferi's own country since, although he sought Australian citizenship, he did not receive it.[146]

Under the *Stewart* doctrine, an alien must be qualified for citizenship and must have applied for citizenship in order to be able to claim a country as his or her own. Otherwise, personal ties to that country are irrelevant, as is any lack of ties to any other country. The *Stewart* doctrine can lead to clearly absurd results. Imagine an 80-year-old woman who was brought to the United States as an infant from Hungary. Imagine she lived all her life in the Midwest, graduated college (with honors) from Iowa State and lived and worked (and paid taxes) in various cities in the United States. Imagine she now lives in Des Moines with her husband. Her children and all of her other

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136. HRC *Madafferi*, *supra* note 112.
137. *Id.* ¶¶ 1.1, 2.1, 2.2, 19.6.
138. *Id.* ¶¶ 2.2, 6.2, 6.9.
139. *Id.* ¶ 6.9.
140. *Id.* at Individual Opinion of Committee Member, Ruth Wedgewood. His parents in Italy had passed away. His grandfather immigrated to Australia. His father had immigrated to Australia but moved back to Italy to retire living off his Australian pension. Mr. Madafferi's Italian passport had expired, and he had renounced his residency within the town of his birth and was no longer registered as residing in Italy. *Id.* ¶ 6.9.
141. *Id.* ¶ 6.11.
142. *Id.* ¶¶ 2.2, 6.4.
143. *Id.* ¶¶ 2.3–2.8.
144. *Id.* ¶¶ 1.1, 2.1, 2.7.
145. This Article is agnostic as to whether these facts alone merit a determination that Australia was Madafferi's "own country."
146. HRC *Madafferi*, *supra* note 112, ¶ 9.6.

close family members are in the United States and are American citizens. Many are in Des Moines, and she sees most of them every Sunday and often throughout the week. She flies the American flag in her yard year-round and dresses in red, white, and blue every Fourth of July. Two of her children and three of her grandchildren served in the U.S. military. She has never traveled abroad. She does not know Hungarian culture and does not speak any Hungarian. She has never been back to Hungary since leaving as an infant. She roots for the Cubs and Vikings and her beloved Iowa State Cyclones. She and her husband have already bought burial plots for themselves in a little cemetery outside Des Moines. For the sake of argument, we can even imagine that she came to the United States legally, has been a lawful permanent resident for her entire life, and has been a completely law-abiding person. However, if she had never applied for citizenship (and thus never "incurred the obligations of citizenship"), pursuant to the *Stewart* doctrine, the United States would not be her own country. Presumably, she would easily qualify for citizenship, but for whatever reason, she did not apply. Perhaps it never seemed important to her because she was American in every sense that mattered in her life. Perhaps she lacked the sophistication or the inclination to apply. Perhaps she did not know she was not a citizen. If these were the facts, it might very well be *arbitrary* for the United States to deport her, but the question at issue here is whether the United States is her "own country." Given that Article 12.4 is not expressly limited to citizens, it is extraordinarily difficult to see how the United States is not her own country for purposes of that provision.[147]

Except for a handful of dissenters who emphasized sticking to precedent, the HRC rejected the *Stewart* doctrine in each of its next three Article 12.4 cases.[148] In its place, the HRC has simply looked to see whether a non-citizen

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147. She also would not have met any of the three exceptions articulated in *Stewart*. *See* HRC *Stewart*, *supra* note 27. Compare with the real-life Marguerite Grimmond, who was born in the United States, moved to Scotland at age two with her Scottish mother, and lived in the United Kingdom for the next seventy-eight years without acquiring British citizenship and without receiving explicit permission from the British government to stay. Upon returning to the UK from her first overseas trip at age eighty, she was told by British immigration authorities that she would be deported and had to leave the United Kingdom within four weeks. *Pensioner Wins Deportation Fight*, BBC NEWS, Jun. 20, 2007, http://news.bbc.co.uk/2/hi/uk_news/scotland/tayside_and_central/6223440.stm. After eventually receiving authorization to stay, Mrs. Grimmond is reported to have said, "I was trying to put a brave face on things but I was a bit churned up inside at the thought that I might have to move to America because I don't know anyone there . . . I know the weather is better across there, but I am quite happy here in rainy old Scotland, and it is nice to know I am here legally at long last." *Id.*

148. The HRC did employ ICCPR Article 12.4 in a case in 2000 to help it decide whether New Zealand had withdrawn citizenship from five Western Samoans in violation of the ICCPR. Although the communication's Samoan authors did not explicitly make a claim that New Zealand had violated Article 12.4, the HRC concluded that at the time of the withdrawal New Zealand was not any of the authors' "own country" as understood in Article 12.4, and, hence, the withdrawal of their citizenship and subsequent deportation did not violate the ICCPR. At the time of the withdrawal, the authors were in their 50s and 60s, had never lived in New Zealand, and did not even know that they had had New Zealand citizenship. In fact, by the time of withdrawal, only one of the authors had even set foot in New Zealand, and that was for a short-term visit. Human Rights Committee, Communication No. 675/1995, *Toala, et al. v. New Zealand* (views adopted on Nov. 2, 2000), U.N. DOC. CCPR/C/63/D/675/1995. Curiously, the HRC received several individual communications that did not charge a State party with a violation of Article

has enough "special ties to or claims in relation to a given country."[149] If so, she can claim the country as her own. What follows is a brief summary of the relevant facts of each of those three cases.

In 2011, in *Nystrom v. Australia*, the HRC concluded that Australia was Stefan Lars Nystrom's "own country" even though Mr. Nystrom was not an Australian citizen.[150] He was a Swedish citizen and held an Australian permanent residency visa until the Australian immigration authorities decided to deport him.[151] Mr. Nystrom's parents immigrated to Australia from Sweden before he was born.[152] When she was pregnant with Mr. Nystrom, his mother visited Sweden and gave birth to him there, returning to Australia with Mr. Nystrom when he was twenty-five-days-old.[153] Mr. Nystrom had few ties to Sweden, never learned Swedish, and had not been in direct contact with any family members there. He spent his whole life (other than his first twenty-five days) in Australia.[154] He had close ties to his mother, sister, and nephews in Australia.[155] He was not married and had no children.[156] Neither he nor his parents ever applied for Australian citizenship.[157] He was 31 years old when Australia first issued a deportation order against him.[158] Because of his cultural, social, and familial ties to Australia and his lack of ties anywhere else, the HRC deemed Australia to be Mr. Nystrom's "own country" as that phrase is used in Article 12.4 of the ICCPR.[159] As such, Australia was prohibited under the terms of the ICCPR from arbitrarily expelling him.[160]

12.4 but whose underlying facts suggest that the authors, who were all aliens challenging the right of their host countries to deport them, would have more-than-plausible, if not winning, Article 12.4 claims. *See, e.g.*, Human Rights Committee, Communication No. 1792/2008, *Dauphin v. Canada* (views adopted on July 28, 2009), U.N. Doc CCPR/C/96/D/1792/2008 [hereinafter HRC *Dauphin*] (describing the author as a 22-year-old Haitian citizen without significant links to Haiti who lawfully came to Canada at age two with his family and otherwise lived all his life in Canada, most of the while assuming he was a Canadian citizen); Human Rights Committee, Communication No. 2387/2014, *A.B. v. Canada* (views adopted on July 15, 2016), U.N. Doc CCPR/C/117/D/2387/2014 [hereinafter HRC *A.B.*] (describing the author as a 37-year-old Somali citizen who fled Somalia at age eleven and arrived in Canada at age thirteen with his mother where he was recognized as refugee and given permanent residency).

149. *See, e.g.*, HRC *Stewart*, *supra* note 27, ¶ 12.4; HRC *Nystrom*, *supra* note 104, ¶ 7.4; HRC *Warsame*, *supra* note 36, ¶ 8.4; HRC *Budlakoti*, *supra* note 36, ¶ 9.2.

150. HRC *Nystrom*, *supra* note 104, ¶ 7.5.

151. *Id.* ¶¶ 1.1, 2.2, 2.4. In fact, pursuant to the terms of his visa, one called an "Absorbed Persons Visa," he was allowed to vote and run for local elective office. *Id.* ¶ 3.3.

152. *Id.* ¶ 2.1.

153. *Id.*

154. *Id.* ¶ 2.2.

155. *Id.* His parents divorced when he was five, and he had not been in much contact with his father.

156. *Id.* at Individual opinion of Committee members Mr. Gerald L. Neuman and Mr. Yuji Iwasawa (dissenting), ¶ 2.3.

157. *Id.* ¶¶ 2.6, 4.9. He claimed that he had always assumed he was an Australian citizen and that he only learned otherwise at age 29 when the state brought up the possibility of canceling his visa. *Id.* ¶ 2.6.

158. *Id.* ¶¶ 2.1, 2.4. Australia decided to deport him because of his extensive criminal activity. For a discussion of his crimes and Australia's decision to deport him, *see infra* notes 224–225 and accompanying text.

159. HRC *Nystrom*, *supra* note 104, ¶¶ 7.4–7.5.

160. For a discussion of the meaning of "arbitrarily" as used in ICCPR Article 12.4 and the HRC's decision regarding *Nystrom*, see infra Part I.B.

Also in 2011, in *Warsame v. Canada*, the HRC concluded that Canada was Jama Warsame's "own country" even though Mr. Warsame was not a Canadian citizen.[161] He was born in Saudi Arabia to Somali parents.[162] He did not have Saudi citizenship, and even though he had not been registered in Somalia and had never been to Somalia, the Canadian authorities assumed that Somalia would recognize him as a citizen as soon as he applied.[163] He came to Canada with his parents at age four and received permanent residency status at age eight as a dependent of his mother.[164] He was raised in Canada, had never visited Somalia, and had limited ability in the language of his parents.[165] He claimed to have close relationships with his mother and sister in Canada.[166] He was not married and had no children.[167] He apparently never applied for Canadian citizenship.[168] He was 22 years old when he received his first deportation order.[169] Because of his cultural, social, and familial ties to Canada and his lack of ties anywhere else, the HRC deemed Canada to be Warsame's "own country" as that phrase is used in Article 12.4 of the ICCPR.[170] As such, Canada was prohibited from arbitrarily expelling him.[171]

Most recently, the HRC concluded in 2018 in *Budlakoti v. Canada* that Canada was Deepan Budlakoti's "own country" even though Mr. Budlakoti was not a Canadian citizen.[172] He was born in Canada to Indian parents who had arrived in Canada four years earlier on diplomatic passports to work as domestic servants for Indian diplomats.[173] He lived in Canada his whole life and always considered himself Canadian and believed he was a Canadian citizen.[174] His parents eventually became Canadian citizens, but formally, Mr. Budlakoti had only permanent residency status under Canadian immigration law, a status he received by virtue of his parents' legal status in the county.[175] Mr. Budlakoti had a younger brother who was a Canadian citizen by birth.[176]

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161. HRC *Warsame*, *supra* note 36, ¶ 8.5.
162. *Id.* ¶¶ 2.1, 8.5.
163. *Id.* ¶¶ 4.2, 4.4.
164. *Id.* ¶ 2.2.
165. *Id.* ¶¶ 2.5, 4.4, 8.5.
166. *Id.* ¶¶ 3.6, 5.10.
167. *Id.* ¶ 4.9.
168. *Id.* ¶ 6.6.
169. *Id.* ¶¶ 2.1, 2.3. Canada decided to deport him because of his extensive criminal activity. For a discussion of his crimes and Canada's decision to deport him, *see infra* notes 226–228 and accompanying text.
170. HRC *Warsame*, *supra* note 36, ¶¶ 8.4–8.5.
171. For a discussion of the meaning of "arbitrarily" as used in ICCPR Article 12.4 and the HRC's decision regarding Warsame, see infra Part I.B.
172. HRC *Budlakoti*, *supra* note 36, ¶¶ 9.2–9.3.
173. *Id.* ¶¶ 2.1, 9.3. Canada normally recognizes everyone born in the territory of Canada as a Canadian citizen. However, Mr. Budlakoti fell into one of the exceptions. Pursuant to Canadian citizenship law, he was not a Canadian citizen because his parents were in Canada in a diplomatic status. *See id.* ¶ 4.14.
174. *Id.* ¶¶ 2.1, 9.3. In fact, the Canadian passport authorities issued him a Canadian passport, erroneously, when he was 13 years old based on his birth certificate. *See id.* ¶ 2.4. Based in part on his misunderstanding, he never applied for citizenship. *See id.* ¶¶ 2.4, 4.4.
175. *Id.* ¶¶ 2.4, 4.4.
176. *Id.* ¶ 2.3.

Mr. Budlakoti appears to have been largely estranged from his family having left home at age thirteen,[177] and at times he had been a ward of the state.[178] He had no spouse and no children.[179] For a brief period of time, he had a small construction business that he started at age nineteen.[180] He had visited India only once, for two weeks, when he was eleven.[181] He was not proficient in any Indian language and claimed not to be familiar with any Indian culture or with any Indian customs.[182] India did not recognize him as a citizen.[183] He was 22 years old when Canada issued its first deportation order against him.[184] Because of his cultural, social and familial ties to Canada, and his lack of ties anywhere else, the HRC deemed Canada to be Budlakoti's "own country" as that phrase is used in Article 12.4 of the ICCPR.[185] As such, Canada was prohibited from arbitrarily expelling him.[186]

It is worth emphasizing that in each of these three cases discussed above – *Budlakoti*, *Nystrom*, and *Warsame* – the person in question had been in his country continuously from very early childhood. Additionally, each achieved adulthood while in the country. Their close and intimate connections were with one country and one country only. These connections were the sole consideration for the determination of whether their host country was also their "own country." It is also worth emphasizing that none of them sought citizenship. And if they had, it appears likely that each would have been denied because of their extensive criminal records. The *Stewart* doctrine had been abandoned.

It is also worth noting that each person either entered his respective country lawfully or was born to parents who were lawfully in the country. However, the HRC's evaluation of the factors that led them to conclude that each was within his own country never included the fact that each had been lawfully admitted or born in the country to parents who had been lawfully admitted.[187] The HRC's analysis focused on the amount and strength of ties – familial, social, cultural, linguistic, and professional – each person had to the

177. *Id.* ¶ 4.16.
178. *Id.* ¶ 5.3.
179. *Id.* ¶ 4.4.
180. *Id.* ¶ 3.1.
181. *Id.* ¶¶ 3.1, 9.3.
182. *Id.*
183. *Id.* ¶¶ 5.3, 6.2.
184. *Id.* ¶¶ 1.1, 2.6. Canada decided to deport him because of his extensive criminal activity. For a discussion of Mr. Budlakoti's crimes and Canada's decision to deport him, *see infra* notes 222–223 and accompanying text.
185. HRC *Budlakoti, supra* note 36, ¶¶ 9.2–9.3.
186. For a discussion of the meaning of "arbitrarily" as used in ICCPR Article 12.4 and the HRC's decision regarding Budlakoti, see infra Part I.B.
187. Granted, in none of these cases did the HRC have to wrestle with a situation in which the child entered unlawfully or was born to parents who were present unlawfully, thus it is not surprising that the HRC did not expressly highlight this or wrestle with a hypothetical opposite situation. HRC *Budlakoti, supra* note 36, ¶¶ 2.1–2.4; HRC *Nystrom, supra* note 104, ¶ 2.1; HRC *Warsame, supra* note 36, ¶ 2.2. *But see infra* notes 241–275 and accompanying text (discussing this situation).

relevant country. The circumstances and legality of their initial entry were irrelevant.

B. *The Interpretation of "Arbitrarily"*

Recall that the full text of Article 12.4 is the following: "No one shall be arbitrarily deprived of the right to enter his own country."[188] Therefore, it is permitted to non-arbitrarily deprive someone of their right to enter his or her own country, thus raising the question of what "arbitrarily" means within the context of Article 12.4. Or, in other words, what constitutes an arbitrary deprivation of such right?

The customary method of treaty interpretation, along with an analysis of the ICCPR's preparatory works and the jurisprudence of the Human Rights Committee, clearly establish that the word "arbitrarily" in Article 12.4 has an extremely broad scope, that is to say, that opportunities for non-arbitrary banishment are exceedingly rare. Indeed, even a concern for national security, public order, or public health would not necessarily entitle a state to banish someone from his or her own country. This interpretation also strongly suggests that it would be arbitrary to banish a non-citizen American for the simple reason that that person had entered the country, or stayed in the country, without explicit permission from the federal government.

1. *Customary Law of Treaty Interpretation*

There are many dictionary definitions of the word "arbitrary." Two from the online Oxford English Dictionary that on first blush plausibly fit the context of Article 12.4 are as follows: "Derived from mere opinion or preference; not based on the nature of things; hence, capricious, uncertain, varying" and "Unrestrained in the exercise of will; of uncontrolled power or authority, absolute; hence, despotic, tyrannical."[189] Black's Law Dictionary defines "arbitrary" (with regard to judicial decisions) as "founded on prejudice or preference rather than on reason or fact."[190] All of these definitions would grant a state considerable latitude in choosing whether to deprive someone of his right to enter his country. They seem to grant a lot of latitude in choosing whether to banish someone. This cannot be the case, considering that banishment is such a harsh measure. Recall that Chief Justice Warren, in a case in which the court declared denationalization (depriving someone of their natural-born American citizenship) unconstitutional, decried banishment as "a fate universally decried by civilized people."[191] Certainly, the ICCPR would not permit a country to banish someone merely because it was done pursuant to some blackletter law or based on some articulable facts. Under

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188. ICCPR, *supra* note 26, at art. 12.4.

189. "*Arbitrary*," OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/10180?redirectedFrom=arbitrary#eid (last visited Jan. 14, 2020).

190. "*Arbitrary*," BLACK'S LAW DICTIONARY (8th ed. 2004).

191. *Trop*, *supra* note 30, at 102.

these definitions, for example, it would not be arbitrary to banish someone based on a law that provides that all citizen criminals can be banished.

The context of Article 12.4 within the ICCPR sheds some light on this matter. Article 12 contains the treaty's free movement provisions. Article 12.1 provides for freedom of movement within a country and the freedom to choose one's residence.[192] Article 12.2 provides for the freedom to leave countries.[193] Of all these movement rights, the right not to be deprived of the right to enter your own country – including the right not to be banished – seems like not only the most valuable but also the least likely to be restricted. In fact, states rarely, if ever, banish citizens in the twenty-first century. It is primitive, unjust, and unnecessary. Meanwhile, states restrict internal movements quite a bit (e.g., exclusions from private or government property, exclusions from dangerous places, incarceration) and often restrict people from leaving the country (e.g., incarceration, parole restrictions).

The remaining Article 12 provision, Article 12.3, provides that the freedom of internal movement, the freedom to choose one's residence, and the freedom to leave any country can be restricted under the following conditions: the restrictions must be provided by law, must be "consistent with other rights recognized in the [ICCPR]," and must be "necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others."[194] Those conditions are very strict. But the right to enter one's country is not subject to the exceptions provided in Article 12.3. A state can deprive someone of the right to enter his own country as long as such deprivation is not "arbitrary," thus suggesting that this freedom can either be permissibly restricted either more readily or less readily than a state can restrict the other movement freedoms. Since the right to enter one's country seems like a much more valuable right, and one that is rarely, if ever, imposed (on citizens, at least), the restriction on states that prohibits them from preventing people from entering their own countries must be more absolute than the restrictions on the deprivations of the other movement freedom.[195] In other words, the deprivation of the right to enter one's own country can be arbitrary *even if* the state were to deem such deprivation necessary to protect national security, public order, public health or morals or the rights and freedoms of others. Therefore, "arbitrarily" must have a particularly broad meaning, one that would capture nearly all state actions that

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192. ICCPR, *supra* note 26, at art. 12.1. ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.").

193. *Id.* at art. 12.2 ("Everyone shall be free to leave any country, including his own.").

194. *Id.* at art. 12.3.

195. *But see, e.g.*, U.N. Econ. & Soc. Council, Comm'n on Human Rights, 6th Sess., 151st mtg. *supra* note 83, at 10 (summarizing the American representative's characterization of banishment as a lesser deprivation because "a person deprived of the right to return to the country of which he was a national had, after all, the rest of the world in which to move and choose a residence, whereas the person deprived of the right of liberty of movement, of choosing his residence within the borders of a state and of leaving his own, was in a far more serious predicament").

deprive a person of the right to enter his own state.[196]

The object and purpose of the ICCPR also point in the direction of this interpretation since, as discussed above, we should interpret ambiguous terms and phrases within the ICCPR in a way that favors the human individual and disfavors state restrictions on freedoms.

Given all of this, "arbitrarily" in the context of Article 12.4 would seem to include not just notions of reasonableness but also notions of utter necessity and strict proportionality. Having "reasons" to expel is not enough. The achievement of a state goal that results from someone's banishment must be important enough to be proportionate to the significant harm that will be imposed on him. Furthermore, if the state's goals can be accomplished without banishment (e.g., by sanctioning criminal behavior through imprisonment), then the deprivation of the right to enter would be deemed arbitrary. It is hard to imagine a situation in which banishment would not be arbitrary.[197]

Given this interpretation, mere procedural due process is not enough to make any banishment non-arbitrary. Banishment done merely in accordance with municipal law may still be arbitrary. There is a difference between being lawful, on one hand, and being reasonable, necessary, proportionate, and justifiable – i.e., not arbitrary – on the other. States parties have an interest in enforcing their municipal laws, including their immigration laws, but they are prohibited from enforcing laws that violate the ICCPR.

2. *Preparatory Works*

An examination of the preparatory works leading to the adoption of the ICCPR yields quite a bit of information about what the negotiating parties

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196. The word "arbitrarily" is used in three other provisions of the ICCPR. For a discussion of these provisions and a discussion of the HRC's interpretation of each, see infra note 220. It might be assumed that the word means the same thing in each provision, and, if so, it would be necessary to do an interpretation of the word in each context and then triangulate into the "correct" definition. However, based on the discussions concerning Article 12.4 by the negotiating states, there is little reason to think that they considered all other uses of the word in the rest of the ICCPR nor that they consciously intended that the word have the exact same meaning in each case. In the General Assembly's four-day negotiation leading to the adoption of the language of Article 12, there were only three comments regarding the fact that the word "arbitrarily" is used elsewhere in the ICCPR, and those comments were generally unremarkable and generated no further discussion. Summary Statement of the Philippines, ICCPR Preparatory Works SR.958, *supra* note 89, at 246–48; Summary Statement of Panama, *id.* ¶ 25; Summary Statement of Ireland, *id.* ¶ 31. In fact, Ireland's comment suggests that the interpretation of "arbitrary" in Article 12.4 might be different from the interpretations of "arbitrary" in Articles 6 and 9 since "the meaning of the wording [in Articles 6 and 9]. . . was amplified and defined in several paragraphs." *Id.* The HRC, however, has interpreted the word "arbitrarily" in each of these provisions to mean that mere lawfulness (under municipal law) does not, in and of itself, constitute non-arbitrary action. *See infra* note 220.

197. Some have argued that allowing DACA recipients to remain in the United States imposes undue costs on society, e.g., administrative costs, medical costs, costs associated with increased job competition. *See Rugaber, supra* note 22. Some may argue that the desire to rid the country of such costs justifies DACA recipients' deportation. However, the societal costs imposed by the average undocumented alien would not seem to be considerably more than those imposed by the average citizen, and any argument that asserts that a desire to rid the country of these costs makes deportation of DACA recipients non-arbitrary (as that term is used in ICCPR Article 12.4) would necessarily lead to the absurd conclusion that the country could also banish any American citizen unless he or she proves themselves to be a net asset to the country.

meant by the word "arbitrarily" and confirms a broad interpretation of the word. The bulk of the discussion that led to their decision to use the word "arbitrarily" concerned the question of whether or not a state should ever be allowed to exile people.[198] Some states thought it was appropriate to allow "lawful exile,"[199] while others considered exile to be an antiquated practice and inappropriate regardless of the circumstance.[200] Many of the states that objected to permitting "lawful exile" also objected to any exceptions at all to the right to enter one's own country.[201] The decision to insert the word "arbitrarily" in the final text of what was to become Article 12.4 was largely a compromise between the states that wanted to provide for "lawful exile" and the states that did not want to permit exile or did not want to restrict the right of entry at all.[202] The negotiating states understood that a rule prohibiting "arbitrary" deprivation of a right was quite ambiguous with regard to what kind of deprivation would be permitted,[203] but it was clearly understood to overwhelmingly restrict States parties.[204]

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198. *See supra* note 83 (providing the proposed draft that the Commission on Human Rights presented to the General Assembly for its consideration prior to the General Assembly's discussion and adoption of Article 12). Note that draft provided that "No one shall be subjected to arbitrary exile" and that otherwise "anyone shall be free to enter his own country." *Id.*

199. *E.g.*, Summary Statement of Portugal, ICCPR Preparatory Works SR.957, *supra* note 84, ¶ 4; Summary Statement of India, *id.* ¶ 12; Summary Statement of Italy, *id.* ¶¶ 26, 31; Summary Statement of the United Kingdom, *id.* ¶ 34; Summary Statement of Ireland, *id.* ¶ 38; Summary Statement of Ireland, ICCPR Preparatory Works, SR.958, *supra* note 89, ¶ 4, Summary Statement of Italy, *id.* ¶ 21; Summary Statement of the United States, U.N. GAOR, 14th Sess., 959th mtg. at 251, U.N. DOC. A/C.3/SR.959, ¶ 32 (Nov. 17, 1959) [hereinafter ICCPR Preparatory Works SR.959].

200. *See e.g.*, Summary Statement of El Salvador, ICCPR Preparatory Works SR.956, *supra* note 90, ¶ 31; Summary Statement of Yugoslavia, ICCPR Preparatory Works SR.957, *supra* note 84, ¶ 7; Summary Statement of Greece, *id.* ¶ 8; Summary Statement of Argentina, ICCPR Preparatory Works SR.958, *supra* note 89, ¶ 2; Summary Statement of Philippines, *id.* ¶ 10. At least ten additional states spoke out against the inclusion of any language that permitted "lawful exile" or non-arbitrary deprivation of one's right to enter his or her own country. Those countries were Spain, El Salvador, Panama, Ethiopia, Cuba, Honduras, Afghanistan, Ecuador, Guatemala, and Colombia. *Id.* ¶¶ 16, 18, 25; ICCPR Preparatory Works SR.959, *supra* note 199, ¶¶ 28–30, 33–34, 36–37. *See also*, Summary Statement of the Philippines, ICCPR Preparatory Works SR.956, *supra* note 90, ¶ 15 ("Exile was no longer a commonly imposed punishment, perhaps because it laid upon other counties the duty of taking in the exile persons."). Two negotiating states, the United Kingdom and Ecuador, expressed the view that being "exiled" was something that could only happen to citizens. Summary Statement of the United Kingdom, ICCPR Preparatory Works SR.957, *supra* note 84, ¶ 34; *Id.* ¶ 35 ("A citizen was exiled; a foreigner was expelled"). This observation lends some support to the argument that the negotiating states were assuming that the Article 12.4 right to enter was a right held only by citizens.

201. *See supra* note 200.

202. *See* Summary Statement of Italy, ICCPR Preparatory Works SR.958, *supra* note 89, ¶ 21 (articulating the compromise of the use of the word "arbitrarily"); Summary Statement of Argentina, *id.* ¶ 29 (same). The vote to approve inserting the word "arbitrarily" was 29 to 20 with 20 abstentions. ICCPR Preparatory Works SR.959, *supra* note 199, ¶ 27. From the tone of the debate and state comments made after the vote, one can safely assume that many of the countries that abstained were against inserting "arbitrarily" or any exception at all into Article 12.4 but were abstaining out of respect for those countries that wanted some kind of exception. *See, e.g.*, Summary Statement of Cuba, *id.* ¶ 29 (voicing its objection to any restrictions on the right to enter one's own country but identifying itself as a state that abstained); Summary Statement of Honduras, *id.* ¶ 30 (same); Summary Statement of Colombia, *id.* ¶ 37 (same).

203. *See, e.g.*, Summary Statement of Yugoslavia, ICCPR Preparatory Works SR.957, *supra* note 84, ¶ 7; Summary Statement of Italy, ICCPR Preparatory Works SR.958, *supra* note 89, ¶ 21.

204. There was no attempt to define the word "arbitrarily," and no state articulated their own understanding of what "arbitrarily" meant in the context of Article 12.4. U.N. GAOR, 14th Sess., 954-59th mtgs., U.N. DOCS. A/C.3/SR.954 through A/C.3/SR.959 (1959). During the debates that led to the

Perhaps more enlightening is that during the decade-long drafting process, any time there was a proposal to allow states to restrict the right of entry for reasons of national security, public order, public health, and the like, these proposals were soon rejected by the other negotiating states. For example, during the drafting conferences of the Commission on Human Rights in 1949, both Lebanon and France proposed language that would permit States to deprive someone of the right to enter his country for "reasons of security or in the general interest."[205] Several negotiating states thought those reasons were too permissive. Some negotiating states argued that the right to enter one's own country was a "fundamental" human right.[206] Consequently, the negotiating states decided to isolate the articulation of the right to enter one's country from the articulation of the other movement rights and place only the most limited restrictions on the exercise of the right to enter.[207]

A similar discussion with similar results occurred during the General Assembly's final four meetings before it adopted the final language of Article 12. Most of those discussions focused on a series of three draft proposals made jointly by Argentina, Belgium, Iran, Italy, and the Philippines, the so-called "Five-Power" amendments.[208] The Original Five-Power Amendment provided that the right to enter one's country could be restricted on the basis of "law" that was "necessary to protect national security, (public safety,) health or morals or the rights and freedoms of others."[209] The First Revised Five Powers Amendment provided a similar set of exceptions.[210] These proposals were met with widespread objection because most states believed that the right to enter one's country should not be subject to such permissive exceptions.[211] Almost no states voiced

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decision to insert the word "arbitrarily" in Article 12.4, there was no explicit discussion about whether or not aliens could be arbitrarily, lawfully, or otherwise exiled or expelled. This omission is understandable considering ICCPR Article 13 addresses deportation processes applicable to aliens. *See* notes 62–66 and accompanying text.

205. U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Draft International Covenant on Human Rights, Lebanon: Amendment to Article 11*, UN Doc. E/CN.4/215/Rev.1 (May 26, 1949); U.N. Econ. & Soc. Council, Commission on Human Rights, *Draft International Covenant on Human Rights, France: Amendment to the Lebanese Proposal*, UN Doc. E/CN.4/275 (May 31, 1949).

206. U.N. Econ. & Soc. Council, Comm'n on Human Rights, *supra* note 83, at 5–9.

207. *Id.* at 5–9, 10–11.

208. U.N., G.A. Draft International Covenants on Human Rights: Argentina, Belgium, Iran, Italy, and the Philippines: amendments to Article 12 of the draft Covenant on Civil and Political Rights, U.N. DOC. A/C.3/L.812 (Nov. 12, 1959) [hereinafter Original Five-Power Amendment]; U.N., G.A., Draft International Covenants on Human Rights: Argentina, Belgium, Iran, Italy, and the Philippines: revised amendments to article 12 of the draft Covenant on Civil and Political Rights, U.N. DOC. A/C.3/L.812/Rev.1 (Nov. 13, 1959) [hereinafter First Revised Five-Power Amendment]; U.N., G.A., Draft International Covenants on Human Rights, Argentina, Belgium, Iran, Italy, and the Philippines: revised amendments to article 12 of the draft Covenant on Civil and Political Rights, U.N. DOC. A/C.3/L.812/Rev.2 (Nov. 16, 1959) [hereinafter Second Revised Five-Power Amendment].

209. Original Five Powers Amendment, *supra* note 208, at art. 12.3.

210. First Revised Five Powers Amendment, *supra* note 208.

211. *See, e.g.*, Summary Statement of the United Kingdom, ICCPR Preparatory Works SR.956, *supra* note 90, ¶ 23; Summary Statement of Ireland, ICCPR Preparatory Works, SR.957, *supra* note 84, ¶ 3, 38; Summary Statement of India, *id.* ¶ 12; Summary Statement of Lebanon, *id.* ¶ 14; Summary Statement of Afghanistan, *id.* ¶ 16; Summary Statement of the United Kingdom, *id.* ¶ 19; Summary Statement of Saudi Arabia, *id.* ¶ 24; Summary Statement of Morocco, *id.* ¶ 32.

support for those exceptions,[212] and those exceptions were roundly rejected.[213]

In other words, during the entire drafting process, the articulation of the right to enter one's own country in Article 12 was almost always deliberately isolated from the other Article 12 movement rights (e.g., the right of internal movement, the right to leave)[214] in order to make the entry right more absolute. As I concluded above, the negotiating states did not want the right to enter one's own country to be restricted merely because such restrictions might be "necessary to protect national security, the general interest, public order (*ordre public*), public health or morals, or the rights and freedoms of others." This strongly suggests that the deprivation of the right to enter one's own country could be arbitrary *even if* the state were to deem such deprivation "necessary" to protect such concerns.[215] Therefore, "arbitrarily" must have a particularly broad meaning, one that captures nearly all state actions that prevent a person from entering his own country. Certainly, concerns like national security may be considered when determining whether or not a deprivation is arbitrary, but such concerns are not necessarily sufficient to justify such deprivation. Admittedly, this still leaves us to wonder what would constitute a non-arbitrary deprivation of the right to enter one's own country, but certainly such situations are relatively rare. In fact, the HRC has repeatedly stated that there are "few, *if any*, circumstances in which deprivation of the right to enter one's own country could be reasonable."[216]

3. *The Jurisprudence of the Human Rights Committee*

As just stated, the HRC has repeatedly asserted that there are "few, *if any*, circumstances in which deprivation of the right to enter one's own country

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212. Even the members of the Five-Powers did not actively support these exceptions. Their proposals were attempts to capture and synthesize the apparent will of the General Assembly based on views most recently expressed by the negotiating states. As that will became more clear, the Five-Power amendments evolved in response.

213. This rejection prompted the Five-Powers to revise their proposal, and the next morning they suggested a new text of Article 12, one which not only removed the authority of states to limit the right of entry based on national security concerns, public order concerns, and the like, but which was adopted later that day as the final text of Article 12. Second Revised Five-Powers Amendment, *supra* note 208; ICCPR Preparatory Works SR.958, *supra* note 89, at Agenda Items, ¶ 2; ICCPR Preparatory Works SR.959, *supra* note 199, ¶ 27 (announcing the result of the vote adopting the Second Revised Five-Power Amendment). The Second Revised Five-Power Amendment also proposed the use of the word "arbitrarily" in Article 12.4, and much of the debate about Article 12.4 for the rest of the day concerned the use of that word or possible alternatives. For a discussion of those later debates, see *supra* notes 198–204 and accompanying text.

214. ICCPR, *supra* note 26, at art. 12.

215. The use of the word "necessary" in Article 12.3 and its omission in regards to Article 12.4's right of entry raise problematic interpretation issues. If an action is "necessary," how can it also be "arbitrary"? It is fairly clear that the negotiating states were worried that States parties might abuse the discretion that Article 12.3 grants. They feared States parties might apply Article 12.3 exceptions too liberally and might restrict the right of entry in ways that are not "necessary" at all. Otherwise, an analysis and interpretation of the word "necessary" in Article 12.3 is beyond the scope of this paper.

216. *E.g.*, Human Rights Committee, *General Comment 27*, *supra* note 104, ¶ 21; HRC *Budlakoti*, *supra* note 36, ¶ 9.4; HRC *Nystrom*, *supra* note 104, ¶ 7.6; HRC *Warsame*, *supra* note 36, ¶ 8.6. (emphasis added).

could be reasonable."[217] In the jurisprudence of the HRC, reasonableness is one of the hallmarks of non-arbitrariness. In its general comments and recent cases addressing Article 12.4, the HRC has reiterated that any denial to enter one's country must be "reasonable in the particular circumstances."[218] Of course, this raises the question of what is reasonable.

In *Budlakoti*, the HRC listed other hallmarks of arbitrariness. It stated, "The notion of 'arbitrariness' includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality."[219] Those are quite a few elements, but the following conclusions can be made about the HRC interpretation on arbitrariness as used in Article 12.4. First, a decision to deny someone the right to enter his own country is one that results after balancing all the interests, costs, and benefits. Second, in order to be non-arbitrary, denial of entry (or expulsion/banishment) must be necessary; that is, there must not be any lesser means to adequately accomplish the State party's fundamental goal, a means that would ensure the state's interests are adequately met without imposing upon someone the extraordinary harsh consequences of banishment from his or her own country.[220]

In the three most recent cases, *Budlakoti*, *Nystrom*, and *Warsame*, the HRC concluded that expulsion would amount to an arbitrary deprivation of the

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217. *See, e.g.*, HRC, General Comment No. 27, *supra* note 104, ¶ 21; HRC Budlakoti, *supra* note 36, ¶ 9.4; HRC Nystrom, *supra* note 104, ¶ 7.6; HRC Warsame, *supra* note 36, ¶8.6.

218. Human Rights Committee, *General Comment 27*, *supra* note 104, ¶ 12; HRC *Nystrom, supra* note 104, ¶ 7.6; HRC *Warsame, supra* note 36, ¶ 8.6.

219. HRC *Budlakoti*, *supra* note 36, ¶ 9.4.

220. The ICCPR prohibits States parties from engaging in three other "arbitrary" behaviors. Article 6.1 of the ICCPR provides, "No one shall be arbitrarily deprived of life." Article 9.1 provides, "No one shall be subjected to arbitrary arrest or detention." Article 17.1 provides, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation." In each case, the HRC has interpreted "arbitrary" in a similar fashion as it interprets "arbitrary" in the context of Article 12.4, that is to say, as a restriction more narrow than would be required by an obligation to merely act lawfully. *See, e.g.*, Human Rights Committee, *General Comment 36*, U.N. Doc CCPR/C/GC/36, ¶ 12 (Oct. 30, 2018) ("A deprivation of life may, nevertheless, be authorized by domestic law and still be arbitrary. The notion of "arbitrariness" is not to be fully equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality."); Human Rights Committee, *General Comment 8*, Article 9 (Right to Liberty and Security of Persons), adopted Jun. 30, 1982, at ¶4 (requiring that any detention must be both "based on grounds and procedures established by law" *and* "not be arbitrary"); Human Rights Committee, *General Comment 16*, Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, adopted April 8, 1988, ¶ 4 (interpreting "arbitrary interference" in the context of Article 17 in such a way that even interference done pursuant to municipal law may be arbitrary. In order to refrain from an arbitrary decision, a state's decision must be "in accordance with the provisions, aims and objectives" of the ICCPR and "reasonable in the particular circumstances"); HRC *A.B., supra* note 148, ¶ 8.7. ("[T]he notion of arbitrariness [in the context of Article 17] includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. The Committee also recalls that the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members would encounter as a consequence of such removal."); HRC *Budlakoti, supra* note 36, ¶ 9.4 (reiterating the same).

right to enter one's country even though each person facing deportation had engaged in extensive criminal activity.[221] Mr. Budlakoti, who was born in Canada and had lived there all his life, had, before he turned twenty-two, been convicted of breaking and entering, trafficking a firearm, possession of an illegal weapon, and trafficking in cocaine, among other charges.[222] He had been sentenced to an aggregate of four years in jail.[223] Mr. Nystrom, a Swedish citizen who had lived in Australia since he was an infant, had been convicted of a large number of crimes since he was ten years old, including aggravated rape (of a child of ten when Mr. Nystrom was sixteen), arson, armed robbery, burglary, theft, and drug possession.[224] He had been sentenced to an aggregate of more than twenty years in prison.[225] Mr. Warsame, a Somali man who lived in Canada since he was four years old, began his life of crime at age fifteen.[226] Among his convictions were an assault of a 60-year-old woman, multiple incidents of theft and robbery (occasionally with violence, including stabbing a store clerk with a screwdriver during one robbery), possession of crack cocaine, and assaulting a fellow inmate.[227] He had been sentenced to an aggregate of at least three years in jail.[228] In each case, the HRC concluded that expulsion would amount to an arbitrary deprivation of the right to enter one's own country, and thus each State party was prohibited under the terms of Article 12.4 from deporting these men.[229]

In reaching these conclusions, the HRC balanced the interests of the state against the harshness of banishment. In none of these cases did the HRC provide a particularly extensive explanation of why it concluded that banishment would be arbitrary. However, in each of these cases, before stating its conclusion, the HRC reiterated its assertion that "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be

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221. HRC *Budlakoti*, *supra* note 36, ¶ 9.4; HRC *Nystrom*, *supra* note 104, ¶ 7.6; HRC *Warsame*, *supra* note 36, ¶ 8.6.

222. HRC *Budlakoti*, *supra* note 36, ¶¶ 2.5, 4.5, 4.16.

223. *Id.* ¶¶ 2.1–2.7. *See also supra* notes 172–186 and accompanying text (concluding that Canada was Mr. Budlakoti's own country).

224. HRC *Nystrom*, *supra* note 92, ¶¶ 2.3, 2.5, 3.10, 4.6.

225. *Id.* ¶¶ 1.1–2.8. *See also supra* notes 150–160 and accompanying text (concluding that Australia was Mr. Nystrom's own country).

226. HRC *Warsame*, *supra* note 36, ¶¶ 2.2., 8.10.

227. *Id.* ¶¶ 2.3, 4.2, 4.3, 5.10, 8.9.

228. *Id.* ¶¶ 2.3, 2.4, 4.3, 5.4, 5.10. *See also supra* notes 161–171 (concluding that Canada was Mr. Warsame's own country).

229. Despite the HRC's conclusions, Australia deported Mr. Nystrom and Canada deported Mr. Warsame. Remedy Australia, Follow-up Report on Violations by Australia of ICERD, ICCPR & CAT in Individual Communications (1994-2014), issued April, 11, 2014, at 32–34 https://remedy.org.au/reports/2014_Follow-Up_Report_to_treaty_bodies.pdf (describing Nystrom's deportation). Canada deported Mr. Warsame and put him on a set of flights to Somalia, but after disembarking in transit in Amsterdam, he requested asylum from the Netherlands, claiming he would be subject to persecution in Somalia. In a Kafkaesque turn of events, however, the Dutch refused to grant him asylum since they deemed him to be Canadian (not Somali) and not subject to asylum-qualifying persecution in Canada. Andrew Stobo Sniderman, *Jame Warsame is a Citizen of Nowhere*, MCCLEAN'S, Dec. 10, 2013, https://www.macleans.ca/news/canada/jame-warsame-is-a-citizen-of-nowhere/.

reasonable."[230] Where it did explain its conclusions more particularly, the HRC emphasized whether or not the crimes were of a violent nature;[231] the extent to which the crimes were motivated or resulted from drug or alcohol addiction and, if so, the length of time of sobriety;[232] and the length of time between the crimes, on the one hand, and the deportation orders, on the other.[233] Nevertheless, it is evident that even the commission of violent crimes did not, in and of itself, justify banishment. Both Mr. Warsame and Mr. Nystrom had committed quite violent crimes, including rape, arson, and assault,[234] yet the HRC concluded that deporting them would be arbitrary.

Indeed, states do not exile their own citizens who behave in a similar fashion.[235] States investigate, arrest, prosecute, punish, and attempt to rehabilitate citizens.[236] As undesirable as one's crimes may be, his identity as a non-citizen does not make the state's criminal justice system any less able to address his criminal activity.[237] Further still, banishing such a person imposes

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230. HRC *Nystrom, supra* note 104, ¶ 7.6; HRC *Warsame, supra* note 36, ¶ 8.6; HRC *Budlakoti, supra* note 36, ¶ 9.4. *See also* HRC *Stewart, supra* note 27, at Individual opinion by Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco José Aguilar Urbina (*dissenting*), ¶ 8 (declaring – after concluding, unlike the majority in *Stewart*, that Canada was Mr. Stewart's own country and consequently reaching the issue of arbitrariness – "deportation could be considered arbitrary if the grounds relied on to deprive him of his right to enter and remain in the country were, in the circumstance, unreasonable, when weighed against the circumstances which make that country his 'own country'"); *Id.* at Individual opinion by Prafullachandra Bhagwati (*dissenting*) ("Where an action taken by the State party against a person is excessive or disproportionate to the harm sought to be prevented, it would be unreasonable and arbitrary.").

231. HRC *Budlakoti, supra* note 36, ¶¶ 9.4.

232. *Id.*; HRC *Nystrom, supra* note 104, ¶ 7.6. *See also* HRC *Stewart, supra* note 27, at Individual opinion by Prafullachandra Bhagwati (*dissenting*) (noting that Mr. Nystrom "has succeeded in controlling his alcohol abuse").

233. HRC, *Nystrom, supra* note 104, ¶ 7.6; HRC *Budlakoti, supra* note 36, ¶ 9.4.

234. *Supra* notes 222–229 and accompanying text.

235. The author knows of no state in the twenty-first century that practices extraterritorial *je jure* exile of its undesirable citizens. Regrettably, *de facto* exile is quite common, often taking the form of flight from persecution or civil unrest.

236. Allowing states to banish people based on a history of criminal convictions would give states great latitude to banish people, in particular since states can decide for themselves what to criminalize and could criminalize (and have criminalized) relatively innocuous things (e.g., drinking alcohol, premarital sex, adultery, blasphemy, apostasy, co-habitation, possession of small amounts of marijuana, underage drinking, public intoxication, homosexual sex, homosexuality, using birth control, having an abortion, administering an abortion, soliciting prostitution, hiring undocumented immigrants, chewing gum, drawing graffiti, swearing, driving while texting, publicly criticizing the government, jaywalking, overeating, drinking soda, spanking one's children, hate speech, posting fake news memes, homelessness, screaming at one's girlfriend, stalking, antitrust activities, tax evasion). Banishment premised on such criminal activity seems neither necessary to achieve any legitimate state goal nor a proportionate response to any such threat of continued criminal behavior. Furthermore, the worse the crime, the less justified it would be to impose such criminality on another country.

237. Several dissenting Committee members in the now-discredited *Stewart* opinion suggested that a state's criminal justice system should always be expected to address any criminal recidivism. *See* HRC *Stewart, supra* note 27, at Individual opinion by Elizabeth Evatt and Ceclia Medina Quiroga, co-signed by Francisco José Aguilar Urbina (*dissenting*), ¶ 9 ("It must be doubted whether the commission of criminal offences alone could justify the expulsion of a person from his own country . . . ."); *Id.* at Individual opinion by Prafullachandra Bhagwati (*dissenting*) (suggesting that the state's goal "to protect society from . . . criminal propensity" can be "achieved by taking lesser action than expulsion or deportation," and asserting that if Mr. Stewart were to commit any more offenses, "he can be adequately punished and imprisoned for it . . . This is the kind of action which would be taken against a national in order to protect the society, and *qua* national, it would be regarded as adequate. I do not see why it should not be regarded

that person's criminal propensity on another country and on another group of people. In fact, such a deportation not only shifts some threat of criminality from one group of people to another, it shifts that threat from a group of people who make up the society in which the non-citizen became a criminal to a group who make up a society that played little or no role in that development.[238]

Determining whether a decision to deport a non-citizen constitutes an arbitrary denial of the right to enter one's own country involves balancing interests and, ultimately, judgment. Still, such balancing and judgment should be undertaken with the assumption that depriving one's right to enter his own country is rarely non-arbitrary.[239]

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as adequate *qua* a person who is not a national . . ."). Mr. Stewart had been convicted forty-two times before being deported from Canada. Most of those convictions were for petty crimes, traffic offenses and drug-related crimes. He had one conviction for "assault with bodily harm." HRC *Stewart, supra* note 27, ¶ 2.2.

238. *See* Summary Statement of the Philippines, ICCPR Preparatory Works SR.956, *supra* note 90, ¶ 15 (suggesting that exile was no longer a commonly imposed punishment "because it laid upon other countries the duty of taking in the exiled persons"). However, in many cases, a banished person quickly deteriorates mentally and physically after he is deported to a country with which he has no substantial connection, whose language he cannot speak, whose culture is unfamiliar, and in which he has few if any familial or social resources. As a result, he may become less capable of engaging in successful criminality. But this possible "bright side" of banishment – the mental and physical deterioration of someone who has likely already served his criminal sentences – hardly seem just. In other cases, a lack of resources in a new country may make a banished person more desperate for self-preservation and more inclined to commit crimes. *See also*, *supra* notes 150–60, 224–225 and accompanying text (discussing *Nystrom v. Australia*); Remedy Australia, *supra* note 228, at 33 (reporting that despite the HRC's conclusion in *Nystrom v. Australia*, Australia deported Mr. Nystrom to Sweden where he resumed drinking and has "variously been homeless, in homeless shelters, in prison and in psychiatric care"); Chris Gelardi, *The Tragic Story of Jimmy Aldaoud, Deported from the Streets of Detroit to His Death in Iraq*, THE INTERCEPT, Aug. 8, 2019, https://theintercept.com/2019/08/08/ice-deportation-iraq-jimmy-aldaoud/ (describing the deportation of a non-citizen American to Iraq and his death two months later).

239. The issue of deference reoccurs in the context of Article 12.4 analysis. Regularly States parties claim to have done an appropriate balancing assessment and thus argue that the HRC should defer to their judgment. Indeed, States parties regularly assert that they have appropriately incorporated ICCPR obligations into their municipal law and properly interpreted and applied it, or, in the case of direct application (self-execution) of the ICCPR, properly interpreted and applied the ICCPR. *E.g.*, HRC *Dauphin, supra* note 148, ¶ 4.2; Human Rights Committee, *Mohammad Sahid v. New Zealand*, Communication No. 893/1999 (views adopted Mar. 28, 2003) [hereinafter HRC *Sahid*], ¶ 4.2 (presenting New Zealand's argument that the HRC should not reconsider the State party's application of its municipal law "unless there are indications of bad faith or abuse of power"). *See also* HRC *Madafferi*, *supra* note 112, at Individual Opinion by Mrs. Ruth Wedgwood (objecting to the substitution of the HRC's judgment for Australia's); Human Rights Committee, *Anna Maroudifou v. Sweden*, Communication No. 58/1979 (views adopted April 9, 1981), U.N. DOC. CCPR/C/OP/1 at 83 (1984), ¶¶ 9.3, 10.1 (concluding that the HRC will defer to state authorities to interpret and apply its own municipal laws and will only upturn such interpretation and/or application in cases where it is established that the State authorities operated in bad faith or abused their power, while simultaneously emphasizing that "domestic law must in themselves be compatible with the provisions of the [ICCPR]"). In response to individual communications received pursuant to the ICCPR's Optional Protocol, the HRC assesses both State party executive decisions and State party judicial decisions, both in the light of ICCPR obligations, but it usually declines assessing the degree to which ICCPR obligations are incorporated into municipal law. It is beyond the scope of this Article to comprehensively describe the level of deference the HRC gives to the decisions and judgments of the States parties' governments or to prescribe levels of deference the HRC ought to apply. However, with regard to fundamental human rights – highly protected liberties – a low level of deference and a high level of scrutiny seem appropriate. For a comparison to judicial review in the United States of legislation and executive decisions that infringe on protected liberties, see generally R. Randall Kelso, *Standards of Review under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The Base Plus Six Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225 (2002).

In each of the HRC Article 12.4 decisions discussed so far, the non-citizen subject to deportation entered the country lawfully and faced visa revocation only upon the state's decision to deport. Each non-citizen had been convicted of crimes, and, in some instances, multiple serious crimes. The state's interest in each of these matters was to eliminate from its territory the criminal threat posed by the non-citizen. The state's interest was the public interest. But what if the deportee was not a criminal? Can a person be deported from his or her own country simply because their entry or presence is unlawful? Can the deportation of a DACA recipient or a Dreamer be non-arbitrary simply because that person has been present in the United States unlawfully?

The HRC has not yet addressed the question of whether a state's decision to deport a non-citizen from his or her own country can be non-arbitrary if the non-citizen is not a convicted criminal or, more relevantly, in the context of DACA recipients and other Dreamers, if the only reason the state wants to deport the non-citizen is that the non-citizen unlawfully entered the territory of the state and/or resides in the territory of the state in violation of its municipal immigration laws.[240]

Although the HRC has not answered this question in the context of an Article 12.4 claim, it has addressed the issue in the context of ICCPR Article 17 and 23 claims. The HRC's analysis there strongly suggests how the HRC would analyze this question in the context of Article 12.4. In *Winata and Li v. Australia*,[241] the HRC considered a claim by two Indonesian citizens, a man and a woman, who were facing deportation from Australia.[242] Each had lawfully entered Australia on non-immigrant, short-term visas but had long overstayed their visas.[243] They met in Australia, entered into a "de facto relationship akin to marriage," and had a son they named Barry.[244] Barry appears to have been born while each of his parents was unlawfully residing in Australia.[245] When Barry turned ten, he became an Australian citizen.[246] A day later, his parents applied for asylum ("protection visas") based on a claim that they would face persecution in Indonesia because of their Chinese ethnicity and Christian religion.[247] Australia denied their applications and eventually issued removal orders.[248] Neither the mother nor the father (nor Barry)

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240. The term "criminality" as used in this Article does not include any "criminality" resulting only from unlawful entry into or unlawful presence in the territory of a state. *See also* U.N. GAOR, New York Declaration for Refugees and Migrants, adopted September 19, 2016, U.N. DOC. A/RES/71/1 (declaring a commitment to "review[] policies that criminalize cross-border movements").

241. Human Rights Committee, Communication No. 930/2000, *Winata and Li v. Canada* (views adopted on July 26, 2001), CCPR/C/72/D/930/2000 [hereinafter HRC *Winata*].

242. Indonesia may have formally withdrawn their citizenship, but Australia assumed that Indonesia would readily re-recognize their Indonesian citizenship if they moved back to Indonesia and applied for it. *Id.* ¶ 2.4.

243. HRC *Winata*, *supra* note 241, ¶ 2.1.

244. *Id.*

245. *Id.* ¶¶ 2.1–2.2.

246. *Id.* ¶ 2.2.

247. *Id.*

248. *Id.* ¶¶ 2.2–2.6, 4.11.

had engaged in any criminal conduct.[249] Australia justified its deportation orders on the fact that Barry's parents had been residing in Australia in violation of Australia's municipal immigration laws.[250]

Mr. Winata and Ms. Li appealed to the HRC and argued that if they were deported either Barry would have to live in Australia without his parents or Barry, an Australian citizen, would be forced to move to Indonesia, a country to which he had never been and whose language and culture he did not know.[251] They argued that their deportation would violate Article 17 of the ICCPR in either case.[252] Article 17 provides, in part, that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, [or] home . . . ."[253] Relevant to our analysis, the HRC interpreted "arbitrarily" as it is used in the context of Article 17 the same way it interprets "arbitrarily" as it is used in the context of Article 12.4.[254] After concluding that such deportations would constitute "interference" with the family, the HRC stated:

> [T]here is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances. In the present case, both [aliens] have been in Australia for over fourteen years. [Their] son has grown in Australia from his birth [thirteen] years ago, attending Australian schools as an ordinary child would and developing the social relationships inherent in that. In view of this duration of time, it is incumbent on the State party to demonstrate *additional factors* justifying the removal of both parents *that go beyond a simple enforcement of its immigration law* in order to avoid a characterization of arbitrariness. In the particular circumstances, therefore, the Committee considers that the removal by the State party of the [parents] would constitute, if implemented, arbitrary interference with the family. . ."[255]

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249. This assertion is based on the fact that there is no mention in the HRC communication of any (non-immigration related) criminal activity. *Id.*

250. HRC *Winata, supra* note 241, ¶ 4.11.

251. *Id.* ¶ 3.4.

252. *Id.* ¶¶ 1, 3.1–3.6.

253. Relatedly, Mr. Winata and Ms. Li also argued that their deportation would violate (i) Article 23.1 of the ICCPR, which reads, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State;" and (ii) Article 24.1 of the ICCPR, which reads, "Every child shall have . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." ICCPR, *supra* note 26, at arts. 23.1, 24.1.

254. *See supra* note 220 and accompanying text.

255. HRC, *Winata, supra* note 241, ¶ 7.3. Four HRC members issued a joint dissenting opinion protesting this interpretation. *Id.* at Individual Opinion by Committee Members Prafullachandra Natwarlal Bhagwati, Tawfik Khalil, David Kretzmer and Max Yalden (dissenting), ¶¶ 4, 5 ((i) asserting, after rejecting that there was any "family interference" at all under the terms of Article 17.1, that a mere desire to enforce state immigration laws is alone an appropriate, non-arbitrary justification for interfering with a family at least in the circumstances where family unity can be maintained by having the child move to Indonesia with his Indonesian parents; and (ii) noting that the implication of the majority's holding is that undocumented immigrants can create a right to stay in their host countries by having and raising children there). Australia rejected the HRC's views but did not deport Mr. Winata and Ms. Li. Remedy Australia, *supra* note 229, at 44.

If the HRC were to apply its interpretation of "arbitrarily" under Article 17 to Article 12.4, a State party would be prohibited from deporting someone from his or her own country for the mere reason that that person's entry into or presence in the territory of that country violated the state's municipal immigration laws. DACA recipients and Dreamers, based on the HRC's interpretation and to the extent they could claim the United States as their own country, would be protected from deportation.[256]

Three years later, the HRC had the opportunity to apply the *Winata* rule in a case involving a Fijian citizen facing deportation from New Zealand. *Sahid v. New Zealand* concerned a 57-year-old Fijian man, Mohammad Sahid, who had been living in New Zealand in violation of its municipal immigration law for fifteen years.[257] He had arrived lawfully on a temporary visa that had long since expired.[258] He had no criminal record and appeared to be a law-abiding, family man.[259] His daughter, a lawful resident, and her four-year-old son, a citizen, also lived in New Zealand.[260] The three appeared to be very close.[261] Mr. Sahid claimed that his daughter suffered from physical and emotional disabilities and that he was the primary caregiver for the entire family.[262] The only justification New Zealand gave for deporting Mr. Sahid was to enforce its immigration law.[263] Like Mr. Winata and Ms. Li above, Mr. Sahid argued, in part, that his deportation would violate New Zealand's ICCPR obligation to protect families.[264]

Curiously, however, Mr. Sahid did not make an Article 17 claim.[265] Instead, he alleged that New Zealand was violating Article 23.1, which states, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[266] Nevertheless, New Zealand defended itself against a hypothetical Article 17 claim,[267] and the HRC, without referring to Article 17, cited to *Winata* in deciding that New Zealand did not violate its obligations under Article 23 (or any other ICCPR obligation):

> [I]n extraordinary circumstances, a State party must demonstrate factors justifying the removal of persons within its jurisdiction that go

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256. *See also supra* note 220 (describing how the HRC has interpreted the word "arbitrarily" in other provisions of the ICCPR).

257. HRC *Sahid, supra* note 239, ¶¶ 1, 2.1.

258. *Id.* ¶ 2.1. Mr. Sahid never hid from New Zealand's immigration authorities. After his New Zealand visa expired, he repeatedly applied for further visas, was rejected each time, and appealed each decision, always without success. This process of applying and appealing lasted many years until he finally ran out of domestic options and was deported. *Id.* ¶¶ 2.1–2.3.

259. *Id.* ¶¶ 3.1–3.3, 5.2–5.3. The assertion that he had no criminal record is based on the fact that there is no mention in the HRC communication of any (non-immigration related) criminal activity.

260. *Id.* ¶¶ 1, 2.1, 4.25.

261. *Id.* ¶¶ 3.1–3.3, 5.2–5.3.

262. *Id.* ¶¶ 3.2–3.3.

263. *Id.* ¶¶ 4.17, 4.22, 6.3, 6.6.

264. *Id.* ¶¶ 1, 3.1.

265. *Id.* ¶¶ 1, 3.1, 4.13.

266. Typically in complaints about family rights, communication authors allege violations of both Article 17 and Article 23.1, and the HRC analyzes them together.

267. HRC *Sahid, supra* note 239, ¶¶ 4.13–4.22.

> beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness. In *Winata*, the extraordinary circumstance was the State party's intention to remove the parents of a minor, born in the State party, who had become a naturalized citizen after the required [ten] years residence in that country. In the present case, [Mr. Sahid's] removal has left his grandson with his mother and her husband in New Zealand. As a result, in the absence of exceptional factors, such as those noted in *Winata*, the Committee finds that the State party's removal of [Mr. Sahid] was not contrary to his right under article 23, paragraph 1, of the Covenant.[268]

The significance of this statement for the interpretation of Article 17 is debatable. The HRC was not asked to adjudge a claim based on Article 17. Consequently, the HRC did not make any formal conclusions as to whether there was "interference with the family" or, if so, whether any such interference was "arbitrary." Nor is it clear what the HRC meant by the phrase "extraordinary circumstances." As stated in *Sahid*, it is only "in extraordinary circumstances" that a State party must "demonstrate factors justifying the removal of persons within its jurisdiction that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness."[269] One wonders what is "extraordinary" about a family unit that contains an immigrant mother, an immigrant father, and a 13-year-old child citizen born and raised in his parents' host country as in *Winata*. Perhaps "extraordinary" was a poor choice of words. Perhaps it is all a matter of perspective and framing. It is clear, however, that the HRC was not particularly inclined to maintain the cohesion of a family unit that included Mr. Sahid. His continued presence close to the other members of that family was not particularly important to the HRC. His daughter was a married, full-grown adult, and his young grandson had parents with whom he lived.[270] The need to include Mr. Sahid in that family did not outweigh New Zealand's interest in enforcing its immigration laws – at least under the terms of ICCPR Article 23, an article that only requires the state to provide some undefined level of "protection" for families.

Neither Mr. Winata, Ms. Li, nor Mr. Sahid entered their host countries in violation of the domestic immigration laws. Mr. Winata and Ms. Li overstayed their visas and resided in Australia unlawfully for many years. Mr.

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268. *Id.* ¶ 8.2.

269. *Id.* ¶ 8.2. The use of the phrase "extraordinary circumstances" may have been adopted from the *Winata* dissent's reference to "exceptional cases" three years earlier. HRC *Winata, supra* note 241, at Individual Opinion by Committee Members Prafullachandra Natwarlal Bhagwati, Tawfik Khalil, David Kretzmer and Max Yalden (dissenting), ¶ 4 ("There may indeed be exceptional cases in which the interference with the family is so strong that requiring a family member who is unlawfully in its territory to leave would be disproportionate to the interest of the State party in maintaining respect for its immigration laws. In such cases it may be possible to characterize a decision requiring the family member to leave as arbitrary.").

270. HRC, *Winata, supra* note 241, ¶ 7.3 (emphasis added).

Sahid overstayed his New Zealand visa and then remained in the country for a decade while under a deportation order. What if, instead, someone both entered and resided in violation of the state's immigration laws? The HRC has not yet considered such a fact pattern. However, it has stated repeatedly that mere compliance with municipal law does not, in itself, make a state's decision to prohibit a person from entering his own country (or a decision to expel someone from his own country) reasonable or non-arbitrary.[271] The municipal law itself must comply with the obligations of Article 12.4. Combined with the *Winata* assertion that "it is incumbent on the State party to demonstrate *additional factors . . . that go beyond a simple enforcement of its immigration law* in order to avoid a characterization of arbitrariness,"[272] HRC jurisprudence seems to dictate that even an immigrant who entered a country unlawfully and/or resides unlawfully cannot legally be removed from his host country if that country has become his own country unless the state can justify the removal beyond a mere desire to enforce its immigration laws. And, even then, the justification would have to be significant enough to be deemed non-arbitrary. Recall that in *Budlakoti*, *Nystrom*, and *Warsame*, the HRC deemed it arbitrary to deport non-citizens with long histories of criminality, including violent criminality. Consequently, one wonders what could justify expelling a DACA recipient or a Dreamer from the United States.[273] One wonders what could justify removing anyone from his or her own country. As the HRC has insisted repeatedly, "There are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."[274]

But any reasoning that claims that this amounts to a non-arbitrary reason is circular. It is begging the question to argue that the justification for banishing someone from his or her country is that they have not been given permission to remain in their country.[275] Denial of permission itself hardly qualifies as a

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271. *E.g.*, Human Rights Committee, *General Comment 27*, *supra* note 104, ¶ 21 (asserting that the prohibition of arbitrary denial "guarantees that *even interference provided for by law* should be in accordance with the provision, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances") (my emphasis); HRC *Budlakoti, supra* note 36, ¶ 9.4 (reiterating the same); HRC *Nystrom, supra* note 104, ¶ 7.6 (reiterating the same); HRC *Warsame, supra* note 36, ¶ 8.6. (reiterating the same); HRC *Stewart*, *supra* note 27, at Individual opinion by Prafullachandra Bhagwati (*dissenting*) ("[T]he concept of arbitrariness must not be confined to procedural arbitrariness but must include substantive arbitrariness as well and it must not be equated with 'against the law' but must be interpreted broadly to include such elements as inappropriateness or excessiveness or disproportionateness.").

272. HRC, *Winata, supra* note 241, ¶ 7.3.

273. Recall that in order to qualify for DACA status, one must not have been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses and must not otherwise pose a threat to national security or public safety. And pursuant to the original bill for the DREAM Act, in order to have qualified as a Dreamer, one would have had to be "of good moral character." DREAM Act, *supra* note 9, § 3(a)(1)(E).

274. *Supra* note 216.

275. At this point, some readers may protest that the banishment (deportation) of some non-citizen Americans is justified by the fact that these people entered the country and/or remained in the country unlawfully, but this conclusion begs the question because the characteristic of an alien's entry or continued stay that leads one to conclude that it is "unlawful" is that it was not expressly permitted by the federal government.

reason for denial of permission. The real question is whether withholding (or revoking) permission is permissible under the ICCPR. Only explanations that make banishment non-arbitrary justify the banishment. In other words, banishment that is motivated solely by a desire to enforce the law, without more, is unjustified and unreasonable. It is, in a word, arbitrary. One might argue that banishment under these circumstances generally fosters respect for law and governance by the rule of law, but the ICCPR is also law, and respect for that law requires that no one be banished without extremely good reason. And as the HRC has emphasized above, it is hard to imagine what justification could exist for banishing anyone from his or her own county.

As Part I demonstrates, there are several strong arguments that Article 12.4's prohibition against arbitrarily depriving someone of the right to enter his own country also provides rights to certain non-citizens not to be deported. The rest of this Article will proceed on the assumption that this is so.

II. U.S. RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS

The United States ratified the ICCPR in 1992.[276] In its instrument of ratification, the United States made a set of statements commonly referred to as "Reservations, Understandings and Declarations," or RUDs. One of the RUDs, the declaration of non-self execution, affects the domestic enforcement of Article 12.4.

A. *Reservations*

The U.S. did not make any explicit reservations concerning Article 12.4. This is significant because a reservation to Article 12.4 would have limited the extent of the United States' obligations under that provision.[277] Without having made a reservation, the United States is bound under international law to the full extent of Article 12.4.[278]

B. *An Understanding*

One statement made under the heading "Understandings" might, at first blush, seem to limit the US's Article 12.4 obligations towards non-citizen Americans. The relevant parts of that statement read as follows: "The United States understands distinctions based upon. . . national or social origin . . . , birth or any other status – as those terms are used in article 2, paragraph 1 and

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276. U.N. Status of Treaties, *supra* note 52.

277. *See* VCLT, *supra* note 55, at art. 2.1(d) (defining "reservation" as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."); *Id.* at art. 21.1 (explaining that reservations "modif[y] for the reserving State . . . the provisions of the treaty to which the reservation relates to the extent of the reservation").

278. RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, *supra* note 55, § 307, cmt. d.

article 26 – to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. . ."[279]

Since the United States does not deport citizens but permits the deportation of non-citizens, the U.S. makes distinctions between citizens and non-citizens. This is a distinction based on a "status." The question then becomes whether the U.S. understanding operates as a reservation that effectively permits the United States to deport even non-citizens Americans as long as the government's deportations are (merely) "rationally related" to a (mere) "legitimate" governmental objective. The answer is no. Even though the enforcement of its immigration laws is a legitimate governmental objective,[280] and even though deporting non-citizens is rationally related to that objective, this understanding does not operate as a reservation permitting the United States to freely (arbitrarily) deport non-citizen Americans.

The United States made this understanding in light of the fact that the general anti-discrimination provisions of the ICCPR (Articles 2.1 and 26) are worded in an absolute fashion;[281] on their face, they prohibit *all* distinctions that can be made on the basis of any kind of "status"— *without any exceptions.*[282] As a practical matter, this clearly is too broad.[283] Even the HRC has observed that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[284] This observation comports with U.S. practice regarding constitutional prohibitions against discrimination. As Professor Stewart has stated in light of the ICCPR anti-discrimination provisions, "As in most if not all legal systems. . . U.S. law does permit certain lawful distinctions to be made among

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279. Article 2, Paragraph 1 of the ICCPR states, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 26 states, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR, *supra* note 26, at arts. 2.1, 26.

280. But as argued above, enforcement of municipal immigration law might nonetheless violate the ICCPR. *Supra* Part I.B.

281. For the text of these provisions, see *supra* note 279.

282. ICCPR Article 4 permits States parties, "[i]n time of public emergency which threatens the life of the nation" to engage in limited discrimination under strictly prescribed procedures except discrimination based "solely on the ground of race, colour, sex, language, religion or social origin." ICCPR, *supra* note 26, at art. 4.

283. For example, prohibiting children from buying cigarettes would not be deemed a violation of the ICCPR's prohibition on status discrimination. Likewise, a public health campaign encouraging men to get tested for prostate cancer would not be deemed a violation of the ICCPR's prohibition on sex discrimination. *See* David P. Stewart, *United States Ratification of the International Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 42 DEPAUL L. REV. 1183, 1197 (1993) (noting the "difficulty [that] lies in the language" of these provisions).

284. Human Rights Committee, *General Comment 18, Non-Discrimination* at 26, ¶ 13, U.N. DOC. HRI/GEN/1/Rev.1 (1994).

individuals when those distinctions are, at minimum, rationally related to a legitimate governmental objective."[285]

However, the United States' understanding should not be read as a reservation that allows the United States, with regard to its ICCPR obligations, to engage in any and all discrimination so long as such discriminations or distinctions are "rationally related to a legitimate governmental objective." Instead, the U.S. is establishing a standard below which it can never engage in discrimination/distinction-making. In other words, the U.S. is stating that it cannot make any distinctions between groups of people unless such distinctions are at least "rationally related to a legitimate governmental objective." But this does not imply that any distinction that is "rationally related to a legitimate governmental objective" necessarily comports with the United States' non-discrimination obligations under the ICCPR.[286] The United States must still comply with its obligations under the ICCPR. In fact, the United States made it clear in its first implementation report to the HRC that its understanding "is construed by the Government as not permitting distinctions that would not be legitimate under the Covenant."[287]

One act that is illegitimate under the ICCPR is arbitrarily banishing people from their own country. Arbitrarily banishing citizens is a violation of the ICCPR. Arbitrarily banishing non-citizen Americans is also a violation of the ICCPR. The U.S., therefore, does not, by virtue of this understanding, reserve a right to distinguish between all citizens and all non-citizens for the purposes of retaining the right to deport all non-citizens.[288] Or, seen from another angle, the arbitrary banishment of non-citizen Americans is not a "legitimate government objective" since such people possess the basic human right pursuant to the ICCPR to remain in their own country.[289]

C. *A Declaration*

Included in the United States RUD was the declaration that "the provisions of Articles 1 through 27 of the Covenant are not self-executing." [290] Since

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285. Stewart, *supra* note 283, at 1195–96.

286. Nor is this true for discrimination analysis under the Constitution. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 747–955 (8th ed. 2010) (discussing standards of review demanded by the Equal Protection Clause).

287. Human Rights Committee, *Comments on the United States of America*, 10, issued Apr. 7, 1995, U.N. DOC. CCPR/C/79/Add.50 (1995). *See also* U.S. Senate Report on Ratification of the International Covenant on Civil and Political Rights, U.S. Senate Executive Report 102–23 (102d Cong., 2d Sess.), Mar. 24, 1992, https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/Senate%20Committee%20on%20Foreign%20Relations%20Report%20on%20the%20ICCPR.pdf [hereinafter Senate Report on the ICCPR].

288. It is widely understood that States parties to the ICCPR can treat all non-citizens differently than how they treat citizens in a whole host of ways, e.g., registration requirements. In fact, citizenship status is a common example where distinctions are often legitimately made.

289. Furthermore, it is challenging to imagine a "legitimate" government objective to which arbitrary banishment would be "rationally related." Indeed, something that is "arbitrarily" done cannot be "rational" or "rationally related" to anything. For a detailed discussion of what "arbitrarily" means within the context of ICCPR Article 12.4, see *supra* Part I.B.

290. Resolution of Advice and Consent, *supra* note 52.

Congress has not passed legislation implementing the obligations of Article 12.4, the fact that the ICCPR is non-self-executing restricts the ability of non-citizen Americans to enjoy Article 12.4 protections. The ICCPR, however, including Article 12.4, still matters, both politically and legally. I now turn to this issue.

III. THE NON-SELF-EXECUTION HURDLE

Before exploring the non-self-executing status of the ICCPR in more detail, it is first important to re-emphasize that regardless of the ICCPR's status under U.S. law, the U.S. maintains an international legal obligation to abide by the ICCPR's human rights norms, including the obligation to refrain from arbitrarily depriving someone of the right to enter his or her own country.[291] In other words, the ICCPR is legally relevant on the international plane.[292] The fact that the ICCPR is non-self-executing does not abrogate this

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291. The customary international law of *pacta sunt servanda* applies. The VCLT articulates this rule as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." VLCT, *supra* note 55, at art. 26. It is typically understood that the human rights articulated in a multilateral human rights treaty are *erga omnes* obligations. *See* Human Rights Committee, *General Comment 31*, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted Mar. 29, 2004, U.N. Doc CCPR/C/21/Rev.1/Add. 13 ¶ 2 ("While Article 2 [of the ICCPR (concerning the general nature of States Parties' obligations under the ICCPR)] is couched in terms of the obligations of States Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty.").

292. Another ICCPR State party could bring a complaint against the United States pursuant to Article 41 alleging that the U.S. is in violation of its obligations under Article 12.4. The United States has declared that it recognizes the competency of the HRC to receive and consider complaints from other States parties who have made similar declarations. Almost fifty other States parties have made such a declaration recognizing this competency. U.N. Status of Treaties, *supra* note 52. Only four Latin American countries have made such a declaration: Argentina, Chile, Ecuador, and Peru. *Id. See also* Senate Report on the ICCPR, *supra* note 287 ("It is in the interest of the United States to participate in and influence the state-to-state complaint procedure established by the Covenant, not least because it is hoped that the work of the Committee will contribute to the development of a generally accepted international law of human rights."). If such a complaint were made, the HRC would encourage the states to find a "friendly solution." ICCPR, *supra* note 26, at art. 41.1(e). The HRC is not authorized to decide the matter or even make recommendations for a solution. *Id.* at art. 41.1(h)(ii). However, it may, with the consent of the parties concerned, appoint an ad hoc Conciliation Commission that would be empowered to report "its views on the possibilities of an amicable solution" if the parties were unable to come to an agreement for a solution. *Id.* at arts. 42.1(a), 42.7(c). These "views on the possibilities of an amicable solution" would not be binding on the parties. Nevertheless, this state-to-state dispute resolution process does offer an avenue for encouraging the United States to adhere to its Article 12.4 obligations. Admittedly, there might seem to be a certain absurdity if a foreign country were to take it upon itself to bring a matter to the HRC in order to protect someone's rights while simultaneously claiming that that person's own country is the United States. After all, if that person is essentially American, why would Peru or Ecuador or Algeria expend the effort to protect that person's rights (despite the *erga omnes* nature of the rights)? However, it is not unimaginable that a country would advocate for one of its own citizens. Furthermore, a country might be motivated to avoid the burdens that an unacculturated person would impose. A country would seem to be particularly motivated to avoid the burdens of someone with a criminal propensity or a history of substance abuse or mental illness (or all of the above). Indeed, this presumption highlights the fact that some state has to bear the burden of such a person's presence, and it raises the question of what justifies one country inflicting that burden on another. For a discussion of passing troublesome people to other countries, *see supra* footnotes 236–238 and accompanying text. *See also supra* notes 150–160, 224–225 and

international obligation in any way.[293] As the Supreme Court emphasized in *Medellín*, the most recent case in which it addressed treaty non-self-execution, even a treaty that is not self-executing "constitutes an international law obligation on the part of the United States."[294]

In fact, declaring that a set of treaty obligations will be non-self-executing is the functional equivalent of declaring that the domestic machinery of state government has already taken,[295] or intends to take, the necessary steps to

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accompanying text (discussing *Nystrom v. Australia*); Remedy Australia, *supra* note 229, at 33 (reporting that despite the HRC's conclusion in *Nystrom v. Australia*, Australia deported Mr. Nystrom to Sweden where he resumed drinking and has "variously been homeless, in homeless shelters, in prison and in psychiatric care"). With regard to alleged Article 12.4 violations, there does not appear to be any binding international adjudication process that would have jurisdiction over the United States. The ICCPR does not contain a compromissory clause or any other dispute resolution process other than the state-to-state dispute resolution process described in Articles 41–42. The U.S. has not ratified the (first) Optional Protocol to the ICCPR. *Supra* note 99. Nor does the United States recognize the compulsory jurisdiction of the International Court of Justice that would otherwise be available under Article 36.2 of the ICJ Statute. ICJ website, Declarations Recognizing the Jurisdiction of the Court as Compulsory, https://www.icj-cij.org/en/declarations. *But see* Worster, *supra* note 25 (detailing scenarios in which the United States, if it deports Dreamers, might face crimes against humanity charges and be subject to the jurisdiction of the International Criminal Court).

293. RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, *supra* note 55, § 310(1) ("Whether a treaty provision is self-executing concerns how the provision is implemented domestically and does not affect the obligation of the United States to comply with it under international law. Even when a treaty provision is not self-executing, compliance with the provision may be achieved through judicial application of pre-existing or newly enacted law, or through legislative, executive, administrative, or other action outside the courts."); VCLT, *supra* note 55, at art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); Young, *supra* note 49, at 128 ("Non-self-executing treaties bind the United States on the international plane."). In the United States' first implementation report to the Human Rights Committee, the U.S. affirmed its international legal obligations under the ICCPR. Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Initial Report of States Parties Due in 1993, Addendum, United States of America, U.N. Doc CCPR/C/81/Add.4, Aug. 24, 1994, at 8 ("In ratifying the Covenant, the United States declared "[T]he provisions of Articles 1 through 27 are not self-executing". This declaration did not limit the international obligations of the United States under the Covenant."); Core Document forming Part of the Reports of States Parties, United States of America, U.N. DOC. HRI/CORE/1/Add.49 (1994), at 138–39 ("The distinction [between self-executing treaties and non-self-executing treaties] is one of domestic law only; in either case, the treaty remains binding on the United States as a matter of international law. Thus, in the case of human rights treaties, a "non-self-executing" treaty does not, in and of itself, accord individuals a right to seek enforcement of its protections in a domestic court, even though the United States continues to be bound to recognize those protections.").

294. Medellín v. Texas, 552 U.S. 491, 504 (2007).

295. When he sought the Senate's consent to ratify the ICCPR, President Bush reported that "existing U.S. law generally complies with the [ICCPR]." Senate Report on the ICCPR, *supra* note 287. This assertion of "general compliance" is also often given as the reason for declaring the ICCPR non-self-executing; the creation of additional private causes of action was not necessary. *Id.* In the United States' first implementation report to the Human Rights Committee, the U.S. stated that "the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. For this reason it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law." Consideration of Reports Submitted by States Parties, USA, *supra* note 293, at 8. *See also* Core Document USA, *supra* note 293, at 141 ("[T]he basic rights and fundamental freedoms guaranteed by the [ICCPR] (other than those the United States took a reservation) have long been protected as a matter for federal constitutional and statutory law . . ."). *But see* Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 CHI. J. INT'L L. 327, 327–29 (2000) (listing several ways that United States law may not comply with the ICCPR). We can add Article 12.4 protection of non-citizen Americans to Professor Goldsmith's list.

domestically implement those treaty obligations.[296] And, indeed, the ICCPR itself contains a provision reiterating this obligation to domestically implement its substantive human rights provisions.[297] The United States has largely implemented Article 12.4 with regard to non-citizen Americans through prosecutorial discretion. DACA is an example of such implementation. However, such prosecutorial discretion is not always exercised, and without comprehensive federal legislation, it is likely that many more non-citizen Americans will be banished.[298]

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296. It is a failure only if the treaty is indeed non-self-executing and there is no other domestic mechanism that achieves the same result. So, for example, with regard to Article 12.4, if there is no federal statute ensuring that non-citizen Americans can remain in the United States, implementation has failed to the extent the executive branch does not exercise enough prosecutorial discretion to fully implement Article 12.4. *See also* Young, *supra* note 49, at 131–34 (arguing that both international law and the Supremacy Clause dictate that treaty obligations be implemented and suggesting that municipal legislation is the most appropriate way to do so). *See also* Core Document USA, *supra* note 293 (reporting that the U.S. in its first ICCPR implementation report to the Human Rights Committee stated that "[s]o long as it complies with its undertakings and responsibilities under duly ratified treaties, the United States considers that it remains generally free to determine the specific modalities of treaty implementation under domestic law. In other words, unless it has specifically agreed to make the provisions of a given treaty part of the judicially enforceable body of domestic law, the United States may follow the alternatives available to it under its own law for implementing treaty obligations in domestic law").

297. ICCPR, *supra* note 26, at art. 2.2 ("Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."). The United States, to the extent it fails to domestically implement the full scope of Article 12.4 not only increases its risk of violating Article 12.4 but also finds itself in continuous violation of Article 2.2. *See generally* Human Rights Committee, *General Comment 31*, *supra* note 291.

298. Increased public awareness of this human rights issue may encourage Congress to act. However, I am under no illusion that the political branches will implement such a broad rule into municipal law, one that authorizes all non-citizen Americans to stay in the United States. Ambiguous feelings towards immigrants, the characterization of the presence of some of them as "illegal," and the fetishizing of the unacceptability of "illegality" (and, by extension, "illegal" immigrants) are all too strong. And this will certainly be the case for the foreseeable future. Furthermore, given that there is a certain segment within the population and within Congress that is quite hostile to "diminishing our sovereignty" or having the "United Nations tell us what do to," highlighting the fact that we are currently in violation of certain treaty obligations, especially one that might serve "illegal aliens," may actually make this particular segment applaud and undermine any attempt at implementation. Indeed, it is a bit challenging to imagine the U.S. Congress passing a law in the foreseeable future that provides a right to stay for long-time permanent legal residents and some kind of rolling regularization process for long-term, (otherwise) unlawfully present aliens. But it becomes imaginable when one frames the issue as one of individual rights and freedoms and focuses on the fact that banishment from one's own country seems so positively unjust. It is also more imaginable when one learns that over the course of the last few decades, the U.S. has passed several pieces of legislation providing amnesty to millions of unlawfully-present aliens, e.g., The Immigration Reform and Control Act of 1986 (regularizing approximately 2.7 million people); The Section 245(i) Amnesty of 1994 (regularizing approximately a half a million people); The Nicaragua Adjustment and Cultural American Relief Act amnesty of 1997 (regularizing approximately one million people); The Haitian Refugee Immigration Fairness Act amnesty of 1998 (regularizing approximately 125,000 people); The Life Act amnesty of 2000 (regularizing approximately one million people); The Immigration Act of 1990 (regularizing approximately 170,000 people); the Late Amnesty of 2000 (regularizing approximately 400,000 people). *See* Alex Nowrasteh, *Legalization or Amnesty for Unlawful Migrants – An American Tradition*, CATO INSTITUTE, July 28, 2014, https://www.cato.org/blog/legalization-or-amnesty-unlawful-immigrants-american-tradition. Indeed, I have little doubt that the sympathy that most Americans feel – including Presidents and members of Congress – for Dreamers and DACA recipients is the exact same sympathy that motivated and underlies ICCPR's Article 12.4: People should be able to stay in their own country.

A. *Self-Execution and Non-Self-Execution*

The doctrine of treaty self-execution is complex and not wholly coherent. This Section provides an explanation of the doctrine based on a survey of the literature and provides a framework for understanding non-self-execution that I will apply to the ICCPR in the following Sections.

1. *General Explanation*

Non-self-executing (NSE) status is often simply understood to mean that a treaty lacks "domestic effect"[299] or "does not create private rights" or is "domestically unenforceable in courts,"[300] or words to that effect.[301] But these statements imprecisely describe non-self-execution. The collective judicial and academic articulation of the principles of self-execution and non-self-execution is notoriously "confusing and confused."[302] To discuss the field, given the current judicial and academic theories, one must start very

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299. *E.g.*, Francisco Forrest Martin, *The Constitution and Human Rights: The International Legal Constructionists Approach to Ensuring the Protection of Human Rights*, 1 FIU L. REV. 81 (2006); Paul B. Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. 1, 23 (2009) (later stating that "what we often mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification," but then, acknowledging the lack of precision of that explanation, rhetorically asking, "But what does "automatic" mean? And "effect"?").

300. *See* RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, *supra* note 55, § 310(1) ("A treaty provision is directly enforceable in courts in the United States only if it is self-executing"); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 (1995) [hereinafter Henkin, *The Ghost*] (referring to non-self-execution as keeping a convention from "having any effect on United States law").

301. *See Medellín, supra* note 294, at 504–07, 526–27 (explaining that a self-executing treaty is one that "automatically ha[s] effect as domestic law," one that "has automatic domestic effect as federal law upon ratification," one that "operates of itself without the aid of any legislative provision," one that "require[s] no legislation to make [it] operative," one that "creates binding federal law," and one that "[has] domestic effect of its own force," and explaining that a non-self-executing treaty is one that "do[es] not by [itself] function as binding federal law," one that "does not by itself give rise to domestically enforceable federal law," one that "can only be enforced pursuant to legislation to carry [it] into effect," and one that "is not domestic law unless Congress has enacted [an] implementing statute[]").

302. Tim Wu, *Treaties Domains, supra* note 49, at 579. *See also* Young, *supra* note 49, at 108, 111 (asserting that since the first application of the principle of non-self-execution by the Supreme Court nearly two centuries ago, "there is little consensus on how to approach these questions" and "the multiplicity of questions marching under the banner of non-self-execution makes it difficult to talk about the issue in any sort of general way."); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1119, 1122, 1123, n.142 (1992) [hereinafter Vázquez, *Treaty-Based Rights*] (calling the term "self-execution" "ambiguous," "amorphous," and "ill-defined and little understood" and recommending avoiding the use the term "entirely"); Wu, *supra* note 49, at 575 ("[T]he rule of self-execution has been stretched beyond recognition in the twentieth century into a loose doctrine that blocks judicial enforcement of treaties on a seemingly ad hoc basis."); Bradley, *Intent, Presumptions, supra* note 49, at 540 ("Despite its pedigree, both the theory behind the self-execution doctrine and its mechanics have long befuddled courts and commentators. There is significant uncertainty, for example, concerning the materials that are relevant to the self-execution analysis, whose intent should count in determining self-executing status, the proper presumptions that should be applied with regard to self-execution, and the domestic legal status of a non-self-executing treaty."); Remarks by Robert E. Dalton, *Judicial Enforcement of Treaties and Self-Execution and Related Doctrines*, 100 AM. SOC. INT'L L. 439, 442 (2006) ("[I]t is clear that 'self-execution' has become an ambiguous term devoid of generally accepted meaning."); Myres McDougal, *Remarks*, 45 ASIL PROC. 102 (1951) ("The word "self-executing" is essentially meaningless and . . . the quicker we drop it from our vocabulary, the better for clarity and understanding."); U.S. v. Postal, 589 F.2d. 862, 876 (5th Cir. 1979), *cert. denied* 444 U.S. 832 (1979) (calling treaty (non-)self-execution the "most confounding [doctrine] in treaty law").

generally and somewhat imprecisely. And that is what we will do here before digging deeper into the exact nature of the ICCPR's non-self-executing status.[303]

A few things are clear. There is little doubt that the substantive human rights provisions of ICCPR are non-self-executing in the United States. American courts have consistently maintained that the ICCPR is non-self-executing.[304] The courts' primary basis for declaring the ICCPR non-self-executing is the fact that the U.S. treaty makers – both the President who ratified the treaty (George H. W. Bush) and the Senate that consented to its ratification[305] – clearly declared their intention that the substantive human rights provisions of the ICCPR be non-self-executing.[306] President Bush and

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303. There has been some scholarly debate on the constitutional legitimacy of non-self-execution. *See, e.g.*, Paust, *Self-Executing Treaties*, *supra* note 49, at 760 (1988) (asserting that the notion of a non-self-executing treaty is a "judicially invalid notion that is patently inconsistent with express language" of the Supremacy Clause); Gruber, *supra* note 49, at 71, 73, 82 ("[T]he constitutional structure requires judicial enforcement of international law" and suggesting that "the whole of self-execution law arose because of an unfortunate treaty interpretation" and manifests itself today because of a "hostility" to the domestic application of international law that "is not seen in our constitutional structure, early legal history or even early treaty case law."); Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM J. TRANSNAT'L. L. 211, 222 (1998) (calling NSE declarations "probably unconstitutional"). *See also* Stefan A. Riesenfeld, & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI-KENT L. REV. 571, 575 (1991) (observing that the U.S. Constitution "directly incorporates treaty law into the municipal order without separate action by the legislature"); Hussain, *supra* note 49 (criticizing the reluctance of courts to enforce treaties and arguing the constitutional basis for doing otherwise).

304. *E.g.*, Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001) (concluding that certain provisions of the ICCPR are non-self-executing because "[t]he Senate's intent was clear – the treaty is *not* self-executing"); Ralk v. Lincoln County, 81 F. Supp. 2d 1372, 1381 (S.D. Ga. 2000); White v. Paulsen, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (holding that the ICCPR was not a self-executing treaty and noting that the Senate "expressly declared" this to be so); Domingues v. State, 961 P.2d 1279, 1280 (Nev. 1998) (holding the ICCPR not self-executing in part due to the "Senate's express reservation" against it). *See also* Sosa v. Alvarez-Manchain, 542 U.S. 692, 728 (2004). Courts are the authority that determine whether a treaty (or a treaty provision) is self-executing or not. *See* RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, *supra* note 55, §§ 306(6), 310.

305. The ICCPR is an Article II treaty. Article II treaties are those that are ratified with the advice and consent of two-thirds of the Senate. U.S. CONST., art. II, § 2, cl. 2. Executive agreements, another constitutionally authorized category of treaties, do not receive the advice and consent of the Senate. *See* United States v. Pink, 315 U.S. 203 (1942) (concluding that executive agreements with foreign countries have "similar dignity" as Article II treaties). Executive agreements present a whole host of unique analytical issues and constitutional uncertainties. All the discussion of self-execution in this Article is intended to apply to Article II treaties only.

306. *See* RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, *supra* note 55, § 310(2) ("If the Senate's resolution of advice and consent specifies that a treaty provision is self-exciting or non-self-executing, courts will defer to this specification."). *See also Medellín, supra* note 294 (suggesting that whether or not a treaty is self-executing turns on the intent of the U.S. treaty makers). *See also* Young, *supra* note 49, at 122–23 ("Self-execution is a function of the intent of federal law makers."); Bradley, *Treaty Duality, supra* note 49, at 132 ("[T]he relevant intent in discerning self-execution is the intent of the U.S. treaty makers (that is, the President and the Senate, not the collective intent of the various parties to the treaty)."); Bradley, *Intent, Presumptions, supra* note 49, at 544 ("On balance, the [*Medellín*] decision is best interpreted as endorsing an intent-of-the-U.S. approach."). Some Supreme Court justices and scholars, however, have challenged the notion that self-execution (or lack thereof) should be wholly or primarily a function of the intent of the Senate and the President. In fact, Supreme Court jurisprudence of the 19th century only tangentially considered the intent of the Senate and the President. Other factors took precedence, including concerns with separation of powers, justiciability, and the intent of treaty parties. Such notions justifiably persist today. *See, e.g.*, Vázquez, *Laughing at Treaties, supra* note 49 (providing a list of considerations to determine whether a treaty is self-executing or not); Vázquez, *Treaties as Law of the Land, supra* note 49 (same); Moore, *Law(makers) of the Land, supra* note 49 (same); Blair Phillips

members of his administration repeatedly told the Senate during its debates on ratification that those provisions of the ICCPR would not be self-executing.[307] In its resolution consenting to the ratification of the ICCPR, the Senate explicitly stated that its "advice and consent is subject to the following declaration[]: That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing." [308] In fact, the US's instrument of ratification deposited by the President makes the same declaration.[309] There is broad scholarly support for the assertion that NSE declarations (as these declarations have come to be known) establish a treaty as non-self-executing,[310]

Friederich, *Criteria for Self-Executing Treaties*, 1968 U. ILL. L.F. 238 (1968) (same); John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1299 (1993) [hereinafter Quigley, *The ICCPR and the Supremacy Clause*] ("In determining whether a treaty is self-executing, the courts ask whether the intent of the parties was to confer rights on individuals."); Riesenfeld, & Abbott, *supra* note 303, at 578, 608 ("Whether or not a treaty is self-executing is not a unilateral question. Whether a treaty requires municipal implementing legislation and is intended to confer rights directly on individuals is a question of the mutual intent of the parties to the treaty, to be determined by the language of the treaty and other indicia of intent."); *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (1988). *But see* Iwasawa, *supra* note 49 (arguing that the "intent of the parties" is not an appropriate indicator of whether or not a treaty is self-executing since the parties are generally not concerned with the municipal processes of domestication (execution) in each State party); Bradley, *Treaty Duality, supra* note 49, at 149–57 (same); David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 69 (1978) (arguing that with regard to multilateral treaties the intent of the parties and the text of the treaty should not be used to determine whether a treaty is self-executing in the U.S.). This Article will assume that, absent the Senate's and President's NSE declarations, most if not all of the substantive human rights provisions of the ICCPR – and at least Article 12.4 – would be fully self-executing. This assumption is reasonable given the following three observations. First, the self-execution of Article 12.4 does not appear to pose any separation of powers, federalism, or other constitutional problems. Second, Article 12.4 is not precatory nor hortatory; it is specific enough to be justiciable. And, third, there is otherwise little reason to believe that the human rights provisions of the ICCPR, and certainly not Article 12.4, are addressed only to the legislatures of the States parties or that the States parties otherwise intended the ICCPR to be non-self-executing. *See generally* Vázquez, *The Four Doctrines, supra* note 49 (listing categories of reasons treaties have been deemed by courts to be "non-self-executing"), Vázquez, *Treaties as Law of the Land, supra* note 49 (same); Vázquez, *Treaty-Based Rights, supra* note 302, at 1114–33 (same); Friederich, *supra* note 306 (same). Indeed, the ICCPR is treated as self-executing in the vast majority of the States parties. Christopher Harland, *The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey through United Nations Human Rights Committee Documents*, 22 HUM. RTS. Q. 187 (2000). ICCPR Article 2.2 requires implementing legislation, but that provision does not indicate that the negotiating parties intended the ICCPR to be non-self-executing. For a discussion of Article 2.2, *see supra* note 297 and accompanying text.

307. *See* Sloss, *The Domestication of IHR*, *supra* note 49, at 165–69.

308. Resolution of Advice and Consent, *supra* note 52.

309. U.N. Status of Treaties, *supra* note 52.

310. RESTATEMENT FOURTH OF FOREIGN RELATIONS Law, *supra* note 55, § 310(2) ("If the Senate's resolution of advice and consent specifies that a treaty provision is self-executing or non-self-executing, courts will defer to this specification."). *See also* Vázquez, *Treaties as Law of the Land, supra* note 49, at 681–83; Vázquez, *Laughing at Treaties, supra* note 49, at 2174–75; 2183–88; Michael Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 906 (2004); Bradley & Goldsmith, *supra* note 49, at 403–23, 439–67. *But see* Ramsey, *supra* note 49, at 1647, 1658–61 (rejecting the efficacy of NSE declarations and asserting that a treaty provision's "non-self-executing character must arise from the treaty itself"); Louis Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 202 (2d ed. 1996) (arguing that the practice of non-self-execution declarations "is 'anti-Constitutional' in spirit and highly problematic as a matter of law"); John Quigley, *Towards a More Effective Judicial Implementation of Treaty-Based Rights*, 29 FORDHAM INT'L L. J. 552, 575 (2006) [hereinafter Quigley, *Judicial Implementation*] ("The legal significance of these declarations remains unclear."); Malvina Halberstam, *U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 64–70 (1997) (calling the coupling of a NSE declaration with an intent not to enact implementing legislation "problematic as a constitutional matter");

and almost all American legal commentators who have opined on the subject have asserted that the ICCPR is non-self-executing (to at least some extent).[311]

Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI-KENT L. REV. 515, 527 (1991) ("[A] Senate's declaration purporting to negate the legal effect of otherwise self-executing treaty provisions is constitutionally questionable . . . . "); Charles H. Dearborn III, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Non-Self-Executing*, 57 TEX. L. REV. 233, 233–34 (1979) (arguing that NSE declarations "are of dubious validity, probably have no binding effect on United States courts, and should not be used as aids in construing the treaties."); Quigley, *The ICCPR and the Supremacy Clause*, *supra* note 306, at 1302–07 (arguing that the validity of NSE declarations is "doubtful"); Riesenfeld & Abbott, *supra* note 303, at 631 (asserting that despite the U.S. treaty makers' NSE declarations domestic courts would deem most of the substantive provisions of the Torture Convention self-executing "because the Torture Convention does not otherwise suggest the necessity for the enactment of subsequent legislation to bring its protection into force"); Weissbrodt, *supra* note 306, at 71 ("Because much of the language of the [human rights] Covenants denotes self-execution, and because self-execution provides an effective means of enforcement, it is improper for the United States to assert a declaration that categorically denies that effect. Just as United States courts have examined each article of the United Nations Charter separately to determine its self-executing effect, so too should the courts be allowed to consider each Article of the [ICCPR]."); Report of the Committee on Human Rights, Annex D, Committee Letter to Senator Claiborne Pell, Dec. 11, 1991, PROCS. & COMM. REPS. OF THE AM. BRANCH OF THE INT'L LAW ASS'N, 1991–1992, at 111 n. 26 ("[It] well may be that a non-self-executing declaration . . . does not bind the judicial branch.") *cited in* Paust, *Avoiding 'Fraudulent' Executive Policy*, *supra* note 49, at n.29.

When the U.S. treaty makers do not make any NSE declarations (or SE declarations), it is more difficult to discern their intent, and there is much judicial and scholarly debate (and confusion) about how courts should discern what the U.S. treaty makers intended, if anything, with regard to the self-execution of such a treaty. The five-justice Supreme Court majority in *Medellín v. Texas* stated that the intent of the Senate and the President is found by examining the text of the treaty itself. Medellín, *supra* note 294, at 519 ("[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect."). *See also* Nelson, *supra* note 49 (asserting that NSE status can be discerned from the text of a treaty). This method of using a treaty's text to discern U.S. treaty makers' intent has justifiably garnered widespread criticism. Critics note that the issue of self-execution is a function of municipal law and each State party has its own municipal rules governing whether a treaty is, to use our American term, "self-executing." In some countries, all treaties are self-executing. In others, none are. In the United States, some treaty provisions are self-executing and others are not. Among this latter group of countries, what distinguishes self-executing provisions from non-self-executing provisions vary. Therefore, there is no reason to believe that the intent of our American federal political branches would be expressed at all within the text of a treaty. This observation is especially true for multilateral treaties. Critics also note that with regard to many multilateral treaties, often many States parties do not participate in the negotiation and adoption of the text of the treaty. It would be impossible for those states to have included any evidence of their own self-executory intentions within the treaty's text. Indeed, the text of the ICCPR was adopted by the international community in December 1966, *two and a half decades* before the Senate consented to its ratification and the President ratified it. The text of Article 12.4 was adopted in 1959, seven years earlier than the adoption of the entire ICCPR. ICCPR Preparatory Works SR.959, *supra* note 199, ¶ 27. For critical commentaries on the *Medellin* decision, *see, e.g.*, Carlos Manuel Vázquez, *Less than Zero?*, 102 AM. J. INT'L L. 563 (2008); Sloss, *Taming Madison's Monster*, *supra* note 49, at 1703–27 (The Court's "treaty interpretation analysis in *Medellín* is akin to analyzing regulations promulgated by the Securities Exchange Commission (SEC) to answer a question about California tort law . . . [The Court's] approach . . . induced [it] to perform a treaty interpretation analysis to answer a question that the treaty does not answer."); David L. Sloss, *Executing* Foster v. Neilson: *The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L. J. 135, 182–87 (2012) (calling the *Medellín* opinion "inscrutable"); Bradley, *Intent, Presumptions*, *supra* note 49; Bradley, *Treaty Duality*, *supra* note 49, at 164–81; Quigley, *A Tragi-Comedy*, *supra* note 49. *But see* Moore, *Law(makers) of the Land*, *supra* note 49 (generally defending *Medellín*). For a discussion of how some scholars reject the notion that self-execution turns on the intent of the U.S. treaty makers, see *supra* note 306.

311. *E.g.*, Sloss, *The Domestication of IHR*, *supra* note 49, at 165–69; Goldsmith, *supra* note 295, at 331; Henkin, *The Ghost*, *supra* note 300; Buergenthal, *supra* note 303, at 222, n.36. *But see* Paust, *Avoiding "Fraudulent" Executive Policy*, *supra* note 49; Halberstam, *supra* note 310, at 64; Quigley, *The ICCPR and the Supremacy Clause*, *supra* note 306, at 1302–04; David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 UC DAVIS L. REV. 1, 46–55 (2002) [hereinafter Sloss, *A Constitutional Fallacy*]; Louis N. Schultze, Jr., *The United States' Detention of Refugees: Evidence of*

There is also no doubt that the treaty would have "domestic effect" if Congress were to pass implementing legislation.[312] To the best of my knowledge, Congress has not passed any legislation for the express purpose of implementing any ICCPR human rights provision.[313] It certainly has not passed any legislation that expressly provides aliens the possibility of enjoying the rights articulated in Article 12.4.[314]

Since the ICCPR is non-self-executing and has not been implemented by Congress, many courts and commentators are quick to deem the ICCPR irrelevant.[315] As such, Article 12.4 would be deemed wholly unhelpful to noncitizen Americans facing removal. Indeed, the NSE status of the ICCPR does render the ICCPR much less relevant as a source of enforceable individual

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the Senate's Flawed Ratification of the International Covenant on Civil and Political Rights, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 641 (1997) (arguing that courts should deem the ICCPR to be self-executing despite the Senate's and President's NSE declarations). *See also supra* note 310 (citing scholars who challenge the effectiveness of NSE declarations).

312. After implementing legislation is enacted, the source of law municipally would be the federal statute, not the treaty itself. Formally, the treaty, even after being so implemented, would remain non-self-executing.

313. To the extent any federal statutes provide individual rights, the passage of such statutes has not been motivated by any deliberate intent on the part of Congress to implement ICCPR rights qua ICCPR rights.

314. All aliens enjoy some degree of constitutional and statutory protections, lawful permanent residents enjoying the most. *See* Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 97, 100–01 (1903) (stating that undocumented aliens have due process rights); Wang Yang Sung v. McGrath, 39 U.S. 33, 49–50 (1950) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law."); T. Alexander Aleinikoff, et al., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1299 (2016) (noting that lawfully admitted noncitizens "largely enjoy the same rights as citizens").

315. *E.g.*, Igartua de la Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (conclusorily dismissing, in an action challenging the inability of Puerto Ricans to vote for the President, an argument based on the ICCPR's provision stating that every citizen shall have the "right to vote" as being "without merit"); Roman-Nose v. New Mexico Dep't. of Human Servs., 967 F.2d 435, 437 (10th Cir. 1992) (expressing that it did not "know of any manner by which Plaintiff can obtain relief from state actions which violate international treaties."); Ralk v. Lincoln Country, Georgia, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000) ("[B]ecause the ICCPR is not self-executing, [the plaintiff] can advance no private right of action under that document."); Heinrich v. Sweet, 49 F. Supp. 2d 27, 43 (D. Mass. 1999); White v. Paulsen, 997 F. Supp. 1380, 1386–87 (E.D. Wash. 1998) (in addition to referring to the NSE declarations, finding that based on the text of the ICCPR "it is apparent that the parties to the ICCPR did not intend for its provisions to be self-executing in the sense of automatically creating a private right of action cognizable by citizens of a State"); In the Matter of the Extradition of Cheung, 968 F. Supp. 791, 802 n. 17 (D. Conn. 1997); United States v. Duarte-Acero, 296 F.3d. 1277, 1283 (11th Cir. 2002) ("[T]he ICCPR does not create judicially-enforceable individual rights. Treaties affect United States law only if they are self-executing or otherwise given effect by congressional legislation ... Therefore, the ICCPR is not binding on federal courts."); Serra v. Lappin, 600 F.3d 1191, 1197 (9th Cir. 2010) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004)) (dismissing an ICCPR claim because the ICCPR "was ratified 'on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts'"); *Hurtado v. U.S. Atty. Gen.*, 401 F. App'x 453, 456 (11th Cir. 2010) (declaring that the ICCPR has "no effect in federal courts"). *See also* Goldsmith, *supra* note 295, at 328–29 (citing seven court cases in which parties asserted ICCPR rights and how the courts rejected each of them "usually without consideration of their merits" because of the NSE declaration); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 259 (2001) ("[M]ost courts refuse to view international law claims as relevant to the resolution of specific cases."); Cole, *supra* note 25, at 629 (observing that when human rights arguments are presented, "they are as often as not ignored or summarily dismissed"); Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 567 (1997) (stating that the U.S. ratification conditions "limit[] the scope of ratification to existing U.S. practice, rendering acceptance a largely hollow, falsely symbolic act").

rights than it would be if the ICCPR were self-executing (or if Congress were to pass implementing legislation).[316]

However, the ICCPR is not irrelevant. A more sophisticated understanding appreciates that even NSE treaties have power as international obligations of the United States[317] and as one of the supreme laws of the land pursuant to the Supremacy Clause.[318] A more sophisticated understanding also leads us to ask what "non-self-executing" really means. And what does it mean for an NSE treaty to be the supreme law of the land? What did the U.S. treaty makers really intend? Regarding the legal status of the ICCPR within the domestic context of the United States, it seems that the U.S. treaty makers

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316. It should come as no surprise that there is considerable debate about the desirability of non-self-execution, especially with regard to human rights treaties. For commentary lamenting non-self-execution, see, e.g., Henkin, *The Ghost, supra* note 300, at 346–49 (characterizing the Senate's and Executive's recent hostility to international law as an "ideological infection"); Damrosch, *supra* note 310, at 518 ("[T]he trend towards non-self-executing treaty declarations is unfortunate and should be resisted."); Paust, *Avoiding "Fraudulent" Executive Policy, supra* note 49, at 1283 ("[T]he attempted non-self-execution policy is far worse than abnegative and absurd; it brings serious dishonor to the United States and should be abandoned."); Gruber, *supra* note 49, at 66 (lamenting that the modern self-execution doctrine appears to be largely driven by "a belief that international and foreign law is illegitimate"); Quigley, *Judicial Implementation, supra* note 310; Buergenthal, *supra* note 303, at 221 (calling it "sad" that the Senate has denied U.S. courts the opportunity to enforce human rights treaties). Others applaud the ability of the political branches to declare treaties non-self-executing, particularly human rights treaties. *E.g.*, Bradley & Goldsmith, *supra* note 49, at 402 (". . .[RUDs] help bridge the political divide between isolationists who want to preserve the United States' sovereign prerogatives, and internationalists who want the United States to increase its involvement in international institutions. . . ."); Stewart, *supra* note 283, at 1189 (observing that extensive RUDs were necessary to ensure there would be enough political support for the ratification of the ICCPR); Sloss, *The Domestication of IHR, supra* note 49, at 171–88 (observing that the U.S. treaty makers insisted on reservations so as to better ensure U.S. compliance with its ICCPR obligations); 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 (1993) (presenting a relatively sympathetic understanding of the US's apparent hypocrisy and recalcitrance to commit to international (human rights) norms).

317. *Supra* notes 291–298 and accompanying text.

318. U.S. CONST. art. VI, cl. 2. *See* Bradley, *Treaty Duality, supra* note 49, at 140–48 (arguing that NSE status never affects a treaty's status as the "supreme Law of the Land"); Henkin, FOREIGN AFFAIRS, *supra* note 310, at 203 ("Whether a treaty is self-executing or not . . . . it is supreme law of the land."); Ramsey, *supra* note 49, at 1639, 1641–42 (dismissing the assertion that NSE treaties are not the supreme law of the land as an assertion that is "not a possible reading of the Constitution's text"); Jordan Paust, INTERNATIONAL LAW AS THE LAW OF THE UNITED STATES 67–80 (2003) (discussing legal effects of NSE treaties); Iwasawa, *supra* note 49, at 645 ("U.S. courts have consistently recognized that provisions of constitutions and statutes are the law of the land, whether or not they are self-executing. Non-self-executing treaty provisions should not be treated any differently."); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 89 AM. J. INT'L L. 310, 316 (1992) (asserting that a treaty may be the supreme law of the land even though it may not be directly enforceable in courts); Sloss, *The Domestication of IHR, supra* note 49, at 148 ("The fact that [a treaty] provision is not directly applicable by the judiciary . . . does not mean that it is without domestic legal force."); Nelson, *supra* note 49 at 805 ("[T]reaties can be the 'supreme Law of the Land' without being self-executing in American courts."); *See also*, Vázquez, *Treaty-Based Rights, supra* note 302, at 1122 (accusing courts that conclude that NSE treaties are not the law of the land as coming to "facile" conclusions and calling their analyses "cavalier"); Sloss, *A Constitutional Fallacy, supra* note 311, at 38 n.169 (citing several court decisions concluding that the ICCPR is the supreme law of the land despite its NSE status). *But* see Halberstam, *supra* note 310, at 65 ("A treaty that is not self-executing is not the supreme law of the land."); Nelson, *supra* note 49, at 808–10 (suggesting that since the nation's treatment of its own citizens has "not traditionally been the subject of international agreements," modern human rights treaties "might . . . lie beyond the scope of the treatymaking power and hence [might] not automatically become part of the 'Law of the Land' under our federal Constitution"). *See also supra* note 38 (discussing how international law is part of American law).

envisioned a particular NSE status. Outside this particular NSE status, the ICCPR has legal force and relevance. In fact, depending on the exact content of the non-self-executory nature of the ICCPR in the United States, the executive and the judiciary might at times be permitted – or even obligated – to act in light of Article 12.4.[319] What follows is a more detailed analysis of the nature of the ICCPR's NSE status and, based on that nature, a description of other ways the ICCPR has (or might have) actual municipal legal force.

2. *A More Detailed Understanding of Non-Self-Execution – the Sloss Model*

When we say that a treaty is "non-self-executing," as we do with the ICCPR, it means, loosely speaking, that it has limited or no effect as American municipal law. But for our purposes, it is inadequate to say simply that a treaty is non-self-executing. That term is too ambiguous. More precision is necessary because a treaty can operate within many different

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319. If there were customary international law prohibiting a nation from arbitrarily depriving someone of their right to enter their own country, the U.S. would be bound to apply such law independently of the ICCPR, and a host of implementation problems that result from the ICCPR's NSE status go away. But other somewhat unsettled legal issues might impede its application (e.g., locating the status of CIL within the legal hierarchy of American laws, especially its relationship to federal statutory law; the ability (or lack thereof) of the executive branch to repudiate CIL through so-called "controlling executive acts"). However, there appears to be no reason to conclude that such a customary international law exists. Even though it may be that the general practice of states is to refrain from expelling Dreamer-type people from their territories, there is no apparent evidence whatsoever that states refrain from such deportations out of a sense of legal obligation (*opinio juris*). *See* Int'l Law Comm'n, Draft Conclusions on the Identification of Customary Int'l Law, U.N. DOC. A/73/10 (2018). On the contrary, states generally assert their sovereign right to deport any non-citizen for whatever reason. In fact, Australia and Canada, the two countries that were subject to the HRC's *Nystrom* and *Warsame* decisions, respectively, refused to accept those decisions. Australia deported Mr. Nystrom, and Canada deported Mr. Warsame. *See supra* note 229. *But see* Universal Declaration of Human Rights, *supra* note 54, at art. 13.2 ("*Everyone* has the right to leave any country, including his own, and to return to *his country*.") (emphasis added); G.A. Res. 71/1 New York Declaration for Refugees and Migrants, ¶ 42 (Oct. 3, 2016) ("We reaffirm that *everyone* has the right . . . to return to *his or her own country*.") (emphasis added); Global Compact for Migration, *Global Compact for Safe, Orderly and Regular Migration* ¶ 37 (July 11, 2018) (referring to "the human right to return to *one's own country* and the obligation of States to readmit their own nationals") (emphasis added); Ass'n of Southeast Asian Nations [ASEAN] Human Rights Declaration ¶ 15 ("*Every person* has the right to leave any country including his or her own, and to return to *his or her country*.") (emphasis added); Org. of African Unity [OAU], African Charter on Human Rights and Peoples' Rights art. 12.2 (June 27, 1981) ("*Every individual* shall have the right to leave any country, including his own, and to return to *his country*.") (emphasis added); Org. of Islamic Conference, Cairo Declaration on Human Rights in Islam art. 12 (Aug. 5, 1990) ("*Every man* shall have the right, within the framework of the Shari'ah, to free movement and to select his place of residence whether within or outside *his country* . . . .") (emphasis added). *See also*, Organization of American States, American Convention on Human Rights art. 22.5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR] ("No one can be expelled from the territory of the state *of which he is a national* or be deprived of the right to enter it.") (emphasis added); Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto art. 3.1, Sept. 16, 1963, C.E.T.S. No. 46 [hereinafter ECHR] (prohibiting States parties from expelling anyone "from the territory of the State *of which he is a national*") (emphasis added); *Id.* at art. 3.2 ("No one shall be deprived of the right to enter the territory of the state *in which he is a national*.") (emphasis added); League of Arab States, Arab Charter on Human Rights art. 22 (Sept. 15, 1994) ("*No citizen* shall be expelled from his country or prevented from returning thereto.") (emphasis added). It is notable that both the ACHR and the ECHR provide a right of remaining and a right of return only to nationals, and the Arab Charter provides similar rights only to citizens.

municipal contexts, and a treaty that everyone refers to as "non-self-executing" may be non-self-executing within some of those contexts and fully self-executing in others.[320] With any given NSE treaty, it is necessary to discern the exact extent to which it is not self-executing. The contexts in which a treaty is void of legal effect, that is to say, the extent to which it is non-self-executing, depends on the intentions of the U.S. treaty makers – the Senate that consented to its ratification and the President who ratified it.[321]

Before going further down this path, it is useful to list some of the contexts in which a treaty might have municipal legal effect. Imagine a fully self-executing treaty. A fully self-executing treaty occupies the same level in the American legal hierarchy and has the same domestic legal effect as federal statutes.[322] Like federal statutes, a self-executing treaty supersedes conflicting state law. Like federal statutes, a self-executing treaty supersedes conflicting earlier-in-time federal statutes.[323] Like federal statutes, a self-executing treaty might restrict the executive branch's behavior or obligate the executive branch to behave in certain ways. Like federal statutes, a self-executing treaty might authorize the executive branch to behave in ways not previously authorized. Like federal statutes, a self-executing treaty might restrict the behaviors of private entities or obligate them to behave in certain ways. Like federal statutes, a self-executing treaty might authorize private entities to behave in ways previously restricted by earlier laws. Courts can interpret and enforce self-executing treaties just as they interpret and enforce federal statutes.[324] Within the sphere of the judicial processes, a self-executing treaty, like a federal statute, might create a private cause of action and it might provide certain judicially enforceable individual rights. And, as they do with federal statutes, courts could employ a self-executing treaty to discern policy and/or interpret other laws.[325] But, a non-self-executing treaty

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320. Sloss, *The Domestication of IHR*, *supra* note 49, at 134. ("The term 'not self-executing,' when applied to treaty provisions, has multiple meanings."). An understanding that self-execution may operate on different planes besides on the political-judicial concept is an understanding that is often lost or ignored in treaty self-execution scholarship. *See e.g.*, Nelson, *supra* note 49, at 817 (equating self-execution to mean simply "provid[ing] rules of decision applicable in American courts").

321. *See supra* notes 304–311 and accompanying text.

322. *See* Breard v. Green, 523 U.S. 371, 376 (1988) (citing Reid v. Covert, 345 U.S. 1, 18 (1957) ("[A]n Act of Congress ... is on full parity with a treaty.")); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed upon the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given either over the other."); RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, *supra* note 55, § 309(2). A non-self-executing treaty also occupies the same level on the legal hierarchy. *But see*, Quigley, *Judicial Implementation, supra* note 310, at 582–85 (suggesting the possibility that treaties "might occupy a rank a step above that of an Act of Congress").

323. It would also supersede, within the municipal and international spheres, conflicting earlier-in-time treaties. *See* VCLT, *supra* note 55, at art. 30.

324. RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, *supra* note 55, §§ 301(2), 306(6).

325. Like federal statutes, a self-executing treaty (indeed, all treaties) are subject to the Constitution. *See* Vázquez, *The Four Doctrines*, *supra* note 49, at 718–19 (describing how some scholars and courts label treaties that conflict with the Constitution or are otherwise limited in effect because of the Constitution "non-self-executing"); RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, *supra* note 55, at § 310(3) (explaining that a treaty provision shall be deemed non-self-executing "to the extent that implementing legislation is constitutionally required").

lacks the legal authority to function in one or more of these ways. The extent to which a non-self-executing treaty fails to function in such ways, that is to say, the extent to which it is non-self-executing,[326] depends on the intentions of the U.S. treaty makers.

Professor David Sloss has identified three broad categories that a treaty can be non-self-executing.[327] A treaty can be non-self-executing pursuant to what he terms the "political-judicial concept," the "congressional-executive concept," and/or the "federal-state concept."[328] Any given NSE treaty (like the ICCPR) is non-self-executing pursuant to one, two, or all three of these concepts. It all depends on the intention of the Senate and the President.[329]

Professor Sloss' political-judicial concept concerns situations where courts are limited in their ability to enforce treaties.[330] Professor Sloss has identified three political-judicial concept variants – the "private right of action" variant, the "no private enforcement" variant, and the "no judicial enforcement" variant.[331] A treaty that is non-self-executory to the extent of the private right of action variant (or what I will call the "*no* private right of action" variant) creates no private cause of action. In other words, no one would be permitted to maintain a lawsuit alleging a violation of an ostensible treaty right. However, under this variant, a defendant in an action initiated by the government or another party could defend themselves with reference to a treaty provision.

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326. Often it is inaccurate to say that a particular treaty is self-executing or not-self-executing since it is possible for some provisions of a treaty to be self-executing and other provisions not to be. This observation points to another dimension of complexity. *See* Vázquez, *The Four Doctrines, supra* note 49, at 722.

327. Sloss, *Taming Madison's Monster, supra* note 49, at 1695. Other scholars have articulated frameworks to understand the principles of treaty (non-)self-execution. *E.g.*, Vázquez, *The Four Doctrines of Self-Executing Treaties*, *supra* note 49; Wu, *supra* note 49. My decision to choose Professor Sloss' framework is based in part on its persuasiveness and in part because it lays out a fruitful framework for identifying the multitude of ways an NSE treaty (or NSE treaty provision) can still matter, legally and otherwise, qualities that are useful for this project.

328. Sloss, *Taming Madison's Monster, supra* note 49, at 1691. *See also* Vázquez, *Four Problems, supra* note 49, at 1761–97 (arguing that treaty non-self-execution is not always about judicial enforcement).

329. *See supra* notes 304–311 and accompanying text. Lest one simply assume that the President and the Senate always intend their NSE declarations to extend to the maximum extent possible, Professor Sloss reminds us that the Senate and the President consider it very important that the United States comply with its treaty obligations, including its obligations under human rights treaties. *See* Sloss, *The Domestication of IHR, supra* note 49, at 178–83. This policy objective would be undermined whenever it is discovered that a treaty with maximum NSE scope provides for human rights protections that municipal law does not already provide. Simply assuming a maximum NSE scope does not do justice to their intention to comply with treaties since opportunities to domestically enforce such treaty provisions contribute to treaty compliance. *See id.* at 182. Professor Sloss also highlights examples of Senate ratification consent resolutions where it made NSE declarations clearly demonstrating that it intended the NSE effect to be partial or that it understood the phrase "non-self-executing" itself to be limited in scope. For example, Professor Sloss highlights three NSE declarations made by the Senate in 2008. These NSE declarations were substantially equivalent to the following: "This Protocol is self-executing. This Protocol does not confer private rights enforceable in United States courts." Sloss, *Taming Madison's Monster, supra* note 49, at 1700.

330. *See* Sloss, *Taming Madison's Monster, supra* note 49, at 1695 ("Under the political-judicial concept, self-executing (SE) treaty provisions are judicially enforceable, but courts may not directly apply NSE treaty provisions unless Congress enacts implementing legislation.").

331. *Id.* at 1745.

The "no private enforcement" variant prohibits courts from entertaining any claims by any private entity either offensively or defensively.[332] However, courts can enforce such a treaty provided the action is brought by the federal government.[333] The "no judicial enforcement" variant goes further than each of the other two political-judicial variants. If a treaty is NSE to the extent of the no judicial enforcement variant, then courts would be barred from directly enforcing the treaty in all cases, regardless of the litigants.[334]

Professor Sloss' congressional-executive concept concerns the effect of a treaty on the executive branch. This concept comprises two variants. Under the first variant, what I will refer to as the "strong" congressional-executive variant, the U.S. treaty makers explicitly prohibit the President and the rest of the executive branch from carrying out the US's treaty obligations.[335] Pursuant to this type of non-self-execution, the President is permitted to carry out the US's treaty obligations *only if* Congress authorizes it via legislation. Under the second variant, what I will call the "weak" congressional-executive concept, the U.S. treaty makers intend to shield the President from any legal obligation that would otherwise be imposed by a treaty.[336] Pursuant to the weak variant, the President comes under a municipal legal obligation to adhere to a treaty obligation *only if* the Congress subsequently requires it via legislation. The difference between the two variants can be summarized as follows: under the strong variant, the executive branch must not carry out the US's treaty obligations,[337] while under the weak variant, the executive branch is permitted, but not required, to carry out the country's treaty obligations.[338]

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332. *Id.* at 1739. The "no private enforcement" variant encompasses the "no private right of action" variant.

333. *Id.* at 1739.

334. *Id.* at 1720, 1745–46. Professor Sloss asserts that the no judicial enforcement variant and the no private enforcement variant may be unconstitutional since they could violate the due process rights of a defendant facing state criminal charges who might otherwise be able to invoke treaty provisions in their defense. *See* Sloss, *Treaty Preemption Defense*, *supra* note 49; David Sloss, *Non-Self-Executing Treaties in the Draft Restatement of Foreign Relations Law*, JUST SECURITY (May 18, 2015), https://www.justsecurity.org/23073/non-self-executing-treaties-draft-restatement-foreign-relations-law/. *But see* Bradley, *Treaty Duality*, *supra* note 49, at 137-40 (defending the constitutionality of such NSE).

335. Professor Sloss states that the congressional-executive concept describes the situation under which "congressional legislation is necessary to authorize federal executive action." Sloss, *Taming Madison's Monster*, *supra* note 49, at 1696. I assume he means that in this situation the Senate has effectively prohibited the President from carrying out the United States' treaty obligations through executive action (i.e., the "strong" variant).

336. *See* Sloss, *Taming Madison's Monster*, *supra* note 49, at n.23. In this footnote, I understand Professor Sloss to be describing the weak congressional-executive variant, the situation where the U.S. treaty makers shield the President, municipally, from the legal obligations that would otherwise be imposed by the treaty.

337. It is vital to understand here that any prohibition against executing a treaty is only a prohibition from the point of view of domestic institutions, most relevantly, American courts. In other words, it is only a prohibition within the municipal sphere. So from the point of view of U.S. courts, who are bound by constitutional federal law, the President must not execute such a treaty, at least not until the Congress authorizes him to do so or requires him to do so. Such a treaty is still binding on the United States within the international sphere, however. No amount of non-self-execution can diminish that. *See supra* notes 291–294 and accompanying text.

338. This shielding exists within the municipal sphere, so American courts cannot demand that the President carry out such a treaty. But, by the same token, American courts cannot declare that the

The congressional-executive concept (in either variant) might appear to be in conflict with the Take Care Clause. It is not. The Supremacy Clause states that "all Treaties made, or which shall be made, under the authority of the United States" are the "supreme Law of the Land,"[339] and the Take Care Clause requires the President to "take care that the Laws be faithfully executed."[340] But if a treaty is "supreme Law of the Land," how can it be that the President might be prohibited or excused from executing it? The short answer is that even though all treaties are the supreme law of the land for purposes of the Supremacy Clause, a treaty that is non-self-executing under the congressional-executive concept is not "Law" for purposes of the Take Care Clause.[341] It is not "Law" under the Take Care Clause because the legislative authority that ratified the treaty, i.e., the U.S. treaty makers, intended it not to be. A legislative body can decide for itself the nature and scope of its laws' obligations. Just as Congress can enact a federal statute that does not obligate the President to act in any way, the U.S. treaty makers can ratify a treaty while shielding him from any obligation to execute it (the weak variant). Just as the Congress could theoretically pass a federal statute that demands the President refrain from executing it, the U.S. treaty makers can ratify a treaty and simultaneously prohibit the President from executing it (the strong variant).[342]

President is violating any principles of municipal law if he does act to carry out the treaty. *But see Medellín*, *supra* note 294, at 527 (stating that a non-self-executing treaty "precludes the assertion that Congress has implicitly authorized the President – acting on his own – to. . . . unilaterally make treaty obligations binding on domestic courts"). *Medellín* might seem to suggest that the President is prohibited from implementing the provisions of *any* non-self-executing treaty without legislative authorization, but to the extent such an interpretation is plausible, the facts in *Medellín* can be distinguished from any attempt by the executive branch to implement Article 12.4 of the ICCPR since there was a federalism concern in *Medellín*, one that would not be an obstacle in the implementation of Article 12.4 and the enforcement of U.S. immigration law.

339. *See supra* note 318 and accompanying text.

340. U.S. CONST. art II, § 3.

341. The Supremacy Clause says nothing about *how* the United States is supposed to implement its treaty obligations. Implementation need not necessarily be the President's responsibility.

342. The U.S. treaty makers may have many reasons for forbidding the President from enforcing a treaty. They might want the bicameral legislative process to pass detailed implementing legislation, and until that happens, the U.S. treaty makers might prefer that the President refrain from taking any action that might frustrate congressional-mandated implementation mechanisms. Another way of approaching this issue is to imagine that the day after the U.S. treaty makers ratify a fully self-executing treaty, the Congress passes a federal statute forbidding the President from executing it. There is no doubt in this case, then, that despite the fact that the treaty is still the supreme law of the land, and still obligates the U.S. internationally, and might still be self-executing in all other ways, the Take Care Clause would not demand that the President execute the treaty. Quite the contrary, the Take Care Clause would demand that the President refrain from executing the treaty. Note, too, that in the alternative, a legislative body could simply choose to pass no law at all, in which case there clearly is no a law for the President to faithfully execute. Or the Congress can change the text of a proposed law until it has the legal scope Congress wants. In the case of a treaty, especially a multilateral treaty, the U.S. treaty makers have limited ability to change the text. Indeed, if the language of the treaty is already adopted, the U.S. treaty makers cannot change the text at all (though they can make reservations). The UN General Assembly adopted the text of the ICCPR's text in 1966. The U.S. ratified it in 1992, twenty-six years later. Furthermore, there is rarely reason to embed within the text of a treaty, especially a multilateral treaty, any explicit language that explains the scope of municipal implementation within and by the United States. For more discussion of the use of a treaty's text to discern whether a treaty is self-executing or not, see *supra* note 310. The ability

Finally, under Professor Sloss' federal-state concept, the provisions of a non-self-executing treaty do not supersede conflicting state law.[343] Under the federal-state concept, the nature of the legal obligation that would otherwise be imposed upon the states by this "supreme Law of the Land" would be non-existent.[344]

B. *The Non-Self-Executing Status of the ICCPR*

As discussed above, the substantive human rights provisions of ICCPR are non-self-executing in the United States.[345] But the U.S. treaty makers were less clear about the extent they intended those provisions to be non-self-executing. It is non-self-executing to the extent of one or more of these concepts (and variants). Which concepts (and variants) depend on the intention of the Senate that consented to the ratification of the ICCPR and the intention of the President who ratified it.

The Senate's ratification resolution and the United States' instrument of ratification provide little guidance in determining the exact nature of the ICCPR's non-self-executing status since both of these documents merely state, "Articles 1 through 27 of the Covenant are not self-executing" without further elaboration.[346] The best source of evidence of the U.S. treaty makers' intentions is what was communicated by Senators, the President, and other executive branch officials during the debates surrounding the Senate's advice and consent process.

After extensively researching these debates, Professor Sloss[347] has concluded that the ICCPR is non-self-executing at least to the extent of the no private right of action variant of the political-judicial concept,[348] and it may

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to regulate or tailor the extent of a treaty's municipal effect with SE/NSE declarations enables the U.S. to enter more treaties that it otherwise would. *See* Bradley & Goldsmith, *supra* note 49.

343. Sloss, *Taming Madison's Monster*, *supra* note 49, at 1696 ("Under the federal-state concept, an SE treaty automatically supersedes conflicting state laws; no legislation is necessary to give the treaty preemptive effect. Conversely, an NSE treaty does not automatically supersede conflicting state laws."). Professor Sloss states that the use of the federal-state concept emerged only in the 1950s in response to the advent of modern international human rights treaties. *Id.* at 1703.

344. At first blush, the federal-state concept may not seem relevant for the purposes of Article 12.4 of the ICCPR since the states have no constitutional authority to admit or deport aliens. Therefore, any immigration rules that might be imposed by the ICCPR would never conflict with state law – for there is no state law on the subject. However, for our purposes here, this understanding is incorrect. For if it were the case, for example, that Congress and the President intended the ICCPR to be non-self-executing *only* to the extent of the federal-state concept – a concept that makes sense in regards to other ICCPR rights (e.g., the freedom of religion) – then the ICCPR would have some municipal force. For example, it would obligate the President and the rest of the executive branch, and courts could enforce it against the executive branch.

345. *See supra* notes 304–311 and accompanying text.

346. *Supra* notes 308–309.

347. It is notable that from 1984 to 1993, Professor Sloss worked in the U.S. Arms Control and Disarmament Agency, where he participated in the executive branch's efforts to obtain Senate advice and consent for the ratification of three major arms control treaties. Sloss, *The Domestication of IHR*, *supra* note 49, at 129.

348. *Id.* at 152–96. Professor Sloss notes that in its letter to the Senate's Foreign Relations Committee asking for advice and consent to the ratification of the ICCPR, the Bush administration explained that "[t]he intent of [the NSE declaration] is to clarify that the Covenant will not create a private

extend so far as to include the no judicial enforcement variant.[349] There appears to be no evidence in those debates, however, that the Senate or the President specifically intended the NSE declarations to include the congressional-executive concept (either variant) or the federal-state concept.[350] In fact, in its first report to the Human Rights Committee, a report in which the United States described the implementation status of the ICCPR, the United States wrote that the NSE declaration "did not limit the international obligations of the United States under the Covenant. Rather, it means that, as a matter of domestic law, the Covenant *does not, by itself, create private rights directly enforceable in U.S. courts.*"[351] The United States made no reference to any other limitations within the municipal sphere.[352]

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cause of action in U.S. courts." *Id.* at 166, citing to Senate Comm. on Foreign Rel., Int'l Covenant on Civ. and Pol. Rts: Rep., S. Exec. Rep. no. 102–23, at 19 (1992)). *Taming Madison's Monster, supra* note 49, at 1719 ("Congress and the executive branch explained [the ICCPR declaration] in accordance with the *[no] private right of action doctrine* . . . .") (emphasis in the original). Professor Sloss notes that the NSE declaration made by the Clinton Administration when it ratified the Race Convention is worded identically to the ICCPR's NSE Declaration, and since the Clinton Administration "clearly and consistently explained the NSE declaration for the Race Convention in terms of the 'private cause of action' concept," Professor Sloss suggests that this is evidence that the ICCPR's NSE declaration is merely meant to mean the same thing – that the ICCPR would not create any private causes of action. *Id.* at 168–71. Professor Sloss also argues that there is reason to think that the U.S. treaties makers assumed that American municipal law (constitutional and statutory) already provided all the rights provided in the ICCPR (except those ICCPR provisions for which the U.S. made reservations). Consequently, there was no need for the establishment of additional causes of action to protect those rights. This observation, then, serves as the justification for the U.S. treaty makers' intention that the ICCPR be non-self-executing to the extent it would not create private causes of action. *Id.* at 183–93 (noting that under this assumption, "the NSE declarations would have no effect on U.S. compliance with international treaty obligations because every claimant entitled to relief under a treaty would obtain that relief on the basis of some other redundant provision of U.S. law"). *See also supra* note 295 and accompanying text.

349. As Professor Sloss explains, the U.S. treaty makers, specifically the Bush Administration, often explained the ICCPR's NSE status in terms of the no private right of action variant, but they were not consistent in doing so. Sometimes they explained it in terms of the no judicial enforcement variant. Sloss, *The Domestication of IHR, supra* note 49, at 147–49, 167, 212–13 ("At times, the Bush Administration explained [its ICCPR] NSE declaration in accordance with the "private cause of action" concept of non-self-execution. At other times, the Bush administration explained the NSE declaration in accordance with the *Foster* concept," i.e., that the treaty "has domestic legal force but cannot be applied directly by the judiciary"). Professor Sloss notes that at a hearing before the Senate Foreign Relations Committee, Richard Schifter, the Assistant Secretary of State for Human Rights and Humanitarian Affairs read a prepared statement that ambiguously described the proposed non-self-executing status of the ICCPR to mean that "the ICCPR provisions, when ratified, will not by themselves create private rights enforceable in U.S. courts." *Id.* at 166 (quoting from *Int'l Covenant on Civ. and Pol. Rts: Hearing Before the Comm. on Foreign Rel.*, U.S. Senate, 102d Cong., at 80 (1991), and noting that "[i]n his oral statement, Mr. Schifter repeated this language almost verbatim").

350. *See Int'l Covenant on Civ. and Pol. Rts.: Hearing Before the Comm. on Foreign Rel.*, U.S. Senate, 102d Cong., at 80 (1991) [hereinafter ICCPR Senate Hearing] (quoting the Bush Administration as stating, "Under the Supremacy Clause, ratified treaties are the law of the land, equivalent to federal statutes ... Consequently, properly ratified treaties can and do supersede inconsistent domestic law. In interpreting the Supremacy Clause, the Supreme Court has long distinguished between treaties that are self-executing and those which are not, the latter being said not to create directly enforceable rights absent subsequent implementing legislation. With respect to the [ICCPR], the Administration has proposed to declare Articles 1–27 non-self-executing.").

351. Consideration of Reports Submitted by States Parties, USA, *supra* note 293, ¶ 8. (emphasis added).

352. Given that there is ambiguity as to whether the NSE declarations are meant to only encompass the no private right of action variant or the much broader no judicial enforcement variant, the *Charming Betsy* canon may come into play. That canon would dictate that courts interpret the NSE declarations in the narrowest way, i.e., only to the extent to which the U.S. treaty makers' intent is quite evident since

Many other commentators have concurred with this conclusion.[353] I have scoured the scholarly literature about these debates and have found no scholars who have looked as closely at the ratification history of the ICCPR and concluded differently.[354]

If this analysis is correct, then the human rights obligations of the ICCPR functions as municipal law for the executive branch[355] and the ICCPR supersedes any conflicting state law. However, it also means that no one can pursue a claim in a court asserting a cause of action created by the ICCPR, and it may be that no one can assert an ICCPR right as a defense in any judicial action against them either.

C. *Legal Significance of the ICCPR for the Executive Branch*

Since the US treaty makers' ICCPR NSE declaration appears to exclude the congressional-executive concept, the ICCPR is law for the executive branch. Therefore, except to the extent later-in-time conflicting federal statutes exist, the executive branch, including DHS and the DOJ, is bound by Article 12.4. And most certainly the executive branch is authorized to exercise discretion to choose to adhere to our article 12.4 obligations.

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such an interpretation would least interfere with U.S. compliance with its treaty obligations. Here, then, the court would interpret the NSE declarations in terms of the no private right of action variant. To the extent that there might be ambiguity regarding whether the NSE declarations were meant to include the congressional-executive and/or the federal-state concepts, the *Charming Betsy* canon would likewise dictate that those declarations only include the political-judicial concept. *See* Sloss, *The Domestication of IHR, supra* note 49, at 213 ("[The *Charming Betsy* doctrine] applies with even greater force when interpreting a declaration included in the U.S. instrument of ratification for a treaty, because, in the words of Justice Harlan, 'it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government" for a court to assume that the very instrument in which the United States accepted international treaty obligations manifested an intention to violate that treaty, unless no other interpretation is possible. Thus, in cases where a defendant seeks to invoke a human rights treaty as a defense to civil or criminal charges brought by the government, courts should not construe the NSE declarations to violate U.S. treaty obligations, 'if any other possible construction remains.'") (internal citations omitted). For a discussion of the *Charming Betsy* canon of interpretation, see *infra* Part III.D.2.

353. *E.g.*, Bassiouni, *supra* note 316, at 1181 ("Through its [package of proposed RUDs] the [Bush] administration clearly stated that no private right of action should be permitted without implementing legislation."); Quigley, *Judicial Implementation, supra* note 310, at 577 ("[T]he Senate expressed no intent to preclude a person from invoking rights-guarantee provisions defensively, to avert adverse government action."); Stewart, *supra* note 283, at 1202 (asserting that the NSE declaration "means that the Covenant does not, by itself, create private rights enforceable in U.S. courts").

354. Many scholars tend to write as if they assume, without being explicit, that the NSE status of the ICCPR is either all-extensive or exists only to the extent of the political-judicial concept, but their opinions often seem to result from a relatively cursory or uncritical assessment of the U.S. treaty makers' intent without having delved deeply into its exact scope or limits. It is not surprising that this would be common. After all, the U.S. treaty-makers declared that the substantive human rights provisions "are non-self-executing" and a desire to prohibit judicial enforcement was the treaty makers' focus. *See, e.g.*, Hussain, *supra* note 49, at 685; Riesenfeld, & Abbott, *supra* note 303, at 574.

355. That is to say, the U.S. treaty makers neither intended to shield the President and the executive branch from the treaty's obligations nor intended to prohibit him from carrying out the treaty. *See supra* notes 335–342 and accompanying text. Sloss, *Taming Madison's Monster, supra* note 49, at 1698 (emphasizing that if a treaty is only NSE in the political-judicial sense, *"an NSE treaty is law for the executive branch"*).

1. *Last-in-Time Rule*

If the ICCPR's human rights provisions are municipal law for some purposes under some circumstances (e.g., binding on the executive branch), it is necessary to determine how those treaty provisions interact with federal statutes. In particular, we must analyze the relationship between the Immigration and Nationality Act (INA) and the ICCPR since the INA purports to grant authority to the executive branch to deport non-citizen Americans, whereas Article 12.4 of the ICCPR prohibits the arbitrary deportation of such Americans.

As discussed above, federal statutes and treaties are understood to occupy the same level on the hierarchy of American law.[356] As a result, the last-in-time rule states that if there is a conflict between the provisions of a federal statute and the provisions of a treaty, the one that was enacted/ratified later in time trumps the one that was enacted/ratified earlier in time.[357] And, in fact, the Bush administration confirmed during the Senate ratification debates that it understood that the ICCPR, even given its NSE status, would supersede prior inconsistent federal statutory law.[358]

The U.S. ratified the ICCPR on June 1, 1992.[359] The INA was enacted in 1952 but has been amended many times since.[360] There is neither time nor space here to comprehensively break down those portions of the INA that predate June 1, 1992, and those that post-date it, but suffice it to say that the original version of the INA authorized the Attorney General to deport law-abiding, non-threatening undocumented non-citizens from the territory of the

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356. In other words, treaties and federal statutes are *pari passu* (or of equal footing or rank). *Supra* notes 322–323 and accompanying text.

357. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other . . . . [I]f the two are inconsistent, the one last in date will control the other."); Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-time Rule for Treaties and Federal Statutes*, 80 IND. L. J. 319 (2005). There is apparently only one Supreme Court case in which the court decided a later-in-time treaty overturned an earlier-in-time federal statute. Barry E. Carter, et al., INTERNATIONAL LAW 210 (7th ed., 2018) (citing *Cook v. United States*, 288 U.S. 102 (1933)). *See also* Martin, *supra* note 299, at 72–79 (challenging the constitutionality of the last-in-time rule and arguing that "treaties have greater authority than federal statutory law"); Quigley, *Judicial Implementation, supra* note 310, at 582–85 (suggesting the possibility that treaties "might occupy a rank a step above that of an Act of Congress"). *But see*, Bradley, *Treaty Duality, supra* note 49, at 157–64 (discussing judicial reluctance to displace statutory law or congressional prerogatives by means of treaty enforcement); Wu, *supra* note 49, at 595–96 (discussing how courts sometimes refuse to apply the last-in-time rule if a non-self-executing treaty would otherwise abrogate an earlier statute).

358. Sloss, *The Domestication of IHR, supra* note 49, at 167 (citing ICCPR Senate Hearing, *supra* note 350, at 80 (quoting the Bush Administration response to Senate inquiries about the anticipated legal effect of the ICCPR, "Under the Supremacy Clause, ratified treaties are the law of the land, equivalent to federal statutes . . . Consequently, properly ratified treaties can and do supersede inconsistent domestic law.")).

359. U.S. Instrument of Ratification, *supra* note 52.

360. For a list of all the amendments to Section 101(a) of the INA as of February 2020, see https://www.law.cornell.edu/uscode/text/8/1101.

United States.[361] In other words, the INA provisions that originally authorized the Attorney General to expel DACA recipients and other Dreamers predate the ratification of the ICCPR. Therefore, except to the extent that post-ratification federal statutes purposefully re-authorized the removal of law-abiding, non-threatening, undocumented non-citizens, applying the last-in-time rule, DACA recipients and other Dreamers (assuming they are non-citizen Americans) have a right to stay in the territory of the United States despite whatever other authorization or direction the INA purports to grant the Attorney General (and, now, the Department of Homeland Security) to do otherwise.

The reader should be reminded that although the focus of the paper is on DACA recipients and other so-called Dreamers, Article 12.4 would protect *any* non-citizen for whom the United States is their own country. The statutory basis for removing some of these people may be found in INA provisions enacted after July 1, 1992, e.g., the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. In such a case, the last-in-time rule may not protect them from banishment.[362] However, the *Charming Betsy* canon might. The *Charming Betsy* canon of statutory interpretation is more commonly associated with the judiciary but may be employed by the executive branch, especially elements of the executive branch operating in an adjudicatory manner. A detailed discussion of the nature and application of the *Charming Betsy* doctrine is in Part III.D.2 below.

2. *Article 12.4 is Law for the Executive Branch*

Since it appears that U.S. treaty makers did not intend the ICCPR's NSE status to include the congressional-executive concept – that is, their intent was not to shield the executive branch from the ICCPR's obligations nor prohibit the executive branch from carrying out the ICCPR's obligations[363] – Article 12.4 is law that restricts the conduct of the executive branch. As a ratified, in-force treaty, the ICCPR is part of the supreme law of that land pursuant to the Supremacy Clause.[364] The ICCPR's NSE does not change that.[365] And as a supreme law of the land – one that the President is neither prohibited

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361. Immigration and Nationality Act of 1952, Public Law 414, Jun. 27, 1952, § 241(a)(1), (2), (9) (listing as among the set of "deportable" aliens, aliens who "entered the United States without inspection," aliens who are "in the United States in violation of this Act," and aliens who were "admitted as a nonimmigrant . . . and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed . . . or to comply with the conditions of any such status").

362. There is neither time nor space in this Article to explore in any depth whatsoever the protections Article 12.4 might afford every category of non-citizen Americans (e.g., those who are convicted felons, those who are suspected of being a terrorist threat).

363. *See supra* Part III.B.

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

365. For a discussion of the status of NSE treaties as the supreme law of the land, *see supra* note 318 and accompanying text. *See also* Henkin, *supra* note 310, at 203–04 ("Whether [a treaty] is self-executing or not, it is supreme law of the land. If it is not self-executing, Marshall said, it is not a 'rule for the Court'; he did not suggest that it is not law for the President or for Congress. It is their obligation to see to it that it is faithfully implemented . . . .").

from executing nor shielded from having to execute – it is among the laws that the President is to take care to faithfully execute pursuant to the Take Care Clause.[366] Additionally, as per the last-in-time rule, the ICCPR trumps any earlier-in-time provisions of the INA that would otherwise authorize (or require) the deportation of DACA residents and Dreamers. Therefore, assuming the statutory provisions authorizing the removal of DACA recipients and Dreamers pre-date the ratification of the ICCPR, the executive branch is prohibited from arbitrarily banishing DACA recipients and Dreamers who qualify as non-citizen Americans. If this analysis is correct, then prosecutorial discretion is not discretionary at all; it is obligatory. And removal actions must be deferred indefinitely.[367]

It should be highlighted that the task of interpreting and administering federal immigration law resides in the first instance with the executive branch, not the judicial. Immigration judges and members of the Board of Immigration Appeals (BIA) are housed in the Department of Justice's Executive Office for Immigration Review (EOIR).[368] Therefore, although Article III courts have some authority to review EOIR decisions,[369] removal decisions are often made by members of the executive branch. Since it appears that U.S. treaty makers did not intend the ICCPR's NSE status to include the congressional-executive concept and that they only intended it to extend to (some variant of) the political-judicial concept, the ICCPR is law, law with municipal force, for the country's immigration judges and BIA members. Immigration judges and BIA members, must, therefore take into consideration and apply ICCPR Article 12.4 when conducting their legal

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366. U.S. CONST. art. II § 3. For a discussion of the relationship between non-self-executing treaties, the Supremacy Clause and the Take Care Clause, *see* Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 934 (1986) ("The President's duty to take care that the laws be faithfully executed includes not only statutes of Congress and judge-made law, but also treaties . . . ."); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 164 (2004) (arguing that constitutional text, history and policy all support the conclusion that treaties are included in the "Laws" of the Take Care clause); Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DEPAUL L. REV. 1241, 1244–47 (1993) (arguing that the Take Care Clause requires the President to "promote and respect" and otherwise execute the ICCPR even though the ICCPR is not "effective in courts"). Swaine, *supra* note 49; Young, *Treaties as "Part of Our Law"*, *supra* note 49, at 129 ("[A] non-self-executing treaty may guide the conduct of the Executive Branch, and particularly officials subordinate to the President . . . [I]t seems possible that a non-self-executing treaty might nonetheless trigger the Executive's authority and obligation to "take Care that the Laws be faithfully executed. The President might order federal officials to comply with a non-self-executing treaty's provisions."). This discussion assumes that the treaty at issue is not NSE pursuant to the congressional-executive concept. For a discussion of how a treaty that is NSE pursuant to the congressional-executive concept relates to the Take Care Clause, see *supra* notes 339–42 and accompanying text. *But see*, Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PENN. L. REV. 1835, 1855 (2016) (observing that the Supreme Court "has yet to examine what the [Take Care] clause means by 'Laws'" and asking rhetorically if it includes the Constitution, treaties, customary international law or federal common law).

367. Or at least until Congress enacts a federal statute prohibiting the executive branch from implementing this ICCPR obligation. For a discussion of possible congressional responses, see Conclusion.

368. 8 C.F.R. § 1003.0(a) (2018).

369. *See, e.g.*, Immigration and Nationality Act, 8 U.S.C. § 1252(g) (2018).

analysis and making their decisions. Such analysis should include the use of the *Charming Betsy* canon of statutory interpretation.[370]

It is also worth noting that despite any possible uncertainty over the outer contours of the ICCPR's NSE status, it seems quite certain that the U.S. treaty makers did not intend the ICCPR's NSE status to include the strong variant of the congressional-executive concept, that is to say, that the treaty makers did not intend to *prohibit* the executive branch from carrying out the ICCPR's obligations. Such a level of NSE would be the strongest to impose on the executive branch. Pursuant to the strong congressional-executive variant, the executive branch would be prohibited from acting in accordance with the principles of Article 12.4, and the Department of Homeland Security and the Attorney General would be obligated to remove (or, at least, try to remove) every DACA recipient and every Dreamer. Clearly, this is not the case. The executive branch has exercised, and intends to continue to exercise, quite a bit of prosecutorial discretion with regard to removing such people.[371] Although some have complained about the extent of such prosecutorial discretion and about the DACA program itself, I have yet to find one instance when opponents of generous discretion premise their arguments on the NSE status of the ICCPR. Indeed, to do so seems absurd. There seems to be no evidence anywhere that the U.S. treaty makers intended to eliminate such prosecutorial discretion when it declared its intention that the ICCPR be non-self-executing. The ICCPR, at least with regard to Article 12.4, is clearly not non-self-executing to the extent of the

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370. For a discussion of the nature and application of the *Charming Betsy* canon, see infra Part III. D.2.

371. The DHS has in recent years always made the pursuit and removal of aliens like the Dreamers a low priority. *See* DACA Memorandum, *supra* note 1; Memorandum from Jeh Charles Johnson, Sec'y of the Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, et al., *Re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (listing among the factors to consider: (i) length of time in the U.S.; (ii) family ties in the U.S.; (iii) community ties in the U.S.; and (iv) humanitarian factors); Exec. Order No. 13768, 82 Fed. Reg. 8789 (Jan. 2017) (announcing that the Trump administration would prioritize the enforcement of immigration laws against those immigrants who have committed crimes); Memorandum from John. F. Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Customs and Border Prot., et al. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf (announcing the Trump administration's intention to maintain the DACA program); Memorandum from John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al., *Re: Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPAP")* (June 15, 2017), https://governor.nebraska.gov/sites/governor.nebraska.gov/files/doc/press/DHS%20DAPA%20Memo%206.16.2017.pdf, at 2 (announcing the Trump administration's intention to maintain the DACA program in its original, non-extended form). Three months later, the Trump administration declared it would wind down the DACA program. DACA Rescission Memorandum, *supra* note 18. Nevertheless, it continues to be the Trump administration's policy to prioritize the removal of non-citizens who have committed crimes. It should be reiterated, however, that in accordance with ICCPR Article 12.4, even a long-term resident non-citizen (documented or not) who poses a threat to national security or public safety might also have an ICCPR right to stay in the U.S. *See supra* Part I.

strong congressional-executive variant.[372]

If, for the sake of argument, we were to assume that the U.S. treaty makers intended the ICCPR to be non-self-executing to the extent of the weak variant of the congressional-executive concept (and not the strong variant), that is to say, that the U.S. treaty makers intended to shield the executive branch from the obligations of the ICCPR, what would be the result? The executive branch would not be under any *municipal* obligation to carry out the US's ICCPR obligations, but obviously the executive branch would still have the discretion to carry out the provisions of the ICCPR. The executive branch would still be able to exercise prosecutorial discretion and enforce the nation's immigration laws in accordance with the United States' *international* human rights legal obligations.[373] For our purposes, that means that the executive branch could still exercise prosecutorial discretion with regard to the deportations of DACA recipients, Dreamers, and other non-citizen Americans.[374] We could refer to this as implementation through executive discretion.[375]

However, we can take this analysis further. Continue to assume that the U.S. treaty makers intended to shield the President from the ICCPR's obligations. Even though, as just stated, the executive branch would not be under any municipal obligation to enforce the provisions of the ICCPR, the *United States* is still under an international legal obligation to carry out the ICCPR. The United States cannot shield itself from its treaty obligations on the international plane just because it declared the treaty to be non-self-executing no matter how far the non-self-execution status extends. International law does not care about how the United States implements its international obligations. Each state is a black box in that regard. But if it is evident that the Congress will not implement the terms of the ICCPR through the enactment of a federal statute or statutes, it may be incumbent on the executive branch to implement this international obligation since only the Congress (acting through the

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372. Since the NSE declaration was a blanket statement for all the substantive human rights provisions of the ICCPR, imposing the strong variant would have forbidden the President from implementing any of the ICCPR rights that protect personal liberties more than the Constitution does.

373. The Clinton administration had an official policy to adhere to the US's international human rights obligations, including those of the ICCPR, and to generally "promote respect for international human rights." President Clinton directed all executive departments and agencies to carry out their work in accordance with this policy. Exec. Order No. 13107, 63 Fed. Reg. 68991 (Jan. 2017). As of December 1, 2019, Executive Order 13107 has not been superseded, amended, revoked or nullified.

374. There may be other provisions in federal statutes that restrict the ability of the executive branch to exercise such discretion. It is beyond the scope of this paper to comprehensively analyze and discuss the extent of the President's discretion to enforce the nation's immigration statutes against DACA recipients and Dreamers. However, after reviewing much of the litigation initiated against the Obama administration's DACA program, the author has yet to find a plaintiff who argues that such discretion would be unconstitutional as long as such discretion is exercised on a case-by-case, individualized manner. For a discussion of the lawsuits challenging the DACA program, see *supra* notes 1–24 and accompanying text.

375. *See also* Thronson, *supra* note 25 (encouraging the use of executive discretion to bring U.S. immigration policy in line with international human rights law); Jack Goldsmith & John P. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2293–95 (2006) (suggesting that prosecutorial discretion is within the President's "completion power").

executive branch) or the executive branch itself can carry out the ICCPR's Article 12.4's international legal requirements. It is an intriguing possibility that, in such a situation, the executive branch may be under an obligation to implement Article 12.4, but it is not one that I will grapple with further here. Fortunately, it is not necessary to determine to what extent the President might or might not be *obligated* to enforce the ICCPR if the ICCPR were non-self-executing to the extent of the weak congressional-federal concept[376] – because there is simply no evidence that the ICCPR is non-self-executing pursuant to the extent of the weak congressional-federal concept.

But what if the executive branch, despite its international and municipal obligation to implement Article 12.4 fails to do so? At first blush, judicial remedies may not be available. But this might not be completely true.

D. *Possible Legal Significance of the ICCPR for the Judicial Branch*

If the ICCPR is non-self-executing only to the extent of the no-private-cause of action variant of the political-judicial concept, then non-citizen Americans facing removal may allege their ICCPR Article 12.4 rights in defense. However, even if the ICCPR's NSE status extends more broadly, or completely, within the political-judicial concept, Article 12.4 may nonetheless affect judicial decisions. A court might be able to use Article 12.4 pursuant to the *Charming Betsy* canon of statutory interpretation to guide its interpretation of federal immigration statutes. Alternatively, the Due Process Clause of the Fifth Amendment may require the judicial enforcement of Article 12.4. Indeed, some scholars and courts have argued that international human rights law, including treaty obligations like Article 12.4, may be used to help guide the interpretation of certain constitutional provisions themselves. These possibilities, and others, are presented in this subsection.

1. *Invocation in Defense*

We have already established that the ICCPR is non-self-executing at least to the extent that it does not provide private causes of action.[377] If it is non-self-executing only to that extent, then DACA recipients, Dreamers, and other non-citizen Americans facing removal proceedings would be able to appeal to the ICCPR as a defense to removal.[378] The ability of someone to

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376. For a discussion of the relationship between congressional-executive NSE status, the Supremacy Clause, and the Take Care Clause, see *supra* notes 339–342 and accompanying text.

377. *See supra* Part III.B.

378. Some may argue that it must not be the case that an alien could evoke Article 12.4 to challenge removal proceedings since it would render Article 12.4's non-self-executory nature devoid of any real effect. After all, how else would an alien employ Article 12.4 but to challenge a removal process? However, the following two points should be considered: First, it is easily imaginable that a person – citizen or otherwise – who believes they were arbitrarily deprived of their right to enter their own country (temporarily or otherwise) might want to file a claim against the government alleging a violation of their ICCPR rights and asking for compensation. Since the ICCPR does not provide any private causes of action, such a person's suit would be dismissed. In other words, a no-private-cause-of-action status even with regard to Article 12.4 is not at all devoid of effect. Second, there is no evidence to suggest that the

appeal to a non-self-executing treaty as a defense to a government-initiated action against that person is a possibility that has been theorized and defended by many scholars.[379] This theory, however, has not garnered much acceptance in the courts, as they tend to deem any non-self-executing treaty as one that cannot be invoked in defense. Such conclusions on the part of the courts are often conclusory and are made without detailed or granular analysis of the treaty makers' intent.[380]

2. *The* Charming Betsy *Canon*

What if the political-judicial limitation extends further, as Professor Sloss suggests it might? Of course, if it extends to what Professor Sloss calls the no private enforcement variant, that is to say, the NSE status that prohibits courts from entertaining any treaty claims by any private entity either offensively or defensively,[381] no private litigant could assert an ICCPR right. An alien facing removal would not be able to assert Article 12.4 to avoid deportation. The same would be true if the ICCPR's NSE status extended to the no judicial enforcement variant. However, two arguments might nevertheless be available to these non-citizens facing deportation, arguments that incorporate Article 12.4 without requiring its direct enforcement. The first involves the *Charming Betsy* canon of statutory interpretation, and the second involves the scope of two constitutional rights, the Fifth Amendment's Due Process Clause and the Ninth Amendment.

The *Charming Betsy* canon of interpretation states that if it is possible to construe a federal statute in a way that comports with international law, then the federal statute should be interpreted as such.[382] The traditional

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U.S. treaty makers intended to have different NSE statuses applied to different substantive human rights provisions of the ICCPR. All the substantive provisions were considered as a group, and the NSE declaration made by the Senate in its consent resolution and the NSE declaration made by the President in the ratification instrument merely state that "the provisions of Articles 1 through 27" are not self-executing. There are plenty of provisions in Articles 1 through 27 for which a "no private right of action" limitation would be quite impactful. Seen in this light, it is wholly plausible that the ICCPR might have been intended to be non-self-executing only to the extent that it does not create any private causes of action.

379. *E.g.*, Newman, *supra* note 366, at 1244–49; Vázquez, *Treaty-Based Rights*, *supra* note 302, at 1143 ("[A] treaty that does not itself confer a right of action . . . is not for that reason unenforceable in the courts. A right of action is not necessary if the treaty is being invoked as a defense."); Sloss, *The Domestication of IHR*, *supra* note 49, at 151–52, 210–13. *But see* Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1224–25 (1991).

380. *See, e.g.*, *Medellín*, *supra* note 294, at 505, n.2 (asserting that a NSE treaty "does not give rise to domestically enforceable federal law" and thus suggesting that an NSE treaty can never be non-self-executing only to the extent that it does not create private causes of action). *See also* Bradley, *Intent, Presumptions*, *supra* note 49, at 547–48 (commenting that the Court in *Medellín* "seems to be clearly rejecting the argument . . . that a NSE treaty merely fails to provide a private right of action and thus can be enforced by courts when [the] treaty is invoked defensively in a criminal case"). *But see* Quigley, *A Tragi-Comedy*, *supra* note 49, at 425 (arguing that the Court's understanding in *Medellín* of non-self-execution as applied to the possibility of invoking a NSE treaty in defense "must be regarded as dictum since [it] was [not] at issue in *Medellín*").

381. *See supra* notes 327–334, 347–354 and accompanying text.

382. "An act of Congress should be construed in accordance with international law where it is possible to do so without distorting the statute." Filartiga v. PenaIrala, 630 F.2d 876, 887 n.20 (2d Cir. 1980)

assumption underlying the *Charming Betsy* canon is that Congress normally expects the U.S. to comply with its international law obligations and, therefore, rarely passes legislation conflicting with international law.[383] As a result, a court should not interpret a federal statute in a way that conflicts with international law if any other interpretation is possible. To do otherwise might inadvertently put the U.S. in a position of violating international law even though Congress might not have intended to. After all, it is not the judiciary's role to violate the law.[384]

A court, therefore, could apply the *Charming Betsy* canon to the INA and interpret it in a way that reflects the country's obligations under the ICCPR – in particular, in a way that does not authorize the Attorney General or the Secretary of Homeland Security to arbitrarily deport non-citizen Americans. There might be enough ambiguity in the INA that a reasonable interpreter could leverage the *Charming Betsy* canon.[385] In doing so, the court

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(quoting Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 67 (1804)). *See also* RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, *supra* note 55, § 309(1) ("[Where fairly possible, courts in the United States will construe federal statutes to avoid conflict with a treaty provision."). *See generally* Ralph G Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Interpretation*, 43 VAND. L. REV. 1103 (1990).

383. Some modern scholars have observed that it does not seem empirically true that the Congresses of the much more mature United States are particularly concerned with adhering to international law, and, therefore, the best justification for the application of the *Charming Betsy* canon is that it helps maintain a proper separation of powers. It is the Congress' role to determine when to violate international law, not the courts' role. *See* Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 OHIO ST. L.J. 1336 (2006); Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) [hereinafter Bradley, *The* Charming Betsy *Canon*].

384. It should be noted that the *Charming Bets*y canon of statutory interpretation operates differently from a similar canon of statutory interpretation known as the presumption against implied repeal. The implied repeal canon reconciles conflicting statutes by minimally paring back the older statute, as opposed to repealing the older statute altogether. *See generally Repeal by Implication*, 55 COLUM. L. REV. 1039 (1955); Jesse W. Markham, Jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation under the Ballooning Concept of "Plain Repugnancy"*, 45 GONZ. L. REV. 437 (2009). Whereas the implied repeal canon operates to preserve at least part of an earlier statute in the face of a later-in-time conflicting statute by paring back the earlier statute to accommodate the later statute, the *Charming Betsy* canon operates to preserve the municipal force of international law in the face of ostensibly conflicting federal statutes by constricting (where plausible) the interpretation of the federal statute.

385. It is well beyond the scope of this Article to scour the INA for a comprehensive list of possible ambiguities or exhaustively analyze them. However, it is worth noting that "immigration law" is defined in the INA to include "conventions and treaties." Immigration and Nationality Act, 8 U.S.C. § 1101(a)(17). Non-citizen Americans' presence in the United States might, then, be permitted pursuant to U.S. "immigration law." Additionally, perhaps non-citizen Americans are not "aliens" as that term is used in the INA. An "alien" is "any person not a citizen or national of the United States." Immigration and Nationality Act, 8 U.S.C. § 1011(a)(3). "Nationals of the United States" include "person[s] who . . . owe[] permanent allegiance to the United States." Immigration and Nationality Act, 8 U.S.C. § 1011(a)(22); Section 308 of the INA (8 U.S.C. § 1408) lists certain categories of persons who are nationals of the United States, but that list is not expressly exhaustive. Given the United States' obligations under Article 12.4 of the ICCPR, perhaps non-citizen Americans are "nationals of the United States" and thus not subject to the vast majority of the immigration provisions of the INA. *See* Hughes v. Ashcroft, 255 F.3d 752, 757 (9th Cir. 2001) (suggesting that INA Section 308 is not an exhaustive list of "nationals of the United States" since persons who have applied for citizenship may qualify as nationals); U.S. v. Morin, 80 F.3d 124, 126 (4th Cir. 1996) (recognizing a permanent resident alien of the U.S. who had applied for U.S. citizenship as a "national of the United States"). *But see* Mohammadi v. Islamic Republic of Iran, 782 F.3d 9, 14 (D.C. Cir. 2015) (quoting Manquez-Almanzar v. Immigration and Naturalization Serv., 418 F.3d 210,

would not be applying the ICCPR directly; instead the court would be applying the INA directly after interpreting it in such a way that it does not violate our international legal obligations.[386] Or, framed differently, a person facing banishment would not be enforcing a private right established by law, but rather would be immune from possible banishment because the INA either forbids it or simply does not grant the Attorney General or the Secretary of Homeland Security the power to inflict it.

Besides finding an appropriate level of ambiguity in the INA, several other obstacles might stand in the way of applying the *Charming Betsy* canon in this way. First, it is debatable whether it is appropriate to employ the *Charming Betsy* canon with regard to an NSE treaty. It might be an excessive infringement on the political branches for a court to employ the *Charming Betsy* canon with regard to a treaty that the political branches expect the courts not to enforce directly.[387] It is not my intention to answer this question here but merely to introduce the possibility of using the *Charming Betsy* canon with regard to NSE treaties like the ICCPR. It is notable, however, that several scholars have argued that this is an appropriate use of the *Charming Betsy* canon,[388] and several courts have said the same.[389] And, indeed, the

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218 (2d Cir. 2005) "The phrase 'owes permanent allegiance' in §1011(a)(22)(B) [of the INA] is . . . a term of art that denotes a legal status for which individuals have never been able to qualify by demonstrating permanent allegiance, as that phrase is popularly understood."); *id.* at 15 ("The courts of appeals to consider the issue thus have overwhelmingly concluded that the status of non-citizen United States nationality is limited to those persons described in 8 U.S.C. § 1408, and that, apart from that provision, an effort to demonstrate "permanent allegiance to the United States" does not render a person a United States national."); Hughes v. Ashcroft, 255 F.3d at 760 (denying "national of the United States" status to a man who was born in Poland, orphaned by the age of two, adopted by American citizen parents, entered the United States at age four, and lived in the United States for the next two and a half decades before being sentenced to a 24-year prison term); Oliver v. Immigration and Naturalization Serv., 517 F.2d 426 (2d Cir. 1975) (denying "national of the United States" status to a woman who had moved (lawfully) to the United States at age ten and lived the next twenty years in the U.S.); In re Moises NAVAS-ACOSTA, 23 I&N Dec. 586 (B.I.A. 2003) ("[N]ationality under the [INA] may be acquired only through birth or naturalization."). It is notable, however, that none of these cases suggesting that only birth or naturalization may confer "national of the United States" status considered the United States' obligations under the ICCPR.

386. Applying the INA to enforce individual human rights jibes with the U.S. treaty makers' understanding that victims of human rights abuses would be able to assert constitutionally provided and/or statutorily provided rights to enforce ICCPR human rights. *See* Sloss, *The Domestication of IHR*, *supra* note 49, at 207 ("The political branches have not expressed an intention for the United States to violate its obligations under human rights treaties; to the contrary, they have clearly expressed their intention to comply. Therefore, in accordance with the *Charming Betsy* maxim, courts should, whenever possible, construe other provisions of U.S. law in a manner that is consistent with U.S. obligations under human rights treaties.").

387. *See* Bradley, *The* Charming Betsy *Canon*, *supra* note 383, at 484 (arguing that the canon "is best thought of today as a device to preserve the proper separation of powers between the three branches of federal government").

388. *E.g.*, *id.* at 483 ("[T]he *Charming Betsy* canon presumably applies to all international obligations of the United States, regardless of whether they are viewed as enforceable domestic law."); Rebecca Crootof, *Judicious Influence: Non-Self-Executing Treaties and the* Charming Betsy *Canon*, 120 YALE L. J. 1784, 1801 (2011); Sloss, *The Domestication of IHR*, *supra* note 49, at 207; Harold C. Webner, *Injunctive Relief: A* Charming Betsy *Boomerang*, 4 NW. J. TECH. & INTELL. PROP. 156, 166 (2006); Ingrid Brunk Wuerth, *Authorization for the Use of Force, International Law & the* Charming Betsy *Canon*, 46 B.C. L. REV. 293, 353–54 (2005); Damrosch, *supra* note 310, at 532 ("Even though a non-self-executing declaration purports to tell courts not to give direct effect to the treaty, it does not go so far as to instruct them to violate it."). *See also* Melissa A. Waters, *Using Human Rights Treaties to Resolve*

purpose of the *Charming Betsy* canon is to avoid unintended violations of international law, and the ICCPR's NSE status does not diminish the US's international obligations under it. In fact, the United States told the Human Rights Committee in 1994 during the US's first ICCPR implementation report that "notwithstanding the non-self-executing declaration of the United States, American courts are not prevented from seeking guidance from the Covenant in interpreting American law."[390] Some courts, however, dispute the legitimacy of employing *Charming Betsy* to an NSE treaty.[391]

Second, one of the justifications of the application of the *Charming Betsy* canon is the assumption that Congress does not normally intend to disrupt the "delicate field of international relations."[392] But it is debatable whether or not a significant concern for "delicate international relations" are implicated when Dreamers are deported.[393] Concern for international relations might, however, be implicated when the United States deports a non-citizen American with criminal propensities, substance abuse issues and/or a complete lack of foreign acculturation.[394]

Lastly, the *Charming Betsy* canon is normally used in relation to international law that existed at the time Congress enacted the statute in question. To apply the *Charming Betsy* canon to interpret a federal statute in light of a treaty that was ratified *after* the enactment of the statute would be relatively novel. However, the *Charming Betsy* canon is not formally limited to the interpretations of later-in-time statutes.[395] It is simply rarely (if ever) used that way. It is rarely used this way because the canon is not necessary in

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Ambiguity: The Advent of a Rights-Conscious Charming Betsy *Canon*, 38 VICTORIA U. WELLINGTON L. REV. 237, (2007) (chronicling the recent use of *Charming Betsy*-like doctrines for non-self-executing human rights treaties in New Zealand, Canada, and Australia).

389. *E.g.*, Hyundai Elec. Co. v. U.S., 23 Ct. Int'l Trade 302, 312–14 (1999); Capitol Records Inc. v. Thomas, 579 F. Sup. 2d 1210, 1226 (D. Minn. 2008); Maria v. McElroy, 68 F. Supp. 2d 206, 231–33 (E. D.N.Y. 1999); My thanks to Rebecca Crootof for bringing most of these cases to my attention. Crootof, *supra* note 389. Dr. Crootof also notes that many courts have employed the *Charming Betsy* canon without first inquiring whether the relevant treaty is self-executing. *Id.* at 1791–96; *e.g.*, Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114–15 (9th Cir. 2001) (doing so with the ICCPR, and doing so to interpret the INA).

390. Human Rights Committee, *Comments on the USA*, *supra* note 287, at ¶ 11.

391. *E.g.*, Al-Bihani v. Obama, 619 F.3d 1, 10, 16 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc); Norsk Hydro Can., Inc. v. U.S., 472 F.3d 1347, 1360 n.21 (Fed. Cir. 2006); Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872, 880 (D.C. Cir. 2006) (Kavanaugh, J., concurring). *But see Al-Bihani*, 619 F.3d at 53 (Williams, J., concurring in the denial of rehearing en banc) ("Judge Kavanaugh, I think, fails to adequately distinguish between treatment of international law norms as 'judicially enforceable limits' on Presidential authority, or as 'domestic U.S. law,' and use of such norms as a 'basis for courts to alter their interpretation of federal statutes.'") (citations omitted).

392. McCulloch v. Sociedad Nacional de Marineros de Honduras, 327 U.S. 10, 21–22 (1964) (quoting Benz v. Compania Naviera Hildago, S.A., 353 U.S. 138, 147 (1957)).

393. Indeed, many current members of the political branches seem to be rather unconcerned about being an American bull in the delicate China shop of international relations. *See generally* Sloss, *Treaties and Individually Enforceable Rights*, *supra* note 49, at 91–110 (documenting the rise of the "nationalist model" of treaty enforcement).

394. For a discussion of the impropriety of forcing an undesirable person on another country, see *supra* note 238 and accompanying text.

395. *See* Jonathan Turley, *Dualist Values in the Age of Legisprudence*, 44 HAST. L.J. 185, 265 (noting that the *Charming Betsy* canon can be used "to read a statute in conformity with a later international agreement"). Professor Turley would, however, call for the "decanonization" of *Charming Betsy*. *Id.* at 263–72 (promoting legislative supremacy and condemning "elitist countermajoritarianism").

circumstances when a self-executing treaty is ratified (or when an NSE treaty has been legislatively implemented) *after* the relevant statute was enacted since the much stronger last-in-time doctrine would apply. Any later-in-time self-executing treaty (or implementing legislation) will simply trump any conflicting provisions in any earlier-in-time federal statute, thus obviating the need for any *Charming Betsy*-like canon of interpretation.

3. *Due Process Clause of the Fifth Amendment and Other Constitutional Rights*

With regard to the Fifth Amendment's Due Process clause,[396] it is possible to argue that the application of a form of non-self-execution that would render the ICCPR utterly impotent to protect someone facing the possibility of banishment is a violation of their due process rights. The argument would be based on the principle that due process entitles someone facing extremely harsh and disproportionate (arbitrary) governmental treatment – treatment that would not only deprive them of their liberty, but would undoubtedly violate their human rights – to appeal to the "supreme Law of the Land" for protection. The demand by the U.S. treaty makers that the supreme Law of the Land (the ICCPR) must be ignored by the judicial branch even in this situation would be deemed unconstitutional.[397] It is beyond the scope of this paper to craft a particularized due process argument that might allow non-citizens facing deportation to appeal to their ICCPR rights, and further away still to evaluate the persuasiveness of such an argument. However, other scholars have suggested similar arguments in different contexts.[398] Professor Sloss, for example, has argued that defendants facing state criminal charges should have the right pursuant to the Fourteenth Amendment's Due Process Clause to appeal to individual rights provided in non-self-executing treaties.[399] Similarly, Professor Vázquez has suggested that it might be "plausible" that defendants before federal military commissions have a due process right to invoke provisions of the Geneva Conventions in support of a defense to criminal charges even if such provisions have been statutorily rendered non-self-executing.[400]

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396. U.S. CONST. amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law ....").

397. Alternatively, the *Charming Betsy* canon can be applied to ambiguous NSE declarations in a way that leads the courts to conclude that the NSE declarations are of limited scope, thus enabling a defendant or a potential deportee to appeal to their treaty rights in the face of government-imposed maltreatment. *See supra* note 352 and accompanying text.

398. *E.g.*, Sloss, *Treaty Preemption Defense*, *supra* note 49; David L. Sloss, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE, Chapter 14 (2016). *But see*, Bradley, *Treaty Duality*, *supra* note 49, at 137–40.

399. Sloss, *Treaty Preemption Defense*, *supra* note 49. However, Professor Sloss notes that although there might be "a constitutional right to raise a treaty-based preemption defense in a state criminal trial, it does not necessarily follow that there is a similar right to raise a treaty-based defense to federal criminal charges." *Id.* at 973. *See also* Sloss, *Treaties and Individually Enforceable Rights*, *supra* note 49.

400. Carlos Manuel Vázquez, The *Military Commission Act, the Geneva Conventions and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 79 n.47 (2007) ("If the Due Process Clause applies in

More aggressively, perhaps, are suggestions that constitutional provisions themselves may, or should be, interpreted in light of international law.[401] Pursuant to these proposals, the Fifth Amendment's Due Process Clause might be interpreted in such a way that the clause itself demands that the federal government refrain from arbitrarily deporting non-citizen Americans. Perhaps the equal protection dimension of the Fifth Amendment's Due Process Clause[402] prohibits the government from banishing any American, citizen or not. After all, the geographic location of someone's birth or their parentage would seem to be irrelevant factors when making distinctions about which Americans can and cannot be banished.[403] The Ninth Amendment might also be a candidate for containing a right for all Americans to remain in the country.[404] Again, it is beyond the scope of this Article to pursue these arguments in any detail other than to note that many scholars and courts have advocated using international human rights law to inform our understanding and expand the application of constitutional provisions, including the due processes clauses and the Ninth Amendment.[405]

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full force, the claim that the [military] commissions afford the procedural guarantees required by common Article 3 [of the Geneva Convention] is more plausible.").

401. *See* Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts in United States History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 570–96 (1989) (citing to 166 Supreme Court cases in which the court "utilize[d] human rights standards as juridic aids for the interpretation of constitutional or statutory norms").

402. Bolling v. Sharpe, 347 U.S. 497 (1954) (articulating the equal protection dimension of the Fifth Amendment's Due Process Clause).

403. Indeed, as this Article has argued, there is no category of Americans who may be (arbitrarily) banished.

404. US. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). It is worth noting that at the time of the adoption of the Bill of Rights, there was no concept or category of "illegal aliens" or "undocumented immigrants" in the United States. Almost without exception, anyone from anywhere in the world was free to enter and stay in the United States and did not require permission from the federal government. *See generally* Gerald L. Neuman, *The Lost Century of Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

405. *E.g.*, Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Cole, *supra* note 25; Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 U. CIN. L. REV. 3 (1983); Gordon A. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39 (1981); Paust, INTERNATIONAL LAW, *supra* note 310, at 323–59; Paust, *Self-Executing Treaties, supra* note 49, at 781–82 (asserting that although NSE treaties "cannot operate directly without implementing legislation, they can be used indirectly as a means of interpreting relevant constitutional provisions"); Jordan Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975); Quigley, *The ICCPR and the Supremacy Clause, supra* note 306, at 1306; Farooq Hassan, *The Doctrine of Incorporation: New Vistas for the Enforcement of International Human Rights?*, 5 HUM. RTS. Q. 68, 83–84 (1983); Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 413–20 (1979); Martin, *supra* note 299, at 84–87; Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring) (citing the International Convention on the Elimination of All Forms of Racial Discrimination for construing the Fourteenth Amendment's equal protection guarantee in support of affirmative action programs); Thompson v. Oklahoma, 487 U.S. 815, n.34 (1988) (citing the ICCPR for construing the Eighth Amendment's prohibition of cruel and unusual punishment as prohibiting the execution of persons under the age of sixteen); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n. 16 (1963) (citing the Universal Declaration of Human Rights for construing the Fifth and Sixth Amendments in citizenship revocation case). *But see* John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 329 (2009) (arguing that the use of international law "does not have a place in a justice-seeking construction of the Constitution"); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J.

4. *Dicta*

Despite the fact that U.S. courts might not be able to directly enforce the ICCPR, courts could nevertheless speak out in appropriate cases and declare – in dicta – that removals contrary to the protections of Article 12.4 violate the United States' international legal obligations.[406] Such declarations by U.S. courts might not be the basis for court holdings, but such declarations could powerfully frame U.S. actions in terms of human rights, bringing attention to the plight of DACA recipients, Dreamers, and other non-citizen Americans and highlighting that there is rarely compelling reason to banish someone.

IV. ADDITIONAL ICCPR PROVISIONS THAT MAY BE HELPFUL TO IMMIGRANTS

Before concluding, it is worth noting other ICCPR rights that might protect non-citizen Americans from removal. Most notably are the rights associated with the preservation of the family,[407] the protection of children,[408] and the principle of *non-refoulement*.[409] It is well beyond the scope of this Article to

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Int'l L. 57 (2004); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005).

406. U.S. courts are competent to decide when the United States has violated international law. *Supra* note 324.

407. ICCPR, *supra* note 26, at art. 17.1 ("No one shall be subjected to arbitrary or unlawful interference with his privacy [and] family . . . ."); *Id.* at art. 23.1 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."). The Human Rights Committee has stated that "while ICCPR does not recognize the right of aliens to enter or reside in the territory of a State party . . ., in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise." Human Rights Committee, *General Comment 15*, The Position of Aliens under the Covenant, adopted April 11, 1986, ¶ 5. And I would add: when considerations of banishment contrary to Article 12.4 arise. *See also* HRC *Dauphin*, *supra* note 148, (concluding that the deportation of a Haitian citizen with a criminal record from Canada where he had lived most of his life would violate his ICCPR rights to family); *supra* notes 241–256 and accompanying text (discussing *Winata*); Human Rights Committee, *General Comment 16*, *supra* note 220; Human Right Committee, *General Comment 19*: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, adopted July 27, 1990.

408. ICCPR, *supra* note 26, at art. 24.1 ("Every child shall have, without any discrimination as to race, colour . . . national . . . origin, . . . or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."). Such rights have been applied by the HRC to prohibit the deportation of aliens with citizen children. *E.g.*, HRC *Winata, supra* note 241. These rights have also been applied by the HRC to prohibit the deportation of aliens with strong family links in their host countries and few in the countries of their citizenship. *E.g.*, HRC *Dauphin, supra* note 148.

409. The ICCPR does not contain an explicit prohibition against *refoulement*, but it has been interpreted to contain an implicit *non-refoulement* rule. For example, the HRC has proclaimed that "the Article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant [asserting a right to life and prohibiting torture, inhumane treatment and non-consensual medical experimentation, respectively], either in the country to which removal is to be effected or in any country to which the person may subsequently be removed." Human Rights Committee, *General Comment 31*, *supra* note 291, ¶ 12. The relevant part of Article 2 of the ICCPR reads, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." ICCPR, *supra* note 26, at art. 2.1. Article 6 of the ICCPR states "[n]o one shall be arbitrarily deprived of life" and provides certain procedural rules for the imposition of the death penalty. *Id.* at art. 6. Article 7 reads, "No one shall be subjected to torture or to cruel, inhuman

discuss these provisions in any more detail except to say that these ICCPR rights might matter too – politically and legally—just as much, and in the same way, as the right contained in Article 12.4.[410]

CONCLUSION

I am well aware that some of the observations and arguments presented here reflect the warnings of those Congress members, jurists, and scholars who fear and protest the intrusion of foreign and international law into the domain of domestic law.[411] After all, we have an international treaty to which the U.S. is bound that authorizes some aliens – even some undocumented aliens – to remain in the country against the government's will. And, indeed, some readers may struggle with envisioning the legitimacy of the legal strategies described in this Article. Some may see these strategies as attempts to do an illegitimate end-around the ICCPR's non-self-executing status.[412] However, framed from a different perspective, it seems difficult to envision the legitimacy of banishing anyone from his or her own country, especially a person who poses no threat to society. We would not imagine doing that to a citizen, regardless of how despicable and threatening they are. Why would it be legitimate to do that to someone like a DACA recipient or a Dreamer, who, through no fault of his or her own, was born somewhere on the earth

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or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." *Id.* at Art. 7. The HRC has reiterated this implicit *non-refoulement* rule in several of its official communications. *See, e.g.*, Human Rights Committee, *Joseph Kindler v. Canada* (1993), Communication No. 470/1991; Human Rights Committee, *Ng v. Canada* (1993), Communication No. 469/1991; Human Rights Committee, *Maksudov et al. v. Kyrgyzstan* (2008), Communication No. 1461, 1462, 1476 & 1477/2006; Human Rights Committee, *Hamida v. Canada* (2010), Communication No. 1544/2007; *Naveed Akram Choudhary v. Canada* (2013), Communication No. 1898/2009, 9.2. *See also* U.N. Office of the High Commissioner for Human Rights (OHCHR), "U.N. Experts Make Urgent Call for U.S. to Regularize, Protect Rights of Young Migrants as DACA Deadline Nears" (Feb. 20, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22677&LangID=E (claiming that many former DACA recipients might be expelled to countries where there are "high levels of violence, lawlessness and crime and where women in particular face very specific and dire risks").

410. Some of these rights may be customary international law as well, thus presenting additional opportunities and hurdles for actualization. *See also* Thronson, *supra* note 25; Maria v. McElroy, 68 F. Supp. 2d 206, 233–34 (E.D.N.Y. 1999) (applying the ICCPR's provisions on family maintenance and its prohibition against cruel, inhumane and degrading treatment in deciding against the deportation of an alien). *See also supra* note 319 (discussing customary international law).

411. *E.g.*, Delahunty & Yoo, *supra* note 405, at 326, 329 (asking rhetorically if American courts of the 1930s or 1950s should have "looked to the decisions of Nazi or Soviet courts for guidance?" and speculating that Supreme Court justices who are inclined to incorporate foreign and international law into their decision making might be "seek[ing] . . . reputation and esteem . . . from a transnational class of judicial and regulatory elites."). *See* Gruber, *supra* note 49, at 57–71 (giving many examples of people who have exhibited similar antagonism towards international law); Henkin, *The Ghost*, *supra* note 300, at 348–49 (discussing the persistence of this hostile sentiment); Natalie Hevener Kaufman, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION (1990) (same).

412. *See* Bradley & Goldsmith, *supra* note 49, at 419–20 (arguing that one of the reasons U.S. treaty makers might use NSE declarations is that they might "believe that if there is to be a change in the scope of domestic rights protections, it should be done by legislation with the participation of the House of Representatives").

outside the territory of the United States and without American parents?[413]

However, it must be acknowledged that any strict implementation of ICCPR's Article 12.4 could have a boomerang effect, one that results in more rigorous enforcement of immigration laws. And it could prompt the executive branch to rigorously ferret out undocumented aliens – all undocumented aliens – lest they remain long enough in the country to earn the right to stay. The government might patrol the borders more rigorously to better ensure that no foreigners enter without permission. After all, the more who enter, the more who will eventually earn the right to stay permanently. The government may even less generously grant foreigners permission to enter lest they morph over time into people who have the right to remain. It could also prompt Congress to pass more restrictive laws.

Indeed, the ramifications could be even broader. As several commentators have concluded – usually in response to arguments that ostensible non-self-executing treaties be deemed self-executing (or less non-self-executing) or in response to arguments urging the United States to be more respectful of international human rights generally, including the human rights to which it has clearly committed (e.g., the ICCPR)[414] – the political response to actually having to adhere to international human rights commitments might lead the United States to become particularly reticent to ratify any more human rights treaties or to do so only with extensive reservations that guarantee the United States need not provide any more individual freedoms than it already does.[415] It might even lead the United States to withdraw from human rights treaties or retreat from the whole international human rights project altogether.

Perhaps a conventional progressive-conservative immigration bargain can be struck: the enactment of legislation that regularizes the immigration status of certain sets of sympathetic or deserving undocumented aliens and provides special protections for non-citizen Americans in exchange for stricter border controls, stricter immigration enforcement, and perhaps even less generous legal immigration opportunities. In the meantime, were the President to take his obligation seriously to take care that the laws – including our treaty-based laws – be faithfully executed,[416] or were the courts to be persuaded by any of the arguments suggested here and enjoin the executive branch from deporting

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413. *See* Goldsmith, *supra* note 295, at 338 (highlighting that the immorality of an act evokes more criticism than the illegality of the act).

414. *E.g.*, Bradley, *The* Charming Betsy *Canon*, *supra* note 383, at 522 (speculating that if arguments that U.S. human rights RUDs and/or NSE treaty status are unconstitutional or otherwise somehow illegitimate are accepted, it "may have the effect, unintended by the critics, of negating the U.S. ratifications, both on the international plane and as a matter of domestic politics. They may also have the effect of reducing the likelihood of future U.S. ratification of human rights treaties").

415. *See* Henkin, *The Ghost*, *supra* note 300, at 342 ("By its reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies, or practices, even where they fall below international standards.").

416. Including through the DHS and the DOJ.

non-citizens Americans,[417] Congress has the power to stop it.[418] A federal statute that unambiguously denies non-citizen Americans any rights under Article 12.4 would preempt the earlier-in-time ICCPR and would not be vulnerable to the *Charming Betsy* canon.[419] And the President's municipal legal obligations would be those of the just-enacted statute.[420] If the statute forbade the executive branch from carrying out the country's obligations under Article 12.4, the executive branch would not be able to exercise prosecutorial discretion to implement it.[421] Any banishment of a non-citizen American, however, would still violate the United States' international human rights obligations – and would prove Chief Justice Warren wrong. Banishment would not, in fact, be universally decried by all civilized people.

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417. *See* Althouse, *supra* note 49, at 794–98 (articulating a realist's appreciation that courts will more likely enforce treaties providing individual rights if they see judicial enforcement as "necessary and good" and that "it [would] not matter so much how many doctrines [stood] in the way.").

418. *See* Swaine, *supra* note 49 (discussing the authority of the Congress to "divest" the President of the authority and/or duty to carry out treaties). *See also supra* Part III.C.1 (describing the last-in-time rule).

419. Certain other constitutional provisions might nonetheless protect Dreamers from deportation, but given the nature of the plenary power the courts have allowed the political branches with regard to immigration and deportation, it would appear challenging for any non-citizen to find a constitutional right to stay in the country. *See supra* Part III.D.3 for a brief description of how the Fifth Amendment's Due Process clause or the Ninth Amendment might serve to protect non-citizen Americans from deportation.

420. It is curious to observe that while it is difficult to imagine the Congress taking such aggressive steps against DACA recipients and Dreamers, it is simultaneously the case that Congress has failed to pass any legislation regularizing their immigration status. For a list of Dreamer regularization bills introduced in Congress over the last two decades, *see supra* note 9 and accompanying text.

421. Note that passing such a statute would effectively have the same legal effect as if the U.S. treaty makers imposed the strong variant of the congressional-executive NSE concept. Such a statute would not, however, operate to change any constitutional interpretation of the kind sketched out in Part III.D.3. *See also generally* Lori McPherson, *Law Review Articles Have Too Many Footnotes*, 68 J. LEGAL EDUC. 457 (2019).