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THE TREATY POWER AND NATIONAL FOREIGN POLICY AS VEHICLES FOR THE ENFORCEMENT OF HUMAN RIGHTS IN THE UNITED STATES

Covey T. Oliver*

The physical mistreatment and social cruelties that humans inflict upon their disadvantaged fellow beings are so horrible\textsuperscript{1} that social, political, and legal action against brutalitarians takes on an emotional intensity that all humane persons must respect and share. It is thus difficult to assume a neutral position in evaluating particular courses aimed at the establishment of a normative world order capable of advancing the causes of human dignity and freedom. The analyst who sympathizes with a determined human rights movement but perceives that at times particular claims or activities in furtherance of human rights may be damaging to other social, political, and legal values cannot but feel guilty for having had the perception.

One may thus suppress the perception or become disinclined to weigh objectively the causal linkage between the achievement of a human rights goal and one or more of the lines of action or argument developed to achieve it. That is, the benefit to the cause of

\textsuperscript{*} Tsanoff Professor of Public Affairs, Jones Graduate School of Administration, Rice University; Hubbell Professor of International Law (emeritus), The Law School, University of Pennsylvania; sometime Assistant Secretary of State for Inter-American Affairs, Department of State, U.S.A.

1. It is a sad and troubling circumstance that federal court transcripts and an appellate opinion have had to record, in the interests of justice to the cause presented, the shocking and revoltingly inhumane treatment of citizens of the United States by Mexican police, judicial personnel, and prison authorities in very recent times. Rosando v. Civiletti, 621 F.2d 1179 (2d Cir. 1980), sets out the abhorrent details of the arrest (by persons who did not identify themselves as officers), post-arrest torture, drum-head court trial (with the judicial officer implicitly proposing bribes to himself), mistreatment by prison gangs tolerated by the prison authorities, and denial of the most elemental decencies as to conditions of imprisonment suffered by a group of Americans, \textit{id.} at 1184-86, who eventually found themselves serving the remainders of their Mexican sentences in prisons in the United States, under the terms of a United States-Mexican treaty permitting such transfers reciprocally. \textit{Id.} at 1198-1201.
human freedom of a particular line of action may not be accurately weighed as to its true contribution to that cause. Moreover, the social costs to other positive objectives, including humanitarian ones such as development, may be understated or ignored. If such tendencies, engendered as they are by a sense of guilt, are not corrected, the human rights movement itself seems an eventual loser, for it will be deprived of the explicit identification of lines of action that are of demonstrated effectiveness and political feasibility. As the title of this Article indicates, I shall attempt to put aside the ubiquitous temptation to demonstrate loyalty to the human rights movement (by ignoring or understating problems of social cost-benefit) and deal with two legal routes by which the achievement of greater human rights for persons subject to the jurisdiction of the United States has been sought: that is, through treaties other than human rights conventions and through foreign-policy stances. Ultimately, I hope to show that a misapprehension as to the proper role played by these routes in international affairs has contributed to a noble though misguided attempt to obtain their application in domestic courts.

BACKGROUND

Historically, the treaty and foreign-affairs-powers theories of action have been put forward in situations where a basis for protection under our Constitution had not yet been clearly established. It happened that the United Nations Charter, with its recognition of human rights and non-discrimination as, at the least, goals for achievement, came into force for the United States before the Su-

2. The question whether denial of development-assistance funds is justifiable in the effort to induce human rights compliance by military juntas that impose themselves upon a people admits of only one answer so far as I am concerned: it is not. First, denial policies do not work to induce change in the juntistas' political attitudes. To the contrary, it is a mistaken application of economic warfare strategies used against highly industrialized, sea-lane vulnerable, enemy states, such as Germany in two world wars and Japan in the second. Second, if development-assistance inputs are not steady, the element of exponentiality on the development curve is defeated. See generally Oliver, The Gringo's Light Switch and Human, Political, and Security Relationships in the New World South and East of the United States, 17 WILLAMETTE L. REV. 185 (1990). Third, the people who would benefit from development are neither the culprits nor causally responsible for what juntas do. Fourth, in the Congress of the United States, not all who demand that foreign aid be cut off or reduced on human rights grounds are as much for human rights as they are covertly against foreign assistance.

3. Articles 55 and 56 of the Charter state:

Article 55—With a view to the creation of conditions of stability and well-
preme Court had developed constitutional principles, as explicit as those known today, for the protection of human dignity. It was thus in *Shelley v. Kraemer,*⁴ which involved racially restrictive land covenants, that the United States as plaintiff invoked the provisions of articles 55⁵ and 56⁶ of the United Nations Charter as an alternative ground for invalidation. The United States Supreme Court, however, saw fit in the 1948 decision to abandon the theretofore limited utilization of domestic civil rights vehicles and decided the case on constitutional grounds favorable to a non-discrimination principle without considering the alternative argument.⁷

A similar situation arose in the *Sei Fujii* case,⁸ two years after being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

*Article 56*—All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in *Article 55.*

U.N. CHARTER arts. 55 & 56.

⁴. 334 U.S. 1 (1948). In *Shelley,* by special leave of the Court, the Solicitor General argued for invalidation of the racially restrictive land covenants involved, in representation of the United States as amicus curiae. With the Solicitor General (Phillip B. Perlman) on the brief was the Attorney General (Tom C. Clark). The Court decided for the plaintiffs seeking invalidation entirely on the equal protection ground. *Id.* at 20. In his opinion, Chief Justice Vinson stated that the Court did not find it necessary to deal with the due process and privileges and immunities of citizens (U.S.) clauses of the post-Civil War amendments, *id.* at 23, but no mention whatever was made of the alternative treaty (United Nations Charter) theory of action, even though asserted by the government’s brief and in several of the other briefs amici, including that of the American Association for the United Nations. For details, see Brief for the United States at 97; Brief for the American Association for the United Nations at 13-14; Brief for the American Civil Liberties Union at 27-28.

⁵. *See* note 3 *supra.*

⁶. *Id.*


⁸. *Sei Fujii v. State,* 217 P.2d 481 (Dist. Ct. App. 1950), *aff’d,* 38 Cal. 2d 718, 242 P.2d 617 (1952). At the time *Sei Fujii* was in the courts of California, the Federal Supreme Court, in *Oyama v. California,* 332 U.S. 633 (1948), had sounded only an uncertain trumpet as to the Alien Land Law and the Federal Constitution. The intermediate appellate court in *Sei Fujii* did not venture beyond where the Supreme Court had gone, on a fourteenth amendment theory of action, in *Oyama,* but invalidated the law under the treaty power (pursuant to articles 55 and 56 of the United Nations Charter). 217 P.2d at 486-88; *see* note 3 *supra.*

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SHELLEY, in 1950. The Alien Land Law of California,9 not seen at the time of the litigation as clearly invalid under the Federal Constitution, was successfully attacked on article 55 and 56 grounds in a California appellate court.10 That state’s supreme court, however, specifically rejected the intermediate court’s reasoning, though it affirmed the invalidation on constitutional grounds.11

Accordingly, an entirely domestic route for the protection of human rights—particularly the equal protection clause of the fourteenth amendment—provided solace to advocates of human dignity and freedom. The great antidiscrimination decisions from 1954 on12 gave continued assurance that many basic human freedoms would be protected in the United States under the Constitution.

The judicial recognition of domestic vehicles for the protection of human rights was timely, for history teaches that the effort to eliminate racially based discrimination by use of the treaty power induced something of a backlash in the halls of Congress. This irony manifested itself in support of the Bricker amendment,13

9. CAL. GEN. LAWS ANN. act 261 (Deering 1944) (declared unconstitutional in Sei Fujii, 38 Cal. 2d 718, 242 P.2d 617 (1952)).
11. Sei Fujii v. State, 38 Cal. 2d at 738, 242 P.2d at 630. The California Supreme Court took the step the United States Supreme Court had not taken in Oyama, 332 U.S. at 640-47, and invalidated the Alien Land Law under the fourteenth amendment, rejecting the alternative treaty-supremacy theory of action on the ground that articles 55 and 56 of the United Nations Charter are not self-executing. 38 Cal. 2d at 720-28, 242 P.2d at 619-24. The State of California did not take the decision to the Supreme Court of the United States. Even so, the decision of the highest court of the state was immediately recognized—and has since been treated in most quarters—as a landmark decision, both on the antidiscrimination reach of the fourteenth amendment and the denial of internal effects as law to non-self-executing treaties not implemented by legislation. See generally R. LILlich & F. Newman, International Human Rights 96-97 (1979).
13. The Bricker proposal for amending the Constitution was originally introduced as S.J. Res. 130, 82d Cong., 2d Sess., 98 CONG. REc. 921 (1952), but failed to be reported out of the Senate Judiciary Committee. Bricker, Safeguarding the Treaty Power, 13 FED. B.J. 77, 77 n.1 (1953). The proposed amendment was introduced anew as S.J. Res. 1, 83d Cong., 1st Sess., 99 CONG. REc. 160 (1953); its substantive sections provided:

1. A provision of a treaty which denies or abridges any right enumerated in this Constitution shall not be of any force or effect.

2. No treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States enumerated in this Constitution.

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which was designed to reduce the maximum internal effect of trea-

3. A treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by the Congress.

4. All executive or other agreements between the President and any international organization, foreign power, or official thereof shall be made only in the manner and to the extent to be prescribed by law. Such agreements shall be subject to the limitations imposed on treaties, or the making of treaties, by this article.

It is not necessary in this presentation to explain in any detail how an intricate sequence of assertions and resistances thereto over a period (roughly 1948 to 1953) produced a series of proposed amendments to the Constitution, several times voted upon in the Senate. The late Senator John Bricker of Ohio was only one of a number of Senate leaders involved in supporting such amendments. The Section on World Peace Through Law of the American Bar Association was intensely active in parallel support. Among the internationalists, one group continued to support an ideal of "United Nations law as the law of the land," oblivious to the threat to an effective international system that the Bricker lines of action portended. Another group resisted the Bricker drive politically and was sensitive to the risks of extremist efforts to limit the scope of the treaty power. The heart of the "Bricker Bicker," as I have called it elsewhere, was a proposal to amend article VI, clause 2 (the supremacy clause) to eliminate the careful differentiation of the founders between "treaties made . . . under the Authority of the United States" and federal legislation made "in Pursuance" of the Constitution. U.S. Const. art VI, cl. 2. The Brickerites would have reduced the former to the reach of the latter. However, the Brickerites also fastened upon executive agreements, grounding themselves on dubious assertions in a 1942 study which claimed that the executive branch used executive agreements for important matters and used treaties approved by the Senate only for technical and less significant aspects of foreign-relations operations. This latter aspect of the Bricker fight eventuated in the requirement that executive agreements be reported, 1 U.S.C. § 112b (Supp. II 1978). In as much as the incoming secretary of state for the Eisenhower administration had, before taking office, supported curbing the treaty power a la Bricker amendment, the executive branch did not mount immediate opposition to so drastic an impediment to foreign-affairs operations. But when Herman Phleger became legal adviser to the Department of State, the situation changed. Perhaps only now is the role played by Dwight D. Eisenhower, who behind the scenes helped to put down the Bricker-amendment drive, becoming known. The intricacies of the drive for the amendment are covered in D. Tanenbaum, The Bricker Amendment Controversy: The Interaction between Domestic and Foreign Affairs (1980) (dissertation on file in Columbia University library). Even though the Bricker-amendment drive failed as to changing the Constitution, it has had a long-lasting effect as to inducing discretion and care within the executive branch when changing or making internal law by the treaty route is under consideration. Thus, for years, until the Panama Canal treaties came before the Senate during the Carter period, the general practice was that the executive branch would not send a treaty requiring internal implementation by statute to the Senate for advice and consent until enactment of the implementing legislation seemed assured. See generally Restatement of the Foreign Relations Law of the United States §§ 141-145 (1962); L. Henkin, Foreign Affairs and the Constitution 139-71 (1972). Senator Bricker set forth his arguments in his 1953 article, supra. A debate concerning the
ties to the limits of congressional power\textsuperscript{14} in the absence of a treaty. (That is, to the powers stated in or derived from article I, section 8 of the Constitution.) The writer well remembers\textsuperscript{15} the effect produced in a Senate committee when the late Senator Everett McKinley Dirksen, speaking in support of the Bricker proposal, waved about an amicus brief signed by Alger Hiss and alluded to the brief's argument that the treaty power authorized internal civil rights law that the Constitution by its own force did not require.

Many of the supporters\textsuperscript{16} of the Bricker amendment were isolationists, but it is too facile to conclude that the effort to reduce the federal treaty power to the maxima of the congressional legislative power was merely the result of isolationism! Time and again the proponents of Brickerism answered objections related to the role of the United States as a nation among nations by pointing out that their proposals did not change at all the international capacity of the United States to make treaties but only limited the internal legal effects of such treaties.\textsuperscript{17} Opposition to the enforcement of civil rights by treaty in days that were still the days of Jim Crow was a fundamental objective of the Brickerites.\textsuperscript{18} Their scare tactics


14. Of course, as has often been noted, expansion of the legislative powers of the Congress made the difference between the key phrasings of the supremacy clause, \textit{quoted at note 13 supra}, of far less importance than the Brickerites assumed, wrongly even in their time. The Bricker group, apparently, was behind the times as to what was happening constitutionally in the United States, as the foregoing and their lack of foresight as to the steady march of antidiscrimination decisions under the Constitution, \textit{e.g.}, \textit{Shelley v. Kraemer}, 334 U.S. 1 (1948), both show.

15. As an ex-officer of the Department of State, by the time back in academe as a teacher of international law, I joined in the resistance against the Brickerites. Dirksen, before he mellowed into "Ev" of the "Ev and Charley Show," was a formidable and cunning foe. On the occasion recalled, Dirksen held in his hand the brief of the American Association for the United Nations, \textit{Shelley v. Kraemer}, 334 U.S. 1 (1948), and wanted the record to show that the first signer of that brief "was one Alger Hiss."

16. A number of the senators supporting the drive to limit the treaty power were from the isolationist wing of the Republican Party. (For a complete listing of the 63 co-sponsors of the 1953 Bricker proposal, see 99 Cong. Rec. 160, 161 (1953)). It was the more-internationalist wing of the Republican Party that recruited then-General Eisenhower to seek the Presidency. Their efforts were successful, at least to the extent that President Eisenhower sought the defeat of the Bricker amendment. \textit{See The Bricker Amendment, supra note 13, at 27}.

17. \textit{The Bricker Amendment, supra note 13, at 28}.

as to the scope of the treaty power induced prudent moderation as
to claims for its competence in courts, for a certain ambiguity as to
its internal effect was a more palatable alternative than destruction
of the power through crippling legislation. This tradeoff was implicit-
ly recognized by Manley O. Hudson, in a telegram19 to counsel
for the state in *Sei Fujii*, while the case was on appeal to the
California Supreme Court:

I am astonished by the decision in the District Court of Appeal
in *Fujii* vs. California. In holding that the California Alien Land
Law must yield to the Charter of the United Nations as the su-
perior authority, the court failed to take account of the estab-
lished law of the United States that only the self-executing provi-
sions of a treaty are automatically incorporated into the supreme
law of the land of the United States so as to supersede previous
national or state legislation. Articles 55 and 56 and other provi-
sions of the Charter cited by the court are in no sense self-
executing.20

Professors Lillich and Newman have written that “Judge
Hudson’s motives for minimizing the legal impact of the Charter
... in so dramatic a style are unclear.”21 Ah, but hear the echo of
George Santayana’s dictum about those who ignore the lessons of
history! Aside from always being dramatic, Judge Hudson undoubt-
edly feared a strong counterreaction against the existing treaty
power through the Bricker proposal should the higher court hold
that a treaty could invalidate a state act that the Federal Constitu-
tion did not. And with good reason, considering that John Foster
Dulles, a leader of the American bar soon to become secretary of
state, had sided with the Brickerites22

In addition to the upsurge in reliance upon the Constitution as
a means of enforcing human rights internally, and the fear that an
uncompromising effort to see treaties as self-executing would back-
fire, there is another (and structurally more significant) factor that
has mitigated against resort to the treaty power as a means of cur-

19. R. LILLICH & F. NEWMAN, supra note 11, at 96-97. The authors presented
it as “An Unusual Occurrence in the Course of the Fujii Appeal,” which, in as much
as it involved merely a telegram to the state’s attorney, seems hardly extraordinary!
20. Id.
21. Id. at 96. The reason for the authors’ surprise is unclear to me, since at
pages 84-87, immediately preceding, they have inserted an excerpt from Hudson’s
writing that unequivocally supports the position he later took in the telegram.
22. See Bricker, supra note 13, at 80. But see The Bricker Amendment, supra
note 13, at 37.
tailing human rights violations. Internal law through self-executing treaties in the United States is enacted by the President only with the consent of two-thirds of the Senate, a quirk of the American Constitution not generally found in other leading democracies. Thus, even assuming the lack of an entirely domestic vehicle, the effort to provide an international route is at best difficult.

**THE ROLE OF INTERNATIONAL ROUTES AND INTERNAL LAW: ADMIRABLE PERSISTENCE OR HARMFUL HINDRANCE?**

So much as to why efforts to use the treaty power as an alternative to the Constitution declined. Why, though, have some human rights scholar-activists persisted with assertions that articles 55 and 56 of the Charter and comparable generalities in other organic conventions are internal law? Perhaps because of despair that acceptable specific conventions on human rights will ever surmount the bias against treaties written into the Constitution by the founding fathers, when by one vote they adhered to a required two-


24. It is rare among the constitutional systems of leading states that treaties become international law outside the normal legislative process. Even in the United States it is rare that self-executing treaties are found to exist where an internal legal effect would be produced thereby. But cf. Asakura v. City of Seattle, 265 U.S. 332 (1924) (holding the foreign-trader-rights provision in a treaty of friendship, commerce, and navigation to operate “without the aid of any legislation, state or national.” Id. at 341). On the other hand, when delegating power to the President to enter executive agreements in the foreign-trade field, Congress kept the power to disapprove the results of his negotiations and has, in the case of Tokyo Round under the General Agreements on Tariffs and Trade, put the international agreement into effect by legislation. See Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (amending 19, 26, 28 U.S.C.) (approving and implementing the agreements reached at the Tokyo Round of Multilateral Trade Negotiations). On the general problem of the United States being out of step with the rest of the world as to parliamentary participation in the treaty process, see Oliver, *The Enforcement of Treaties by a Federal State*, I-1974 Recueil des Cours 331, 362-89.

25. The quirk has become outmoded politically since the enactment of the seventeenth amendment, providing for the popular election of senators. See Oliver, Editorial, *Getting the Senators to Accept the Reference of Treaties to Both Houses for Approval by Simple Majorities: Does the Senate’s Sense Resolution in the Foreign Relations Authorization Act Point a Way?*, 74 Am. J. Int’l L. 142 (1980). The two-thirds requirement amounts to a bias against international commitment by treaty that is unique to the United States among leading nations. Theoretically the principle obtains also in countries that have copied the United States Constitution in absolute or nearly absolute detail, but actually some of these states disregard their constitutions or indulge in charades as to application. The question whether the Constitution of 1787 has been a desirable system for export is a valid one, considering the possibilities of linkage between this system and the syndrome of executive (often coupist) domination and legislative impotence in certain Latin American countries.
thirds approval in the Senate. Could it be, also, that even with specific enumerations of rights in human rights conventions, they wish to see a residual, constitution-like general authority of expan-
sible content for control of anti-rights conduct in the United States? Or could it be that they quest for a great ideal not yet as-
sured in world terms through its complete acceptance as a supranational mandate by the United States? Several of these pos-
sible motivations are suggested by this statement-question asked of students by Lillich and Newman:

The Universal Declaration has been used by the courts of many countries to flesh out and occasionally upgrade domestic constitutional and statutory norms. If U.S. courts continue to re-
gard the human rights clauses of the UN Charter as non-self-
executing, and if the United States, when it ratifies the human rights conventions does so with the non-self-executing reserva-
tions proposed by President Carter, should not human rights ac-
tivists and civil rights lawyers argue that the Declaration infuses U.S. constitutional principles with enlightened international standards (e.g., that the Universal Declaration's Article 5 prohi-
bition against "cruel, inhuman or degrading treatment or punish-
ment" provides enlightened guidance as to the contemporary content of the Eighth Amendment's "cruel and unusual punish-
ment" standard)?

The authors are candid as to the case law against their belief that the doctrine of Sei Fujii should be displaced. While they point out that the Sei Fujii decision is binding on only California courts, they also recognize the precedential value accorded that de-
cision by other state courts. Nevertheless, in part relying on a number of cases holding that certain Charter provisions are self-
executing, Lillich and Newman argue that the issue remains a live one. Further, since the United States Supreme Court has never addressed the question, they believe that reports of the theory's death are premature.

The authors also point to a bit of hypocrisy on the part of the United States. Why, for instance, has our government continually condemned Chile, South Africa, and the Soviet Union for violating

26. See id. at 143 n.6.
27. R. LILLICH & F. NEWMAN, supra note 11, at 122.
28. Id. at 100.
29. Id.
30. Id.
31. Id.
Charter obligations, while our courts have refused to recognize any internal power of the very same provisions. In addition, the authors correctly recognize that the International Court of Justice declared the Charter's human rights provisions to be binding in regard to the internal affairs of Namibia, a conclusion the United States supported on record in both the General Assembly and the Security Council. In conclusion, the authors offer an explanation of our judiciary's reluctance and an argument for the casting aside of that reluctance:

Some U.S. judges understandably find it difficult to accept the fact that, on occasion, international human rights law may set a higher standard than U.S. constitutional or statutory law. In an adversary proceeding, this reluctance mitigates against the direct invocation of UN human rights norms. Nevertheless, invoking international human rights law in domestic courts offers an excellent opportunity to help expand constitutional guarantees such as due process and equal protection. Why, even a Fujii-minded judge may reason, should such phrases in the U.S. Constitution be interpreted to guarantee fewer rights to the individual than does, say, the Universal Declaration of Human Rights?

Lillich and Newman offer an admirable dedication to an admirable ideal. The mere presentation of an argument for the invocation of non-self-executing law in domestic courts forces the examination and reexamination of the purpose of the foreign-affairs-powers theory of action. Yet, their arguments contain an important misapprehension concerning the role properly played by this theory of action, a role that was highlighted in a recent celebrated case.

THE TREATY LAW AND FOREIGN POLICY THEORIES REVIVED: ILLEGAL ALIEN SCHOOLCHILDREN'S SUITS CHALLENGING A TEXAS STATUTE

In the late 1970's, various independent school districts in Texas began enforcing a state statute that did not require the use of state funds to educate persons who are not either citizens of the United States or legally admitted aliens. This enforcement, un-

32. Id.
33. Id.
34. Id. at 101.
dertaken in reaction to the increasing burden placed on these school districts by a growing number of illegal alien schoolchildren, was challenged in a number of suits beginning in 1977. The plaintiff children and their parents reacted to the difficulty of paying tuition to attend local public schools, while the schoolboards, dependent upon state funds for a considerable portion of their budget, assumed that the statute authorized—if not commanded—the exclusion of plaintiffs from free tuition.

The first case was brought against the Independent School District of Tyler, Texas, on equal protection and overriding treaty and foreign-policy theories of action. The theories in the alternative to the constitutional ground were supported by a brief amicus filed by a human rights group. The district judge ruled for the plaintiffs on both equal protection and overriding federal law grounds and the case was affirmed (on equal protection grounds) on October 20, 1980, by the United States Court of Appeals for the Fifth Circuit. At the same time, a group of parallel cases was consolidated for trial before a federal district court in Houston.

The consolidated case was decided, after extensive hearings, on July 21, 1980, by Judge Woodrow Seals. While Judge Seals
ruled for plaintiffs, he rested his decision to issue an injunction against the denial of free tuition exclusively on equal protection grounds. The judge considered the alternative grounds advanced by the plaintiffs through acceptance by them of a brief amicus filed by the International Human Rights Group of Washington, D.C., but ultimately rejected those theories.

On appeal, the Fifth Circuit stayed the trial judge’s injunction against denial of free tuition to undocumented alien schoolchildren; but Justice Powell vacated the stay, with the result that throughout Texas “named and unnamed non-citizen children,” to use the designation that appears in the heading of the order by Justice Powell, were registered in August-September, 1980, without paying tuition. In this posture, the consolidated cases are now pending before the Court of Appeals for the Fifth Circuit. Inasmuch as plaintiffs in the unconsolidated first case relied upon both equal protection and treaty/foreign-policy grounds, and the trial judge in the later consolidated cases considered and rejected the alternative grounds, it is possible that the circuit court will address the issues that are of interest here, even though it decided the unconsolidated case solely on equal protection grounds. This conjecture is reinforced by the fact that a decision involving the question whether a treaty (not one involving human rights) is self-executing was recently decided against self-execution by the

47. 501 F. Supp. at 583-84.
49. 501 F. Supp. at 584-96.
50. The timing of the various decisions presents interesting questions. On July 21, 1980, the district court issued its injunction in the consolidated cases, id. at 597, and later refused to stay the injunction. However, the injunction was subsequently stayed, though without opinion, sometime prior to September 4, by the Fifth Circuit. On September 4, Mr. Justice Powell vacated the stay. Certain Named and Unnamed Non-Citizen Children and Their Parents, 101 S. Ct. 12 (1980). Perhaps in response to Justice Powell’s action, and in seeming contradiction to their action in vacating the stay in the consolidated cases, the Fifth Circuit affirmed the unconsolidated case, Doe v. Plyler, on October 20, 628 F.2d 448, aff’g 458 F. Supp. 569.
52. Id.
54. See 458 F. Supp. at 592.
55. 501 F. Supp. at 584-96.
56. But see notes 46 & 50 supra.
Fifth Circuit. 57 United States v. Postal, 58 the case under reference, has been criticized by eminent scholarly authority on general grounds. 59 The methodology used in that case to characterize the treaty involved 60 as non-self-executing was explicitly based upon the methodology of the Supreme Court of California in Sei Fujii. 61

Before proceeding to Judge Seals’ decision in the consolidated cases, it would be prudent to examine the opinion of Mr. Justice Powell 62 as Circuit Justice on application to vacate the circuit court’s stay of Judge Seals’ injunction. In so doing, one may find some indication of the attitude on the general topic we are considering, that of the theories of action in the alternative that human rights groups have advanced in these cases. Apropos of all appellate consideration still ahead, one assumes that it is well understood that causes based on alternative theories of action need not be considered by judges beyond the first theory that decides the case. However, courts may also rule for a party on all or more than a single one of the theories of suit advanced. Finally, judges may accept one, or less than all the theories of action advanced, but take up the others to consider and reject them, as indeed Judge Seals did in the consolidated cases. But it is especially to be noted that a theory of action in the alternative is supposed to stand on its own bottom; so theoretically, at least, the plaintiffs in the schoolchildren’s cases are asking courts to rule for them on treaty/foreign-relations grounds even if the courts do not agree with the first (or constitutional) ground advanced. This is the case posed by

57. United States v. Postal, 589 F.2d 862 (5th Cir. 1979).
58. Id.
60. The treaty did not involve human rights per se, but whether article 6 of the 1958 Convention on the High Seas, done Apr. 29, 1958, 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82, was self-executing. The court held that it was not, 589 F.2d at 878, and that, although the arrest by the Coast Guard of an identified foreign vessel, not hotly pursued, violated the international obligations of the United States under the convention, no jurisdictional defense to criminal prosecution for hovering (to smuggle narcotics) lay. Id. at 884.
61. Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952). There was one variance from the usual interpretative methodologies used by the courts in the United States to resolve the issue of self-execution, vel non. See RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 154 (1962). The testimony of the chief negotiator for the United States at the Senate hearing was accepted in evidence and, “[a]lthough . . . not entirely unequivocal,” was given weight. 589 F.2d at 881.
Lillich and Newman, as noted above, where they think judges should not be deterred by the presence of a standard higher than that of domestic laws.

Justice Powell’s order vacating the statewide stay of the circuit court mentions only the equal protection theory of action, even when citing the Tyler Independent School District Case, where the alternative grounds of interest here were generally relied upon by plaintiffs. That case, however, was not within the purview of the Circuit Justice (Mr. Justice Powell) in this hearing, as it was in Judge Seals’ opinion in the consolidated case where the order was for a statewide injunction. It was this injunction that was stayed by the circuit court and taken to the Circuit Justice.

Justice Powell declared that when vacating a stay pending appeal the Circuit Justice should be satisfied that (i) there is a likelihood that the Supreme Court will grant certiorari or note probable jurisdiction and (ii) a significant possibility that a majority of the Supreme Court will agree with the district court’s decision. Recognizing that it is difficult to determine whether the second eventuality will happen, Justice Powell noted that the major case relied upon by the district court, Matthews v. Diaz, upheld the power of Congress to make distinctions (as to Medicare benefits) between legal and illegal aliens under the due process clause of the fifth amendment. Continuing, he noted that the extremely broad power of Congress over all aspects of immigration and naturalization was involved in the Diaz case, whereas here the issue under an equal protection analysis involves the relationships between aliens and states of the Union, a matter carefully reserved in the earlier case. Nonetheless, he concluded: “Although the question is close, it is not unreasonable to believe that five Members of the Court may agree with the decision of the District Court . . . .” In context, the phrase “agree with the decision of the District

63. See text accompanying note 34 supra.
64. 101 S. Ct. at 13 (citing Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978)).
65. Id. at 14.
66. 426 U.S. 67 (1976), holding that the due process clause applies to “aliens unlawfully residing in the United States.” (Justice Powell’s language in the instant case, 101 S. Ct. at 13, to state the rule of Diaz.)
67. 101 S. Ct. at 15.
68. Id.
69. See Matthews v. Diaz, 426 U.S. at 84-85. The issue was dealt with in the negative as to generalized federal preemption by Judge Seals in the consolidated case. 501 F. Supp. at 556.
70. 101 S. Ct. at 15.
Court” refers only to the explicit holding upon which the injunction was based (equal protection), not to the totality of Judge Seals’ opinion. Under these circumstances a commentator may venture that it is also not unreasonable to believe that at least some members of a majority of the Supreme Court that should agree with Judge Seals would also express views on the alternative theories of action that he took up and rejected. This may depend in large part on the framing of the Fifth Circuit’s opinion on appeal.\(^7\)

Thus, we come to an examination of what was argued before Judge Seals regarding the alternative theories of action and his responses thereto. At this point full disclosure requires me to reveal that I, steadfastly for the alien children on public policy and humanitarian grounds under equal protection, testified as an expert witness for the state on the alternative grounds, largely because I regarded the contentions of the brief amicus as incorrect on grounds of precedent, bad from the standpoint of foreign-policy operations, and to some degree lacking in the candor owed by counsel to a court.\(^2\) Despite knowledge of my outlook on the constitutional merits of the case, the state accepted me as their expert witness on the alternative theories of relief, I believe, because counsel for the state found these latter contentions unnerving for their novelty.\(^3\)

The plaintiffs’ basic contentions under the alternative theories of action, outlined in the proposition presented at the opening of the brief amicus,\(^4\) revolved around two central theories. First,

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71. See notes 46 & 50 supra.
72. Plaintiffs did not, for example, cite to Fujii in their brief. At trial, plaintiffs in charge of the treaty/federal preemption leg of the argument sought to diminish the Fujii decision by reference to the lack of a Supreme Court decision in that case. In addition, an expert witness for the plaintiff testified on cross examination that he deemed Fujii outmoded.
73. Counsel found the contentions to be novel, not in general, as Fujii had proceeded along similar general lines of argumentation, but as to effective response in regard to the O.A.S. Charter.
74. The outline in the amicus brief read in pertinent part:

III. DENIAL OF FREE ELEMENTARY SCHOOL EDUCATION TO PLAINTIFFS VIOLATES UNITED STATES TREATY OBLIGATIONS AND MUST THEREFORE BE PROHIBITED UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION
A. Charter of the Organization of American States
B. Charter of the United Nations
C. The relevant human rights provisions of the Charter of the Organization of American States and the United Nations Charter are self-
they argued that the human rights provisions of the United Nations Charter and the Charter of the Organization of American States were being violated by the Texas statute's denial of tuition-free education. As a crucial second step in their analysis, plaintiffs put forth the proposal that the Charters' provisions are self-executing. Accordingly, then, their first conclusion was that the Texas statute operated against fulfillment of United States treaty obligations and were thus prohibited by the supremacy clause.

executing and therefore directly binding on the state and local governments

IV. SECTION 21.031 IS PREEMPTED BY OR CONSTITUTES AN IMPERMISSIBLE INTERFERENCE WITH THE EXERCISE OF THE FEDERAL GOVERNMENT'S FOREIGN AFFAIRS POWER AND IS THEREFORE INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

A. The Texas statute and school board policy are preempted by federal laws, treaties, and other activities concerning the treatment of aliens and human rights, and they are thereby unconstitutional under the Supremacy Clause

1. The Texas statute is preempted by federal activities with respect to immigration and the protection of alien rights

2. The Texas statute is preempted by federal treaties in the area of human rights, education, and non-discrimination

3. The Texas statute is preempted by federal policy as expressed in the Convention Regulating the Status of Aliens in their Respective Territories

B. The Texas statute violates expressed and implied foreign policy objectives of the federal government and thus constitutes an impermissible intrusion into the exclusive federal foreign affairs authority

75. See note 3 supra.

76. Article 31, section (h) of the O.A.S. Charter provides:

To accelerate their economic and social development, in accordance with their own methods and procedures and within the framework of the democratic principles and the institutions of the inter-American system, the Member States agree to dedicate every effort to achieve the following basic goals:

h) Rapid eradication of illiteracy and expansion of educational opportunities for all.

O.A.S. CHARTER art. 31, § (h). Other provisions of article 31 are discussed in text accompanying notes 93-99 infra.


78. See note 74 supra. U.S. CONST. art. VI, § 2 reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
The second theory was premised upon the federal government's exclusive authority in the area of foreign affairs.\textsuperscript{79} By this argument, the Texas statute was in contravention of federal activities in the areas of immigration and alien rights, federal treaties regarding education, human rights, and non-discrimination, and federal participation in the Convention Regulating the Status of Aliens in their Respective Territories. While similar in appearance to the first theory, the second does not rely upon the potential self-executing authority of these policies. Instead, the theory proposes that because the federal government has chosen to exercise its exclusive foreign-affairs power in these areas, any contravening state policy is prohibited by the supremacy clause.\textsuperscript{80}

The treaty power argument as to the Charter of the Organization of American States caught my eye, since I had been Assistant Secretary of State for the region at the time of the 1967 Protocol of Buenos Aires,\textsuperscript{81} and as such I knew two highly relevant facts about diplomacy and treaty-making in the Western hemisphere: (i) that provisions of the sort relied upon by the brief are commonly understood to be good intentions and common goal utterances but not explicit national commitments, and (ii) neither Mexico, from whence the illegal aliens and their non-citizen progeny mainly come, nor any other treaty party, most likely, would admit a reciprocal obligation to the one sought to be imposed here.

Judge Seals began his treatment of the O.A.S. Charter/treaty-power argument by recognizing that the United States became an O.A.S. member by ratifying the Charter on June 19, 1951.\textsuperscript{82} Significantly, he next quoted the preamble to article 31 \textsuperscript{83} (which in section (h) deals with illiteracy and education) and to article 47,\textsuperscript{84} which deals exclusively with education. Because these preambles provide a special insight into the workings of foreign policy, they are worthy of being printed here in text. The preamble to article 31 provides: "To accelerate their economic and social development, in accordance with their own methods and procedures and within the framework of the democratic principles in the institutions of

\textsuperscript{79.} See note 74 supra.
\textsuperscript{80.} Id.
\textsuperscript{82.} 501 F. Supp. at 589.
\textsuperscript{83.} Id.
\textsuperscript{84.} Id.
the inter-American system, the Member States agree to dedicate every effort to achieve the following basic goals."

The preamble to article 47 provides: "The Member States will exert the greatest efforts, in accordance with their constitutional processes, to insure the effective exercise of the right to education, on the following bases . . . ." Judge Seals next reviewed the well-settled conditions under which a treaty becomes internal law, and concluded that it does so only "if it is self-executing, or, if it is non self-executing, only when it is implemented by act of Congress." As no relevant act of Congress had been passed regarding articles 31 or 47, it was only left to determine whether the O.A.S. Charter was a self-executing treaty. The two principal methods of determination were stated as follows:

First, the language of the treaty must manifest that the parties intend to confer rights or obligations on the citizenry of the compacting nations. Second, 'if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution. . . .' Sei Fujii v. State, 38 Cal. 2d 718, 721-22, 242 P.2d 617, 620 (1952).

Relying in large part on the language in the relevant preambles quoted above, the judge concluded that no contractual obligation had been created and that the circumstances surrounding the ratification of the Charter indicated only that the parties had agreed to certain goals worth seeking within the limits of their internal processes.

As to the plaintiffs' second alternative theory, the foreign-policy-preemption argument, the court recognized that the Charter evinces "a federal commitment to education which we have affirmed to the international community." However, quoting Justice Stewart, Judge Seals cautioned that the "'shifting winds at the State Department' cannot control whether a particular statute is in conflict with the United States' conduct of foreign relations." On this basis, he argued that the intention of those who ratified the

85. O.A.S. CHARTER art. 31 (preamble) (emphasis added).
86. Id. art. 47 (preamble) (emphasis added).
87. 501 F. Supp. at 589.
88. Id. at 590 (citation omitted).
89. Id. at 589-92.
90. Id. at 591 (quoting Zschemig v. Miller, 389 U.S. 429, 443 (1968) (Stewart, J., concurring)).
91. Id.
treaty should control the question whether its goals were to be protected by the supremacy clause.\textsuperscript{92}

Article 31 of the Charter is an enumeration of fourteen goals, the achievement of which was to be sought with "every effort" of the member states.\textsuperscript{93} Among these are equitable distribution of national income;\textsuperscript{94} adequate and equitable bases of taxation;\textsuperscript{95} adequate housing for all sectors of the population;\textsuperscript{96} fair wages, employment opportunities, and acceptable working conditions for all;\textsuperscript{97} and rapid eradication of illiteracy and expansion of educational opportunities for all.\textsuperscript{98} Were the foreign-policy-preemption argument to be accepted in the schoolchildren's cases, all state law in conflict with any of these wide-ranging goals would be subject to invalidation pursuant to the supremacy clause. The judge concluded that even if it were questionable whether the language of the Charter is contractual in nature, the intention of the ratifying administration could not have been that article 31 should "be used by the judicial branch as a test for all state and federal statutes which touch on subjects embraced."\textsuperscript{99}

Judge Seals' treatment of the relevant provisions of the United Nations Charter and the Universal Declaration of Human Rights\textsuperscript{100} was similar to his discussion of the O.A.S. provisions. While recognizing that "these are admirable principles [and] represent standards toward which all societies should strive,"\textsuperscript{101} he concluded that "[h]olding those principles in high esteem does not mean that the City of Houston could not constitutionally decline to provide its workers with paid vacations [article 24, Declaration] or that the State of Texas intrudes into foreign relations if it denies a person the right to education."\textsuperscript{102}

The court passed over in silence the failure of the brief to cite Sei Fujii and to make clear that the American Convention on Human Rights has only (and belatedly) been signed by a President\textsuperscript{103}

\begin{itemize}
  \item 92. Id.
  \item 93. O.A.S. CHARTER art. 31.
  \item 94. Id. art. 31, § (b).
  \item 95. Id. art. 31, § (c).
  \item 96. Id. art. 31, § (k).
  \item 97. Id. art. 31, § (g).
  \item 98. Id. art. 31, § (h).
  \item 99. 501 F. Supp. at 592.
  \item 101. Id. at 593.
  \item 102. Id.
  \item 103. Along with the Convention on the Prevention and Punishment of the Crime of Genocide, \textit{opened for signature} Dec. 9, 1948, 78 U.N.T.S. 277, which has
\end{itemize}
and is still pending in the Senate,\textsuperscript{104} with reservations proposed by the executive.\textsuperscript{105} In any case, the existence of foreign-policy lines of action by a particular administration were dismissed as to their competence under the supremacy clause to displace state law.\textsuperscript{106} An eloquent statement by Judge Seals, placing in perspective the role of the foreign-policy power, bears restatement here:

\begin{quote}
The constitutional delegation of the authority to conduct foreign affairs enables our nation to speak with one voice in our dealings with foreign governments and international organizations. That authority, in the absence of the exercise of the power to make treaties having the effect of domestic law, has not evolved to prohibit the states from enacting laws which may affect an area of international concern.\textsuperscript{107}
\end{quote}

\textbf{CONCLUSION}

Although not wishing to include oneself in the class, it is true that professional diplomats in many quarters have found the American human rights movement in recent years to violate Talleyrand's dictum, "and above all, not too much zeal." In the negotiation of international agreements, especially structural ones, it is often necessary to balance one side's desire for commitment now to common action against another side's reluctance to go beyond agreeing to work in its own way toward general goals. In this area the second best is not really the enemy of the best because the latter is simply not an attainable negotiating objective. But it is better than nothing to be able to bring up in diplomacy the lagging conduct of another party through reference to earlier generalizations. This serves the important function of a foot in the door. Were it not for such enumerations as those in article 47 of the O.A.S. Charter, it would not be possible to discuss national attainments in particular countries, as the wall of inviolable national privacy would not have been reduced at all.

\textsuperscript{104} See id.
\textsuperscript{105} See id.
\textsuperscript{106} 501 F. Supp. 591.
\textsuperscript{107} Id. at 595.

\footnotesize{been there for many years. Hearings were held in November, 1979, \textit{Hearings on the International Human Rights Treaties Before the Senate Comm. on Foreign Relations}, 96th Cong., 1st Sess. (1979) [hereinafter cited as \textit{Hearings on Human Rights}], on four human rights conventions one of which is the American Convention on Human Rights, \textit{opened for signature} Nov. 22, 1969, O.A.S. Doc. OEA/SER. K/XVI/11, Doc. 65, Rev. 1, CORR. 2 (1970). This latter convention was opened for signature in 1969, signed by the President on June 1, 1977, and referred to the Senate for advice and consent on February 23, 1978.}
To attempt after the fact of treaty negotiation to bootstrap such provisions into specific international commitment that either is automatically internal law, or that requires conforming internal legislation, would be undesirable operational retroactivity as far as the original negotiation is concerned. If the United States is going to follow a policy of making treaties that by possibility could have internal effect as law into supreme national law, the treatymakers for the United States should know this when they sit down to negotiate.

Moreover, the three possible explanations for the admirable continued advocacy of those human rights activists such as Lillich and Newman, in the face of the continued validity of the Sei Fujii doctrine, fail to provide realistic goals for the treaty process. If these advocates seek a residual authority for the expansion of human rights in the United States, their goal can be realized by effective usage of our own Constitution without the resultant harm to the conduct of foreign policy. If they seek to avoid the difficulties of treaty ratification, they risk havoc in a renewal of Bricker-like proposals. And if they seek to set a precedent here for a great ideal to be recognized and later enforced worldwide, they must misread the reality that other nations are led primarily by their own internal dictates and that "second best" generalities are better than none at all. Nonetheless, continued advocacy of domestic application of the international routes provides for the continued examination of the purpose of the foreign-affairs-powers theory of action.

Finally, to thrust the load into the treaty process that the human rights activists sought to impose in the alien children's cases, places, especially in these times, too great a burden on that process, already somewhat fragile as a result of our peculiar arrangements (under the Constitution) as to treaties. The prospect of ei-

108. Even armed attacks by one member on another no longer invoke serious action in the Security Council or reference to the General Assembly under the Uniting for Peace Resolution. G.A. Res. 377, 5 U.N. GAOR, Supp. (No. 19) 10, U.N. Doc. A/1775 (1950). Compare the Suez Crisis of 1956. When the restrictions on national use of force under articles two through four of the Charter are varied by majoritarian and rogue state insistence that use of force for attainment of their "good" or "vital security" preferences is as legal as individual and collective self-defense. When the O.A.S. limps along, as ineffectual under the supposed structural improvements of the Protocol of Buenos Aires as formerly. When internal political shifts in the United States in response to frustration with much of the rest of the world hint at the loss of current expectation as to the rise of an effective world legal order and of return to realpolitik.

109. There is always latent hostility to the capacity of the President and two-
ther no Senate approval of the human rights conventions now be-
fore it,\textsuperscript{110} or their approval with all the reservations proposed by
the executive branch,\textsuperscript{111} would be regrettable. But to assert, while
these are before the Senate, that the United States is already
committed under general provisions in basic charters, can have
only even worse effects on the prospect of Senate approval, on
their implementation by simple majority in both houses, on a use-
ful diplomatic modality, and perhaps even on the cause of human
rights under the Constitution. Above all, it is certain that binding
ourselves up as a nation in this way is not going to further the
cause of human rights elsewhere, not even in Mexico. We would
end up looking silly to other countries; and that is no way to influ-
ence and lead, as by now we ought to have learned, not only from
human rights episodes, but from others as well.\textsuperscript{112}

\textsuperscript{110} See Hearings on Human Rights, supra note 103.

\textsuperscript{111} See id.

\textsuperscript{112} As this article went to press, the Fifth Circuit affirmed, without opinion,
Judge Seals’ decision in the consolidated case.