Human Rights Treaties in and beyond the Senate: 
The Spirit of Senator Proxmire

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The second time I met Roger Clark, he stood on a chair and sang *Waltzing Matilda*. The occasion was a party celebrating Roger’s forty years of teaching at Rutgers-Camden. As the toasts that evening made clear, Roger had become an institution within Rutgers. Everyone knew his hearty New Zealand accent, tracked his running, noted his love of music so pluralist that it included the unofficial Australian anthem, and, above all, acknowledged his devotion to the moral imperatives that underlie international humanitarian and human rights law.

In tribute to Roger, this essay explores issues related to the ratification of human rights treaties in the United States. For supporters, the picture at first is a bleak one. In 1995, Louis Henkin wrote a famous piece in which he suggested that the process of human rights treaty ratification was haunted by ‘the ghost of Senator Bricker’—the isolationist Senator who in the 1950s had waged a fierce assault on the treaty power, especially with regard to human rights treaties. Since that time, Senator Bricker’s ghost has proved even more real. Professor Henkin’s concern was with how the United States ratified human rights treaties—with the packet of reservations, declarations, and understandings (‘rud s’) attached by the Senate in giving its advice and consent. Today, the question is not how but whether. It is now twenty years since the United States ratified a major human rights treaty.

Yet one common theme that arches across U.S. foreign relations law is the power of the dialectic. ‘A Hamilton may be matched against a Madison;’ 2 ‘Professor Taft is counterbalanced by Theodore Roosevelt;’ 3 and the great Supreme Court decisions of *Youngstown* and *Curtiss-Wright* stand in tension with one another. 4 So too in the Senate. The ghost of Senator Bricker may be on the prowl. But opposing him is the spirit of the Senator Proxmire, the late

2 *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579, 635 n1 (1952) (Jackson, J, concurring).
3 Ibid (adding that ‘[i]t even seems that President Taft cancels out Professor Taft’).
internationalist who for many years led a lonely campaign to keep the Genocide Convention on the Senate’s agenda. His spirit is one with whom Roger would enjoy a conversation. For unlike Senator Bricker, Senator Proxmire believed that the United States should be responsive to international human rights norms. His tenacity ultimately helped lead to the ratification of the Genocide Convention, thirty-nine years after President Truman had signed it.

The spirit of Senator Proxmire embodies two trends in relation to unratified human rights treaties. The first is simply that efforts towards Senate advice and consent for at least some of these treaties persist and persist. While no Senator today can match Senator Proxmire’s tenacity, the treaties’ supporters keep on trying. The second trend—is less direct, but even more interesting—is that unratified human rights treaties are nonetheless influencing the shape of law in the United States. As scholars have documented, these treaties are affecting administrative action, state and local legislation, and judicial interpretation. The most high-profile example is the Supreme Court’s citation to unratified human rights treaties in the course of constitutional interpretation. In essence, these uses of unratified human rights treaties are advancing Senator Proxmire’s goal of having the United States be responsive to human rights norms, although not doing so through his preferred means of treaty ratification.

There is an intriguing parallel between how isolationists and internationalists have used what might be considered second-best legal tools in order to pursue their goals. Just as Senator Bricker did not achieve a constitutional amendment limiting the treaty power but his spiritual descendants used rud s to similar effect, so advocates of human rights treaties are failing to achieve their ratification yet making them count in other ways. In both cases, opponents have cried foul. Professor Henkin viewed the use of certain rud s as bordering on unconstitutional, and those wary of international influences view uses of unratified human rights treaties as inappropriate dodges around the constitutional process for treaty advice and consent. But in both cases, the practice has embraced half-measures.

1 Human Rights Treaties in the Senate from 1995 to 2014

In the early 1990s, the United States seemed on the cusp of abandoning its longstanding aloofness to human rights treaties. In 1992, the United States