

1992

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24 U. Tol. L. Rev. 203 (1992-1993)

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UNITED STATES RATIFICATION OF THE INTERNATIONAL BILL OF RIGHTS: A FITTING CELEBRATION OF THE BICENTENNIAL OF THE U.S. BILL OF RIGHTS

*Nadine Strossen**

I. INTRODUCTION

AN eminently appropriate way for the American people to honor the United States' Bill of Rights, whose bicentennial we celebrated on December 15, 1991, would be to become party to another, potentially more protective, set of principles, which carries forward the core human rights aspirations expressed in the U.S. Bill of Rights: the International Bill of Rights. The three documents that constitute the International Bill of Rights are the Universal Declaration of Human Rights, which the United Nations adopted by consensus in 1948,¹ and two covenants that spell out in greater detail the broad principles enunciated in the Universal Declaration: the International Covenant on Civil and Political Rights ("ICCPR")² and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").³ These three documents contain core human rights principles that are widely recognized by the international community.

The United States has not ratified the ICESCR. Although it did ratify the ICCPR in 1992, that ratification was limited by such extensive qualifications as to render it essentially nugatory as a tool for advancing human rights in the U.S. Indeed, given the breadth of these qualifications, some international law experts argued that they undermined the very validity of the U.S. ratification under international law and concluded that no ratification was a lesser evil than ratification so rife with limitations.⁴

Of overriding importance, the U.S. ratification was subject to a declaration that the ICCPR provisions are not "self-executing," which

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This article is based on the Cannon Lecture, which Professor Strossen delivered at the University of Toledo College of Law on November 6, 1991.

For research assistance with this article, the author wishes to thank Marie Costello, Caroline Gargione, William Mills and Catherine Siemann.

1. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 14-15 (1982).

2. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967).

3. *Id.* at 49.

4. See *infra* text accompanying note 18.

means that they are not legally enforceable against federal or state governments in the U.S. in any American courts; they will be binding in domestic courts only if Congress passes implementing legislation.⁵ Moreover, the U.S. ratification makes exceptions for all ICCPR provisions that set more protective human rights standards than those currently recognized under U.S. law. Therefore, even assuming that the U.S. has satisfied the international standards for ratification of the ICCPR in a technical sense, that ratification is not meaningful in terms of extending the human rights of people in the U.S.

In order to bridge the gap between the exception-ridden ratification of the U.S. and the human rights standards in the ICCPR, Congress should pass corrective legislation. For example, the proposed International Human Rights Conformity Act of 1992, although not correcting every respect in which U.S. law fails to conform with international human rights standards, would achieve substantial U.S. compliance with the ICCPR.⁶

The central point of this article is that meaningful U.S. ratification⁷ of the rights-enhancing provisions of the covenants would be a significant step in fostering human rights in the U.S. That conclusion follows from the fact that, in certain important respects, international human rights norms are more rights-protective than the corresponding domestic law standards. As the Rehnquist Court continues to construe domestic human rights norms in an increasingly narrow fashion, the situations in which international standards afford more protection will increase. Therefore, it behooves U.S. human rights activists to seek the incorporation of international human rights norms into domestic law. Even if the U.S. does not ratify the covenants, U.S. human rights lawyers should urge U.S. courts to rely on more rights-protective international human rights standards through the doctrine of unwritten or "customary" international law. To the extent that international standards are less protective of human rights than their domestic counterparts, the U.S. should not incorporate them into U.S. law; international human rights precepts should be invoked only to expand, and not to curtail, Americans' human rights.⁸

The first part of this article briefly outlines the history of U.S. action (or inaction) concerning the covenants, as well as the international human

5. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 131 (1987) (U.S. courts are bound to give effect to international law, except that a "non-self-executing" agreement will be given effect only after adoption of necessary implementing legislation).

6. See *infra* text accompanying note 80.

7. Although the U.S. has technically ratified the ICCPR, for the reasons noted above, that ratification was lacking in real significance, in terms of making the ICCPR's rights-enhancing provisions domestically enforceable. Therefore, for the sake of brevity, throughout this article, the term "meaningful ratification" will be used to signify a ratification that is not crippled with rights-undermining qualifications. Such a ratification could be secured, in effect, through corrective legislation such as the International Human Rights Conformity Act of 1992.

8. See *infra* text accompanying notes 61-63.

rights and foreign policy concerns weighing in favor of meaningful U.S. ratification. The second part then canvasses the advantages of ratification specifically in terms of domestic civil rights and liberties. It outlines the Rehnquist Court's hostility toward individual and minority group rights; explains how the actual enforcement of such rights throughout our history has depended on the efforts of domestic human rights organizations, such as the American Civil Liberties Union ("ACLU"); describes how such organizations recently have responded to the Rehnquist Court's hostility to human rights by invoking alternative rights-protective strategies, other than federal litigation under the U.S. Bill of Rights; and gives examples of specific areas where reliance on international human rights norms could constitute one promising alternative strategy.

The third part sets out a critical analysis of the reasons for the U.S.'s historic failure to meaningfully ratify the covenants, emphasizing why those reasons are unpersuasive. Finally, the fourth part explains how U.S. lawyers and judges can and should incorporate selected international human rights norms into U.S. jurisprudence, even absent ratification of the covenants.

II. HISTORY OF U.S. NON-RATIFICATION OF INTERNATIONAL BILL OF RIGHTS

The U.S. was a leader in the forming of the United Nations after World War II and in drafting the human rights provisions of the U.N. Charter.⁹ The U.S. also has taken a leading role in drafting, and getting other countries to sign and ratify, approximately forty other international human rights instruments, including the International Bill of Rights.¹⁰ Both of the international covenants have been ratified by about one hundred countries, including virtually every U.S. ally and every Western European nation, with the sole exceptions of Turkey and Greece.¹¹ The U.S. voted for U.N. adoption of the two international covenants in 1966, and signed those covenants in 1976, but still has not ratified the ICESCR at all, and did not accomplish even its highly encumbered ratification of the ICCPR until 1992.

The U.S.'s foot-dragging regarding the international covenants is a specific manifestation of its general failure to ratify international human rights treaties. There are more than forty such treaties to which the U.S. could be a party, of which it has ratified only about a dozen, and most

9. See LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 506-09 (1973); Dean Rusk, *A Personal Reflection on International Covenants on Human Rights*, 9 HOFSTRA L. REV. 515, 515 (1981).

10. Judith Guertin, Comment, *Customary International Law and Women's Rights: The Equal Rights Amendment as a Fait Accompli*, 1987 DET. C.L. REV. 121, 133.

11. *Statement of the ACLU Before the Foreign Relations Comm. of the U.S. Senate on Ratification of the International Covenant on Civil and Political Rights* (Dec. 13, 1991) [hereinafter *Statement of the ACLU*].

of those are among the least significant.¹² Among the most important international human rights treaties to which the U.S. could, but has not, become a party (aside from the ICESCR) is the major regional agreement applicable to the Western Hemisphere, the American Convention on Human Rights.¹³

President Carter was the first U.S. President to recommend Senate ratification of the two covenants. However, he attached many reservations that would have substantially limited their impact on U.S. human rights policy.¹⁴ In any event, the Senate did not act favorably on President Carter's recommendation. Then, throughout its eight-year existence, the Reagan Administration said that these two covenants were "under review" and did not take any position for or against ratification.¹⁵

Until late summer of 1991, the Bush Administration continued in the Reagan Administration's posture, saying that the lengthy review process was still ongoing. However, the Bush Administration announced in August of 1991 that it would be recommending Senate ratification of the ICCPR.¹⁶ In making this announcement, President Bush said, "U.S. ratification of the [ICCPR] at this moment in history would underscore our national commitment to fostering democratic values through international law. U.S. ratification would provide an additional and effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world."¹⁷

Following the President's announcement, the Bush Administration forwarded the ICCPR to the Senate Foreign Relations Committee, together with an attached package of limiting "reservations," "declarations" and "understandings." These limitations are, in many respects, similar to those that had been recommended by President Carter. They were so extensive that some human rights activists feared that ratification subject to them would be an empty gesture, at best. For example, the Lawyers Committee for Human Rights, a U.S.-based international human rights organization, urged the Senate Foreign Relations Committee not to recommend ratification, in light of the extensive limitations. The Chairman of the Lawyers Committee explained:

The Lawyers Committee emphatically endorses the view that ratification of the Covenant would underscore our national commitment to promoting

12. See generally RICHARD B. LILICH, *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: A COMPILATION OF TREATIES, AGREEMENTS & DECLARATIONS OF SPECIAL INTEREST TO THE UNITED STATES* (rev. ed. 1988).

13. See Nov. 22, 1969, 36 O.A.S.T.S. 1, OEA/ser.A/16 (English) (1970), reprinted in 9 I.L.M. 673 (1970).

14. See David Weissbrodt, *U.S. Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35 (1978).

15. See Dennis DeConcini & Steny H. Hoyer, *Time to Ratify U.N. Human Rights Covenants*, CHRISTIAN SCI. MONITOR, Apr. 18, 1990, at 19.

16. U.S. Department of State Dispatch (Sept. 16, 1991) (Statement by Deputy Spokesman Richard Boucher, Sept. 10, 1991).

17. *Id.*

human rights in U.S. foreign policy.

We are deeply concerned, however, by the reservations, declarations and understandings proposed by the Administration. We believe that only one reservation, relating to limitations on free speech in Article 20 of the Covenant, is constitutionally required. The other qualifications proposed by the Administration are all designed to support the Administration's view that this treaty should not, in any way, change or commit us to change anything in U.S. law or practice, now or in the future. It is this principle that we strongly oppose. Ratification, subject to the reservations proposed by the Administration, would render the treaty forever useless as a tool to improve human rights in the United States.

The Administration's qualifying language applies one set of rules to the United States and another set of rules to the rest of the world. No other nation has taken this view. We believe it is wrong; it undermines the basic purpose of the treaty.

We oppose the Administration's approach on [several] grounds. First, we believe that other countries, including our closest allies, will view ratification in this manner as hypocritical. Second, our ratification subject to the principle of "no domestic application" may be imitated cynically by other states, such as China or Cuba, which [also] seek the diplomatic benefits of ratification but cling to the view that adherence to international human rights standards violates their sovereignty. We would scorn any ratification by other countries, such as China, if they included reservations identical to those proposed by the Administration.

Reluctantly, we have come to conclude that if the choice before the Senate is now between ratifying the Covenant subject to the Administration's misguided principle or delaying ratification until the most objectionable reservations are removed, we support delay.¹⁸

The Senate Foreign Relations Committee held hearings on the Bush Administration proposal in November, 1991, and subsequently recommended its approval by the full Senate. On April 2, 1992, the Senate consented to U.S. ratification of the ICCPR, subject to all the limitations that the Bush Administration had proposed. On June 8, 1992, the Executive Branch formally deposited the United States' instrument of ratification with the United Nations, thus completing our nation's ratification process.

The Senate Foreign Relations Committee's Report on the ICCPR expressly recognizes that U.S. law is in some respects less rights-protective than the ICCPR and that the qualifications attached to U.S. ratification exempt the U.S. from the higher international standard. However, the report suggests that these discrepancies should be remedied through subsequent legislation:

The Committee recognizes the importance of adhering to internationally recognized standards of human rights. Although the U.S. record of adherence

18. Letter from Marvin E. Frankel, Chairman, Lawyers Comm. for Human Rights, to Senator Claiborne Pell, Chairman, Senate Foreign Relations Comm. (Mar. 2, 1992) (on file with author).

has been good, there are some areas in which U.S. law differs from the international standard. For example, the Covenant prohibits the imposition of the death penalty for crimes committed by persons below the age of eighteen but U.S. law allows it for juveniles between the ages of 16 and 18. In areas such as these, it may be appropriate and necessary to question whether changes in U.S. law should be made to bring the United States into full compliance at the international level. However, the Committee anticipates that changes in U.S. law in these areas will occur through the normal legislative process.

The approach taken by the Administration and the Committee in its resolution of ratification will enable the United States to ratify the Covenant promptly and to participate with greater effectiveness in the process of shaping international norms and behavior in the area of human rights. It does not preclude the United States from modifying its obligations under the Covenant in the future if changes in U.S. law allow the United States to come into full compliance.¹⁹

One of the practical reasons why the U.S. has so far failed to meaningfully ratify the covenants is that there has not been a very active constituency pressing for such action based on the covenants' impact specifically in the domestic sphere. The domestically-based international human rights groups have provided pressure for ratification. However, in support of that goal, these organizations stress non-domestic considerations—namely, concerns of international human rights (i.e., the rights of individuals in other countries) and foreign policy. I refer to organizations such as Amnesty International U.S.A., Human Rights Watch, the Lawyers Committee for Human Rights and other groups that monitor human rights violations by non-U.S. governments.²⁰

The international human rights groups emphasize that the U.S.'s ability to exercise its considerable, or at least potentially considerable, influence in persuading other governments to comply with human rights norms is severely undermined by the U.S. government's failure to ratify these basic documents. The U.S. has a series of statutes that limit aid and trade benefits to governments that consistently commit gross human rights violations.²¹ However, our credibility in using these or other levers to affect other countries' human rights practices is undermined by our non-ratification of the covenants. One example of this adverse impact of non-ratification is in U.S. efforts to improve the human rights situation in China. Every time the U.S. tries to raise this subject with Chinese officials or diplomats, they routinely say, "You have no standing to challenge our

19. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1992), reprinted in 31 I.L.M. 645, 650 (1992).

20. *Statement of the ACLU*, *supra* note 11.

21. See, e.g., Foreign Assistance Act of 1961 §§ 116(a), 502B(a)(2), 22 U.S.C. §§ 2151n(a), 2304(a)(2) (1988) (denying economic aid and military/security assistance, respectively to countries that demonstrate "a consistent pattern of gross violations of internationally recognized human rights").

practices. You have not even become party to the two basic United Nations covenants on human rights."²²

Another reason why U.S. ratification of the covenants would be helpful from a foreign policy and international human rights perspective is that the U.S. then could participate in the important process of implementing these covenants. Implementation involves both a more detailed elaboration and refinement of the substantive norms governing international human rights and the development of new international procedural mechanisms for actually enforcing those norms. Currently, as a non-participant in the implementation process, the U.S. is not able to shape its development.²³

Yet another disadvantage of U.S. non-ratification of the covenants, in terms of foreign policy and international human rights concerns, is the lost opportunity to persuade other countries to become parties. Although many have already done so, there are still many that have not.²⁴

III. ADVANTAGES OF RATIFICATION IN TERMS OF DOMESTIC HUMAN RIGHTS

I wanted to mention, but not to emphasize, the considerations in favor of ratification in terms of promoting human rights in other countries. I want to emphasize, instead, another reason for ratification, which is very important but often overlooked: ratification should enhance the civil liberties and civil rights of people here in the U.S. Accordingly, I hope that the ACLU and other domestic human rights organizations will become an active, strong constituency urging the ratification of these treaties as important instruments to add to the arsenal of tools for advancing rights here at home. In fact, the ACLU submitted testimony to the Senate Judiciary Committee supporting U.S. ratification of the ICCPR without most of the reservations proposed by the Bush Administration²⁵ and cooperated with other domestic civil rights and civil liberties organizations in formulating strategy for promoting U.S. ratification.

Now that we have a Supreme Court that consistently interprets, or rather *mis*interprets, the U.S. Bill of Rights as not providing much security for human rights,²⁶ it is especially important to develop alternative human rights norms, and institutions for enforcing them, which are more protective.

22. *Statement of the ACLU*, *supra* note 11.

23. *Ratification of the Covenant on Civil and Political Rights by the U.S.*, *Executive Summary of Legal Position of the International Human Rights Law Group* (Sept. 30, 1991).

24. *Id.*

25. *Statement of the ACLU*, *supra* note 11.

26. See Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285 (1991); Nadine Strossen, *The Free Speech Jurisprudence of the Rehnquist Court*, 1991 Y.B. ON FREE SPEECH 83; Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 866-903 (1990) [hereinafter *Judicial Protection*].

For this reason, U.S. ratification of the International Bill of Rights would be an eminently fitting celebration of the bicentennial of the U.S. Bill of Rights. The bicentennial occurred on December 15, 1991. Coincidentally, that was only one day removed from the twenty-fifth anniversary of the United Nations' adoption of the international covenants on December 16, 1966. I believe that this link in terms of timing is an appropriate symbol of the close relationship between the two Bills of Rights.

A. ACLU's Role in Protecting Domestic Human Rights

Some friends in the audience for the Cannon Lecture said they thought it would be helpful if I would briefly explain something about the ACLU's work to give you some perspective on why the International Bill of Rights would facilitate it. Therefore, I'll give you a thumbnail sketch.²⁷ I think the ACLU's unique role is best summarized by the fact that, of all the important human rights organizations in this country, it is the only one that advocates all civil liberties for all people. There are many fine organizations that concentrate on particular rights, such as free speech, religious freedom and so forth. Likewise, many other important organizations concentrate on defending rights for a particular group of people, such as African Americans, women, Native Americans, and so on.

The ACLU, though, is the only organization that attempts to defend the entire spectrum of fundamental human rights for all individuals, recognizing that all such rights are inextricably interconnected. As a constitutional law professor, I can attest to the historical accuracy of this premise underlying the ACLU's broad mission—the indivisibility of all rights. American constitutional history demonstrates that governmental violation of a particular right of a particular individual ultimately endangers all rights for all individuals.

One relatively simple way I can indicate the breadth of the ACLU's human rights work is to list the various special projects within the national ACLU, each focusing on a particular set of civil liberties issues. These projects deal with AIDS, aliens' and immigrants' rights, arts censorship, children's rights, the death penalty, the rights of lesbians and gay men, national security, prisoners' rights, privacy and technology, race and poverty, reproductive freedom, voting rights, women's rights and rights in the workplace.

The ACLU argues more cases in the U.S. Supreme Court than any other entity, except the U.S. government. In addition, until last year, the ACLU won most of the Supreme Court cases in which it was involved. Last year, for the first time in recent history, the ACLU lost more than fifty percent of such cases. Given the current composition of the U.S. Supreme Court and its hostility toward many human rights claims, the

²⁷ For a comprehensive study, see SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (1990).

ACLU generally does not seek Supreme Court review, but more often than not now appears in the Court at the initiative of its adversaries.²⁸

B. U.S. Supreme Court's Increasingly Narrow Interpretation of U.S. Bill of Rights

The foregoing facts about the ACLU's declining success rate before the Supreme Court point to a major reason for the increased importance of turning to international human rights regimes: the Supreme Court's increasing inhospitality toward human rights. During its 1990-91 term, the Court directly overturned more of its own precedents than it had ever overturned in any previous term; it overruled seven of its own precedents.²⁹

On the last day of the 1990-91 term, in *Payne v. Tennessee*,³⁰ Chief Justice William Rehnquist announced that the Court would henceforth be more willing to overturn its past precedents. In the past, the Court had said it would overrule precedents only under extraordinary circumstances, which did not include a change in the Court's personnel and in their judicial philosophies.³¹ In short, the mere fact that the Court's current members disagreed with previous decisions would not have warranted overruling them.³² In *Payne*, Chief Justice Rehnquist indicated that the Court now feels free to overturn earlier rulings with which the current majority disagrees.³³

This prompted Justice Thurgood Marshall, in his last dissent before resigning from the Supreme Court, to issue a blistering criticism of Chief Justice Rehnquist's new approach.³⁴ Justice Marshall said that the Court was ignoring its historic role as a "protector of the powerless,"³⁵ and he issued a list of what he called "endangered precedents,"³⁶ earlier rulings that would satisfy Chief Justice Rehnquist's new, looser criteria for overruling. These precedents included many landmark decisions guaranteeing civil rights and civil liberties.

Justice John Paul Stevens, a judicial moderate, appointed by a Republican President, echoed Justice Marshall's dismay in his separate dissent. Justice

28. Stephen A. Holmes, *Frustrated by Federal Courts, ACLU Looks to States on Individual Rights*, N.Y. TIMES, Sept. 30, 1991, at A14.

29. See *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (overruling *Solem v. Helm*, 463 U.S. 277 (1983)); *Payne v. Tennessee*, 111 S. Ct. 2597 (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), & *South Carolina v. Gathers*, 490 U.S. 805 (1989)), *reh'g denied*, 112 S. Ct. 28 (1991); *Coleman v. Thompson*, 111 S. Ct. 2546 (overruling *Fay v. Noia*, 372 U.S. 391 (1963)), *reh'g denied*, 112 S. Ct. 27 (1991); *California v. Acevedo*, 111 S. Ct. 1982 (1991) (overruling *Arkansas v. Sanders*, 442 U.S. 753 (1979)); *Arizona v. Fulminante*, 111 S. Ct. 1246 (overruling *Chapman v. California*, 386 U.S. 18 (1967)); *United States v. Chadwick*, 433 U.S. 1 (1977)), *reh'g denied*, 111 S. Ct. 2067 (1991).

30. 111 S. Ct. 2597, 2609-11 (1991).

31. *Id.* at 2619 (Marshall, J., dissenting).

32. *Id.* at 2619, 2622 (Marshall, J., dissenting).

33. *Id.* at 2609-11.

34. *Id.* at 2619-23 (Marshall, J., dissenting).

35. *Id.* at 2625 (Marshall, J., dissenting).

36. *Id.* at 2623 & n.2 (Marshall, J., dissenting).

Stevens concluded that the *Payne* decision marked "a sad day for a great institution."³⁷ Both dissenters agreed that the Court was abandoning the role it has played throughout the last half century as the ultimate guarantor of individual and minority group rights against the "tyranny of the majority" through vigorous enforcement of the Bill of Rights.³⁸

Not only is the Rehnquist Court directly overturning Supreme Court precedents in record numbers, but it is also overturning even more precedents indirectly. In many such cases, the Court pays lip service to precedent, but so substantially "reinterprets" them that they are, in fact, stripped of force. Dramatic examples of that approach include the Court's most recent decisions regarding the ongoing vitality of *Roe v. Wade*,³⁹ the 1973 decision recognizing that a woman's right to choose an abortion is a fundamental right. These decisions are *Webster v. Reproductive Health Services*,⁴⁰ *Rust v. Sullivan*⁴¹ and *Planned Parenthood v. Casey*.⁴² None of them expressly stated that *Roe* was overturned; to the contrary, the plurality opinion in *Webster* asserted that *Roe* was still good law,⁴³ and the unusual three-person opinion for the Court in *Casey* asserted that *Roe*'s "essential holding" continued in force.⁴⁴ In fact, though, all three decisions upheld restrictions on the right to choose an abortion that are so burdensome as to belie the fundamental status of that right from a constitutional law perspective. More significantly, from the viewpoint of many women, such a theoretical right has no practical significance, because of the numerous obstacles to its exercise that the Court has condoned.

The fact that the Court has in effect, albeit not expressly, eviscerated *Roe* has been acknowledged by justices from opposite ends of the spectrum in terms of the merits of the issue (i.e., whether *Roe* was correctly decided and whether it should be reaffirmed). In the *Webster* case, Justice Harry Blackmun, *Roe*'s author, repudiated the plurality's assertion that it was not overturning *Roe*.⁴⁵ Charging that the Court indirectly and evasively accomplished such result, his dissent took the plurality to task for stealthily sabotaging precedent:

Never in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review the plurality obscures the portent of its analysis. With feigned restraint, the plurality announces that its analysis leaves *Roe* "undisturbed," [b]ut this disclaimer is totally meaningless. The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly

37. *Id.* at 2631 (Stevens, J., dissenting).

38. *Id.* at 2625 (Marshall, J., dissenting), 2631 (Stevens, J., dissenting).

39. 410 U.S. 113 (1973).

40. 492 U.S. 490 (1989).

41. 111 S. Ct. 1759 (1991).

42. 112 S. Ct. 2791 (1992).

43. *Webster*, 492 U.S. at 521 (plurality).

44. *Casey*, 112 S. Ct. at 2809.

45. See *Webster*, 492 U.S. at 521 (plurality).

Thus, "not with a bang, but a whimper," the plurality discards a landmark case of the last generation.⁴⁶

Justice Blackmun's charge that the Rehnquist Court is effectively, if not expressly, undermining *Roe* was reiterated in his dissent in *Rust v. Sullivan*,⁴⁷ the 1991 decision that upheld the Department of Health and Human Services' "gag rule" prohibiting health professionals at federally funded family planning clinics from giving their patients any information about abortion, even if abortion is a medically indicated option. Justice Blackmun wrote: "If a right is found to be unenforceable, even against flagrant attempts by government to circumvent it, then it ceases to be a right at all."⁴⁸

In the Court's most recent abortion ruling, *Planned Parenthood v. Casey*,⁴⁹ decided in June of 1992, this theme that it was actually sabotaging *Roe*, notwithstanding its refusal to candidly acknowledge that fact, was taken up by Chief Justice Rehnquist. As one of the two dissenters in *Roe* itself, Chief Justice Rehnquist could hardly disagree with Justice Blackmun more fundamentally on the merits of that decision. However, despite their sharp ideological differences, Justices Blackmun and Rehnquist are in complete accord with each other as to *Roe*'s current eviscerated status. In *Casey*, Chief Justice Rehnquist described the Court's effective, albeit unacknowledged, overturning of *Roe* as follows:

While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality. Decisions following *Roe* are frankly overruled in part

Roe v. Wade stands as a sort of judicial Potemkin Village, which may be pointed out to passers by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis is imported.⁵⁰

As indicated by Chief Justice Rehnquist's opinion, the onerous restrictions on abortion that the Court upheld in *Casey*, under its new, deferential standard of review, had previously been held unconstitutional under *Roe*'s strict scrutiny approach.⁵¹

46. *Id.* at 538, 557 (Blackmun, J., concurring in part and dissenting in part).

47. 111 S. Ct. 1759 (1991).

48. *Id.* at 1786 (Blackmun, J., dissenting).

49. 112 S. Ct. 2791 (1992).

50. *Id.* at 2860 (citations omitted), 2866-67 (Rehnquist, C.J., dissenting in part).

51. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (holding unconstitutional mandated information and reporting requirements which "pose an unacceptable danger of deterring the exercise" of a woman's right to choose an abortion); *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983) (24-hour waiting period and requirement that prescribed information be provided by physicians only held unconstitutional).

Because of its aggressive overturning of rights-protective precedents, both directly and indirectly, the Supreme Court no longer can be relied on to secure human rights. Its narrow interpretation of the Bill of Rights, and of the federal courts' role in enforcing those rights, mirrors the view of the entire federal judiciary, approximately seventy percent of whose judges have been appointed by Presidents Reagan and Bush pursuant to specific campaign pledges to name judges who adhere to narrow views of judicially enforceable, constitutionally based human rights. Therefore, to secure domestic human rights, one must look to alternative sources of protection, other than the U.S. Bill of Rights, and to alternative forums other than federal courts.

C. Domestic Human Rights Organizations' Increasing Reliance on Alternatives to Federal Judicial Enforcement of U.S. Bill of Rights

As I am fond of telling my constitutional law students, the Supreme Court's interpretation of the U.S. Constitution defines a floor for our rights, not a ceiling. All the Supreme Court does in its decisions is to set a level below which other government officials may not sink in protecting individual and minority group rights. Nothing is to stop such officials from choosing to give greater protection to rights than the Supreme Court says they have to, as a matter of federal constitutional law. For example, Congress may pass legislation that protects rights across the country. State legislatures may accomplish the same result within their state borders.

In light of the federal courts' recent narrow interpretations of federal constitutional rights, the ACLU and other domestic human rights organizations are placing increasing reliance on alternative avenues for rights protection.⁵² It would be helpful to add the International Bill of Rights to that array of alternative approaches. Before focusing on the international tools directly, I would like to comment on one of the other alternative strategies, since I believe it constitutes a particularly persuasive precedent for reliance on international human rights. I am referring to state courts' interpretations of their state constitutions.

Many state constitutions contain language that is explicitly more rights-protective than the U.S. Constitution.⁵³ Moreover, the U.S. Supreme Court has recognized that state courts are free to interpret their constitutions as affording more protection for human rights than the U.S. Supreme Court has interpreted the U.S. Constitution to afford, even if the pertinent provisions in the two constitutions are identical.⁵⁴ That is because the state constitution may be interpreted in light of state history and traditions that would shed a different meaning on the words than the meaning assigned them by the U.S. Supreme Court.⁵⁵

52. Holmes, *supra* note 28.

53. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

54. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

55. *Id.* at 495.

The movement to rely on state constitutional interpretation as a vehicle for expanding human rights started to develop momentum about fifteen years ago. When it was first advanced by some judges and scholars, not that long ago, it seemed as visionary as the notion of similarly relying on international human rights may seem now. Certainly, when I went to law school in the early 1970's, no one studied state constitutions. Since then, though, there has been an influential movement to educate lawyers and judges to consider state constitutions in human rights cases. One early proponent of that movement was Supreme Court Justice William Brennan.⁵⁶ Another early proponent, as well as practitioner, was Justice Hans Linde, who then sat on the Oregon Supreme Court.⁵⁷ Justice Linde made a big impact on U.S. lawyers by saying that if you bring a human rights case and do not rely on your state constitution, you really are committing malpractice.⁵⁸

Not surprisingly, given the link between the two strategies for protecting domestic human rights, Justice Linde has been an advocate for using international human rights in some of the same ways that state constitutional standards have been used.⁵⁹ Probably because international human rights law is more exotic than state constitutional law, Justice Linde has expressed his warning to lawyers in somewhat toned-down language. He says, if you are advocating a human rights case in the U.S. and do not rely on the relevant principles of international human rights law, you are "skating on the thin edge of malpractice."⁶⁰ So, as Justice Linde recognizes, we have not yet incorporated international human rights law into our domestic law as fully as we have incorporated state constitutional law. What is required to more fully integrate international standards into domestic law is the same process of acculturation and education as has already made great strides, in the recent past, concerning state constitutional law.

Although the movement to incorporate international human rights norms into the domestic legal culture lags behind that of incorporating state constitutional norms, it too has made enormous strides in the past two decades. When I was in law school, there were no courses on international human rights law, either at my alma mater, Harvard Law School, or elsewhere. Now Harvard Law School is one of many that has a formal program in international human rights, with many courses, faculty members, law reviews and clinical programs focusing on the area. Few law schools do *not* regularly offer courses in the area.

56. See, e.g., *id.* at 502.

57. Edmund B. Spaeth, Jr., *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 733 (1988).

58. *Id.* See also *State v. Lowry*, 667 P.2d 996 (Or. 1983); *State v. Jewett*, 500 A.2d 233 (Vt. 1985).

59. Joseph R. Grodin, *Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391 (1988).

60. Spaeth, *supra* note 57, at 733.

D. Enhancement of Domestic Human Rights by Incorporation of International Human Rights Norms

One of the reasons why the U.S. is lagging in its support for international human rights treaties is the attitude that we are so much freer here than are residents of other countries, so we do not need these international protections. This objection raises an important point—that international human rights norms would be incorporated into domestic law only to the extent that the international standards are more protective of individual or minority group rights than the domestic standards.⁶¹ To the extent that international human rights standards are less protective than the corresponding U.S. norms, the former would not supersede the latter. To clarify this, the U.S. should qualify its ratification of any international human rights treaty by making a reservation to provisions that are less rights-protective than domestic law. The ICCPR includes one such provision that was appropriately the subject of an express U.S. reservation; article 20 excludes hate speech and war propaganda from free speech protection, in contrast with American law.⁶²

Again, the incorporation of state constitutional norms affords an instructive analogy. State constitutional standards regarding human rights may deviate from the Supreme Court's interpretation of the federal Constitution only in the direction of ratcheting up (i.e., giving more protection for rights).⁶³ The same is true of international human rights. Therefore, the question of whether international human rights standards are more protective than the corresponding domestic standards is important.

Having had experience in international human rights work in many parts of the world, I believe that the U.S. in general is the freest society on earth, a fact that makes me feel very patriotic. However, this generalization does not diminish the importance of relying on international human rights as a vehicle for securing and expanding domestic rights for two important reasons. First, a major—if not *the* major—factor accounting for the high level of human rights in the U.S. is the work of the ACLU and other domestic human rights organizations, which has helped to translate the Bill of Rights' paper guarantees of liberty into actual rights for real people. The second, related point is that the Supreme Court's increasingly narrow interpretation of the U.S. Bill of Rights will multiply the instances in which international human rights norms are more protective. Thus, international human rights norms may provide essential new tools for the human rights organizations in the U.S. I would like to expand on both of these points.

Elaboration on the first point—the crucial role that domestic organizations have played in securing actual governmental respect for rights—is not only important in the context of my particular discussion,

61. See *Reid v. Covert*, 354 U.S. 1, 89 (1957).

62. *Statement of the ACLU*, *supra* note 11, at 3.

63. See *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

but is also consistent with a principal theme of the Cannon Lectures in general: emphasis on the limitations of our legal system and on the humanistic dimensions of that system. To be sure, since its adoption two hundred years ago, the U.S. Bill of Rights has been an important potential tool for securing individual and minority group rights. However, like all tools, whether its potential is realized depends on whether and how it is used. In fact, the Bill of Rights was not used to secure personal liberties and minority group rights until human rights organizations provided the resources to make that possible, chiefly by providing lawyers to victims of rights violations.

The crucial role that domestic human rights organizations played in translating the Bill of Rights' promises into reality is indicated by considering the status of human rights before the advent of such organizations during the early decades of this century. Although the Bill of Rights declared rights to exist almost from the nation's beginning, as was recognized by their principal author, James Madison, these declarations constituted mere "parchment barriers"⁶⁴ against governmental interference with liberty. These guarantees were not self-executing, and, for much of our nation's history, there simply were no systematic means for seeking their judicial enforcement. Accordingly, the actual state of human rights in this country was deplorable for most of our history.

For example, when the ACLU was founded in 1920, there was racial apartheid by law in many parts of the country, there were rampant lynchings and other race-motivated violence, women did not have the right to vote and women were arrested for discussing birth control in public. Workers who had been fired for advocating unions had no remedy, the police conducted warrantless searches of homes, the government routinely deported non-citizens because of their political views, and Attorney General A. Mitchell Palmer conducted notorious nationwide raids to arrest communists and labor organizers. During World War I, thousands of people were prosecuted and imprisoned merely for peaceful expression of anti-war views.⁶⁵

In short, the mere enactment of the Bill of Rights did not guarantee human rights. What was required, in addition, were individuals and organizations willing and able to take the necessary action to secure actual governmental respect for rights. Now that human rights can no longer be entrusted to federal judicial interpretation of the U.S. Bill of Rights, domestic human rights activists must turn to other channels, including international human rights.

Thus, we come to the second point—that in certain significant respects U.S. rights standards are less protective than are the comparable international norms.⁶⁶ While the trend of the Rehnquist Court's rulings is

64. 1 Annals of Congress 457 (J. Gales ed. 1789) (statement of James Madison).

65. See AMERICAN CIVIL LIBERTIES UNION, BRIEFING PAPER No. 9, A HISTORY OF THE BILL OF RIGHTS 4 (1991).

66. See generally *Judicial Protection*, *supra* note 26.

toward lesser protection of rights, the trend in international human rights law appears to be in the opposite direction. One important area where international law is more rights-protective than domestic law is privacy, especially in the sense of personal autonomy and decisions about sexuality. Other areas where international human rights law is more protective than domestic law include the death penalty,⁶⁷ prisoners' rights,⁶⁸ the rights of other institutionalized individuals such as mental patients⁶⁹ and certain aspects of criminal procedure.⁷⁰

Let me give you two recent, dramatic examples of areas in which the Supreme Court's definitions of domestic rights are much narrower than the corresponding international standards. One involves personal privacy in the sense of sexual autonomy and control over one's body. In 1986, in *Bowers v. Hardwick*,⁷¹ the Supreme Court ruled that the constitutional right of privacy does not include the right to engage in consensual homosexual activity.⁷² The opinions of the justices who voted to support that conclusion contained sweeping, condemnatory language about homosexuality. Chief Justice Warren Burger's concurring opinion asserted that such sexual conduct had been universally condemned "throughout the history of western civilization."⁷³ This opinion neglected to mention that, five years earlier, the European Court of Human Rights had held that the right to engage in homosexual sodomy is guaranteed under the European Convention on Human Rights and accordingly invalidated an anti-sodomy law that had been enacted by Northern Ireland.⁷⁴

Another, more recent illustration of the divergence between relatively unprotective domestic rights interpretations by the Rehnquist Court, and more protective interpretations of international norms, is afforded by contrasting *Rust v. Sullivan*⁷⁵ with a virtually simultaneous decision by the European Commission on Human Rights. The Supreme Court held that personnel at government-funded family planning clinics do not have a right to speak about the availability of abortion as an option, even when that option is medically indicated for a particular patient.⁷⁶ The Court ruled that the First Amendment's free speech guarantee does not extend to the provision of information about abortion at government-funded family planning clinics. The European Commission on Human Rights adopted a strikingly different position in a case from Ireland.

67. *Statement of the ACLU, supra* note 11, at 6.

68. *Id.* at 7.

69. *Id.*

70. *Id.* at 8.

71. 478 U.S. 186 (1986).

72. *Id.* at 192-95.

73. *Id.* at 196 (Burger, C.J., concurring).

74. See *Dudgeon Case*, 45 Eur. Ct. H.R. (ser. A) (1981) (invalidating Northern Ireland law). *Accord*, *Norris Case*, 129 Eur. Ct. H.R. (ser. A) (1988) (invalidating Irish statute criminalizing consensual homosexual contact between adult males).

75. 111 S. Ct. 1759 (1991).

76. *Id.* at 1777-78.

Ireland's Constitution provides that the right to life begins at conception, so abortion is prohibited as a matter of Irish constitutional law.⁷⁷ The European Commission nonetheless held that it violated the international human rights norms secured by the European Convention on Human Rights, to which Ireland is a signatory, for the Irish government to prohibit health professionals from giving information to Irish women about getting abortions in other countries, such as the United Kingdom.⁷⁸ In October of 1992, the European Court of Human Rights affirmed the Commission's judgment.⁷⁹ Contrary to the U.S. Supreme Court's cramped interpretation of the First Amendment's free speech guarantee, the European Court held that the European Convention's free speech guarantee extends to the provision of information about abortion, even in countries where abortion violates both the constitution and criminal laws.

What a particularly dramatic contrast there is between these two cases! In the U.S., women have a constitutionally guaranteed right to choose an abortion, yet the millions of poor women whose only access to health care and information is at federally funded clinics are deprived of information about that constitutionally guaranteed option. In contrast, for a woman to have an abortion in Ireland would violate the fetus' constitutional rights, yet Irish women nevertheless have the right to receive information about obtaining abortions elsewhere.

Just as international human rights law in general contains certain added rights protections, beyond those afforded by current U.S. law, so, too, the ICCPR contains some added rights guarantees. If the U.S. had ratified the ICCPR without limitations on its rights-enhancing provisions, it would have expanded the rights of Americans in many significant respects. If enacted, the International Human Rights Conformity Act of 1992 would accomplish U.S. compliance with the ICCPR, and thus augment Americans' rights, in the following ways: it would prohibit the execution of juvenile offenders and of pregnant women; it would incorporate international standards of cruel, inhuman or degrading treatment and punishment into U.S. law; it would require the retroactive imposition of lighter criminal penalties; it would afford compensation for unlawful arrests and for convictions resulting from the miscarriage of justice; it would, in most instances,⁸⁰ prohibit successive prosecutions by federal and state authorities;

77 The constitutional provision at issue, which came into force following a 1983 referendum, reads as follows:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

IR. CONST. art. 40.3.3°

78. *Open Door Counselling Ltd. v. Ireland*, 14 E.H.R.R. 131 (1991).

79. *Open Door & Dublin Well Woman v. Ireland*, 246 Eur. Ct. H.R. (ser. A) (1992).

80. The Act specifies that it "does not preclude successive prosecution under federal law when the Attorney General of the United States has determined that such prosecution is necessary to enforce rights protected under the United States Constitution, this Act, or any other Federal civil rights statute." Int'l Human Rights Conformity Act of 1992 § 108(c) (1992).

and it would require jails and prisons to separate juvenile from adult offenders and defendants awaiting trial from those who had already been convicted.

I hope I have given you a sense of the great potential for using international human rights law as a more expansive tool for protecting important rights in the U.S. than the Rehnquist Court's version of the U.S. Bill of Rights has become. In the remainder of this article, I will elaborate on two specific dimensions of this subject: first, a critical analysis of the U.S.'s failure to meaningfully ratify the International Bill of Rights; and second, an outline of the important role that international human rights norms can play in domestic law, even without U.S. treaty ratification.

IV CRITICAL ANALYSIS OF U.S. FAILURE TO MEANINGFULLY RATIFY INTERNATIONAL BILL OF RIGHTS

I will now outline the history of the U.S. failure to meaningfully ratify the International Bill of Rights, the proffered reasons for that failure and the flaws in such reasons. Initially, I will sketch the background of the International Bill of Rights, and the U.S.'s important role in its development.

Appalled by the atrocities of World War II, U.S. officials played a leading role in forming the United Nations and in ensuring that the promotion of human rights would be an essential element of the U.N. Charter.⁸¹ Shortly after the U.N.'s formation, a U.N. Commission on Human Rights was established to draft the International Bill of Rights. The U.S. representative to the U.N., Eleanor Roosevelt, was the chairperson of this commission. She convinced the other members that the International Bill of Rights should consist of both a declaration enunciating general principles and treaties setting out more specific guarantees for implementing those principles.⁸²

In accordance with Eleanor Roosevelt's vision, the Universal Declaration of Human Rights was adopted on December 10, 1948. It proclaimed that civil, political, economic, social and cultural rights all constitute one indivisible body of rights and that their protection is necessary for the preservation of human dignity and world peace. Borrowing from President Franklin Delano Roosevelt's famous "Four Freedoms" speech in 1941, the Universal Declaration states:

Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind. The advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.⁸³

81. See SOHN & BUERGENTHAL, *supra* note 9, at 506-09.

82. Richard N. Gardner, *Eleanor Roosevelt's Legacy: Human Rights*, N.Y. TIMES, Dec. 10, 1988, at 27

83. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, at 56 (1948).

The two specific covenants that were designed to implement the ideals pronounced in the Universal Declaration, the ICCPR and the ICESCR, were drafted during the 1950's and adopted by the U.N. in 1966. By 1976, enough countries had ratified the covenants for them to come into force.

The ICCPR is modeled on the U.S. Bill of Rights. It guarantees the following rights: freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom of movement; due process of law; privacy; and freedom of thought, expression, assembly, association and religion. All these rights are guaranteed to all human beings, regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Each signatory state pledges that whenever these rights are violated, an effective remedy will be available.⁸⁴

The ICESCR was influenced by President Franklin Roosevelt's Economic Bill of Rights, proposed in January, 1944. It includes the right to adequate food, clothing, recreation, medical care, education, social security and a decent home. The ICESCR guarantees the following rights: just and favorable work conditions; formation and joining of trade unions; social security; adequate standard of living; access to the highest attainable standard of physical and mental health; and education. Like the rights secured by the ICCPR, those protected under the ICESCR are guaranteed to all without discrimination. Unlike the rights secured by the ICCPR, which become effective immediately upon a nation's ratification, those protected under the ICESCR are to be progressively implemented by each ratifying country "to the maximum of its available resources."⁸⁵

Prior to the fall of 1991, the two U.N. covenants had been twice discussed in the Senate: first, in the 1950's, shortly after they were drafted, and secondly, in 1979, after they were proposed by the Carter Administration. Recently, two social scientists, Natalie Hevener Kaufman and David Whiteman, systematically analyzed all the arguments that were raised against ratification during those two sets of hearings.⁸⁶ They concluded that the covenants were rejected in the 1950's due to concerns about domestic and foreign policy that are no longer relevant. However, strikingly, they found that the very same concerns resurfaced in 1979 as major reasons for again failing to ratify. In other words, a momentum had developed behind the negative arguments initially proffered in the 1950's, which transcended the arguments' actual persuasive value.⁸⁷

During the covenants' first consideration in the Senate in the 1950's, the leading opponent of ratification was an elected official from this state,

84. *Statement of the ACLU, supra* note 11, at 53.

85. *Id.*

86. Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the U.S. Senate: The Legacy of the Bricker Agreement*, 10 HUM. RTS. Q. 309 (1988).

87. *Id.* at 310-12.

Ohio Senator John Bricker. He was the proponent of a series of resolutions that would have amended the U.S. Constitution to limit the treaty-making power. These proposals reflected two basic concerns, which also prompted Senator Bricker to oppose U.S. ratification of human rights treaties. One of his concerns dealt with domestic policy, the other with foreign policy.

Domestically, Senator Bricker was very concerned about treaties—especially those dealing with human rights—being used to limit “states’ rights.”⁸⁸ Back in the 1950’s, that was a buzzword in the context of the then-nascent civil rights movement. This was even before *Brown v. Board of Education*⁸⁹ held that governmental race discrimination was unconstitutional, and well before the 1964 Civil Rights Act prohibited much private sector racial discrimination. Bricker and others who supported his amendment were especially concerned about the guarantees of racial equality in the International Bill of Rights. Before the Supreme Court’s 1954 ruling that racially segregated public schools violated the fourteenth amendment’s equal protection clause, there was no domestic legal authority for challenging most racial discrimination. Therefore, Thurgood Marshall, Jack Greenberg and the other NAACP lawyers who were fighting racial segregation relied specifically on international law principles, including those set out in the United Nations Charter. Bricker and others feared that U.S. ratification of the covenants would speed the domestic civil rights movement, which they were not supporting.

The second reason for Senator Bricker’s opposition to the covenants was grounded in foreign policy concerns. During the 1950’s the U.S. was, of course, in the Cold War. Senator Bricker and his allies viewed the international covenants as increasing the Soviet bloc’s power.⁹⁰

Even in the 1950’s, when Senator Bricker initially raised these arguments against U.S. ratification of the covenants, I think there were some severe problems with them. *A fortiori*, these arguments were even weaker when they were resurrected more than two decades later to forestall President Carter’s request that the Senate ratify the covenants. The lack of persuasiveness of Senator Bricker’s reasons for opposing U.S. ratification of the covenants in the 1950’s is indicated by the fact that even President Eisenhower’s Secretary of State, John Foster Dulles, initially believed that the covenants should be ratified. However, because of the political strength of Senator Bricker and his allies, the Eisenhower Administration made a deal with them. The Administration refused to support Senator Bricker’s proposed constitutional amendment, but, as a concession to the concerns underlying the amendment, the Administration agreed not to push for ratification of the human rights covenants.⁹¹

Even assuming that there was some merit to Senator Bricker’s anti-ratification arguments back in the 1950’s, it seems incontrovertible that

88. *Id.* at 315.

89. 347 U.S. 483 (1954).

90. Kaufman & Whiteman, *supra* note 86, at 313, 326-27.

91. *Id.* at 319.

neither of those arguments has any force whatsoever today. First, our own Constitution has been interpreted as guaranteeing racial equality and prohibiting racial discrimination by state governments; the argument that "states' rights" include the right to engage in racial discrimination has been resoundingly rejected. Thus, the racial equality norms in the international covenants no longer deviate from U.S. law as they did in the early 1950's. Second, from a foreign policy point of view, the Cold War is over, and we have entered a "new world order" in which countering the power of the former Soviet bloc should no longer be of such great importance to the U.S. As a leading international law scholar and expert on Soviet law has written:

It has been said that the participation of the Soviet Union is proof of the worthlessness of [international human rights treaties]. It has been said that international instruments embody socialistic notions that are not really "rights" at all. It has also been said that the Soviet Union would exploit U.S. adherence for propagandistic uses of [its] own. By relying on these and other arguments that presuppose continued ideological struggle between two hostile blocs, opponents have prevented the most important human rights treaties from becoming part of "the supreme Law of the Land," and the few that have been allowed to squeak by are fettered with debilitating reservations aimed at minimizing their effectiveness as law in the United States.

These objections never withstood scrutiny even during the height of the Cold War, and today they carry no force whatsoever.⁹²

Despite all the reasons for rejecting Senator Bricker's arguments today (let alone when they were initially made), those arguments continue to exert influence now, four decades later. This was the conclusion of the Kaufman and Whiteman article. The article quoted Senator Bricker as stating, when introducing his first constitutional amendment in 1951. "My purpose in offering this resolution is to bury the so-called covenant on human rights so deep that no one holding high public office will ever dare to attempt its resurrection."⁹³ Almost forty years later, Kaufman and Whiteman concluded: "As we consider the status of the human rights covenants today, it would appear that the ghost of Senator John Bricker must be smiling at the fulfillment of his wish."⁹⁴ They explained: "Our main conclusions are that contemporary arguments against passage of human rights treaties have not changed substantially from arguments presented in the 1950's, and that the legacy of these earlier deliberations is still apparent in the attitude of those considering the treaties now."⁹⁵ Few of the staff members of the Senate Foreign Relations Committee are

92. Lori Fisler Damrosch, *International Human Rights Law in Soviet and American Courts*, 100 YALE L.J. 2315, 2334 (1991).

93. Kaufman & Whiteman, *supra* note 86, at 309.

94. *Id.*

95. *Id.* at 310.

now familiar with the specifics of the debate in the 1950's. Instead, the legacy lies in the near-universal perception that human rights treaties are inherently controversial.

In short, Kaufman and Whiteman concluded that the power of the anti-ratification rhetoric of the 1950's carried forward so that people still assume the covenants to be vaguely threatening to important interests of our state and national governments without being aware of the specific reasons.⁹⁶ That is the bad news. The good news is that Kaufman and Whiteman also concluded that the single most important factor in turning the tide would be presidential support.⁹⁷ Staff members of the Senate Foreign Relations Committee whom they interviewed during the Reagan Administration said that the Administration's lack of interest was the most important reason the Senate had no plans even to consider, let alone to approve, the covenants.⁹⁸

As Kaufman and Whiteman explain, the President's important role in securing ratification of human rights treaties is supported by the history of the Genocide Treaty of 1948. Almost immediately after President Reagan's unexpected endorsement of this treaty, the Senate Foreign Relations Committee held hearings on it and recommended ratification just a few weeks later. Yet, earlier that same year, the Committee's staff had been pessimistic about securing ratification of the treaty.⁹⁹ In light of the foregoing historical evidence, there is a solid basis for hope that a future administration, which is supportive of human rights, could well propel ratification of international treaties that protect such rights.

V INCORPORATION OF INTERNATIONAL HUMAN RIGHTS NORMS INTO DOMESTIC LAW BY THE U.S. LEGAL PROFESSION APART FROM TREATY RATIFICATION

Even before and apart from ratification of the International Bill of Rights, U.S. lawyers and judges can and should incorporate international human rights principles into domestic law. In addition to positive sources of international human rights law, such as treaties and covenants, international human rights law also has an analogue to unwritten common law in the domestic sphere. In the international law sphere, the unwritten law is called customary law. It consists of those norms that are widely accepted by the community of civilized nations.¹⁰⁰

Treaty provisions are not themselves sources of customary international law norms; however, they do constitute evidence of the existence of such norms. The fact that approximately one hundred countries have ratified

96. *Id.* at 335.

97. *Id.* at 332-33.

98. *Id.* at 333.

99. *Id.*

100. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

each of the covenants is itself evidence of the widespread acceptance of these norms and is a basis for concluding that they should be seen as part of customary international law

According to the Supreme Court, the three classic types of evidence of customary international law norms are the works of scholars, the general usage and practice of nations and judicial decisions.¹⁰¹ Other types of evidence include resolutions of international bodies, national legislation, public declarations by international and national officials, and diplomatic documents.¹⁰²

International jurists have made credible arguments that most, if not all, international human rights standards have achieved the general recognition necessary to constitute customary international law norms. Indeed, judges and scholars have made the stronger argument that most international human rights principles are included in the subset of customary norms that are so fundamental as to be nonderogable.¹⁰³ These "peremptory" norms, or "jus cogens," cannot be changed by agreement.¹⁰⁴ Some international law scholars have argued that the international human rights standards embodied in the International Bill of Rights are at least "rapidly establishing" themselves as peremptory norms, if they have not already attained that status.¹⁰⁵ Not all commentators agree that all international human rights principles presently constitute nonderogable norms. In contrast, though, there appears to be a broad consensus among international law scholars that all such principles are included in customary international law.¹⁰⁶ During the Carter Administration, the U.S. government took the position that both covenants embody customary international law principles.¹⁰⁷

Customary international norms can be incorporated into domestic law in two different ways: as directly binding, controlling legal standards, or

101. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

102. See LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE* 362 (1989).

103. See *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3, 301, 304 (Feb. 5) (Ammoun, J., concurring); *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, 1966 I.C.J. 6, 298 (July 18) (Tanaka, J., dissenting); CHEN, *supra* note 102, at 215; MYERS S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 345 (1980); Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 441-42 (1989); David F. Klein, Comment, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 346-47, 365 (1988).

104. See Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, reprinted in 8 I.L.M. 679, 698-99 (1969).

105. See Parker & Neylon, *supra* note 103, at 442.

106. See Sohn, *supra* note 1, at 12.

107. See Memorial of the United States of America before the International Court of Justice, Case Concerning United States Diplomatic and Consular Staff in Teheran (*United States of America v. Iran*) (Final Order), 1980 I.C.J. 3; Barbara D. Budros, Comment, *The Former American Hostages' Human Rights Claims Against Iran: Can They Be Waived?* 4 Hous. J. INT'L L. 101, 111 n.52 (1981); accord Memorandum for United States as Amicus Curiae at 307 *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (No. 79-6090), reprinted in 19 I.L.M. 585, 587-601 (1980).

as non-binding, but influential, standards of interpretation.¹⁰⁸ The theory that customary norms are directly binding means that a government is bound to comply with such norms, even if it has not ratified an agreement that explicitly obligates it to do so. This theory is solidly supported by established international law principles. It also received widespread judicial enforcement early in U.S. history. However, in more recent history, this direct approach to incorporating customary international law into domestic jurisprudence has received much less support. Therefore, one should not expect it to be a significant avenue for integrating international human rights principles into domestic law in the foreseeable future.¹⁰⁹

The willingness of U.S. courts to directly enforce customary international law principles has followed a cyclical pattern throughout history. Early in our history, consistent with the then predominant natural law philosophy, courts vigorously enforced customary international law standards as directly binding elements of domestic law.¹¹⁰ In contrast, from about the mid-nineteenth century through the mid-twentieth century, customary international law norms played a less vital part in domestic adjudication. This change reflected the rise of legal positivism, as well as the "conservative" or "classical" approach to international law, which emphasized national sovereignty.¹¹¹ Since World War II, U.S. courts have again become more receptive to international customary law, consistent with the rejection of legal positivism and the rise of a new internationalism.

Probably the high-water mark for acceptance of the directly binding nature of customary international human rights norms was the decision by the U.S. Court of Appeals for the Second Circuit in 1980 in *Filartiga v. Pena-Irala*.¹¹² The Second Circuit held that a rarely used federal jurisdictional statute created an implied cause of action for violation of customary international human rights standards.¹¹³ In so doing, the Second Circuit revived the incorporationist approach to customary international law which had been prevalent early in our history, but had fallen into disuse since the nineteenth century. The court recognized that international law, or "the law of nations," is a dynamic concept that should be construed in accordance with the current customs and usages of civilized nations, as articulated by jurists and commentators.¹¹⁴ It specifically held

108. See *Judicial Protection*, *supra* note 26, at 815-37.

109. *Id.* at 818-23.

110. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 820, 825 (1989).

111. See Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV INT'L L.J. 53, 64-66 (1981); Joan F. Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 655, 675 n.77 (1983); Jordon J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 236 (1975).

112. 630 F.2d 876 (2d Cir. 1980).

113. *Id.* at 889-90.

114. *Id.* at 884.

that U.S. law directly incorporated customary international law principles prohibiting deliberate government torture.¹¹⁵

The *Filartiga* decision created hope in the international law community that it presaged a trend toward the wholesale domestic incorporation of customary international human rights law.¹¹⁶ However, that development has not occurred.¹¹⁷ To the contrary, few subsequent decisions have followed the *Filartiga* approach of treating customary international law principles as directly binding on the U.S. government.¹¹⁸

In summary, there is much scholarly support for the view that most international human rights norms constitute at least binding rules of customary law—if not, indeed, nonderogable binding rules. Accordingly, commentators have argued that various international human rights norms should control in U.S. litigation. However, relatively few courts have actually enforced this theory in specific cases. Therefore, for the immediate future, the more promising route for incorporating customary international human rights norms into domestic law appears to be the indirect route, under which such norms provide guidance in interpreting domestic legal standards.

Even positivists, who resist incorporating customary international law norms into our own domestic laws as directly binding, recognize the indirect role that such norms can play by providing interpretive standards for U.S. law.¹¹⁹ In other words, to the extent that our own statutes or constitutional norms are vague ambiguous or incomplete, we can use customary international law to provide guidance in interpreting or implementing them.

In 1989, Professor Jordan Paust of the University of Houston Law Center published a comprehensive survey of the interpretive use of customary international human rights norms by U.S. courts throughout history.¹²⁰ He concluded: "[M]ost of the Supreme Court Justices throughout our constitutional history have recognized that human rights can provide useful content for the identification, clarification and supplementation of constitutional or statutory norms."¹²¹ Moreover, he showed that the

115. *Id.* at 884-85.

116. See Steven Scheebaum, *Recent Judicial Developments in Human Rights Law*, 1 LAW GROUP DOCKET 1, 7 (1981). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2 (1987).

117. See Gordon A. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 Hous. J. INT'L L. 39, 40 (1981).

118. See *Judicial Protection*, *supra* note 26, at 822 n.81.

119. See HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 438-40 (W. Tucker ed., 1966). See also HANS Kelsen, *PURE THEORY OF LAW* 353-55 (M. Knight trans. 1967); HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 145-55 (A. Wedberg trans., 1945); Neil MacCormick, *A Moralistic Case for A-Moralistic Law?* 20 VAL. U.L. REV. 1, 20 (1985).

120. Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543 (1989).

121. *Id.* at 596.

Supreme Court's interpretive reliance on customary international human rights norms has been steadily increasing.¹²² He also demonstrated that the many Supreme Court Justices who have invoked customary international human rights concepts have spanned disparate jurisprudential approaches.¹²³

The Rehnquist Court's most recent reference to the interpretive use of customary international human rights standards was discouraging. The Court's ruling was consistent with its general trend toward contracting the judicial protection of rights, as well as with its pattern of departing from rights-protective precedents.

Until recently, the Court had consistently invoked international human rights norms in determining whether an application of the death penalty constituted cruel and unusual punishment in violation of the eighth amendment.¹²⁴ For example, in *Thompson v Oklahoma*,¹²⁵ in 1988, the Supreme Court held that a death sentence imposed on an offender who was fifteen years old at the time of his offense violated the Eighth Amendment. Writing for the plurality, Justice John Paul Stevens cited international legal standards in reasoning that the sentence "offend[ed] civilized standards of decency."¹²⁶ He noted that the leading western European countries, as well as the Soviet Union, prohibited executions of individuals who were juveniles at the time of their crimes. He also cited two treaties that the U.S. had not ratified that explicitly prohibit juvenile death penalties—the ICCPR and the American Convention on Human Rights.¹²⁷ In his dissent, Justice Antonin Scalia implied that international standards should not be taken into account in interpreting the U.S. Constitution.¹²⁸

One year later, in *Stanford v Kentucky*,¹²⁹ the Supreme Court concluded that imposing the death penalty on an individual for a crime committed while sixteen or seventeen years old does not violate the Eighth Amendment. The majority opinion was written by Justice Scalia, who took this opportunity to reiterate his views about the irrelevance of international law and practices in construing the U.S. Constitution. Justice Scalia's majority opinion, as well as Justice Brennan's dissent, well state the two, widely divergent, possible views about interpreting domestic law in light of international customary law. The majority opinion recognized that the key question in Eighth Amendment analysis is whether the challenged punishment is contrary to "evolving standards of decency." In determining what those standards are, Justice Scalia explained, "we have looked not to our own [i.e., the Justices' own personal] conceptions of decency, but

122. *Id.* at 588-89.

123. *See id.* at 590.

124. *See* *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 593 n.4, 596 n.10 (1974).

125. 487 U.S. 815 (1988).

126. *Id.* at 830 (plurality).

127. *Id.* at 831 n.34.

128. *Id.* at 863-65 (Scalia, J., dissenting).

129. 492 U.S. 361 (1989).

to those of modern American society as a whole."¹³⁰ Then, in a footnote to this sentence, Justice Scalia emphasized his rejection of the theory that international law even plays an interpretive role in U.S. jurisprudence. He wrote:

We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* that the sentencing practices of other countries are relevant. While "the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.¹³¹

In contrast, the dissent stated: "Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis

In addition, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties."¹³² The dissent then recited relevant evidence, including the fact that, since 1979, Amnesty International has recorded only eight executions of offenders under eighteen years old throughout the entire world, three of which were in the U.S. and the remaining five of which occurred in Pakistan, Bangladesh, Rwanda and Barbados.¹³³ In short, the U.S. had executed more juvenile offenders than any other country

As disappointing as the Supreme Court's recently constricted view about the interpretive value of customary international norms is, the impact of that view is less significant than that of typical Supreme Court rulings. In contrast with domestic law, there is no judicial hierarchy in the interpretive use of customary international law.¹³⁴ Accordingly, both lower federal courts and state courts may make interpretive use of international norms, independent of the U.S. Supreme Court's rulings in this area. In fact, some state and lower federal courts have made significant contributions to this emerging area of jurisprudence.¹³⁵ Additionally, legislative and executive branch officials, at all levels of government, are free to take account of customary international law norms in their official acts.¹³⁶

130. *Id.* at 369.

131. *Id.* at 369 n.1.

132. *Id.* at 389-90 (Brennan, J., dissenting).

133. *Id.* at 389 (Brennan, J., dissenting).

134. Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT'L LAW 61, 67 (1984).

135. See *Judicial Protection*, *supra* note 26, at 835-36 nn.140-42 (citing cases).

136. See Jordan J. Paust, *Does Your Police Force Use Illegal Weapons? A Configurative Approach to Decision Integrating International and Domestic Law*, 18 HARV INT'L L.J. 19 (1977).

VI. CONCLUSION

I think there is a great promise that the United States Bill of Rights and the International Bill of Rights can work together to protect the human rights of Americans. That interrelationship was well-stated by President Jimmy Carter in the message that he issued upon signing the two international covenants and sending them to the Senate. He said:

The covenants that I signed today are unusual in the world of international politics and diplomacy. They say absolutely nothing about powerful governments or military alliances or the privileges and immunities of statesmen and high officials. Instead, they are concerned about the rights of individual human beings and the duties of government to the people they are created to serve.

[T]o those who believe that instruments of this kind are futile, I would suggest that there are powerful lessons to be learned in the history of my own country. Our own Declaration of Independence and the Bill of Rights expressed a lofty standard of liberty and equality, but in practice these rights were enjoyed only by a very small segment of our people. In the years and decades that followed, those who struggled for universal suffrage, those who struggled for the abolition of slavery, those who struggled for women's rights, those who struggled for racial equality, in spite of discouragement and personal danger, drew their own inspiration from these two great documents—the Declaration of Independence and the Bill of Rights. Because the beliefs expressed in these documents were at the heart of what we Americans most valued about ourselves, they created a momentum toward the realization of the hopes that they offered.

My hope and my belief is that the international covenants that I signed today can play a similar role in the advancement and the ultimate realization of human rights in the world at large.¹³⁷

As I noted earlier, during the first century of our own Bill of Rights, it largely languished, unenforced. The rights of Americans were often honored in the breach. During the second century of our Bill of Rights, it was actually used by lawyers and activists as a potent tool for making important strides toward realizing our national ideals of liberty, justice and equality for all. As we enter the third century of our own Bill of Rights, I hope that the International Bill of Rights will soon complement it as an important additional tool that will help to bring us ever closer to those original ideals.

137 Remarks on Signing International Covenants on Human Rights, 13 WEEKLY COMP. PRES. DOC. 1488, 1488-89 (Oct. 5, 1977).