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Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis

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> As nature abhors a vacuum, constitutional documents abhor straitjackets. Great ideas cannot be imprisoned; they must be able to move freely from one part of the earth to another.[1]

Recently there has been a surge of enthusiasm for utilizing international human rights norms in domestic litigation. Some scholars and judges support the notion that these norms should be deemed directly binding on federal and state courts. Such a relatively powerful use of international human rights principles, however, has met with widespread resistance from many courts and commentators. Given the isolationist bent of the American legal system, it is unlikely that international human rights law will be directly incorporated into U.S. law.

A more modest—but nevertheless important—claim for the contribution of international human rights standards to the domestic legal system is more promising and should be widely accepted by federal and state courts. Under this approach, the international standards may provide guiding principles for interpreting federal and state constitutions and statutes. Indeed, this Article makes an even more limited, but still significant, claim: that international human rights principles may guide the determination of "legal process" issues concerning judicial review of constitutional rights claims.[2] The international norms would inform the

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

2. For a helpful recent description of legal process analysis, see Amar, Book Review, 102 HARV. L. REV. 688, 691 (1989) (reviewing P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1988)):

process—the analytical or methodological questions—rather than the substance of domestic individual rights adjudication. This proposed use of international human rights norms is apparently novel and no judicial or scholarly commentary has addressed it directly.[3] There is widespread support, however, for the interpretive use of international standards to resolve issues of constitutional substance.[4] This Article's more modest interpretive use of these standards to resolve issues of constitutional process, therefore, should gain easy acceptance. A domestic role for international human rights norms is consistent not only with the U.S. Government's active promotion of international human rights since World War II, but also with the longstanding practice of U.S. courts concerning the domestic role of international law in general.[5]

International human rights precepts should be invoked only to expand, rather than to limit, protections of individual rights under domestic law.[6] The U.S. Government consistently has defended its refusal to ratify important international human rights treaties by asserting that domestic law provides more protection than its international counterparts.[7] While this claim is true with respect to many rights, there are significant areas where U.S. law is less protective of individual freedom than international law.[8] In particular, the analytical methodology for reviewing a

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> The legal process school [of legal thought] focuses primary attention on who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made . . . . The question what is or ought to be the substantive law governing citizen behavior in a given area is no longer the sole, or even the dominant, object of legal analysis. Rather, legal process analysis illuminates how substantive norms governing primary conduct shape, and are in turn shaped by, organizational structure and procedural rules.

See also id. at 694 (legal process theories "pay[ ] strict attention to second-order rules allocating power between federal courts and other institutions").

3. Professor Gordon A. Christenson has suggested a similar interpretive domestic role for international human rights standards. *See infra* text accompanying notes 148-55.

4. *See* 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, 651 (1989) ("[A]ny lingering question whether [human rights] precepts can be used in private litigation and judicial decisionmaking should shift to the question of how such precepts can be used . . . more effectively.").

5. *See infra* text accompanying notes 89-100.

6. Reid v. Covert, 354 U.S. 1, 89 (1957).

7. *See* Rusk, *Reflection on International Covenants,* 9 HOFSTRA L. REV. 515, 520 (1981); Weissbrodt, *United States Ratification of the Human Rights Covenants,* 63 MINN. L. REV. 35, 45 (1978).

8. For example, in contrast with international human rights instruments, the U.S. Constitution contains no explicit privacy guarantee. Moreover, the privacy rights that the Supreme Court has found to be implicit in the Constitution are in some important respects narrower than those guaranteed under international documents. *See infra* text accompanying notes 306-10. *See also* Warbrick, *"Federal" Aspects of the European Convention on Human*

claimed rights violation used in the international approach is more protective of individual rights than the judicial review recently applied by the Supreme Court.

The Supreme Court's recent constitutional rights decisions have tended to employ analytical techniques that take a narrow view of judicial power to protect individual rights and a correspondingly broad view of the power of the other governmental branches to invade such rights.[9] This constricting perspective on the scope of judicial review could have long-range adverse consequences upon individual freedom far beyond the particular substantive holdings. While this trend has been developing since the 1970s, it gathered substantial momentum during the Court's 1988-89 Term. This Article discusses decisions from that Term as illustrative of the long-range trend.

The international human rights law approach to legal process appears to be moving in the opposite direction: toward modes of judicial review that result in more expansive interpretations of rights and more restrictive interpretations of the government's power to circumscribe those rights. Because international human rights instruments were substantially influenced by the U.S. Constitution and are susceptible to the same range of interpretations regarding legal process issues, it is instructive to assess the process dimensions of U.S. individual rights cases in light of the corresponding, but contrasting, international trends.

The most developed body of international human rights jurisprudence emanates from the two tribunals that enforce the European Convention on Human Rights:[10] the European Commission of Human Rights and the European Court of Human Rights. This Article, therefore, focuses on decisions of the Convention organs. This is consistent with U.S. court rulings that have relied on the European Convention and the cases implementing it as a major source of international human rights law.[11] The methodological approaches employed by the European Com-

Rights, 10 MICH. J. INT'L L. 698, 698 (1989) (U.S. Supreme Court has not found any constitutional limits on state power to allow corporal punishment in schools, whereas judgments under European Convention have essentially outlawed such punishment).

9. *See infra* Part IV.

10. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention].

11. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 884 n.16 (2d Cir. 1980) (court recognized that one source of customary international law is judicial decisions; only judicial decision it cited was issued by European Court of Human Rights); *accord* Fernandez v. Wilkinson, 505 F. Supp. 787, 797 (D. Kan. 1980), *aff'd,* 654 F.2d 1382 (10th Cir. 1981) (cited European Convention as among "principal sources of fundamental human rights" and "indicative of the customs and usages of civilized nations").

mission and Court, however, parallel those employed under other instruments embodying international human rights norms. Canada's counterpart to the U.S. Bill of Rights, the Charter of Rights and Freedoms, for example, which was adopted in 1982, borrows much language from the European Convention.[12] Convention jurisprudence is therefore relevant to Charter interpretation, and vice versa.

For the sake of brevity, this Article concentrates on European Commission and Court decisions concerning one particular substantive right: privacy. In terms of judicial process, however, the Convention organs' privacy decisions are consistent with their decisions construing other substantive freedoms.[13] Accordingly, the methodological approaches that characterize the European Commission's and Court's privacy decisions should guide U.S. courts in analyzing claimed infringements of all individual rights, not just privacy.

The dichotomy between the U.S. and international human rights law, in terms of legal process, is paradoxical. The Bill of Rights in the U.S. Constitution is enforceable directly against government officials throughout the U.S., and has been judicially enforced for almost two centuries. By contrast, neither the European Convention nor other international human rights instruments have any direct force within any national legal system. Furthermore, these international agreements have been subject to a more limited judicial review power than the U.S. Bill of Rights, both in scope and duration. Accordingly, one would expect U.S. courts to exercise more intense judicial review processes than international tribunals.

This disparity is not explicable in terms of the express language of the relevant human rights instruments.[14] Because the U.S. Constitution served as an important model for the subsequent international human rights instruments,[15] much of the language in the international instruments is similar to that in the Constitution. The language is often ambiguous and subject to differing interpretations.[16] Indeed, the differences

12. *See* Gibson, *Reasonable Limits Under the Canadian Charter of Rights and Freedoms*, 15 MANITOBA L.J. 27, 27 (1985).

13. *See* Hovius, *The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?*, 17 OTTAWA L. REV. 213, 223 (1985) (referring to similarity of European Convention articles 8-11, which protect, respectively: privacy; freedom of thought, conscience, and religion; freedom of expression; and freedom of peaceful assembly and association).

14. *See* Warbrick, *supra* note 8, at 699 (U.S. Supreme Court and European Court have ruled differently on permissibility of corporal punishment, despite similar governing language in U.S. Constitution and European Convention).

15. *See* Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 415 (1979).

16. Indeed, opponents of the domestic use of human rights principles in international

between the terms of the respective instruments suggest that the Bill of Rights should be construed as more rights protective than international agreements, such as the European Convention. Similar to other international human rights instruments, the Convention contains express limitations clauses prescribing the circumstances in which government may restrict prima facie protected rights.[17] By contrast, many U.S. constitutional guarantees are phrased in absolute terms. Arguably, the U.S. Supreme Court should be especially reluctant to infer such limitations, and should do so only narrowly.

Part I of this Article argues that international norms may play a significant role in domestic jurisprudence by providing directly binding decisional rules. Part II demonstrates that, a fortiori, international norms may be invoked to fulfill a more limited role: informing the interpretation of domestic legal rules, including rules of judicial process. Part III analyzes contemporary international human rights law from a legal process perspective, focusing, by way of illustration, on the European Convention privacy jurisprudence. Finally, Part IV applies the legal process perspective to recent constitutional rights decisions by the U.S. Supreme Court, contrasts the Court's evolving methodological approach with the developing international one, and shows that the latter is more consistent with U.S. constitutional traditions than the former. The Article concludes that by using international human rights norms to resolve judicial process issues, U.S. courts would be faithful both to the burgeoning movement for the internationalization of individual rights and to our nation's own constitutional precedents.

I. Incorporation of International Human Rights Norms as Directly Binding Domestic Legal Standards

This Article makes a relatively modest and uncontroversial claim about the role that international human rights norms should play in domestic adjudication. To put the limited nature of that claim into perspective, the Article first surveys arguments advocating a more prominent domestic role for international human rights. Although these arguments have been controverted, they have received significant support

treaties have argued that these provisions are too vague to permit judicial enforcement absent implementing legislation. *See* Oliver, *The Treaty Power and National Foreign Policy as Vehicles for the Enforcement of Human Rights in the United States,* 9 HOFSTRA L. REV. 411 (1981). *But see* Paust, Book Review 56 N.Y.U. L. REV 227, 239 (1981) (contending that U.N. Charter is sufficiently specific to be self executing).

17. *See infra* Part III.

from both scholars and judges.[18] To the extent that these arguments support the proposition that certain international human rights norms should be directly binding on U.S. courts, they support the more modest proposition that such norms provide significant interpretive guidance in implementing domestic law. The purpose of canvassing these arguments is not to make another contribution to the flourishing debate about whether international legal norms should play a direct role in U.S. law, but rather, to show that the mere existence of this debate reinforces the conclusion that international law should at a minimum play an indirect, interpretive role in U.S. law.

A. Potentially Binding Effect of Treaties Protecting Human Rights

The argument that state and federal courts in the U.S. are bound directly by human rights principles in treaties is, for two reasons, relatively unpromising as a means of integrating international principles into domestic law. First, the only treaties that could be directly binding would be those the U.S. has ratified, as well as signed.[19] Of the more than forty human rights agreements to which the U.S. could be a party,[20]

18. For a thorough list of recent legal scholarship on this issue, see Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-1955,* 69 IOWA L. REV. 901, 901 n.1 (1984).

19. The U.S. may have some obligation with respect to international instruments that it has signed but not ratified. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 336, *reprinted in* 8 I.L.M. 679, 686 (1969) (art. 18: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . or (b) expressed its consent to be bound by the treaty . . . .").

The U.S. has signed but not ratified the Vienna Convention, as well as several major international human rights treaties. *See infra* note 20. Thus, the U.S. arguably is bound to refrain from acts calculated to frustrate the purposes of these treaties. *See* Burke, Coliver, de la Vega & Rosenbaum, *Application of International Human Rights Law in State and Federal Courts,* 18 TEX. INT'L L.J. 291, 309 (1983); Nash, *Contemporary Practice of the United States Relating to International Law,* 75 AM. J. INT'L L. 142, 147 (1981) (quotes letter dated Sept. 12, 1980 from State Department Legal Advisor to Senator Adlai Stevenson, stating, in part, "While the United States has not yet ratified the Vienna Convention on the Law of Treaties, we consistently apply those of its terms which constitute a codification of customary international law"); Paust, *supra* note 4, at 645 n.593 (U.S. accepts view that Vienna Convention is presumptively customary). For a discussion of customary international law, see *infra* text accompanying notes 44-88.

20. The U.S. has signed but not ratified the following human rights agreements:

—International Convention on the Elimination of All Forms of Racial Discrimination, U.N. GAOR Res. A/2106 (Dec. 12, 1965) Annex, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969);

—International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR];

—International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16,

however, it has ratified only twelve.[21] The international human rights agreements that the U.S. has not ratified include two major U.N. instruments that, together with the Universal Declaration of Human Rights (UDHR),[22] constitute the "International Bill of Rights:"[23] the International Covenant on Civil and Political Rights (ICCPR)[24] and the International Covenant on Economic, Social, and Cultural Rights.[25] The U.S.

1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

For a complete list, see R. LILLICH, INTERNATIONAL HUMAN RIGHTS: A COMPILATION OF TREATIES, AGREEMENTS & DECLARATIONS OF SPECIAL INTEREST TO THE UNITED STATES, vii (rev. ed. 1988).

21. The U.S. has ratified the following human rights treaties:

1) U.N. CHARTER;

2) Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950);

3) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950);

4) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950);

5) Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950);

6) The Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253, as amended July 7, 1955 (entered into force Mar. 9, 1927);

7) Protocol to the Slavery Convention, December 7, 1953, 7 U.S.T. 479, T.I.A.S. No. 3532, 182 U.N.T.S. 51 & 212 U.N.T.S. 17 (entered into force Dec. 7, 1953);

8) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957);

9) Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967);

10) Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135 (entered into force July 7, 1954);

11) Convention on the Prevention and Punishment of the Crime of Genocide, in force Jan. 12, 1951, 78 U.N.T.S. 277 (in force for U.S. Feb. 23, 1989);

12) Inter-American Convention on the Granting of Political Rights of Women, May 2, 1948, 27 U.S.T. 3301, T.I.A.S. No. 8365 (entered into force Apr. 22, 1949).

22. The United Nations General Assembly unanimously adopted the UDHR as an elaboration of the Charter's human rights provisions. *See* Sohn, *supra* note 1, at 14-15.

23. *See* L. CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 207 (1989).

24. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), 999 U.N.T.S. 171.

25. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967), 993 U.N.T.S. 3.

also has not ratified the major applicable regional human rights accord, the American Convention on Human Rights.[26]

The second reason why it will be difficult to incorporate international human rights norms directly into U.S. law via treaties results from a judicial doctrine. Initiated by Chief Justice John Marshall,[27] the "self-executing treaty" doctrine stipulates that not even the few U.S.-ratified human rights treaties would necessarily be binding on domestic courts. Unless a court deems a treaty to be "self-executing,"[28] the treaty will bind domestic courts only if Congress has passed legislation for the specific purpose of implementing the treaty provisions domestically. Although some Supreme Court decisions have ignored this doctrine[29]

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

Other human rights instruments to which the U.S. has not become a party include:

—Declaration on the Rights of Disabled Persons, G.A. Res. 3447, 30 U.N. GAOR Supp. (No. 34) at 88, U.N. Doc. A/10034 (1975);

—Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Treatment, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975);

—Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856, 26 U.N. GAOR Supp. (No. 29) at 93, U.N. Doc. A/8429 (1971);

—International Convention on the Elimination of all Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195;

—Declaration of the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959);

—Standard Minimum Rules for the Treatment of Prisoners, First U.N. Congress on the Prevention of Crime and the Treatment of Offenders. Annex I.A at 67, U.N. Doc. A/CONF/6/1 (1956), *adopted* July 31, 1957, by the U.N. Economic and Social Council, E.S.C. Res. 663C (XXIV), 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/13048 (1957).

27. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829):

> Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court.

28. *See* Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976) (when treaty does not explicitly create private right of action, court looks to treaty as whole to determine whether it evidences intent to provide such right).

29. *See* Nielson v. Johnson, 279 U.S. 47, 52 (1928); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (treaty law "operates of itself without the aid of any legislation, state or national, and it will be applied and given authoritative effect by the courts"); *see also* Paust, *International Law and Control of the Media: Terror, Repression, and the Alternatives,* 53 IND. L.J. 621, 666-68 (1978) (while some commentators have construed these cases as having assumed the self-executing nature of relevant treaties, it is more accurate to recognize that the Court has issued, and not reconciled, two separate lines of cases).

and it has been subject to criticism,[30] it is apparently accepted as settled.[31]

With respect to the few human rights treaties that the U.S. has ratified, the judicial rulings on point (though also subject to criticism) have generally held that these treaties are neither self-executing nor the subject of implementing legislation.[32] Hence, the treaties are regarded as lacking direct legal force in domestic courts. The leading case on this point is *Sei Fujii v. California,* [33] in which the California Supreme Court held that the U.N. Charter is not self-executing. Of the various international instruments to which the U.S. is party, the U.N. Charter was potentially the most fruitful source of rights protections in domestic courts.[34] Therefore, *Sei Fujii* was particularly damaging to the prospective domestic incorporation of international human rights law.

It is noteworthy that the California Supreme Court's holding in *Sei Fujii* overturned a contrary ruling by the California District Court of

30. *See* Paust, *Self-Executing Treaties,* 82 AM. J. INT'L L. 760 *passim* (1988).

31. *See* 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 necessary implementing legislation has been adopted.).

32. *See* United States v. Terraza-Carrasco, 861 F.2d 93, 96-97 & n.3 (5th Cir. 1988) (UDHR does not create cause of action); Dickens v. Lewis, 750 F.2d 1251, 1253-54 (5th Cir. 1984) (no cause of action created by U.N. Charter, UDHR, or ICCPR); Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982) (U.N. Protocol Relating to the Status of Refugees is not self-executing treaty, although Congress implemented it, at least in part, through Refugee Act of 1980); Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir.) (Hague Conventions are not self-executing), *cert. denied,* 429 U.S. 835 (1976); Handel v. Artukovic, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985) (neither Geneva nor Hague Convention is self-executing) Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396, 1406 (D.D.C. 1985) (UDHR provides no right of action), *aff'd,* 809 F.2d 794 (D.C. Cir. 1987); *In re* Alien Children Educ. Litig., 501 F. Supp. 544, 590, 592-93 (S.D. Tex. 1980) (neither OAS Amended Charter nor U.N. Charter can displace inconsistent state laws); Davis v. District Director, INS, 481 F. Supp. 1178, 1183 n.7 (D.D.C. 1979) (neither U.N. Charter nor UDHR supersedes U.S. law); United States v. Gonzalez-Vargas, 370 F. Supp. 908, 914-15 (D.P.R. 1974) (U.N. Charter art. 73(a) is not self-executing), *vacated,* 558 F.2d 631 (1st Cir. 1977); Jamur Productions Corp. v. Quill, 51 Misc. 2d 501, 273 N.Y.S. 348, 356 (N.Y. Sup. Ct. 1966) (UDHR creates no cause of action).

33. 38 Cal. 2d 718, 721-22, 242 P.2d 617, 619-21 (1952). The lower court had invalidated California's Alien Land Law, which discriminated against Japanese-Americans, on the ground that it conflicted with the U.N. Charter's anti-discrimination provisions. 217 P.2d 481, 488 (1950), *reh'g denied,* 218 P.2d 595 (1950). The lower court explained that, under the Constitution's Supremacy Clause, the Charter was part of the supreme law of the land, and any inconsistent state law was invalid. Although the California Supreme Court affirmed the lower court's conclusion that the Alien Land Law was invalid, it based this holding on the fourteenth amendment. Reasoning that none of the U.N. Charter's human rights provisions are self-executing, the California Supreme Court expressly repudiated the lower court's holding that the Charter governed this case. *Sei Fujii,* 38 Cal. 2d at 722, 242 P.2d at 620.

34. *See* Lockwood, *supra* note 18, at 912.

Appeal[35] and has been criticized severely by international law scholars.[36] It is also noteworthy that the *Sei Fujii* decision was not appealed to the U.S. Supreme Court, nor has the Supreme Court ever expressly addressed the U.N. Charter's domestic enforceability in any other case. Consequently, *Sei Fujii* constitutes binding authority in California only. Indeed, four U.S. Supreme Court Justices endorsed the notion that the U.N. Charter should be binding on U.S. courts.[37] Nevertheless, most subsequent decisions throughout the U.S. have uncritically followed *Sei Fujii* in holding that the U.N. Charter's human rights provisions are not self-executing, and therefore not directly incorporated into U.S. law.[38]

Judges and scholars have criticized each element of the self-executing treaty doctrine as applied in the international human rights context. First, some have argued that the self-executing treaty doctrine is inherently incoherent and that all ratified treaties concerning individual rights should be incorporated automatically into domestic law.[39] Second, even

35. *See supra* note 33.

36. *See, e.g.,* Hudson, *Charter Provisions on Human Rights in American Law,* 44 AM. J. INT'L L. 543 (1950); Paust, *supra* note 16, at 239 (1981) (two primary rationales for *Sei Fujii* holding—that Charter's human rights provisions were not obligatory and lacked specificity—are both incorrect); Wright, *National Courts and Human Rights—The Fujii Case,* 45 AM. J. INT'L L. 62 (1951) (discussion of result of *Fujii* and its effect on international law and legal policy).

It has been suggested that a significant factor affecting the result in *Sei Fujii* was that it was decided before Brown v. Board of Education, 347 U.S. 483 (1954), interpreted the fourteenth amendment as proscribing state-sponsored racial discrimination, and that if *Sei Fujii* had been decided today, its outcome would be different. *See* Note, *The Domestic Application of International Human Rights Law: Evolving the Species,* 5 HASTINGS INT'L & COMP. L. REV. 161, 195-96 (1982) (authored by Jeffrey Hadley Louden).

37. *See* Oyama v. California, 332 U.S. 633, 649-50 (1948) (Black, J., concurring) (majority invalidated California's Alien Land Law, as applied in this case, under fourteenth amendment's equal protection clause, but did not reach law's underlying constitutionality; Black concurrence would have invalidated law, partly on ground that it violates U.S. obligations under U.N. Charter); *id.* at 673 (Murphy, J., concurring) (same).

Justice Black's concurring opinion stated:

> [W]e have recently pledged ourselves to cooperate with the United Nations to "promote . . . universal respect for, and observance of, human rights . . . for all without distinction as to race, sex, language, or religion." How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?

Id. at 649-50 (citing U.N. CHARTER).

38. *See, e.g.,* Hitai v. Immigration and Naturalization Serv., 343 F.2d 466, 468 (2d Cir. 1965); Vlissidis v. Anadell, 262 F.2d 398, 400 (7th Cir. 1959); Puerto Rico v. Muskie, 507 F. Supp. 1035, 1064 (D.P.R.), *vacated,* 668 F.2d 611 (1981); Davis v. Immigration and Naturalization Serv., 481 F. Supp. 1178, 1183 n.7 (D.D.C. 1979); Camacho v. Rodgers, 199 F. Supp. 155, 158 (S.D.N.Y. 1961); Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 157-58, 60 N.W.2d 110, 116-17 (1953), *aff'd,* 348 U.S. 880 (1954), *vacated,* 349 U.S. 70 (1955).

39. *See* Note, *supra* note 36, at 190-91, 208; Wright, *supra* note 36, at 68-69; *see also* Sayre, *Shelley v. Kraemer and United Nations Law,* 34 IOWA L. REV. 1, 6 (1948) (criticized

if this doctrine has force in other contexts, it is inapplicable to human rights provisions of U.S.-ratified treaties because such provisions are in fact self-executing.[40] Third, even if these human rights guarantees are not self-executing, Congress has passed implementing legislation making them effective anyway.[41] Furthermore, consistent with the critique of *Sei Fujii* and its progeny, some U.S. Government officials have treated the U.S. as being bound by the U.N. Charter's human rights clauses.[42]

Despite the flaws in the application of the self-executing treaty doctrine in the international human rights context, critics recognize that this doctrine has become so widely accepted that it is unlikely to be repudiated in the foreseeable future.[43]

B. Potentially Binding Effect of International Human Rights Norms as Customary International Law

A more promising route for directly incorporating international human rights norms into U.S. law is the argument that these norms are binding as customary international law. But while the principles underlying the customary international law approach are quite solidly entrenched as a matter of theory and received widespread judicial

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Supreme Court's failure to rely on U.S. treaty obligations under U.N. Charter as basis for refusing to enforce racially restrictive covenant, noting that Charter "is now not only part of our Constitution, but by our constitutional act we are part of the United Nations. . . . [W]e are morally and legally bound to give them all [the Charter's provisions] full effect all the time." (footnotes omitted)).

Support for the notion that treaties become binding law without the passage of implementing legislation can be inferred from Congress's failure to pass a constitutional amendment proposed by Ohio Senator John Bricker in 1953, which provided in part, "A treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation." *See* S.J. Res. 1, 83d Cong., 1st Sess., 99 CONG. REC. 6777 (1953).

40. *See* 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, 40-41 (1977) (U.N. Charter human rights guarantees are directly binding law in U.S.); Note, *supra* note 36, at 200-07 (language of U.N. Charter, circumstances surrounding its creation, and additional contextual and policy considerations indicate that its human rights provisions were intended to be self-executing).

41. *See* Paust, *supra* note 40, at 40-41 n.81 (arguing that 1964 Civil Rights Act implemented "general human rights law," and noting that Senate committee that drafted it "seemed intent on implementing the human rights provisions of the U.N. Charter").

42. *See* Lillich, *Invoking International Human Rights Law in Domestic Courts,* 54 U. CIN. L. REV. 367, 380 n.63 (1985) (during Ford and Carter Administrations, U.S. consistently took position that human rights clauses of U.N. Charter have legal effect and thus must be complied with by all countries, including U.S.); *see also* Helsinki Accords, *done* Aug. 1, 1975, art. 1(a)(VII), U.S. Dept. of State, Pub. No. 826, *reprinted in* 14 I.L.M. 1292, 1295 (1975) (U.S. pledged to "fulfill [its] obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which [it] may be bound.").

43. *See supra* text accompanying notes 27-34.

enforcement early in our nation's history, as a matter of actual practice they have been invoked only rarely in human rights cases in recent years. Therefore, this possible alternative route for domesticating international human rights law, although theoretically sound, should not be expected to produce widespread practical results in the immediate future.

Customary norms of international law are those that are so widely accepted by the international community that they are binding even on states that have not ratified treaties embodying them.[44] Treaty provisions are not themselves sources of customary international norms. Rather, they constitute evidence that such norms exist. The three classic types of evidence of a customary norm, as enumerated by the Supreme Court, are "the works of jurists[;] . . . the general usage and practice of nations; [and] . . . judicial decisions."[45] Other types of evidence include resolutions of international bodies, national legislation, public utterances by international and national officials, and diplomatic correspondence and instructions.[46] Indeed, relevant evidence for demonstrating the existence of customary international law standards includes "[e]very record of act or spoken word which presents an authentic picture of the practice of states in their international dealings."[47]

It is usually difficult to document that a principle has achieved the general recognition necessary to constitute a customary international law norm.[48] Nevertheless, credible arguments have been made that most, if not all, international human rights standards satisfy this test. Indeed, judges and scholars have made the stronger argument that most international human rights principles are included in a subset of customary

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

45. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *see also* Statute of the International Court of Justice, art. 38 (1945), 59 Stat. 1055, 1060 (1945):

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

46. *See* L. CHEN, *supra* note 23, at 362.

47. G. FINCH, THE SOURCES OF INTERNATIONAL LAW 51 (1937) (quoting WALKER, HISTORY OF THE LAW OF NATIONS vol. 1, ch.2 (1899)).

48. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 430 (1964) (high standard of mutual assent between civilized nations is required before rule may be said to be part of customary international law).

norms that are so fundamental that they are nonderogable.[49] Referred to as "peremptory" norms or "*jus cogens,*" these standards cannot be changed by agreement.[50] The human rights values embodied in the U.N. Charter,[51] the Universal Declaration of Human Rights,[52] and the International Covenant on Civil and Political Rights[53] are all elements of customary international law that are "rapidly establishing" themselves as *jus cogens,* if they have not already achieved that status.[54] Similarly, the International Court of Justice has declared that rules concerning the basic human rights are "obligations *erga omnes*" (owing by each state to all

49. *See* Barcelona Traction, Light & Power Co. (Belgium v. Spain), 1970 I.C.J. 3, 301 (Ammoun, J., concurring) ("protection of human rights . . . has been considered to be capable of constituting a legal norm"); *id.* at 304 (principles in U.N. Charter preamble are *jus cogens*); The South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.) 1966 I.C.J. 6, 298 (Tanaka, J., dissenting) (whole of human rights law constitutes *jus cogens*); L. CHEN, *supra* note 23, at 215 ("the great bulk of the contemporary human rights prescriptions" should be regarded as *jus cogens*); M. MCDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 345 (1980) (same); Parker & Neylon, *Jus Cogens: Compelling the Law of Human Rights,* 12 HASTINGS INT'L & COMP. L. REV. 411, 441-42 (1989) (all human rights norms are binding as customary international law, and most are peremptory); 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, 365 (1988) (authored by David F. Klien) (principles protecting human rights constitute peremptory international norms).

50. *See* Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, *reprinted in* 8 I.L.M. 698-99 (1969) (art. 53 defines "peremptory norm of general international law (*jus cogens*)" as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; provides that treaty that conflicts with peremptory norm is void).

51. Sohn, *supra* note 1, at 13-14 (U.N. Charter's basic human rights provisions constitute *jus cogens*).

52. *See* L. CHEN, *supra* note 23, at 367-68 (although UDHR was only aspirational rather than authoritative when originally adopted, it has become "part of customary international law, a vital component of *jus cogens,* and an indispensable component of the developing global bill of human rights"); M. MCDOUGAL, H. LASSWELL & L. CHEN, *supra* note 49, at 345 ("great bulk of contemporary human rights prescriptions" establishing themselves as *jus cogens*); Blum & 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, 69-70 & n.75 (1981) (UDHR, although recommendatory at its inception, is now considered authoritative interpretation of Charter, binding as customary international law); Nayar, *Introduction: Human Rights: The United Nations and United States Foreign Policy,* 19 HARV. INT'L L.J. 813, 815-17 (1978) (whole UDHR is customary international law); Sohn, *supra* note 1, at 17 (UDHR "has become basic component of international customary law, binding on all states, not only" U.N. members); Paust, *supra* note 4, at 570 & n.182.

53. Parker & Neylon, *supra* note 49, at 419 n.40 (ICCPR is widely viewed as codification of customary international law; "only one of the Covenant's nonderogable rights . . . may not yet be universally accepted as *jus cogens*"); Sohn, *supra* note 1, at 32 (virtually all provisions of ICCPR can be considered *jus cogens*).

54. Parker & Neylon, *supra* note 49, at 442.

persons).[55] Not all commentators agree that all of these international human rights principles presently constitute nonderogable norms.[56] There appears to be a consensus, however, that all such principles are included in customary international law.[57] The U.S. Government has taken the position that all three instruments embody customary law principles.[58]

The willingness of U.S. courts to enforce customary international law principles has gone through a cyclical pattern during the course of U.S. history. Early in our nation's history, the courts vigorously enforced customary international law standards, viewing them as being incorporated in domestic law. By contrast, from about the mid-nineteenth century until the mid-twentieth century, reflecting a generally constricted view of international law, customary international law norms played a less vital part in domestic adjudication. Since World War II, however, the pattern has come full circle and courts have again resorted to customary international law standards—including human rights standards—with renewed frequency. As two commentators observed, this historical pattern "has created substantial parallels between the late twentieth century and the period around 1789"[59] in terms of the domestic role of customary international law. Such a parallel should be particularly

55. Barcelona Traction, Light & Power Co. (Belgium v. Spain), 1970 I.C.J. 4, 32 ("In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes.*").

56. *See* T. MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 58-60 (1987) (derogable human rights in treaties are not *jus cogens*); Higgins, *Derogation Under Human Rights Treaties,* 1976-77 BRIT. Y.B. INT'L L. 282 ("[C]ertain rights . . . are so fundamental that no derogation can be made [but this does not lead] to the view that all human rights are *jus cogens.*").

57. *See* Sohn, *supra* note 1, at 12 (U.N. Charter, UDHR, Covenants, as well as about 50 additional declarations and conventions concerning especially important human rights issues, "have become a part of international customary law and . . . are binding on all states.").

58. *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 [hereinafter Memorial] (arguing that these principles were violated by Iran's alleged failure to provide U.S. nationals with the "most constant protection and security" in connection with hostage-taking at U.S. Embassy):

> The existence of such fundamental rights for all human beings . . . and the existence of a corresponding duty on the part of every State to respect and observe them, are now reflected, *inter alia,* in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the International Covenant on Civil and Political Rights, regional conventions and other instruments defining basic human rights . . . .

quoted in 4 HOUS. J. INT'L L. 101, 111 & n.52 (1981); *accord* Memorandum for the United States as Amicus Curiae, at 3-7, Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980), *reprinted in* 19 I.L.M. 585, 587-601 (May 1980).

59. Blum & Steinhardt, *supra* note 52, at 56.

significant to those who emphasize the intent of the U.S. Constitution's framers in interpreting that document.

There is much evidence that the framers intended customary international law, then referred to as "the law of nations," to be incorporated in U.S. domestic law.[60] This "law of nations" included protection for human rights, then designated the "rights of man."[61] During the pre-Revolutionary period and the early days of the American Republic, courts as well as other government bodies regularly treated customary law as an enforceable element of domestic law.[62] Chief Justice Marshall wrote in 1815 that "the Court is bound by the law of nations which is part of the law of the land."[63] The framers' receptivity to incorporating the unwritten law of nations into domestic law is one particular manifestation of their natural law philosophy, under which unwritten fundamental principles were deemed binding and judicially enforceable, notwithstanding the specification of some rights in the Constitution.[64]

60. *See* Jay, *The Status of the Law of Nations in Early American Law,* 42 VAND. L. REV. 819, 820, 825 (1989) (many leading figures during era of Constitution's framing made declarations to effect that law of nations was part of American law and in important respects binding on our government). *But see* Maier, *The Authoritative Sources of Customary International Law in the United States,* 10 MICH. J. INT'L L. 450, 460 (1989) ("No scholar has yet successfully demonstrated that the United States' Government's decision-making authority . . . was conferred by the people subject to the limitations created by an international legal regime.").

61. *See* Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought,* 30 STAN. L. REV. 843, 858-61 (1978) (founding generation constitutional theorists believed in unwritten fundamental constitution, whose tenets were reflected in the universal law of nations, and which was supreme over positive law); Paust, *Litigating Human Rights: A Commentary on the Comments,* 4 HOUS. J. INT'L L. 81, 88-89 (1981); Paust, *supra* note 40, at 50 ("[A] basic expectation of the Founding Fathers was that the Rights of Man were to be protected under the Constitution.").

62. *See* Jay, *supra* note 60, at 825 (in early years of American Republic, federal judges, leading political figures, and commentators commonly stated that law of nations was part of U.S. law). For a frequently quoted Supreme Court enunciation of this principle, see The Paquete Habana, 175 U.S. 677, 700 (1900):

> International law is part of our law, and must be ascertained and administered by the courts . . . as often as questions of right depending upon it are duly presented . . . . [W]here there is no treaty . . . , resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators . . . .

See also Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (under peace treaty with Britain, custom demanded repayment of obligations to British citizen, state law or state constitution notwithstanding); Comment, *supra* note 49, at 337-38 (customary international law is part of British common law, according to Blackstone).

63. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).

64. *See* Grey, *Do We Have an Unwritten Constitution?,* 27 STAN. L. REV. 703, 715-16 (1975):

> For the generation that framed the Constitution, the concept of a "higher law," protecting "natural rights," and taking precedence over ordinary positive law . . . was widely shared and deeply felt. An essential element of American constitutionalism

It has been argued that the reliance upon customary international law early in U.S. history is not relevant in assessing the role that such law should play under contemporary circumstances.[65] In any event, even if customary international law is incorporated into domestic law as a matter of principle, since the late nineteenth century this principle only rarely has been invoked and enforced in actual practice.[66] The courts' decreasing enforcement of customary international law beginning in the late 1800s reflected the philosophy of legal "positivism," which had then gained ascendancy over the naturalist school of thought.[67] The courts' decreasing reliance on customary international law is also a facet of the "conservative" or "classical" approach to international law that became prevalent by 1900. This approach emphasized states' absolute sovereignty and took a correspondingly restrictive view of the sphere of international law.[68] The "conservative" construction of international law coalesced with legal positivism to deny legal force to any international law principles except the relatively small subset that were enumerated in technically binding treaties.

The conservative, positivist view of international law has been in decline since World War II. Correspondingly, there has been a return to the previous treatment of customary international law as an element of domestic law, binding in U.S. courts. This revitalization of customary international law, specifically in the human rights context, is illustrated by two significant recent events: the U.S. Government's filing of a brief with the International Court of Justice in which it contended that certain human rights treaties embodied enforceable customary law norms;[69] and the decision by the U.S. Court of Appeals for the Second Circuit in *Filar-*

was the reduction to written form—and hence to positive law—of some of the principles of natural rights. But at the same time, it was generally recognized that written constitutions could not completely codify the higher law.

65. *See* Jay, *supra* note 60, at 849 (contextual difference between U.S. position in world affairs during early American history and at present "should lead us to view the various statements about the law of nations from that era as having no bearing on modern controversies").

66. *See* Maier, *supra* note 60, at 463 (whatever may have been case in 1789, modern decisions make clear that international legal regime is not incorporated in U.S. law); Note, *supra* note 36, at 166 ("While these principles [that international customary law is included within American common law] appear strong and unequivocal, their application has been weak and ambiguous.").

67. *See* Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty,* 52 U. CIN. L. REV. 655, 676 n.77 (1983); Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee,* 60 CORNELL L. REV. 231, 236 (1975).

68. *See* Blum & Steinhardt, *supra* note 52, at 64-66; Note, *Toward an International Law of Human Rights Based upon the Mutual Expectations of States,* 21 VA. J. INT'L L. 185, 190 (1980) (authored by G. David Fensterheim).

69. *See* Memorial, *supra* note 58.

tiga v. Pena-Irala, [70] which held that a rarely used federal jurisdictional statute created an implied cause of action for a violation of customary international human rights standards.

The International Court of Justice case had been instituted by the U.S. against Iran. The U.S. argued that Iran, by allowing its citizens to hold personnel hostage at the American Embassy in Teheran, violated customary international human rights principles evidenced by various multilateral declarations and treaties.[71] Significantly, the U.S. relied on the International Covenant on Civil and Political Rights (ICCPR), which the U.S. has not ratified. Pursuant to the principle of reciprocity in international law, in which one state will not be held to a higher standard of behavior than another state asserting a claim against it, the U.S. assertion that the ICCPR creates an obligation on Iran's part implies that the U.S. also would deem itself bound by the ICCPR, notwithstanding its non-ratification of that Covenant.[72]

In its *Filartiga* decision in 1980,[73] the Second Circuit revived the incorporationist approach to customary international law, prevalent earlier in our history, but which had fallen into disuse since the nineteenth century. The *Filartiga* court recognized that the "law of nations" is a dynamic concept, which should be construed in accordance with the current customs and usages of civilized nations, as articulated by jurists and commentators.[74] It held specifically that U.S. law directly incorporated customary international law principles prohibiting deliberate government torture.[75] Moreover, in the most controversial aspect of its opinion, the *Filartiga* court held that an old and rarely invoked federal jurisdictional statute, the "Alien Tort Statute,"[76] created an implied right of action for violations of customary international law.[77] In *Filartiga,* the U.S. Government again supported an incorporationist view of customary international law, as it had done in the Iranian hostage case.[78]

70. 630 F.2d 876, 889 (2d Cir. 1980).

71. *See* Memorial, *supra* note 58.

72. Note, *supra* note 68, at 188-89 n.13.

73. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

74. *Id.* at 884.

75. *Id.* at 884-85.

76. 28 U.S.C. § 1350 (1982) (codifying the Judiciary Act of 1789, ch. 20, sec. 9b, 1 Stat. 73, 77 (1789)) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). Prior to *Filartiga,* section 1350 had been held to provide federal jurisdiction in only two cases. *See Filartiga,* 630 F.2d at 887 & n.21.

77. *Filartiga,* 630 F.2d at 886.

78. *See* Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) (joint amicus brief of Departments of State and

Despite some predictions that *Filartiga* heralded a trend toward wholesale domestic incorporation of customary international human rights law,[79] that development has not yet materialized.[80] Some subsequent opinions by federal[81] and state[82] court judges also have treated customary international human rights norms as directly enforceable, and commentators have praised this approach.[83] Other subsequent decisions and commentary, however, have criticized *Filartiga*'s holding that the Alien Tort Statute automatically provides a cause of action for violation of established customary international law norms.[84] Moreover, even

Justice arguing that Alien Tort Statute vests federal courts with jurisdiction to adjudicate claimed violations of customary international law).

79. *See* Scheebaum, *Recent Judicial Developments in Human Rights Law,* L. GROUP DOCKET 1, 7 (Spring 1981) ("[T]he effect of *Filartiga* is to direct American lawyers and judges to international sources of the rights of litigants."); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2 (1987).

80. *See* Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation,* 4 HOUS. J. INT'L L. 39, 40 (1981) (claim that human rights provisions of international instruments are part of federal common law is overbroad and aspirational).

81. *See* United States v. Romano, 706 F.2d 370, 375 & n.1 (2d Cir. 1983) (suggests that alien may assert denial of justice in U.S. criminal justice process if that process does not comply with ICCPR); Forti v. Suarez-Mason, 694 F. Supp. 707, 710 (N.D. Cal. 1988) (recognizes customary international law norm against "disappearance," citing UDHR and ICCPR); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (recognizes customary international law norm proscribing summary execution or murder by government, citing UDHR, ICCPR, and American Convention); Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1122, n.2 (N.D. Ga. 1983) (customary international law principles prohibiting prolonged detention are binding on U.S., citing UDHR, ICCPR, and American Convention) (dictum); Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980) (customary international law, as evidenced by U.N. Charter and U.N. Standard Minimum Rules for the Treatment of Prisoners, are part of U.S. law) (dictum); Fernandez v. Wilkinson, 505 F. Supp. 787, 795 (D. Kan. 1980) (customary international law, as reflected in U.N. treaties and American Convention, secures to excluded alien the right to be free of arbitrary detention even though U.S. Constitution and statutes have been interpreted as affording no protection to such individuals), *aff'd sub. nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981); Schneider v. Rusk, 218 F. Supp. 302, 319 (D.D.C. 1963) (Fahy, J., dissenting) (citing UDHR, concludes that there is fundamental right to nationality).

82. *See* Wong v. Tenneco, 39 Cal. 3d 126, 142-43, 702 P.2d 570, 581, 216 Cal. Rptr. 412, 423 (1985) (Mosk, J., dissenting) (court should not enforce Mexican statute that violates UDHR).

83. *See, e.g.,* Blum & Steinhardt, *supra* note 52, at 112-13.

84. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 810-23 (D.C. Cir. 1984) (Bork, J., concurring); *see also* Handel v. Artukovic, 601 F. Supp. 1421, 1427 (C.D. Cal. 1985) (without citing *Filartiga,* holds that no implied cause of action arises merely from breach of customary international law; there must be specific implementing legislation). *But see* Paust, *supra* note 4, at 628, 649-50 (criticizes *Tel-Oren* opinions of Judges Bork and Edwards as "deviant," "ludicrous," "false, arrogant nonsense," and "patently erroneous").

Significantly, the authors of the *Tel-Oren* and *Artukovic* opinions did not challenge *Filartiga*'s other important holdings about customary international law. *See Tel-Oren,* 726 F.2d at 820 (Bork, J., concurring) (agrees with following major propositions established in *Filartiga*: that "law of nations" is not stagnant and should be construed as it exists today; that one source

some courts and commentators agreeing with this holding have emphasized that few norms have been established widely enough to be recognized as part of customary international law.[85]

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 rules or *jus cogens.*[86] Accordingly, commentators have argued that various international human rights norms should be viewed as controlling in U.S. litigation.[87] Relatively few courts, however, actually have enforced this theory in specific cases.[88]

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of that law is customs and usages of civilized nations, as articulated by jurists and commentators; that international law today confers fundamental rights upon all people to be free from torture; and that section 1350 opens federal courts for adjudication of rights already recognized by international law; disagrees with *Filartiga* only to extent that it assumes section 1350 not only confers jurisdiction, but also creates private cause of action for any violation of law of nations; instead argues that section 1350 merely confers jurisdiction to enforce international norm that itself provides cause of action).

85. *See* United States v. Covos, 872 F.2d 805, 808 (8th Cir. 1989) (insufficient evidence to demonstrate that customary international law prohibits warrantless use of pen register to track all calls made from telephone); Jean v. Nelson, 727 F.2d 957, 964 n.4 (11th Cir. 1984) (there is apparently no customary international law norm against detention of uninvited aliens); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795-96 (D.C. Cir. 1984) (Edwards, J., concurring) (distinguished *Filartiga* on ground that, unlike torture, politically motivated terrorism does not violate customary international law); Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 325 n.16 (2d Cir. 1981) (distinguished *Filartiga* on ground that, unlike torture, commercial acts at issue did not violate customary international law) *rev'd,* 461 U.S. 480 (1983); *In re* Alien Children Educ. Litig., 501 F. Supp. 544, 596 (S.D. Tex. 1980) (right to education not recognized as customary international law principle); *see also* Hartman, *supra* note 67, at 665 (practical use of customary international law "may be restricted to rather narrow range of issues as to which international consensus has developed adequately").

86. *See supra* text accompanying notes 49-58.

87. *See* Hartman, *supra* note 67, at 659-87 (customary international norms prohibiting execution of individual who was juvenile at time of offense is incorporated into federal common law and supreme over inconsistent state legislation); Paust, *supra* note 40, at 53 (uniform international prohibition on hollow-point ammunition should provide basis for proscribing police use of such ammunition in U.S.); Comment, *Customary International Law and Women's Rights: The Equal Rights Amendment as a Fait Accompli,* 1 DET. C.L. REV. 121, 125, 148-49 (1987) (authored by Judith Guertin) (as part of customary international law, principles mandating equal rights for women, including reduction of disparity between women's and men's economic conditions, are part of U.S. law, controlling in U.S. courts). The foregoing authorities also argue, in the alternative, for a "weaker" indirect theory of domestic incorporation: that the applicable international norms should provide guidance in interpreting domestic legal provisions. *See infra* text accompanying notes 144-47.

88. Another potential avenue for incorporating international human rights standards was recently discussed—and rejected—in *In re* Alien Children Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980). Plaintiffs argued that a state statute prohibiting the use of state funds to educate undocumented alien children should be invalidated under the Constitution's supremacy clause because it impermissibly interfered with U.S. foreign policy. They maintained that the eradication of illiteracy and the expansion of educational opportunities constitute elements of U.S.

II. Interpretive Use of International Human Rights Norms

In contrast to U.S. courts' current reluctance to view themselves as bound directly by international human rights principles on substantive issues, they are much more willing to invoke such principles—whether embodied in treaties or in other manifestations of customary international law—to guide the interpretation of domestic legal norms.[89] There is also a scholarly consensus supporting this interpretive use of international human rights norms in domestic litigation.[90] Even apostles of pos-

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foreign policy, as evidenced by the government's signature of treaties and its active support for the international recognition of human rights. *Id.* at 590.

The court, however, rejected the plaintiffs' contention that "the federal recognition of human rights, by itself, prevents the states from interfering with the enjoyment of these rights." *Id.* at 594. It distinguished the three Supreme Court decisions upon which plaintiffs relied by stressing that the state policies those cases invalidated posed direct threats to central U.S. foreign policy concerns and purported to assess the legitimacy of foreign governments, thus potentially causing friction with such governments. *See id.* at 594 (citing Zschernig v. Miller, 389 U.S. 429 (1968) (striking down Oregon statute conditioning foreign resident's right to inherit property in Oregon on "democracy quotient" of foreign regime); United States v. Pink, 315 U.S. 203, 231 (1942) (New York policy "refuses to give effect or recognition in New York to acts of the Soviet Government which the United States by its policy of recognition agreed no longer to question"); United States v. Belmont, 301 U.S. 324, 331 (1937) (New York could not undermine compact between U.S. and Soviet Union)).

89. International law norms are identified through the same types of evidence, *see supra* text accompanying notes 45-47, when the norms are used for interpretive purposes as when they are asserted to be directly binding. *See* Hartman, *Enforcement of International Human Rights Law in State and Federal Courts,* 7 WHITTIER L. REV. 741, 748-50 (1985).

90. *See, e.g.,* Linde, *Comments,* 18 INT'L LAW. 77, 80-81 (1984):

> [I]f you are to succeed with your argument that a provision of human rights law is law in a domestic court, you must be able to show that the national lawmakers . . . intended this effect . . . . But often there is no need to take on that burden.
>
> If instead, you argue that a court should look to international instruments to assist it in interpreting a domestic statute or constitution, then you are asking the court to do what it is empowered to do and using international law in the process. Moreover, an advocate wishing to invoke international human rights norms reasonably could argue that an applicable domestic law already contains the protections that the claimant contends, but that, if the court were not to accept this view, then the court might well find itself running afoul of national policy as expressed by the United States government through its participation in international human rights activities and declarations.

See also Claydon, *The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms,* 2 CONN. J. INT'L L. 349, 359 (1987) (urges more use of international sources for persuasive purposes, in interpreting Canadian Charter, without direct implementation); Hoffman, *The Application of International Human Rights Law in State Courts: A View from California,* 18 INT'L LAW. 61, 61 (1984) (the use of international human rights law that is most likely to be accepted by state court judges, and which in author's opinion is most appropriate, is to provide specific content to broad norms such as equal protection or due process); Maier, *supra* note 60, at 481 ("Encouraging incremental acceptance of international law into the domestic legal system is the best and surest way to maintain its stability. . . . [S]eeking to endow it with too much authority too quickly can only be detrimental . . . .");

itivism concede that judges should be free to resolve ambiguities, or to fill gaps, in positive law by reference to universally accepted legal principles.[91]

Acceptable as is the interpretive use of international human rights standards for construing the substantive content of domestic law principles, such use should be even more acceptable for construing the methodological approach toward enforcing domestic law principles. The role that international law would play in guiding analytical techniques is even more attenuated than its role in guiding substantive interpretations. Therefore, that role should be palatable even to jurists of an isolationist inclination, who resist assigning to international law any powerful position in the domestic arena. The modesty of the proposed role for international human rights norms should not, however, belie its significance. The increasingly rich jurisprudence under the European Convention and the Canadian Charter, in particular, provide important insights into legal process issues in U.S. individual rights adjudication.

The resort to international human rights standards for purposes of construing domestic statutes and constitutions is fully consistent with, and justified by: U.S. foreign policy stances; the intent of the framers of the U.S. Constitution; the early practice of U.S. courts and other government officials; the concerns of jurists who take an "interpretivist" view of constitutional adjudication; the practice of courts in other countries; the recommendations of international law scholars; and the consistent practice of federal and state courts throughout the U.S. Each of these justifications for the interpretive use of international human rights norms is discussed in turn below. Thereafter, the Article shows why these justifications are especially weighty in the specific context of process issues.

A. Consistency with U.S. Foreign Policy

To assign to international human rights norms at least an indirect, interpretive role in domestic litigation is seemly in light of the U.S. Gov-

Paust, *supra* note 40, at 42 (use of customary international norms for interpreting constitutional terms is especially useful "in this age of global interdependence which creates transnational patterns of subjectivity and a more detailed manifestation of uniform expectations about the content of basic human rights"); Paust, *supra* note 4, at 593-94 & n.359 (discussing the need for more effectively using human rights precepts in private litigation).

91. *See* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 438-40 (W. Tucker ed. 1966); *see also* H. KELSEN, PURE THEORY OF LAW 353-55 (M. Knight trans. 1967) (author considers international law together with national law as one system of norms); H. KELSEN, GENERAL THEORY OF LAW AND STATE 145-49 (A. Wedberg trans. 1961); MacCormick, *A Moralistic Case for A-Moralistic Law?*, 20 VAL. U.L. REV. 1, 20 (1985) ("All [legal questions] are morally loaded. None can be answered without staking out some moral position.").

ernment's asserted championship of international human rights. Our government was a major force in forming the United Nations and drafting the human rights provisions of the U.N. Charter.[92] We also have taken a leading role in drafting, and getting other countries to sign and ratify, approximately forty other international human rights instruments.[93] U.S. government officials profess outrage when international human rights norms are violated,[94] and on occasion manifest this outrage in concrete terms, for example, by withholding foreign aid or trade privileges.[95] The U.S. is one of the first nations in the world to enact a substantial body of domestic law designed to increase the enforcement of internationally guaranteed human rights through economic incentives and sanctions.[96] These laws have served as models for similar legislation,

92. *See* L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 506-09 (1973); Rusk, *supra* note 7, at 515.

93. Comment, *supra* note 87, at 133.

94. *See* Christenson, *supra* note 80, at 46 (noting "paradox that while court-cited provincial (their own) sources of law lead us to become juridically isolated, our perceptions refer nonetheless to the interconnectedness of global reality as justification for universal norms . . . . We are outraged when these norms are violated.").

95. *See, e.g.*, § 502B(a)(2) of the Foreign Assistance Act of 1961 (as amended 22 U.S.C. § 2304 (1982)) and § 116(a) of the same Act (22 U.S.C. § 2151 (1982)) (denying military or security assistance, or economic aid, respectively, to countries that demonstrate "a consistent pattern of gross violations of internationally recognized human rights"). Other U.S. statutes that curtail military or economic assistance to states that violate human rights include: International Security Assistance and Arms Export Control Act, Pub. L. No. 94-329, 90 Stat. 729 (1976) (codified in scattered sections of 22 U.S.C.); International Development and Food Assistance Act of 1978, Pub. L. No. 95-424, 92 Stat. 937 (codified in scattered sections of 22 U.S.C.); Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, 92 Stat. 965 (1978) (codified in scattered sections of 1, 5, 8, 16, 20, 22, & 44 U.S.C.); International Monetary Fund Supplementary Financing Facility, Pub. L. No. 95-435, 92 Stat. 1051 (Oct. 10, 1978) (codified at 22 U.S.C. § 286(a), (e); Appropriation for Foreign Assistance and Related Programs, Pub. L. No. 95-481, 92 Stat. 1599 (1979) (codified at 22 U.S.C. §§ 262, 2169); Export-Import Bank Amendments, Pub. L. No. 95-630, 92 Stat. 3641 (1978) (codified in scattered sections of 5, 12, 15, 18, 31 & 42 U.S.C.); Inter-American Development Act and African Development Fund, Pub. L. No. 94-302, 90 Stat. 591 (1976) (codified at 22 U.S.C. §§ 283, 290(g), 2101).

Furthermore, legislation governing U.S. participation in international financial institutions such as the World Bank also requires the U.S. representatives to vote against aid to countries whose governments engage in gross human rights violations. *See, e.g.*, 22 U.S.C. § 262(d) (1986).

In addition to the foregoing generally applicable legislation, Congress has enacted various country-specific laws aimed at forcing the Executive Branch to cut off aid to a particular country to which the general laws are not, in Congress' view, being applied as strictly as they should be. *See* Buergenthal, *The U.S. and International Human Rights*, 9 HUM. RTS. L.J. 141, 156-57 (1988).

96. Congress, however, has not consistently enforced this human rights legislation. *See* D. FORSYTHE, HUMAN RIGHTS AND U.S. FOREIGN POLICY: CONGRESS RECONSIDERED 51-79 (1988).

that other nations are now beginning to adopt.[97] As one observer commented, since 1970 the status of human rights in other countries has become "a central factor in United States foreign policy . . . second only to overriding considerations of national security."[98]

Consistent with the leadership role that the U.S. has assumed in promoting the worldwide acceptance and implementation of human rights norms, it is appropriate that such norms be observed in domestic litigation at least to the limited extent of being considered in interpreting and applying ambiguous provisions of domestic positive law. To deny international human rights norms even this modest role could seem hypocritical[99] in view of the U.S. insistence that other nations directly adopt and enforce such norms.[100]

B. Consistency with Framers' Intent and Early Judicial Practice

The suggestion that domestic courts make interpretive use of customary international human rights norms "has an historic basis older even than the United States Constitution."[101] As discussed above, during our nation's pre-Revolutionary and early constitutional history, customary international law was generally assumed to play an even more significant role in domestic jurisprudence; at that early stage, such law was regularly treated as directly binding on, and enforceable in, domestic courts.[102] The frequency with which U.S. courts treated international

97. *See* Buergenthal, *supra* note 95, at 141.

98. Blum & Steinhardt, *supra* note 52, at 80 n.114 (citing Congressional Research Service, Foreign Affairs and National Defense Division, *Human Rights and U.S. Policy Issues* (May 6, 1977, updated April 19, 1979); *see also Human Rights: An Important Concern of U.S. Foreign Policy,* 76 DEP'T ST. BULL. 289, 290 (1977) (statement by Deputy Secretary of State Warren Christopher) (during Carter Administration, concern for human rights was "an integral part of our foreign policy").

99. *See* Jaffee v. United States, 663 F.2d 1226, 1250 (3d Cir. 1981) (Gibbons, J., dissenting) ("That any judicial tribunal . . . would choose to place a class of persons outside the protection against human rights violations . . . is surprising. That it should be an American court will . . . embarrass our Government."); *see also* U.S. Government brief in the *Filartiga* case, *supra* note 58, at 922 (refusal to recognize private cause of action for human rights violation in U.S. federal courts might seriously damage U.S. credibility in human rights field).

100. *See* § 502B(a)(1) of the Foreign Assistance Act of 1961, as amended (22 U.S.C. § 2304(a)(1)), which enunciates the policy considerations underlying U.S. legislation conditioning benefits on enforcement of international human rights:

> The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world. . . . Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

101. Paust, *supra* note 40, at 92.

102. *See supra* text accompanying notes 60-64; *see also* Paust, *supra* note 4, at 651.

norms as directly binding was greater during the country's early history and declined during the nineteenth century. The frequency with which U.S. courts have used international norms for interpretive guidance has followed this same historic pattern. This pattern may have reflected the initial paucity, followed by a growing availability, of domestic legal sources.[103] It also was reinforced by the relatively restrictive, positivist conception of international law that became increasingly dominant during the late nineteenth century.[104] But this "conservative" or "classical" conception was on the wane by the middle of the twentieth century.[105] At that point, courts again became more receptive to considering international standards in interpreting domestic legal norms.

C. Consistency with Practice in Other Nations

Consistent with the generally increasing tendency of countries around the world to recognize international human rights norms, courts in other countries are more frequently using such norms to construe domestic legislation and constitutions. For example, at the conclusion of a 1988 colloquium among judges of British Commonwealth countries, the participating jurists recognized " 'a growing tendency for national courts to have regard to these international norms [protecting human rights] for the purpose of deciding cases where the domestic law—whether constitutional, statute or common law—is uncertain or incomplete.' "[106] The participants welcomed this development and urged courts and lawyers to make even more vigorous interpretive use of international human rights norms in the future.[107]

103. *See* Wright, *supra* note 36, at 81.

104. *See supra* text accompanying notes 67-68.

105. *See* Parker & Neylon, *supra* note 49, at 422.

106. Kirby, *The Bangalore Principles on the Domestic Application of International Human Rights Norms,* 14 COMMONWEALTH L. BULL. 1196, 1197 (1988).

107. It is within the proper nature of the judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation, or common law.

Id.

Even where domestic or "national" law is not incomplete or ambiguous, the participants urged that it should still be evaluated in light of applicable international human rights norms, and if necessary, modified to conform to such norms. They stated:

> [W]here national law is clear, and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistencies to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

Canadian courts and lawyers regularly have invoked international human rights standards in interpreting Canada's Charter of Rights and Freedoms.[108] One survey of the first five years of Charter jurisprudence concluded that international human rights standards were actually outcome-determinative in about five percent of all Charter cases in which such standards were invoked and influential to the outcome in about thirty percent of these cases.[109] More strikingly, even before Canadian liberties were entrenched through the Charter, a Canadian court relied on the U.N. Charter to interpret Canadian "public policy" in a rights protective fashion. Three years before the U.S. Supreme Court invoked the fourteenth amendment to justify its refusal to enforce a racially restrictive covenant in *Shelley v. Kraemer,* [110] the Ontario High Court refused to enforce an anti-Semitic restrictive covenant on the ground that it violated the human rights provisions of the U.N. Charter and thus was contrary to Canadian public policy.[111]

The domestic interpretive use of international human rights norms is common in other countries outside the British Commonwealth as well. The standards embodied in the European Convention for the Protection of Human Rights have had a significant effect on the domestic jurisprudence of many European countries.[112] Similarly, even absent a written declaration of rights binding on the European Economic Community, its European Court of Justice has undertaken to enforce "basic individual

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Id.

108. *See* Claydon, *supra* note 90, at 349; Hovius, *supra* note 13, at 218.

109. Claydon, *supra* note 90, at 357. The total number of reported Charter cases in which the judges referred to international human rights law was "more than seventy." *Id.*

The Canadian Charter expressly calls for interpretation in light of standards beyond Canada's own jurisprudence, insofar as article 1 sanctions limitations on Charter rights that are necessary in a "free and democratic society." Moreover, norms embodied in several international human rights treaties strongly influenced the Charter-drafting process. *See id.* at 349. Both of these factors distinguish the U.S. Bill of Rights from the Canadian Charter. Neither factor, however, should warrant a less significant role for international norms in interpreting Bill of Rights, in contrast with Charter, provisions. First, although the U.S. Constitution does not expressly advert to norms common to "free" or "democratic" societies, the Supreme Court consistently has relied on such widely shared standards in protecting certain implied fundamental rights. *See infra* text accompanying notes 133-35. Second, just as the recently enacted Canadian Charter was influenced by earlier international human rights instruments, so the latter were influenced by the even earlier U.S. Bill of Rights. Furthermore, the Bill of Rights exerted an important influence on the Canadian Charter. *See* Claydon, *supra* note 90, at 350. Consequently, the judicial interpretations of any of these interrelated norms should be equally relevant in construing any of the others.

110. 334 U.S. 1 (1948).

111. *In re* Drummond Wren, 4 D.L.R. 674 (Ontario High Ct. 1945).

112. *See* Jensen, *The Impact of the European Convention for the Protection of Human Rights on National Law,* 52 U. CIN. L. REV. 760, 790 (1983).

rights" that are "implicit in the general principles of Community law"[113] by interpreting those "general principles" in light of the "constitutional traditions common to member states."[114] Moreover, the European Court of Justice has found these implied principles by referring to the European Convention, even when that instrument was not binding on all Community member states.[115]

D. Consistency with Interpretivist Concerns

From the perspective of an interpretivist—someone who believes the Constitution and statutes should be construed relatively strictly according to their literal terms—there are advantages to using international human rights norms to interpret ambiguous or incomplete domestic legal standards. The existence and acceptance of international human rights norms are matters susceptible to objective determination. Such norms are manifested in both written instruments and the actual practices of nations. Moreover, whether a particular norm is reflected in a multilateral treaty that has been explicitly ratified by multiple nations, or whether it is reflected in widely shared practices around the world, the norm requires the acquiescence of numerous societies. Therefore, judicial interpretation of international human rights norms avoids a significant potential danger involved in judicial interpretations of ambiguous or open-ended positive law provisions: that the judges will rely on their own subjective, individualistic notions of morality.[116]

113. Stauder v. City of Ulm, 15 Receuil 419 (1970), 7 COMMON MKT. L.R. 342 (1970).

114. Pescatore, *The Protection of Human Rights in the European Communities,* 9 COMMON MKT. L.R. 73, 77 (1972) (written communication submitted on behalf of European Court of Justice by one judge of that Court, at Parliamentary Conference on Human Rights organized by Council of Europe on October 18-20, 1970).

115. *See id.* at 79.

116. Two international law scholars who have urged U.S. courts to interpret particular constitutional standards in light of international norms have cogently explained the interpretivist appeal of such an approach. *See* Hartman, *supra* note 67, at 691-93 (footnotes omitted):

> [U]sing established international norms to inform the meaning of constitutional provisions deflects some of the more telling criticisms of noninterpretive review. Pegging constitutional definitions to objectively verifiable customary norms permits progressive development of constitutional law while minimizing the subjective contribution of the individual judge in identifying shared community values. Even some theorists who are, at heart, interpretivists yearn for workable noninterpretive standards for those constitutional principles they regard as crucial, albeit imprecise or historically unprecedented. . . .
>
> . . . The "natural law" and shared moral precepts components found in human rights norms complement the strong positivist component, which is keyed to objectively demonstrable state practice and clear articulation in authoritative international instruments. . . . The ruling moral choice embodied in the norm is more compelling than the product of ordinary, noninterpretive review, because it results from an elab-

E. Consistency with U.S. Judicial Practice

The preceding discussion has elaborated on a number of rationales for the conclusion that U.S. courts should make interpretive use of international human rights standards. In fact, throughout U.S. history, federal and state courts have invoked international legal norms in interpreting provisions of domestic constitutions and statutes. Both lower federal courts and state supreme courts may initiate interpretive use of international standards, independent of the U.S. Supreme Court's leadership in this area. There is no hierarchy of courts in interpreting international law in contrast to domestic law.[117] Accordingly, some state and lower federal courts have made significant contributions to this emerging area of jurisprudence.[118]

Moreover, state and local executive and legislative branch officials have issued directives reflecting international human rights norms.[119]

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orate process for the formation of international consensus, not the lonely "prophecy" of a single judge.

See Paust, *supra* note 67, at 236-37:

> With a comprehensive perspective, the courts could more easily and more rationally discover the content of rights which are not specifically enumerated in the Constitution . . . . A court which uses these sorts of indicia of "rights" content would not be acting arbitrarily, deferring to transcendental sources, or expounding a personal social preference. On the contrary, it would be rationally implementing social demands and expectations which are generally shared and which are empirically discernible. . . . [A] court [which invoked universally shared norms] can recapture the broader jurisprudential perspective thought necessary by the Framers of the Constitution, without resorting to the evils of a naturalist school—*e.g.*, ad hocery, autonomous concepts, personal viewpoints, arbitrary decision-making, and so forth . . . .

Accord id. at 259-60; Paust, *supra* note 40, at 51.

The use of international human rights norms to inform the interpretation of domestic legal standards is advantageous from the perspective of international, as well as domestic, law. See Woloshyn, *To What Extent Can Canadian Courts be Expected to Enforce International Human Rights Law in Civil Litigation?*, 50 SASKATCHEWAN L. REV. 1, 2-3 (1985):

> Since World War II, international law in general, and international human rights law in particular, has developed . . . in many ways. . . . Nevertheless the status of individuals before international tribunals is still very limited. Lawyers interested in human rights issues, while hopeful of an expansion of remedies on the international front, must seek to import beneficial international law principles into domestic courts as these are the fora most readily available to individual litigants, as well as being the ones before which they must appear against their will.

117. Hoffman, *supra* note 90, at 67.

118. Over the course of U.S. judicial history, state courts traditionally have taken the lead in enforcing fundamental rights. Not only was the leadership role that the Warren Court exercised in this regard unusual in the context of the Supreme Court's general history, but even many Warren Court decisions had been presaged by rights-protective state court decisions. *Id.* at 66-67.

119. *See* Paust, *supra* note 40, at 21 (in 1974, Connecticut State Adjutant General declared that police use of hollow-nosed ammunition would violate international law and should be

Further, neither the Supreme Court nor any other U.S. federal or state court deliberately has declined to invoke international human rights standards in an interpretive vein.[120] It is also noteworthy that the U.S. Government has contended, in briefs submitted to the Supreme Court, that the human rights principles in the U.N. Charter represent U.S. public policy and hence should guide the Court's constitutional interpretation.[121]

This section surveys Supreme Court and lower court decisions expressly relying on international norms of human rights law in interpreting both constitutional and statutory provisions. The opinions in which courts have acknowledged explicitly the role played by international human rights standards are merely a subset of the opinions that such standards actually have influenced. As observed by a lawyer who sought to evaluate the European Convention's influence on the domestic law of European countries, "judges seldom reveal—indeed they may not even be aware of—their real motivations for adhering to certain principles."[122] Similarly, a study of the impact of U.N. Charter provisions outlawing racial discrimination on U.S. Supreme Court decisions concluded that the Charter provisions played a more significant role than is indicated simply by explicit Supreme Court references to them.[123]

(1) Supreme Court Decisions

In a recently published comprehensive survey of the use of international human rights norms by U.S. courts throughout American history, Professor Paust concluded that "most of the Supreme Court Justices throughout our constitutional history have recognized that human rights

prohibited throughout the state; Hartford City Council, adverting to international law proscription, unanimously denounced use of such ammunition by state or local police).

120. *See infra* text accompanying notes 128-29 (Supreme Court plurality opinion says international human rights standards should not be *dispositive* of eighth amendment issue, but are *relevant*); *cf.* Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1061 n.18 (N.D. Ga. 1981) (stated that there was no need to rely on customary international human rights law in construing domestic legal principles, as petitioner had requested; relying simply on domestic authorities, court already had concluded that petitioner was entitled to relief he sought).

121. Brief for the United States as Amicus Curiae at 92, Shelley v. Kraemer, 334 U.S. 1 (1948) (No. 72).

122. Jensen, *supra* note 112, at 761.

123. *See* Lockwood, *supra* note 18, at 948-49:

> [T]he courts were fully cognizant of the central antiracial discrimination norms of the Charter and of the international ramifications of continued segregation at home. . . . [I]t is a fair inference . . . that these factors . . . played a role in helping American courts to redefine constitutional provisions that previously had been held not to reach segregation. . . . One senses that the Charter was an important influence on the judiciary, sub silentio.

can provide useful content for the identification, clarification and supplementation of constitutional or statutory norms."[124] Moreover, Professor Paust demonstrated that, throughout U.S. history, the Supreme Court's interpretive reliance on international human rights norms has been increasing steadily.[125] He has also shown that the many Supreme Court Justices who have invoked human rights concepts have spanned disparate jurisprudential approaches, that nearly all of the Court's present members have invoked such precepts, and that none of the present Justices has repudiated the interpretive use of human rights norms.[126]

a. Constitutional Interpretation

In the constitutional domain, the Supreme Court has invoked international human rights norms most consistently in determining whether a death penalty is cruel and unusual in violation of the eighth amendment.[127] In one of the death penalty decisions issued during the Court's 1988-89 Term, Chief Justice Rehnquist's plurality opinion cautioned that neither international human rights norms nor the legal standards of other countries should be dispositive of the eighth amendment issue. Instead, these standards should serve only to corroborate those inferable from U.S. law.[128] In contrast, the dissenting Justices noted that previous Supreme Court decisions had accorded more weight to international and transnational legal standards.[129] In another eighth amendment con-

124. Paust, *supra* note 4, at 596.

125. *See id.* at 584, 588-89 (since 1930, Supreme Court's invocation of human rights precepts has increased five-fold over Court's preceding history; further, Court's use of these precepts has increased in last 25 years; Supreme Court used "human rights" or equivalent phrases in 50 cases from 1793 to 1893, and in 93 cases from 1925 to 1989, with nearly half the latter occurring in the last 20 years).

126. *See id.* at 590.

127. *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).

128. Stanford v. Kentucky, 109 S. Ct. 2969, 2975 n.1 (1989) ("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 . . . in our Constitution as well,' they cannot . . . establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.") (citations omitted).

129. *Id.* at 2985 & n.10 (Brennan, J., dissenting) ("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.").

text,[130] the court has referred to international legal standards in invalidating the "infliction of unneccessary suffering upon prisoners."[131]

Beyond the eighth amendment context, both the Court as a whole and individual Supreme Court Justices have relied on international human rights norms to construe the fifth and sixth amendment's fair criminal process guarantees[132] and the fifth and fourteenth amendment's due process and equal protection guarantees. Although not expressly relying on international human rights norms, many Supreme Court decisions evaluating whether a right is sufficiently "fundamental" to be protected under the fourteenth amendment have referred to the "universal sense of justice"[133] and similar formulations[134] that are strikingly similar to characterizations of customary international law.[135]

b. Statutory Interpretation

In 1804 Chief Justice John Marshall declared, "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."[136] The Court has continued to invoke

130. Estelle v. Gamble, 429 U.S. 97 (1976).

131. *Id.* at 103 n.8.

132. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n.16, 164-66 (1963) (cites UDHR to support conclusion that federal statute violates fifth and sixth amendments).

133. Betts v. Brady, 316 U.S. 455, 462 (1942).

134. *See, e.g.,* Robinson v. California, 370 U.S. 660, 666 (1962) ("universally thought"); Trop v. Dulles, 356 U.S. 86, 102 (1958) (the virtual unanimity of the "civilized nations of the world"); Rochin v. California, 342 U.S. 165, 169, 172-73 (1952) (norms of "human rights" law; "shocks the conscience"); Malinski v. New York, 324 U.S. 401, 414 (1945) (police conduct had to conform to "civilized standards"); Betts v. Brady, 316 U.S. 455, 462 (1942) (government cannot act in way that "den[ies] fundamental fairness, shocking to the universal sense of justice"); Holden v. Hardy, 169 U.S. 366, 389 (1898) ("certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard"); *see also* Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting) ("experience with the requirements of a free society"); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 469 (1947) (Frankfurter, J., concurring) ("standards of decency more or less universally accepted").

135. *See, e.g.,* Hague Convention No. IV, preamble, 1 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 633 (compiled by C. BEVANS); Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539 (Feb. 28, 1910) (defines "the law of nations" as "result[ing] from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience").

It is also noteworthy that the U.S. Government has contended in Supreme Court briefs that the human rights principles in the U.N. Charter represent U.S. public policy and hence should guide the Court's constitutional interpretation. *See* Brief for the United States as Amicus Curiae in Shelley v. Kraemer, 334 U.S. 1, 97-101 (1948) (Docket No. 72).

136. Murray v. Schooner Charming Betsey, 6 U.S. (2 Cranch) 64, 118 (1804).

this precept through the present day,[137] specifically in the context of human rights guarantees.[138]

(2) Lower Court Decisions

As previously noted, both lower federal courts and state courts may independently invoke international human rights norms for interpretive purposes, regardless of whether the Supreme Court takes the lead in this direction.[139] Lower federal court judges actually have relied on international human rights standards in construing both constitutional[140] and statutory provisions,[141] and state court judges have done the same.[142]

137. *See, e.g.*, Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953). This principle is also embodied in RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 134 (1987).

138. *See* Immigration & Naturalization Serv. v. Cardoza-Fonseca, 107 S. Ct. 1207, 1214 (1987) (term "refugee" in Refugee Act of 1980 was to be interpreted in conformance with definition in U.N. Protocol Relating to the Status of Refugees); Hurd v. Hodge, 334 U.S. 24, 34 (1948) (in construing 1866 Civil Rights Act to preclude judicial enforcement of racially restrictive covenants in District of Columbia, Court noted that, even absent Act, judicial enforcement of covenants would contravene U.S. public policy, and that U.N. treaties are a source for determining content of public policy); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 549 n.5 (1949) (Frankfurter, J., concurring) (refers to UDHR art. 20(2)).

139. *See supra* text accompanying notes 117-18.

140. *See* Jaffee v. United States, 663 F.2d 1226, 1248-50 (3rd Cir. 1981) (Gibbons, J., dissenting) (in light of international agreements proscribing experimentation on human subjects, such conduct violates U.S. and state constitutions and laws); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388-90 (10th Cir. 1981) (indefinite detention violates due process clause of fifth amendment, citing provisions of UDHR and American Convention) (dictum); United States v. Toscanino, 500 F.2d 267, 277-80, *reh'g denied,* 504 F.2d 1380 (2d Cir. 1974) (Milligan, J., dissenting) (U.S. agents' abduction of alien defendant from Uruguay would violate provisions in U.N. and O.A.S. Charters, thus violating his rights under fifth amendment due process clause; proof of such abduction would require dismissal of charges against defendant); Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980) (cites U.N. Charter and U.N. Standard Minimum Rules for the Treatment of Prisoners as relevant to interpreting requisite standards for treatment of prisoners under due process clause); Tayyari v. New Mexico State Univ., 495 F. Supp. 1365, 1378-79 (D. N.M. 1980) (in interpreting President's constitutional power to conduct foreign affairs, refers to UDHR and International Convention on Economic, Social and Cultural Rights); Copeland v. Secretary of State, 226 F. Supp. 20, 32 n.16 (S.D.N.Y.) (in interpreting constitutional right to travel, cites UDHR), *vacated,* 378 U.S. 588 (1964).

141. *See* Cerillo-Perez v. Immigration & Naturalization Serv., 809 F.2d 1419, 1423 (9th Cir. 1987) (uses UDHR to interpret provision of federal immigration statute concerning deportation); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389-90 (10th Cir. 1981) (cites "accepted international law principles" to support construction of Immigration and Naturalization Act; in doing so, rejected orthodox interpretation established by long line of cases); *In Re* Weitzman, 426 F.2d 439, 461 (8th Cir. 1970) (Heaney, J., dissenting) (federal naturalization statute should be interpreted consistently with UDHR); United States v. Williams, 480 F. Supp. 482, 486 n.3 (D. Mass.) (in interpreting statute regarding extradition, considers UDHR and ICCPR), *rev'd,* 611 F.2d 914 (1st Cir. 1979); *see also* Paust, Book Review, 60 CORNELL L.

Professor Paust's recent exhaustive survey concluded that the generalizations regarding the Supreme Court's reliance on international human rights standards, summarized above, apply as well to lower federal court opinions.[143]

REV. 231, 242 (1975) (*Filartiga* case illustrates indirect, as well as direct, incorporation of international human rights law to extent meaning of Alien Tort Statute is unclear and international law is relevant to its interpretation).

142. The following state court decisions relied on international human rights norms in construing constitutional provisions: City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 130 n.2, 610 P.2d 436, 439 n.2, 164 Cal. Rptr. 539, 542 n.2 (1980) (refers to UDHR in defining scope of state constitutional right of privacy as invalidating zoning ordinance that prohibits more than five nonrelated individuals from cohabiting); American Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n, 32 Cal. 3d 603, 608 n.4, 651 P.2d 1151, 1154 n.4, 186 Cal. Rptr. 345, 348 n.4 (1982) (constitutional provision prohibiting employment discrimination should be interpreted in light of UDHR) (dictum); People v. Levins, 22 Cal. 3d 620, 625, 568 P.2d 939, 942, 150 Cal. Rptr 458, 461, (1978) (Newman, J., concurring) (in interpreting equal protection guarantee, cites UDHR and ICCPR) (dictum); Cramer v. Tyars, 23 Cal. 3d 131, 151 n.1, 588 P.2d 793, 805 n.1, 151 Cal. Rptr. 653, 665 n.1 (1979) (Newman, J., dissenting) (in interpreting state constitutional privilege against self-incrimination, refers to UDHR); Sei Fujii v. State, 38 Cal. 2d 718, 725-35, 242 P.2d 617, 622-28 (1952) (invokes U.N. Charter's non-discrimination norms to interpret evolving standards under fourteenth amendment); Perez v. Sharp, 32 Cal. 2d 711, 732-33, 198 P.2d 17, 29-30 (1948) (Carter, J., concurring) (in joining court's opinion to invalidate miscegenation statute under fourteenth amendment equal protection clause, relies on U.N. Charter); *In re* Barbara White, 97 Cal. App. 3d 141, 149 n.4, 158 Cal. Rptr. 562, 567 n.4 (1979) (in finding implied constitutional right to intrastate travel, cites UDHR); Sheridan Rd. Baptist Church v. Department of Educ., 426 Mich. 462, 537 n.30, 396 N.W.2d 373, 408 n. 30 (1986) (in construing scope of parents' constitutional right to direct children's education under due process and free exercise guarantees, cites UDHR), *cert. denied,* 481 U.S. 1050 (1978); Sterling v. Cupp, 290 Or. 611, 622 n.21, 625 P.2d 123, 131 n.21 (1981) (in interpreting state constitutional provision protecting imprisoned individuals from "unnecessary rigor" as prohibiting female guards from searching intimate bodily areas of male prisoners, relies on customary international standard of respect for dignity of prisoners and cites UDHR, ICCPR, European Convention, and American Convention); Namba v. McCourt, 185 Or. 579, 604, 204 P.2d 569, 579 (1949) (Oregon statute prohibiting aliens from owning land held to violate fourteenth amendment equal protection clause, as interpreted in light of U.N. Charter); Eggert v. City of Seattle, 81 Wash. 2d 840, 841, 505 P.2d 801, 802 (1973) (in interpreting implied constitutional right to travel, relies on UDHR); Pauley v. Kelly, 255 S.E.2d 859, 864 n.5 (W. Va. 1979) (in interpreting federal and state equal protection guarantees as protecting fundamental right to education, cites UDHR); Wilson v. Hacker, 200 Misc. 124, 135, 101 N.Y.S.2d 461, 473 (N.Y. Sup. Ct. 1950) (cites article 2 of UDHR, which prohibits sex discrimination, as "[i]ndicative of the spirit of our times").

One state court opinion relied on international human rights norms in interpreting statutory provisions: Boehm v. Superior Court, 178 Cal. App. 3d 494, 502, 223 Cal. Rptr. 716, 721 (1986) (relies on UDHR to interpret California welfare statute as guaranteeing funds for clothing, transportation, and medical care).

143. *See* Paust, *supra* note 4, at 594 (human rights precepts have been referred to in over 90 circuit court opinions, including some from every circuit, since 1930, and in over 1000 lower federal court opinions overall; about half the relevant circuit court opinions were written in the last ten years).

F. Consistency with Scholarly Recommendations

In addition to the specific areas where U.S. courts already have relied upon international human rights norms to interpret domestic law, further recommendations for such use have been made by international law experts. Professor Paust has urged, for example, that the clear international prohibition upon hollow-point ammunition should provide U.S. decisionmakers with a ground for prohibiting police use of such weapons.[144] More generally, Professor Paust also has urged U.S. courts to refer to international human rights principles in giving content to the broadly phrased guarantees contained in the ninth amendment.[145] Professor Hartman has advocated recourse to international human rights principles proscribing the juvenile death penalty in interpreting the eighth amendment's prohibition on "cruel and unusual punishments."[146] And a student commentator recently argued that equal treatment for women should be protected by U.S. constitutional guarantees interpreted in light of gender equality principles under international law.[147]

G. Interpretive Use of International Human Rights Norms for Resolving Legal Process Issues

As the preceding discussion shows, the interpretive use of international human rights norms to supply substantive content to domestic legal provisions is well justified in theory, as well as long and widely accepted in practice. The interpretive use of such norms to determine methodological or analytical approaches for applying substantive standards is at least as well justified in theory, and should be even more acceptable in practice. All of the theoretical justifications for interpretive use of international human rights norms in the substantive context—consistency with U.S. foreign policy, the constitutional framers' intent, early American judicial practice, practice in other nations, interpretivist concerns, U.S. judicial practice, and scholarly recommendations—should apply a fortiori in the process context. Such a limited role for international standards should be acceptable even to judges of a particularly isolationist inclination, while nevertheless providing a valuable broader

144. *See* Paust, *supra* note 40, at 53. Professor Paust also argues that the international proscription should be directly binding on U.S. courts. *See id.* at 53.

145. Paust, *supra* note 141, at 237.

146. *See* Hartman, *supra* note 67, at 659, 687-98. Professor Hartman also argues, in the alternative, that the proscription of the juvenile death penalty should be regarded as a directly binding norm of customary international law. *See id.* at 659-87.

147. *See* Comment, *supra* note 87, at 125, 148-49. The comment also argues that gender equality norms are part of customary international law, directly binding on U.S. courts. *See id.* at 148.

perspective upon the appropriate judicial role in resolving individual rights claims. The suggested use of international norms is one that is sensitive to, and strikes a balance between, concerns of both national sovereignty and individual liberty.

At present, there appears to be no explicit judicial discussion of the proposed process-interpretive role for international human rights norms. This vacuum may be due to the failure of lawyers and scholars to commend such a possible use to judges' attention. The author is aware of only one scholarly work that recommends a similar use of international human rights standards: Professor Gordon A. Christenson's thoughtful proposal that human rights norms should inform the levels of scrutiny applied to government action under the due process and equal protection standards of the fifth and fourteenth amendments.[148]

Professor Christenson illustrates his proposed process-oriented interpretive role for international norms through a discussion of *Plyler v. Doe.*[149] In *Plyler,* the Supreme Court held that the fourteenth amendment's equal protection clause was violated by a Texas statute that denied local school districts reimbursement for funds spent to educate children not legally in the U.S.[150] Some human rights activists urged the Court to hold for the first time that the Constitution guarantees a fundamental right to education.[151] They argued that the U.S. is directly bound by customary human rights principles, embodied in international instruments, that recognize such a right.[152] As Professor Christenson explains, however, these arguments went beyond what was needed for international human rights norms to inform domestic law in a fashion that would be sensitive to both individual rights and national sovereignty and would take account of both judicial responsibility and legislative power:

> If children are denied education solely by reason of their status as illegal aliens . . . a stronger argument would be that specific human rights provisions binding upon many nation-states through external sources of custom or agreement, justify application of a stricter standard of scrutiny to discriminatory classifications burdening these rights. This argument is more persuasive than the argument that an autonomous

148. Christenson, *supra* note 80, at 40; *see also* Paust, *supra* note 4, at 602.

149. 457 U.S. 202 (1982).

150. *Id.* at 220.

151. Christenson, *supra* note 80, at 53.

152. The following international instruments provide that all children have a right of access to free public education: Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), 3 U.N. GAOR 71, 76, art. 26(1), U.N. Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights, *supra* note 20, at art. 13(1); UNESCO Convention on Discrimination in Education, arts. 3(e), 4, 429 U.N.T.S. 93 (1960); Declaration of the Rights of the Child, principle 7, *supra* note 27, at 20.

> human rights norm such as free public education, never recognized as such in United States constitutional law, limits state action.[153]

Professor Christenson reasons that even if the Court did not find that the U.S. Constitution implicitly guarantees a right just because that right is widely recognized under international law, it still should evaluate deprivations of such a right under some form of heightened scrutiny. Heightened scrutiny also would be appropriate, in his view, with respect to classifications that burden groups protected by international norms of nondiscrimination.[154] In short, he urges that the two triggers of equal protection clause strict scrutiny—"fundamental rights" and "suspect classifications"—be defined in light of international human rights norms.[155]

This Article builds upon Professor Christenson's specific proposal and urge more generally that U.S. courts seek guidance from international human rights jurisprudence in developing their overall judicial process for reviewing claimed infringements of any constitutional rights. Legal process issues that could be illuminated by the approaches for implementing international human rights norms would include not only the general level of judicial scrutiny, as Professor Christenson suggests, but also the following specific issues:

—the scope accorded to a protected right, as a prima facie matter;

—whether a right is defined in negative terms only, or also in positive terms—*i.e.,* whether it only prohibits the state from interfering with its exercise, or whether it also requires the state to afford any affirmative protections, including protections against interference by private actors;

—how carefully designed or narrowly tailored a challenged government measure should be for promoting the alleged government interest—*i.e.,* whether the measure should be necessary for that purpose, whether

153. Christenson, *supra* note 80, at 53.

154. *See id.* at 54:

> Human rights norms indicate the consensus of civilized nations that education and [equal treatment for aliens] are important values. . . . [D]iscriminatory classification that burdens a fundamental value recognized by these international norms should . . . trigger heightened scrutiny.

155. The Supreme Court currently uses heightened scrutiny to review government actions that burden only a few rights deemed "fundamental," or that discriminate on the basis of only a few classifications deemed "suspect." The Court has held fundamental rights to include—in addition to enumerated constitutional guarantees—certain intimate personal choices about child-bearing and child-rearing, interstate travel, voting, and access to certain judicial procedures. It has held that fundamental rights do not include access to education or welfare benefits, or engaging in consensual homosexual relations. The Court has held that "suspect" classifications are those based on race, ethnicity, and alienage. It has held that classifications based on illegitimacy, gender, age, or wealth are not suspect. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 16, at 1436 (2d ed. 1988).

it need only be useful, or whether it should satisfy some intermediate standard in this regard;

—whether an asserted government justification for limiting a right should be assessed in light of democratic values—*i.e .*, whether certain government means or ends should be rejected as incompatible with such values;

—how much weight should be assigned to the existence of alternative measures for pursuing an asserted government goal that are less intrusive on rights—*i.e.*, whether the government should be required to utilize the least restrictive alternative measure, or a less restrictive one;

—whether courts should assess the proportionality between a challenged measure's incursion on rights and its promotion of governmental goals;

—the extent to which a government-imposed limitation on rights must be clearly expressed in law, thus circumscribing government decisionmakers' discretion in enforcing it;

—the extent to which courts should defer to the determinations of decisionmakers in the other branches of government concerning the importance of the countervailing government interest or the appropriateness of the means chosen to advance that interest;

—which party bears the burden of proof, and what quantum and type of evidence are necessary to meet that burden;

—how broadly a right is interpreted in temporal terms—*i.e.*, whether it is interpreted in light of current norms, or instead in light of evolving norms;

—the extent to which an alleged government interest is evaluated not only in terms of laws in effect, but also in terms of whether, and how consistently, any such laws are actually enforced;

—how broadly a right is interpreted in geographic terms—*i.e.*, whether it is interpreted in light of more localized norms or in light of norms prevalent in a broader geographic context;

—the amount and type of evidence that courts should demand to evaluate a government interest allegedly promoted by a rights-infringing measure—*i.e.*, whether the government should adduce actual evidence of tangible harm absent the measure or whether speculation about such harm suffices;

—whether the government's asserted justification for a rights-infringing measure should be the actual, good-faith motivation for the government's adoption of such measure; and

—how important the government's asserted countervailing interest must be.

The next Part of this Article analyzes the international law standards concerning these legal process issues. It focuses on the privacy decisions of the European Commission and the European Court.[156] Although the following discussion concentrates on the European Convention organs' privacy jurisprudence, the applicable process principles have a broader significance in two respects. First, the Convention organs' analytical approach to privacy claims parallels their approach to claims regarding other rights. Second, the Convention organs' methodological strategies reflect broadly shared international standards. The Canadian Charter of Rights and Freedoms, for example, which was strongly influenced by the European Convention, incorporates similar process standards, both on its face and as judicially interpreted.[157] To underscore that the European Convention privacy jurisprudence illustrates the legal process applicable to claims under international human rights instruments more generally, the following discussion contains occasional references both to rights other than privacy and to rights-protective instruments other than the European Convention.[158]

III. Legal Process Analysis of International Human Rights Jurisprudence

Article 8 of the European Convention, which protects privacy,[159] is structurally typical of the Convention's rights-protecting provisions. Each of these provisions contains two sections: the first defining the scope of the rights entitled to protection as a prima facie matter, and the second delineating the grounds on which the government may limit such

156. *See infra* Part III.

157. *See* Gibson, *supra* note 12, at 27-28.

158. References to the Canadian Charter are particularly numerous for the same reason that the European Convention is stressed: both instruments are enforceable, at the behest of individuals, by relatively active tribunals, and therefore both have given rise to significant bodies of jurisprudence.

159. Article 8 provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention, *supra* note 10, at art. 8.

rights.[160] In evaluating whether challenged government conduct violates article 8, both the Commission and the Court employ a relatively strict form of scrutiny.[161] This strict standard is manifested both in the Convention organs' relatively broad reading of article 8(1)'s rights-defining language and in their relatively narrow reading of article 8(2)'s rights-limiting language. A similarly strict scrutiny is applied under other Convention provisions[162] and other human rights instruments.[163]

A. Broad Definition of Prima Facie Rights

The European Commission and Court liberally interpret article 8's first clause, which defines privacy rights,[164] in two ways: first, as encompassing a wide range of rights and second, as imposing upon the government the affirmative duty to protect individual privacy against interference, including interference by non-state actors.

(1) Wide Range of Rights Secured

The European Commission and Court consistently have given a broad scope to the rights that the Convention protects as a prima facie matter. In the Commission's words, both Convention tribunals hold that "the provisions of the Convention should not be interpreted restrictively so as to prevent its aims and objects being achieved."[165]

160. This structural similarity among the various Convention provisions accounts for the similar interpretive approaches that the Convention organs have employed in construing them and makes a decision concerning one particular provision significant in terms of shedding light on other, parallel provisions.

161. This generalization applies as well to the Convention organs' evaluation of alleged violations of other Convention provisions. Throughout the remainder of this Article, the references to article 8 should be construed as illustrative only; the statements also apply to structurally similar Convention provisions unless expressly qualified.

162. *See* Warbrick, *supra* note 8, at 711 (European Court has construed Convention's purpose as broadly protective of individual rights, at expense of state sovereignty).

163. *See* Bender, *Justification for Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks About the Proper Role of Section One of the Canadian Charter*, 13 MANITOBA L. REV. 669, 679 (1983):

> Section 1's reference to limits that can be "demonstrably justified suggests to me that *Charter* balancing tests ought to be closer in character to the U.S. brand of "strict" judicial scrutiny than to U.S. "minimum" scrutiny. The burden of showing an adequate justification, that is, should be on the proponent of limiting *Charter* rights; that burden, moreover, should be a heavy one—it should have factual (rather than speculative) support in a substantial or compelling (rather than merely legitimate) governmental or societal interest. I would think that care should be taken that limits on protected rights and freedoms be no greater than demonstrably necessary to serve the relevant governmental concerns.

164. Article 8(1) provides: "Everyone has the right to respect for his private and family life, his home and his correspondence."

165. Golder Case, 16 Eur. Ct. H.R. (Ser. B) (1975).

In accordance with the generally broad perspective on rights secured by the Convention,[166] the Commission and Court have uniformly recognized that it protects privacy rights beyond those expressly enumerated in article 8. For example, although article 8—in contrast with the corresponding provisions of other international human rights instruments[167]—does not expressly protect "honor," "dignity," or "reputation," it has been interpreted as impliedly covering such concepts.[168]

The European Commission's first description of the rights protected by article 8, in a 1976 opinion that has been widely quoted in subsequent Commission and Court rulings,[169] encompassed a broad array of rights:

> For numerous anglo-saxon and French authors the right to respect for "private life" is the right to privacy, the right to live, as far as one wishes, protected from publicity . . . . In the opinion of the Commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one's own personality.[170]

Subsequent Commission rulings have amplified this broad description of privacy rights still further. The Commission has ruled that any human relationships are protected, including sexual relationships.[171] Further, the Commission has stated that privacy entails an individual's

166. For an example of another decision that found an unenumerated right to be implicitly protected by another Convention provision, see *id.* (article 10 guaranteeing freedom of speech, secures right of access to court).

167. *See* UDHR art. 12, *supra* note 152, at 73 ("No one shall be subjected to . . . attacks upon his honour and reputation."); ICCPR art. 17, *supra* note 20, at 177 (same); American Convention on Human Rights art. 11, *supra* note 26, at 5 ("Everyone has the right to have his honor respected and his dignity recognized.").

168. *See* Rees v. United Kingdom, 36 Eur. Comm'n H.R. 78, 87 (1984); Van Oosterwijck Case, 36 Eur. Ct. H.R. (ser. B) at 23-26 (1979-80) (report of the Comm'n) (governments must allow individuals who have undergone sex-change surgery to obtain altered official identification documents, to protect them from embarrassment caused by apparent discrepancy between physical appearances and documents' gender identifications); *see also* X v. Belgium, 46 Eur. Comm'n H.R. 216 (1974); X v. Norway, 14 Eur. Comm'n H.R. 228 (1979) (disclosing person's criminal record to others interferes with article 8(1) rights).

As another example of the Convention organs' expansive interpretation of article 8(1), see Case of Klass and Others, 28 Eur. Ct. H.R. (ser. A) at 21 (1978) (although telephone calls not expressly mentioned in article 8(1), they are embraced within "private life" and "correspondence").

169. *See, e.g.*, Bruggeman & Scheuten v. Federal Republic of Germany, 5 Eur. Comm'n H.R. 103, 115 (1976), 10 Eur. Comm'n H.R. 100, 116 (1978); McFeeley v. United Kingdom, 20 Eur. Comm'n H.R. 44, 91 (1980); X. v. Federal Republic of Germany, 27 Eur. Comm'n H.R. 243, 245 (1982); Van Oosterwijck Case, 36 Eur. Ct. H.R. (ser. B) at 25-26 (1980) (Report of the Comm'n).

170. X v. Iceland, 5 Eur. Comm'n H.R. 86, 87 (1976).

171. *See Bruggemann,* 10 Eur. Comm'n H.R. 100.

right to "freely pursue the development and fulfillment of his personality" through channels other than human relationships.[172]

The European Convention organs have interpreted article 8(1)'s concept of "family life" as broadly as they have interpreted its concept of "private life." In the 1979 *Marckx* case,[173] the Court held that this notion embraced "illegitimate" family relationships such as those between a parent and a child born out of wedlock[174] and between such a child and its grandparents.[175]

One can gain more precise sense of how generously the Convention organs have construed article 8(1) by considering some specific relationships or conduct that they have held it to encompass. As previously noted, the Commission and Court have protected various family relationships, including "natural" or "illegitimate" ones.[176] They also have secured a range of privacy rights for prisoners, including their rights to send and receive correspondence.[177] Another dimension of privacy that has been protected under Article 8 is that secured by the fourth amendment to the U.S. Constitution: the right to be free from unreasonable searches and seizures.[178]

Finally, the Commission and Court have held article 8 to guarantee the aspect of privacy that involves making basic choices about such intimate matters as sexual orientation and reproduction—what Professor Laurence Tribe has termed the rights of "personhood."[179] Parallel to the

172. *See* Andre Deklerck v. Belgium, 21 Eur. Comm'n H.R. 116, 124 (1981) (article 8(1) applied to law that prevented certain individuals from keeping alcoholic beverages in their homes).

173. Marckx Case, 31 Eur. Ct. H.R. (ser. A) (1979).

174. *Id.* at 19.

175. *Id.* at 21.

176. *See also* Hendriks v. The Netherlands, 29 Eur. Comm'n H.R. 5, 14 (1982) (article 8 protects "right of a divorced parent, who is deprived of custody . . . to have access to or contact with his child").

177. Case of Campbell & Fell, 80 Eur. Ct. H.R. (ser. A) at 48-49 (1984) (rule requiring completion of internal prison review procedures before prisoner could correspond with outside world about prison event violated article 8); Golder Case, 18 Eur. Ct. H.R. (ser. A) at 20 (1975) (same); Case of Silver & Others, 61 Eur. Ct. H.R. (ser. A) (1983) (prisoners were wrongfully deprived of their right to send mail). *See also* X v. United Kingdom, 39 Eur. Comm'n H.R. 63 (1972); X v. United Kingdom, 42 Eur. Comm'n H.R. 140, 140-41 (1972) (article 8 protects prisoners' right to attend family funerals); Draper v. United Kingdom, 24 Eur. Comm'n H.R. 72, 78 (1980) (article 12 protects prisoners' right to get married); Hamer v. United Kingdom, 24 Eur. Comm'n H.R. 5 (1979) (same).

178. Malone Case, 82 Eur. Ct. H.R. (ser. A) (1984) (article 8 was violated by British practices permitting government interception of mail and telephone calls, as well as authorizing "pen register," which records numbers to which telephone calls were placed); *cf.* Smith v. Maryland, 442 U.S. 735, 737, 745-46 (1979) (fourth amendment not implicated by police use of pen register for criminal investigation or prosecution).

179. L. TRIBE, *supra* note 155, at § 15-1 (1988). Other international human rights instru-

U.S. Supreme Court in *Roe v. Wade,*[180] the European Commission has held that a woman's choice whether or not to have an abortion is protected under this rubric, although the Commission—much like the U.S. Supreme Court—found that the woman's right is limited by the countervailing interest in protecting the fetus.[181] In other respects, the European Convention organs have defined the personal autonomy branch of privacy more expansively than has the U.S. Supreme Court. First, they have extended this form of privacy protection to transsexuals who have undergone sex-change surgery.[182] Second, they have upheld the claim that the U.S. Supreme Court expressly rejected in *Bowers v. Hardwick*:[183] that the right to privacy shelters homosexual relations between consenting adults.[184]

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ments also protect this aspect of privacy. *See* International Covenant on Economic, Social and Cultural Rights, *supra,* note 20, at art. 6(2) (refers to "economic, social and cultural development"). Although this provision applies to development of the larger society, it has been construed as also embracing the development of the individual person. *See* Sohn, *supra* note 1, at 46.

180. 410 U.S. 113 (1973). A woman's right to choose an abortion free from government regulation, which was recognized in *Roe,* was recently limited in Webster v. Reproductive Health Servs. *See infra* text accompanying notes 322-34.

181. *See* Bruggeman & Scheuten v. Federal Republic of Germany, 10 Eur. Comm'n H.R. 100 (1978); *see also* Paton v. United Kingdom, 19 Eur. Comm'n H.R. 244 (1980) (in affirming English High Court decision permitting abortions, Commission ruled that fetus is not protected under Convention provisions protecting right to life).

Other international human rights agreements have been interpreted as protecting a woman's right to choose an abortion, notwithstanding arguments that the protected right to life encompasses fetal life. *See* Case 2141, INTER-AM. C.H.R. 25, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981) (Massachusetts statute permitting abortion did not violate American Declaration on the Rights and Duties of Man, because it does not protect right to life from moment of conception).

182. *See Rees, reprinted in* 7 Eur. Hum. Rts. Rep. 429, 433-34 (Eur. Comm'n on Hum. Rts.) (1985) (article 8 was violated by law that did not permit designation of sex on birth certificate to be changed after sex-altering medical treatment); Van Oosterwijck Case, 36 Eur. Ct. H.R. (ser. B) at 23-26 (1980) (Report of the Comm'n). The U.S. Supreme Court has not faced this issue, and lower federal and state courts have resolved it against privacy claims. *See* Taitz, *Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination,* 13 AM. J.L. & MED. 53, 53 (1984) (case law in U.S. prevents post-operative transsexuals from gaining legal recognition); *see also* Ulane v. Eastern Airlines, 742 F.2d 1081, 1084-85 (7th Cir. 1984) (Title VII does not protect transsexuals from employment discrimination), *cert. denied,* 471 U.S. 1017 (1985); *In re* Paula M. Grossman, 127 N.J. Super. 13, 33-34 (Super. Ct. App. Div.) (dismissal of tenured teacher who underwent sex-reassignment surgery did not violate teacher's equal protection rights), *cert. denied,* 65 N.J. 292, 321 A.2d 253 (1974).

183. 478 U.S. 186 (1986).

184. *See* Norris Case, 129 Eur. Ct. H.R. (ser. A) (1988) (invalidating similar Irish statute, when applicant's homosexual activities had not been subject of any government action, including investigation); Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) (1981) (invalidating Northern Ireland law criminalizing consensual homosexual conduct between adult males, when applicant's homosexual activities had been investigated, but not prosecuted).

The notion that judicial bodies legitimately may protect rights not specifically enumerated in a written, rights-declaring instrument has been extended even further by the European Court of Justice, the European Economic Community's supreme judicial body. The Community has not adopted any express declaration of rights comparable to the European Convention. Furthermore, the European Court of Justice has as its primary responsibility the interpretation of instruments enunciating economic and trade relationships.[185] Nevertheless, the Court of Justice has found that "basic individual rights [are] implicit in the general principles of Community law," and it has declared that it will "ensure" that these implied rights "shall be observed."[186]

(2) Government's Affirmative Obligation to Protect Rights

The second manner in which the European Convention organs broadly define article 8(1)'s prima facie privacy right is by extending the state's obligation beyond mere noninterference. In some circumstances, the Convention organs have ruled that the state additionally has an affirmative duty to protect privacy against interference by not only state agents, but also nongovernmental actors. Like other aspects of the legal process applicable to article 8, this imposition of affirmative obligations is not commanded by the provision's express language. To the contrary, the article's only explicit directive to the government is negative, barring "interference . . . with the exercise of [the privacy] right" except under specified limited circumstances.[187] Moreover, in framing this purely negative language, article 8's drafters apparently deliberately eschewed the additional language contained in article 12 of the Universal Declaration. While article 8 contains many similarities to article 12's first sentence,[188] it entirely omits any parallel to article 12's second sentence, which guarantees "the protection of the law against . . . interference" with privacy.[189]

185. Pescatore, *supra* note 114, at 73.

186. Stauder v. City of Ulm, 15 Recueil 419 (1970), 7 COMMON MKT. L. REV. 342 (1970) *quoted in* Pescatore, *supra* note 114, at 77; *accord* Internationale Handelgesellschaft mbH v. Vorratstelle für Getreide und Futtermittel, Frankfurt/Main, 16 Recueil 1125, 8 COMMON MKT. L. REV. 250 (1971) (discussed in Pescatore, *supra* note 114, at 77-78).

187. European Convention, *supra* note 10, art. 8(1).

188. Article 12's first sentence provides: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation."

189. As previously noted, article 8 also omits article 12's express reference to "honour and reputation," but the Convention organs still deemed these interests to be implicitly protected under article 8. *See supra* text accompanying notes 167-70.

The affirmative government duty aspect of the legal process applicable to article 8 also pertains to other European Convention guarantees[190] and to provisions in additional international human rights instruments. Indeed, as indicated above, other international instruments contain language that more clearly assigns to the government an affirmative rights-protecting duty.[191] Article 2 of the International Covenant on Civil and Political Rights, for example, requires each State Party not only to respect, but also to "ensure" the recognized rights of all individuals within its territory and subject to its jurisdiction.[192] The Covenant drafters construe it as requiring states "to protect human life against unwarranted actions by public authorities as well as by private persons."[193]

The first case in which the European Court expressly recognized the state's occasional affirmative obligation to ensure privacy was the 1979 *Marckx* case. As one commentator observed, this ruling signalled the Court's adoption of a judicial "activism" that transcends the case's immediate factual context.[194] The *Marckx* Court invalidated Belgian laws that denied children born out of wedlock certain legal relationships with their parents and other family members and also discriminated against them in terms of inheritance rights. The European Court ordered the Belgian Government to undertake the necessary domestic law reforms to terminate this discriminatory treatment. The Court acknowledged that compelling a respondent government to undertake affirmative acts was relatively unusual, but it nevertheless found such a remedial order compatible with article 8.[195]

190. *See* Warbrick, *supra* note 8, at 711 (European Court has interpreted Convention as imposing more than mere formal duty on states, but as further requiring states effectively to protect individual rights). The construction of article 8 as imposing affirmative obligations on governments may well be aided by article 8's formulation of the privacy right as encompassing "the right to respect for . . . private . . . life." Other Convention rights are also phrased in affirmative terms, in contrast with the U.S. Bill of Rights, which enjoins government interference with rights. *Compare, e.g.*, European Convention art. 10(1), *supra* note 10, at 231 ("Everyone has the right to freedom of expression.") *with* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

191. *See supra* text accompanying notes 188-89.

192. *Supra* note 20, at 173.

193. *Annotations on the Text of the Draft of the International Covenants on Human Rights*, 10 U.N. GAOR Annex (Agenda Item 28, pt. II) at 30, U.N. Doc. A/2929 (1955).

194. Salzberg, *The Marckx Case: The Impact on European Jurisprudence of the European Court of Human Rights' 1979 Marckx Decision Declaring Belgian Illegitimacy Statutes Violative of the European Convention on Human Rights*, 13 DEN. J. INT'L L. & POL'Y 283, 288 (1984).

195. *See* Marckx Case, 31 Eur. Ct. H.R. (ser. A) at 15 (1979):

> [T]he object of [article 8] is "essentially" that of protecting the individual against arbitrary interference by the public authorities. Nevertheless, it does not merely compel the State to abstain from such interference: in addition to this primarily

In another 1979 decision, to facilitate privacy rights, the European Court also imposed an affirmative obligation upon a national government.[196] In the *Airey* case, the Court held that Ireland should provide legal aid for individuals seeking judicially recognized marriage separations.[197] Although Irish law does not permit divorces, it does enable certain spouses to be relieved of the duty of cohabiting by a judicial separation decree, which will be granted only upon proof of a specified matrimonial offense. While individuals may represent themselves in seeking such decrees, the Court noted that in all recent separation proceedings, petitioners had been represented by lawyers.[198] The Court also noted the significant cost involved in securing an attorney's services for such proceedings, and that the *Airey* applicant could not afford these fees.[199] By not affirmatively facilitating the applicant's judicial separation, the Court concluded, Ireland had violated her article 8 rights.[200]

Since these two 1979 decisions, both the Commission[201] and the Court[202] repeatedly have imposed upon states other positive obligations to facilitate individuals' enjoyment of their privacy rights. One such de-

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negative undertaking, there may be positive obligations inherent in an effective "respect" for family life.

This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. . . . [R]espect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family.

(citation omitted)

196. Airey Case, 32 Eur. Ct. H.R. (ser. A) (1979).

197. *Id.* at 15.

198. *Id.* at 13.

199. *Id.*

200. *Id.* at 17.

201. *See* Rees v. United Kingdom, *reprinted in* 7 Eur. Hum. Rts. Rep. 429 (Eur. Comm'n on Hum. Rts.) (1985) (ordered government to permit individuals who have undergone sex-change operations to obtain birth certificates and other official documents that reflect appropriate gender); Van Oosterwijck Case, 36 Eur. Ct. H.R. (ser. B) (1979-80) (Report of the Comm'n); Johnston v. Ireland, *reprinted in* 8 Eur. Hum. Rts. Rep. 214, 219-21 (Eur. Comm'n on Hum. Rts.) (1985) (in country that makes no provision for divorce, state was required to grant legal recognition to family ties of child born to married man, who had been separated from his wife, and woman with whom he was living); Draper v. United Kingdom, 20 Eur. Comm'n H.R. 72, 78 (1980) (ordered prison officials to make arrangements for prisoners to get married; prison officials must take affirmative steps to facilitate prisoners' exercise of other privacy rights, including corresponding with legal advisers and others, receiving visits from family members, and attending family funerals); Hamer v. United Kingdom, 24 Eur. Comm'n H.R. 5 (1979).

202. Case of Abdulaziz, Cabales & Balkanaldi, 94 Eur. Ct. H.R. (ser. A) at 31-34 (1985) (under certain circumstances state may be required to admit to its territory alien spouse of settled immigrant to secure couple's effective enjoyment of their family life) (dictum).

cision by the European Court is particularly noteworthy because it required the state to protect privacy against invasions by non governmental actors. In *X & Y v. The Netherlands,*[203] the Court required the Dutch Government to alter its criminal law to allow the prosecution of a man who had allegedly raped a mentally retarded sixteen-year-old girl.[204] There was a gap in the Dutch criminal law, in that it deemed a mentally retarded rape victim incapable of initiating a prosecution, but also forbade anyone else, such as her father, from instigating a prosecution on her behalf.[205] The European Court held this lacuna in Dutch law to violate the father's and daughter's privacy rights, notwithstanding the availability of a civil action against the alleged rapist.[206] The Court expressly declared that a state's "positive obligations inherent in an effective respect for private or family life . . . may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[207]

B. Narrow Construction of Permissible Government Limits on Prima Facie Rights

The foregoing discussion shows that the European Convention organs strictly scrutinize privacy-infringing measures by broadly defining the conduct and choices that are deemed protected, at least as a prima facie matter, by article 8(1). There is also a second dimension to the Convention tribunals' strict scrutiny of privacy infringements: their correspondingly narrow interpretation of permissible government limitations on privacy rights, as defined in article 8(2).[208] Article 8(2) contains language identical to that in other Convention provisions regarding additional rights.[209] Therefore, the Convention organs' analytical methods for reviewing a government measure under article 8(2) are applicable to government measures limiting other rights as well.

203. Case of X & Y v. The Netherlands, 91 Eur. Ct. H.R. (ser. A) (1985).
204. *Id.* at 14.
205. *Id.* at 13.
206. *Id.*
207. *Id.* at 11.
208. Article 8(2) provides:

> There shall be no interference by a public authority with the exercise of this right [to privacy] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention, *supra* note 10, art. 8(2), at 230.
209. *See id.*, art. 9(2), at 230 (freedom to manifest one's religion or beliefs), art. 10(2), at 230 (freedom of expression), art. 11(2), at 231 (freedom of peaceful assembly and association).

The European Court has stated expressly that, as a general principle, the Convention's rights-limiting clauses must be narrowly interpreted.[210] This generally narrow interpretation has been manifested in a number of specific analytical standards and methods that the Convention tribunals have developed, under article 8(2) and similar provisions, for reviewing government measures that intrude on prima facie rights.

(1) Necessity Standard

The European Court has stressed that government limitations on privacy must be *necessary* to promote the asserted government interest and that mere convenience or desirability is an inadequate justification.[211] Indeed, on occasion the Court has said that section 2 sets a standard of "*strict* necessity." The Court has taken this more stringent approach when the challenged privacy limitations are viewed as particularly incompatible with a democracy and more characteristic of a "police state."[212] The Court, for example, applied this more demanding standard in reviewing secret police surveillance through telephone wiretaps and mail interception.[213]

The rule that European Convention rights may be interfered with only on grounds of necessity mirrors rules enunciated under other international human rights instruments.[214] The International Covenant on Civil and Political Rights, for example, generally requires restrictions to be at least "necessary" to promote certain enumerated government interests.[215] With respect to restrictions on some rights, the ICCPR demands

210. *See* Case of Klass and Others, 28 Eur. Ct. H.R. (ser. A) at 21 (1978) ("[Article 8(2)], since it provides for an exception to a right guaranteed by the Convention, is to be narrowly interpreted.") *accord, e.g.,* Case of Winterwerp, 33 Eur. Ct. H.R. (ser. A.) at 16 (1980).

211. *See* Handyside Case, 24 Eur. Ct. H.R. (ser. A) at 22 (1976) (while " 'necessary' . . . is not synonymous with 'indispensable' . . . , neither has it the flexibility of such expressions as 'admissible,' 'ordinary' . . . , 'useful' . . . , 'reasonable' . . . or 'desirable' . . . it implies here the existence of a 'pressing social need' ").

212. *See Klass,* 28 Eur. Ct. H.R. (ser. A) at 22 (1978) (purpose of strictly enforcing article 8(2) conditions for permissible limitations on rights is "to ensure that the society does not slide imperceptibly towards totalitarianism").

213. *Id.* at 21 ("Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions."). Consistent with this strict necessity standard, the *Klass* opinion stated that the challenged surveillance measures had to be "in all respects within the bounds of necessity," *id.* at 22, and upheld these measures because they reduced surveillance to an "unavoidable minimum." *Id.* at 28.

214. *See, e.g.,* Paust, *supra* note 40, at 29 (under international law, one of the basic principles regulating use of weapons is that of necessity).

215. *See, e.g.,* ICCPR, *supra* note 20, art. 12, at 176 (liberty of movement and freedom to choose residence), art. 18(3), at 178 (religious freedom), art. 19(3), at 178 (freedom of expression), art. 21, at 178 (right of peaceful assembly), art. 22, at 178 (freedom of association).

the greater justification of "strict" necessity.[216] Similarly, the American Convention on Human Rights expressly provides that the exercise of certain rights may be restricted only insofar as "necessary" to promote specified government concerns.[217] Likewise, although the Canadian Charter's general limitations clause does not explicitly prescribe a necessity standard, it has been interpreted as imposing such a standard.[218]

(2) Context of Democratic Society

As noted above, the European Commission and Court maintain a special vigilance against government intrusions that smack of totalitarianism.[219] This aspect of their legal process is consistent with article 8(2)'s explicit definition of necessity in terms of protecting a *democratic* society.[220] Thus, the Commission and Court have warned governments that they will not tolerate privacy limitations that actually would damage democratic values for the purported purpose of promoting them.[221] In this context, the Convention tribunals have defined a "democratic society" as embodying principles of not only majority rule, but also protection of individual and minority group rights against majoritarian incursions.[222] Similarly, the European Court has observed that "two

216. *See, e.g., id.* art. 4(1), at 174 (in public emergency, states may derogate certain protected rights to extent "strictly required by the exigencies of the situation"), art. 14, at 176 (press and public may be excluded from trial to extent "strictly necessary" to avoid prejudicing proceedings).

217. *See* American Convention on Human Rights, *done* Nov. 22, 1969, art. 16(2), 36 O.A.S.T.S. 1, 6 OEA/ser. A/16 (English) (1970), *reprinted in* 9 I.L.M. 673, 679 (1970) (freedom of association); art. 22(3), at 7, 9 I.L.M. at 680 (rights to move and reside).

218. Section 1 of the Charter provides that all the guaranteed rights are "subject only to such . . . limits as can be demonstrably justified . . . ." This language has been construed to require that any rights-limiting measure be *necessary* to promote the government's asserted interest. *See* Quebec Ass'n of Protestant School Bd. v. A.-G. Quebec (No. 2) (1983), 140 D.L.R.3d 33, 89 (Que. S.C.) (government must "convincingly demonstrate[ ]" that challenged measure is "necessary to achieve" government aim), *aff'd,* 1 D.L.R.4th 573 (C.A. 1984); Bender, *supra* note 163, at 679; Hovius, *supra* note 13, at 241-44.

219. *See supra* text accompanying notes 212-13.

220. Under article 8(2), the only permissible government interferences with privacy are those that are, *inter alia,* "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." European Convention, *supra* note 10, at 230.

221. *See* Case of Klass and Others, 28 Eur. Ct. H.R. (ser. A) at 232 (1978):

> The Court, being aware of the danger such a law [authorizing secret police surveillance to protect national security] poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.

222. *See* Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) at 24 (1981) ("It would be quite con-

hallmarks" of a "democratic society" are "tolerance and broad-mindedness."[223] Accordingly, the Convention organs have found that the "necessary in a democratic society" standard is not satisfied by a restriction whose asserted justification is to shield majorities from conduct that they might find offensive, but which causes no tangible harm.[224]

The requirement that any limitation on a prima facie right be necessary specifically in the context of a democratic society is also expressed in other international human rights instruments, including the Universal Declaration[225] and several provisions of the ICCPR.[226] The *travaux preparatoires* indicate that this requirement should be interpreted as the European Commission and Court have interpreted the European Convention's corresponding provision.[227] The Canadian Charter's general

trary [to the right to respect for private life] to interpret Article 8(2) as allowing a majority an unqualified right to impose its standards of private sexual morality on the whole of society.").

223. *Id.* at 21.

224. *Id.* at 24 ("Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."); *accord id.* at 22 ("The Court is not concerned with making any value-judgment as to the morality of homosexual relations between adult males."). *But see* Handyside, 24 Eur. Ct. H.R. (ser. A) at 24 (1976) (even though many States parties to Convention had permitted publication of *The Little Red Schoolbook,* and even though some 18,000 copies had been sold in Britain without prosecution, "the competent English judges were entitled, in the exercise of their discretion, to think . . . that the *Schoolbook* would have pernicious effects on the morals of many of the children . . . who would read it."); *see also* Hovius, *supra* note 13, at 245 (Commission gives more deference to domestic authorities' decisions regarding obscenity, as distinguished from other, legislation).

225. *See* UDHR *supra* note 152, art. 29(2), at 77 ("[E]veryone shall be subject only to such limitations . . . solely for [certain specified purposes] *in a democratic society.* (emphasis added)).

226. *See* ICCPR, *supra* note 20, art. 14(1), at 176 ("the Press and the public may be excluded from all or part of a trial for reasons of morals, public order . . . or national security in a democratic society"); art. 21, at 178 ("No restrictions may be placed on the exercise of this right [peaceful assembly] other than those . . . which are necessary in a democratic society in the interests of national security or public safety, public order . . . , the protection of public health or morals or the protection of the rights and freedoms of others."); art. 22(1), at 178 (same regarding freedom of association).

227. *See Annotations on the Text of the Draft International Covenants on Human Rights,* 10 U.N. GAOR Annex (Agenda Item 28, pt. II) at 54, U.N. Doc. A/2929 (1955) (in response to objection that "democracy" might be interpreted differently in various countries, it was argued that "democratic" society respects principles of U.N. Charter, UDHR, and human rights Covenants).

limitations clause also contains the same language,[228] which the Canadian courts likewise have interpreted in a rights-protective spirit.[229]

(3) Least Intrusive Alternative Requirement

Another essential component of the Convention tribunals' judicial review process is their enforcement of the "least intrusive alternative" requirement.[230] The European Commission and Court refuse to deem any privacy limitation to be justified unless no alternative measure, less intrusive on privacy, is available to promote the countervailing government interest. In upholding Germany's law that authorizes secret surveillance to protect national security and combat terrorism, for example, the Court stressed that the law reduced surveillance to an "unavoidable minimum."[231]

The least intrusive alternative rule also has been enforced with respect to European Convention rights other than privacy,[232] and with respect to various freedoms under other international human rights instruments.[233] The Canadian Charter of Rights and Freedoms also has been construed as imposing this rule.[234]

228. Section 1 of the Canadian Charter allows only those limitations that, *inter alia,* "can be justified in a free and democratic society." CANADIAN CHARTER OF RIGHTS AND FREEDOMS, CONSTITUTION ACT, Part I (as enacted by the Canada Act, 1982, c.11 (U.K.) § 1) [hereinafter CANADIAN CHARTER].

229. *See* Gibson, *supra* note 12, at 40 (although there was risk that this phrase would be used to justify every measure that had previously been sanctioned in Canada or other free and democratic societies, that risk has not materialized in practice).

230. A variation on this standard requires the government to employ a *less* restrictive alternative, even if not the *least* restrictive one. The most common verbal variations for describing this requirement include one word from each of the following three categories: "least" or "less"; "drastic," "intrusive," or "restrictive"; and "alternatives" or "means."

231. Case of Klass and Others, 28 Eur. Ct. H.R. (ser. A) at 28 (1978).

232. The Sunday Times Case, 30 Eur. Ct. H.R. (ser. A) at 35-42 (1985) (invalidated, as overbroad, absolute rule that any media coverage of issue before courts constituted contempt, irrespective of circumstances). For examples of decisions enforcing the least intrusive means test with respect to other rights under the European Convention, see, *e.g.,* Christians Against Racism and Fascism v. United Kingdom, 21 Eur. Comm'n H.R. 138, 150 (1980) (complete ban on parades and processions can be justified only if it can be shown that less stringent measures would not serve public purpose of preventing disorder); Case of Young, James & Webster, 44 Eur. Ct. H.R. (ser. A) at 25-26 (1981) (unions that entered into closed shop agreement could have protected adequately members' interests without legislation compelling current employees to join union, so detriment suffered by latter went further than necessary); Barthold Case, 90 Eur. Ct. H.R. (ser. A) at 23-26 (1985) (restriction on press interviews about matters of public concern hampered free expression more than necessary to prevent publicity-seeking by professionals).

233. *See* Paust, *supra* note 40, at 29 (international law regulates use of weapons in accordance with principle of humanity, or prohibition against unnecessary suffering).

234. *See, e.g., Re* Southam Inc. & The Queen (No. 1), 146 D.L.R.3d 408, 429 (Ont. C.A. 1983) (absolute ban on public and press attendance at juvenile trials struck down as overbroad,

(4) Proportionality Requirement

The European Commission and Court have enforced the necessity and least intrusive alternative standards as necessary, but not sufficient, justifications for any limitation on privacy or other rights. This facet of the Convention tribunals' legal process is demonstrated by their enforcement of a proportionality requirement in interpreting article 8(2), as well as other limitations clauses. Under this criterion, a rights limitation will be invalidated if the extent to which it abridges freedom is disproportionate to the extent to which it advances a competing government interest.[235] Even if a privacy limitation were necessary for promoting the asserted government interest, and the least intrusive measure for doing so, that measure still would be prohibited if the resulting privacy invasion outweighed the promotion of the countervailing interest.[236]

The Convention organs' invalidation of privacy restrictions pursuant to proportionality analysis is illustrated by the *Dudgeon* case, which nullified Northern Ireland's statute proscribing homosexual relations between consenting adult males.[237] A dissenting opinion disagreed specifically with the majority's view that a law disproportionately invasive of privacy cannot be sustained simply because there is no other measure for effectively advancing the government's asserted interest.[238] The Court

because discretionary ban would sufficiently promote interests at stake); R. v. Big M Drug Mart Ltd., 58 N.R. 31 (S.C.C.) (1985) ("The court may wish to ask whether the means adopted to achieve the end sought to do so by impairing as little as possible the right . . . in question."); R.v. Bryant, 48 O.R. 2d 732, 985 (C.A. 1984) ("The standard by which the reasonableness of the limitation of the Charter right must be assessed [includes] . . . that the limitation is restricted to that which is necessary for the attainment of the desired objective."); *see also* Bender, *supra* note 163, at 679.

235. *See, e.g.,* Handyside Case, 24 Eur. Ct. H.R. (ser. A) (1976) ("every . . . 'restriction' . . . must be proportionate to the legitimate aim pursued").

236. *See* Hovius, *supra* note 13, at 251:

> In these cases [*Young* and *Barthold*], the Court did not in fact conclude that any equally effective but less restrictive means was available to reach the legitimate goal pursued by the domestic authorities. Instead, the Court insisted that the value of the right at stake required the domestic authorities to settle for less effective means.

237. *See* Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) at 24 (1981):

> On the issue of proportionality, the Court considers that such justifications as there are for retaining the law . . . are outweighed by the detrimental effects which the very existence of the legislative provisions . . . can have on the life of a person of homosexual orientation . . . .
>
> . . . .
>
> [T]he restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.

238. *See id.* at 33 (Matscher, J., dissenting) ("To my mind . . . once it has been granted that an aim is legitimate for the purposes of Article 8 (2), any measure directed towards the accomplishment of that aim is necessary if failure to take the measure would create a risk that

majority steadfastly has refused to attribute such significant weight to government efficiency concerns.

The proportionality component of the Convention tribunals' legal process mirrors other international human rights norms,[239] including those set forth under the Canadian Charter.[240] Further, both the European Convention and other human rights agreements recognize that the proportionality test is a separate requirement above and beyond the necessity and least restrictive alternative standards. In other words, the government's end alone cannot justify its means. The European Convention, for example, provides generally that "[i]n time of . . . public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required."[241] The Convention stipulates, however, that certain rights are nonderogable even under these exigent circumstances: the right to life; freedom from torture or inhuman or degrading treatment or punishment; freedom from slavery or involuntary servitude; and freedom from retroactive criminal punishment.[242] The ICCPR contains similar terms.[243]

(5) Requirement of Specific Legal Standards Constraining Discretion

Another element of the Convention organs' judicial process is the requirement that rights limitations be narrowly drawn and precisely worded, thus clearly cabining government discretion. This requirement derives from the phrase in article 8(2) (and other limitations clauses) dictating that any measure interfering with rights must be "in accordance

that aim would not be achieved."). This view is similar to that adopted by the U.S. Supreme Court in several recent decisions rejecting the least intrusive alternative and proportionality requirements in individual rights adjudication. *See infra* text accompanying notes 391-431.

239. *See* Paust, *supra* note 40, at 29 (international law regulates weapons use in accordance with proportionality principle).

240. *See* Quebec Assoc. of Protestant School Bds. v. A.-G. Quebec (No. 2), 140 D.L.R.3d 33 (Que. S.C. 1983), *aff'd*; 1 D.L.R.4th 573, at 89 (C.A. 1984) (government must "convincingly demonstrate" that "rigour of [challenged measure] is not disproportionate to its purpose").

241. European Convention, *supra* note 10, art. 15(1), at 232.

242. *Id.* art 15(2), at 232.

243. *See* ICCPR, *supra* note 20, art. 4(1), at 174 (when "strictly required" during a "public emergency which threatens the life of the nation," government may derogate from some protected rights); art. 4(2), at 174 (certain rights are absolutely nonderogable, even if this strict necessity test could be met: right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery or involuntary servitude; freedom from imprisonment on ground of inability to fulfil a contractual obligation; freedom from retroactive criminal punishment; right to recognition as person before law; and freedom of thought, conscience, and religion).

with the law." The European Court first construed this phrase in *The Sunday Times Case,*[244] which involved freedom of the press. The Court stated that the phrase comprises two requirements. First, the law must be "accessible:" that is, individuals must have an adequate indication of the legal rules applicable in a given situation.[245] Second, a norm must be formulated with sufficient precision to enable individuals to regulate their conduct; they must be able to foresee the consequences that a given action may entail.[246]

The more a government measure intrudes upon a Convention right, the more precision the European Court will require. In the *Malone* case, for example, the Court held that a high degree of precision was necessary to validate the secret police surveillance measures at issue. It found an article 8 violation because the law did not define the police power with sufficient clarity.[247]

Other international human rights instruments provide analogous limitations on government's power to circumscribe rights. The Universal Declaration of Human Rights, for example, provides that rights "shall be subject only to such limitations as are determined by law."[248] Similarly, the Canadian Charter's general limitations clause provides that any justifiable limitation on a protected right must be "prescribed by law."[249] This language has been equated to the Convention's corresponding phrase, and in construing it, Canadian authorities have relied on the above-described Convention jurisprudence.[250] Accordingly, Canadian courts have nullified laws that grant government authorities broad discretionary powers to limit Charter rights.[251]

244. 30 Eur. Ct. H.R. (ser. A) at 30-31 (1979).

245. *Id.* at 31.

246. *Id.*

247. Malone Case, 82 Eur. Ct. H.R. (ser. A) at 30 (1984).

248. U.D.H.R., *supra* note 22, at 77.

249. Art. 1.

250. *See* Gibson, *supra* note 12, at 43-45.

251. *See Re* Ontario Film & Video Appreciation Soc. & Ontario Bd. of Censors, 147 D.L.R.3d 58, 67 (Ont. H.C. 1983) ("Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law."), *aff'd*, 5 D.L.R.4th 766 (Ont. C.A. 1984). Significantly, the *Ontario Film* court found that the requirement that rights limitations be prescribed by law was not satisfied by written standards contained in pamphlets that the censorship board used to implement the statute and regulations. Although the court acknowledged that these published standards did provide guidance to filmmakers as to how their films would be judged, it stressed that "[t]hey have no legislative or legal force of any kind" and therefore "do not qualify" as the "law" necessary to justify any limitation on Charter rights. *Id.* at 67. This aspect of the decision was approved by the Ontario Court of Appeal in *Reference Re Education Act,* 10 D.L.R.4th 491, 520 (Ont. C.A. 1984). This ruling contrasts starkly with the U.S. Supreme

(6) Limited Deference to Other Government Decisionmakers: Burden of Proof on Government

As an additional component of their judicial process, the Convention organs have accorded decreasing deference to government decisionmakers with respect to either the importance of the interests assertedly promoted by the challenged actions or the efficacy of such actions in promoting these interests. Rather, the European Commission and Court have tended to subject government assertions on such points to increasingly vigorous scrutiny.[252] In short, the government bears the burden of proof regarding its asserted justifications for rights-limiting measures.

The Convention tribunals have stated that national government decisionmakers are entitled to more deference—or, to use their rubric, a wider "margin of appreciation"—regarding certain kinds of decisions that are traditionally consigned to a particular community's power of self-determination. Even with respect to some of these decisions, however, the European Court and Commission have refused to defer to the national government. In both the *Dudgeon* and the *Norris* cases, for example, which invalidated laws proscribing consensual adult male homosexuality, the Court acknowledged that

> the view taken . . . of the requirements of morals varies from time to time and from place to place, especially in our era, [and that] by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements.[253]

Nevertheless, the Court refused in each case to attribute significant weight to the government's determination that consensual adult male homosexuality offended the majority of people in that particular country. Thus, the *Dudgeon* Court acknowledged the "genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law [to legalize such homosexual

Court's ruling in the recent case of Ward v. Rock Against Racism. *See infra* text accompanying notes 409-12.

252. *See* Doswald-Beck, *The Meaning of the "Right to Respect for Private Life" Under the European Convention on Human Rights,* 4 HUM. RTS. L.J. 283, 301-03 (1983). When they first began to function, the Convention organs may well have exercised more self-restraint in order to encroach less on national sovereignty, but as their power has become more firmly entrenched, such self-restraint has become less important for maintaining their legitimacy. *See id.* at 303; Hovius, *supra* note 13, at 261. Courts within a single country should not feel it necessary to exercise self-restraint similar to that practiced in early European Commission and Court rulings, since rulings by domestic courts do not entail any threat to sovereignty. *See id.*

253. Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) at 21 (quoting the Handyside judgment, 24 Eur. Ct. H.R. (ser. A) at 22 (1976)).

activities] would be seriously damaging to the moral fabric of society."[254] It nevertheless ruled that "it is for the Court to make the final evaluation as to whether" the restriction on private activity was justified by the societal moral concern,[255] and it reached a negative conclusion on this issue.[256]

Another example of the European Court's refusal to defer to national determinations, even concerning matters that are generally due a relatively great "margin of appreciation," is afforded by *X & Y v. the Netherlands.*[257] In this case, the national law afforded only a civil remedy for a sixteen year-old mentally retarded girl who had been raped, but did not permit the alleged rapist to be criminally prosecuted. The Court acknowledged that "the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation."[258] The Court further recognized that "[r]ecourse to the criminal law is not necessarily the only answer."[259] Nonetheless, it decided that the civil law remedy was inadequate and required the Netherlands to protect one individual from another's privacy-invading action specifically by enacting criminal sanctions.[260]

The Convention organs' slight deference to government decisionmakers, and their corresponding imposition of a high burden of proof on those decisionmakers, have parallels under other human rights instruments. Canadian courts, for example, have held that the govern-

254. *Id.*

255. *Id.* at 23. A dissenting opinion took issue specifically with this aspect of the majority's analysis. *See id.* at 30-31.

256. *Accord* Norris Case, 142 Eur. Ct. H.R. (ser. A) at 14 (1988) (Court rejected government argument that "the moral fibre of a democratic nation is a matter for its own institutions"). A significant factor in the Court's determination not to grant a wider margin of appreciation to the national moral judgments reflected in the statutes challenged in the Dudgeon and Norris cases was the fact that these statutes severely intruded on "a most intimate aspect of private life." *Id.* at 21.

257. Case of X & Y v. Netherlands, 91 Eur. Ct. H.R. (ser. A) at 12 (1985).

258. *Id.* at 8.

259. *Id.*

260. *Id.* (reasoning that effective deterrence could be achieved only through criminal law measures). For an example of a case where a Convention organ did defer to a government decision of a sort said to be entitled to an especially significant margin of appreciation, see the Case of Abdulaziz, Cabales & Balkanaldi, 94 Eur. Ct. H.R. (ser. A) at 6 (1985) (there should be wider margin of appreciation regarding state's positive obligations under article 8, especially concerning extent of its obligations to admit to its territory relatives of settled immigrants; as well-established international law principle, state has right to control entry of non-nationals into its territory).

ment must bear a substantial burden to justify any encroachment on Charter rights.[261]

The European tribunals' pattern of according less deference to the determinations of other government decisionmakers reflects their tendency to view any challenged decision in a context that is increasingly broad along both temporal and geographic dimensions. The Commission and Court are decreasingly willing to defer to concerns particular to a specific country or moment in time. Instead, they evaluate these concerns in the broader context of evolving, European-wide standards and practices.

(7) Temporal Trends and Actual Enforcement Practice

As one scholar of the European human rights system has observed, the Convention organs refuse to be bound by the original intentions of the Convention framers: "now the Commission and Court principally look at contemporary attitudes."[262] Indeed, another scholar has observed that refusal to take a static view of acceptable government rationales for limiting Convention rights is *consistent* with the framers' intent, which was "to protect the individual against the threats of the future, as well as the threats of the past."[263] This intention is reflected in the preamble to the Statute of the Council of Europe, since it refers not only to the "maintenance" of human rights, but also to their "further realisation."[264] Consistent with this purpose, the Convention tribunals are cognizant of their responsibility not only to resolve the immediate conflict between the parties, but also, "more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them."[265]

The dynamic approach toward interpreting the European Convention is consistent with the interpretive approach toward international

261. *See Re* Southam and the Queen (No. 1) 146 D.L.R.3d 408, 419-20 (Ont. C.A. 1983); Canadian Newspapers Co. v. A.-G. Canada, 16 D.L.R.4th 642, 660-61, 5 C.R.D. 425.20-12 (Ont. C.A. 1984); Quebec Ass. of Protestant School Bds. v. A.-G. Quebec (No. 2), 140 D.L.R.3d 33, 89 (Que. S.C. 1983), *aff'd,* 1 D.L.R.4th 573 (C.A. 1984); *see also* Bender, *supra* note 163, at 679.

262. Doswald-Beck, *supra* note 252, at 287.

263. F. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 18 (1975). Accordingly, he concludes, the general presumption that treaty obligations should be interpreted restrictively does not apply to the Convention; instead, he argues, "the interpretation of the Convention must be 'dynamic' in the sense that it must be interpreted in the light of developments in social and political attitudes." *Id.* at 17-18.

264. Preamble, Statute of the Council of Europe, May 15, 1949, 87 U.N.T.S. 103.

265. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 62 (1978).

human rights treaties generally, as reflected in article 31(1) of the Vienna Convention on the Law of Treaties.[266] This clause provides that a treaty will be interpreted both in accordance with its plain terms "and in the light of its objects and purpose." Commentators have observed that this formulation requires an "evolutive" or "teleological" interpretive technique.[267]

A relatively early example of the European Court's "evolutive interpretation," specifically in the privacy context, is the *Marckx* case.[268] The Court agreed with the Belgian Government's argument that, when the Convention was drafted, many European countries permitted discrimination against children born out of wedlock. Nevertheless, the Court declared that Convention standards would evolve with general European law reform trends, regardless of whether a particular country had altered its own national laws.[269] The *Dudgeon* Court employed a similar analysis. It recognized that homosexual relations had been widely banned throughout the Contracting States when the Convention was adopted.[270] Nevertheless, by the time *Dudgeon* was decided in 1981, there was a general European movement toward decriminalization, which strongly influenced the Court's invalidation of Ireland's remaining ban.[271]

The Convention organs also have considered progressive developments in evaluating restrictions on other privacy rights, including a prisoner's right to marry[272] and transsexuals' rights to change their legal

266. Although the U.S. has not ratified the Vienna Convention, the U.S. may be bound by the Convention's terms on the theory that they reflect customary international law principles. *See supra* note 19.

267. Drzemczewski, *The Sui Generis Nature of the European Convention on Human Rights,* 29 INT'L & COMP. L.Q. 54, 57, 60-61 (1980).

268. *See supra* notes 194-95 and accompanying text.

269. *See* Marckx Case, 31 Eur. Ct. H.R. (ser. A) at 19 (1978). The Court recalled that the Convention is to "be interpreted in the light of present-day conditions"; it could not but be struck, it stressed, by the evolution in the domestic law of the great majority of the Member States towards equality between "legitimate" and "illegitimate" children. *Id.*

270. *Id.* at 23.

271. *See* Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981).

> As compared with the era when [the challenged Northern Ireland] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States . . . it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States . . . .

272. *See* Draper v. United Kingdom, 20 Eur. Comm'n H.R. 72, 78 (1980) (distinguished earlier Commission ruling that refusal to allow prisoner to marry did not violate article 12, because current decision must be based on present-day conditions and there is general trend in

gender identifications.[273] This "evolutive" interpretation characterizes the Commission's and Court's process of enforcing additional Convention rights as well.[274] Additionally, even when the Convention tribunals do not rule that evolving standards warrant the invalidation of a challenged state measure, their opinions still may urge the state to undertake reform. Such suggestions may constitute signals that currently acceptable measures in the future will run afoul of dynamic European human rights standards.[275]

This dynamic temporal facet of the Convention tribunals' legal process, like other facets, is followed by the Canadian courts in enforcing the Charter of Rights and Freedoms. In determining whether challenged rights limitations "can be demonstrably justified *in a free and democratic society,*"[276] as required under article 1, the Canadian courts commonly examine similar measures in other western democracies.[277] Although this article 1 language could have been invoked to automatically uphold any presently or previously sanctioned limitation, it instead has been used to push Canadian law toward progressive reform.[278]

Another feature of the Convention organs' legal process facilitates their enforcement of evolving standards, consistent with progressive, reforming trends: they discern those standards not only by considering the laws that are technically in force, but also by taking into account law enforcement patterns. The Convention tribunals do not assume that con-

European penal systems toward reduction of differences between life in prison and life at liberty, and increasing emphasis on rehabilitation).

273. *See* Rees v. United Kingdom, *reprinted in* 7 Eur. Hum. Rts. Rep. 409, 432-33 (1984) (in distinguishing previous Commission decision that had not recognized transsexual rights, notes changed medical opinion and fact that several member states had recognized sex change rights in interim).

274. *See* Tyrer Case, 26 Eur. Ct. H.R. (ser. A) at 15-16 (1978) (stressed that "the Convention is a living instrument . . . which must be interpreted in the light of present-day conditions," and that it could not "but be influenced by the developments . . . in the penal policy" of other member States regarding corporal punishment); Warbrick, *supra* note 8, at 711 (European Court has adopted "progressive" or "dynamic" approach to Convention interpretation, taking account of changing political, social, and economic circumstances).

275. For example, in the Case of Klass and Others, the European Court upheld the German secret police surveillance system despite its lack of judicial supervision, but stressed that such supervision was preferable. In the subsequent Malone Case, Judge Pettiti's concurring opinion urged the Court to rule squarely that any police interception of communications during a criminal investigation must be judicially authorized. The majority did not address this issue. *See* Hovius, *supra* note 13, at 247 n.159 (Convention organs typically urge states to live up to higher standards even though their present laws or practices do not violate Convention).

276. Art. 1 (emphasis added).

277. *See* Layne v. Reed, 5 C.R.D. 725.300-03 (Ont. C.A. 1984); R. v. Keegstra, 5 C.R.D. 525.100-04 (Alta. Q.B. 1984); *Re* Southam, Inc. and The Queen (No. 1), 146 D.L.R.3d 408 (Ont. C.A. 1984).

278. *See* Gibson, *supra* note 12, at 40.

temporary standards are necessarily reflected by a nation's laws simply because they are in place. Rather, if certain laws are not regularly enforced, the Convention organs may infer that they are inconsistent with contemporary standards. This approach is exemplified by the *Dudgeon* case. In concluding that there was "increased tolerance . . . of homosexual behaviour" throughout the signatory states, the European Court stressed not only that many member states had decriminalized such behavior, but also that "[i]n Northern Ireland itself, the authorities have refrained in recent years from enforcing the law."[279]

(8) Broad Geographic Context

The Commission's and Court's reluctance to consider the asserted government interests of a particular country, in geographic isolation, parallels their reluctance to consider such interests in temporal isolation. A scholar of the European Convention system has observed that "[p]robably the most important factor [influencing the scope of the Convention organs' deference to state decisionmakers] is the existence of a consensus in the law or practice among the Contracting States."[280] The fact that a particular state's practice is less rights-protective than that of other European states will not automatically lead to invalidating the challenged practice.[281] The less protective state, however, must bear a substantial burden of proof, and the more fundamental the right, or the more severe its infringement, the heavier this burden becomes. If some states can manage without certain restrictions, there should be at least a presumption that such restrictions are not "necessary in a democratic society."[282]

The Convention organs' assessment of rights-limiting measures in accordance with evolving, liberalizing trends across Europe as a whole, rather than in accordance with the parochial current judgment of the national government at issue, has the effect of moving all states parties in the direction of rights-enhancing reforms. This is consistent with the Convention's purpose of promoting human rights, rather than merely

279. Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981).

280. Hovius, *supra* note 13, at 257; *see, e.g.*, The Sunday Times Case, 30 Eur. Ct. H.R. (ser. A) at 276 (1979) ("The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. . . . Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.").

281. The Sunday Times Case, 30 Eur. Ct. H.R. (ser. A) at 277 (1979); Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) at 165-66 (1981); *see also* X v. United Kingdom, Application No. 7215/75, *reprinted in* 3 Eur. Hum. Rts. Rep. 63 (1978).

282. Note, *Secret Surveillance and the European Convention on Human Rights,* 33 STAN. L. REV. 1113, 1133 (1981) (authored by G. Griffith).

maintaining them.[283] Thus, while European-wide human rights standards could have been defined in terms of the "lowest common denominator"—only those rights that were universally respected among the Convention signatories—they have in fact been defined in terms of a higher common denominator.

The European Court of Justice apparently shares a similar view of its role in defining those "basic individual rights" that it has held to be implicitly protected by European Community law.[284] As one member of that court explained:

> The Court . . . will be compelled . . . to defer every time to the highest standard of protection, since it is difficult to see how Community law can maintain its authority if it fails to reach a level of protection considered essential in any individual member State. For once, the method of reconciling and levelling will be in an upward direction, that is to say, towards solutions giving the best protection to individual rights.[285]

(9) Actual Evidence of Tangible Harm

As noted above, the Convention organs refuse to defer to government assertions that a rights-limiting measure is justified on the ground of some intangible benefit to public morals.[286] This position is one specific manifestation of another more general process that the Convention organs follow in reviewing any rights restriction: they insist that the government produce actual evidence of some tangible harm expected to result from the right's unfettered exercise. The Convention organs refuse to allow the government to rely on unsubstantiated assertions about any speculative or intangible harm, such as moral offense.[287]

This methodological approach was demonstrated in the *Dudgeon* case. The European Court stressed the absence of "evidence" that the actual "effects" of tolerating homosexual conduct were injurious to the public.[288] Indeed, the Court noted that this assertion was belied by the experience in Northern Ireland itself, where such acts had not been prosecuted in recent years. As the Court noted, "No evidence has been adduced to show that this has been injurious to moral standards in

283. *See supra* text accompanying notes 263-65.

284. *See supra* text accompanying note 186.

285. Pescatore, *supra* note 114, at 79.

286. *See supra* text accompanying notes 223-24 .

287. *See* Warbrick, *supra* note 8, at 724 (European Court's rejection of arguments based on states' original intentions makes it less likely that majority prejudice or conviction in particular region can justify rights restriction).

288. Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) at 24 (1981).

Northern Ireland or that there has been any public demand for stricter enforcement of the law."[289]

Parallel to the European Convention, the Canadian Charter also has been construed as requiring the government to adduce actual facts to justify any rights limitation and as not permitting the government to rely on sheer speculation.[290] This reading is consistent with the wording of the Charter's general limitations clause, which allows only such limitations as "can be *demonstrably* justified."[291]

(10) Good Faith Requirement

Another feature of the European Convention organs' process for reviewing a rights-limiting measure is their demand that the government have a good faith intent to promote its alleged interest through the chosen measure.[292] This good faith factor also appears to be required under the emerging Canadian Charter jurisprudence.[293]

(11) Importance of Government Interest

Article 8 of the European Convention expressly enumerates the particular government interests deemed sufficiently important to justify restrictions on privacy or other rights (assuming the additional criteria for permissible restrictions are also satisfied). Along with other Convention

289. *Id.* Significantly, the judges who dissented from the *Dudgeon* ruling would have imposed different evidentiary standards, allowing the government to rest its asserted justification upon speculation, rather than actual evidence, regarding the societal harm allegedly caused by homosexual activity. *See id.* at 30 (Zekia, J., dissenting) (legalizing homosexual activities "is very likely to cause many disturbances" and thus government is justified in not reforming the law "for the preservation of public peace"); *accord id.* at 34 (Matscher, J., dissenting) (criticizes majority's reliance on lack of evidence that Northern Ireland's failure to prosecute homosexual conduct has injured moral standards).

Similarly, in invalidating Ireland's proscription on male homosexual acts, the Norris Court emphasized that "the Government [has] adduced no evidence which would point to the existence of factors justifying the retention of the impugned laws which are additional to or are of greater weight than those present in the . . . Dudgeon Case." Norris Case, 142 Eur. Ct. H.R. (ser. A) at 15 (1988).

290. *See* Bender, *supra* note 163.

291. Article 1 (emphasis added); *see* Gibson, *supra* note 12, at 46 (this word "seems to have been intended to require more by way of proof of justification than a mere assertion by government or an assumption by the court").

292. *See, e.g.,* Case of Klass & Others, 28 Eur. Ct. H.R. (ser. A), at 231 (1978) (law's actual aim is "indeed" what government asserted it to be).

293. *See* R. v. Big M Drug Mart Ltd., 1 S.C.R. 295, 354 (1985) (purpose of legislation prohibiting certain activities on Sundays was to safeguard public morality); *see also* Gibson, *supra* note 12, at 39 ("good faith" is required to justify rights-limiting measure under Charter; "the means employed must be genuinely intended to advance the intended purpose" (citing Christian, *The Limitation of Liberty: A Consideration of s. 1 of the Charter of Rights and Freedoms,* (1982) U.B.C.L.R. (special *Charter* edition) 105)).

limitations clauses, article 8(2) allows restrictions to promote "the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

This Convention language is similar to language in other international human rights instruments. The ICCPR, for example, sanctions limitations to promote interests in "national security, public order, public health or morals, or the rights and freedoms of others."[294] The ICCPR further provides that some rights may be abridged only to promote an even narrower, even more urgent, class of government interests.[295] The Universal Declaration of Human Rights,[296] the American Convention on Human Rights,[297] and the American Declaration of the Rights and Duties of Man[298] all prescribe similarly limited categories of government interests deemed sufficiently important to justify infringements on protected rights. By contrast, the Canadian Charter does not expressly list the types of interests that may justify rights infringements. Nevertheless, it has been interpreted as permitting such infringements only to advance "substantial or compelling (not merely legitimate)" government interests.[299] Canadian courts have ruled that considerations of government efficiency or convenience are insufficiently important to override Charter freedoms.[300]

294. *See* European Convention, *supra* note 10, art. 23 (liberty of movement and freedom to choose residence); art. 18(3) (religious freedom); art. 21 (right of peaceful assembly); art. 22 (freedom of association).

295. For example, article 8(3)(c)(iii) permits exceptions to the prohibition on involuntary servitude for exacting service in cases of "emergency or calamity threatening the life or well-being of the community." Similarly, article 4(1) permits derogation from some protected rights only in case of a "public emergency which threatens the life of the nation."

296. *See* Universal Declaration of Human Rights, G.A. Res. 217A, 3 U.N. GAOR 71, U.N. Doc. A/810 (1984) art. 29(2) ("[E]veryone shall be subject only to such limitations . . . determined solely for the purpose of securing due recognition and respect for the rights . . . of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.").

297. *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36 at 1, O.A.S. Doc. OEA/ser. L/V/II, 23 doc. 21, ser. 6 (entered into force July 8, 1978), *reprinted in* 9 I.L.M. 99 (1970), art. 16(2) (freedom of association may be restricted only "in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others"); art. 22(3) (rights to move and reside may be restricted only to promote same interests).

298. *See* American Declaration on the Rights and Duties of Man, *signed* May 2, 1948, O.A.S. off. rec. OEA/ser. L/V/II doc. 21, ser. 6 (English 1979) art. XXVIII (The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.).

299. *See* Bender, *supra* note 163, at 679.

300. *See* Singh v. Minister of Employment & Immigration, 58 N.R. 1 14 C.R.R. 13

IV. Legal Process Analysis of Recent Supreme Court Constitutional Rights Jurisprudence

In terms of legal process, the Supreme Court's recent constitutional rights cases are sharply distinguishable from the international human rights trends. Employing the various methodological approaches analyzed above, the European Commission and Court have applied an invigorated standard of judicial review to claimed rights violations. This standard defines protected rights broadly and construes the government's latitude to limit such rights narrowly. By contrast, U.S. Supreme Court decisions increasingly have displayed the opposite tendencies.

These trends in the process facets of U.S. rights jurisprudence, and their divergence from the European developments, were demonstrated graphically by decisions issued during the Court's most recent term. A consistent theme unifying Supreme Court rulings on various constitutional rights during the 1988-89 term was the Court's application of weakened judicial review standards. These standards gave stingy scope to rights and broad deference to government decisions limiting rights. These most recent cases, however, manifest judicial process trends that have been developing over a longer period.

In case after case decided recently by the Supreme Court, a crucial battleground[301] has been not only the particular result that should be

(S.C.C. 1985) (invalidating lack of appeal process for refugee claims where asserted justification was that such appeals would unduly burden government resources):

> I have considerable doubt that [this] type of utilitarian consideration . . . can constitute a justification for a limitation on the rights set out in the *Charter.* Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so.

301. *See* County of Allegheny v. ACLU, 109 S. Ct. 3086, 3098-101 (1989) (major issue is what standard should apply to determination whether government display of religious symbol violates establishment clause); Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3050-53 (1989) (major issue is standard of review applicable to regulations on abortions); Board of Trustees of the State Univ. of N.Y. v. Fox, 109 S. Ct. 3028, 3032 (1989) ("[T]he major issue here [is] the last element of the *Central Hudson* analysis [concerning lawfulness of restrictions on commercial speech]."); Stanford v. Kentucky, 109 S. Ct. 2969, 2979-80 (1989) *reh'g. denied,* 110 S. Ct. 23 (1989) (only relevant issue in reviewing penalty under eighth amendment is whether it is approved by national consensus; rejects argument that, to survive challenge, penalty must be proportionate to defendant's blameworthiness and must make measurable contribution to acceptable goals of punishment); Ward v. Rock against Racism, 109 S. Ct. 2746, 2753 (1989), *reh'g denied* 110 S. Ct. 23 (1989) ("We granted certiorari . . . to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech."); Thornburgh v. Abbott, 109 S. Ct. 1874, 1879 (1989) ("The question here . . . is what standard of review this Court should apply to prison regulations limiting [publishers'] access" to prisoners.); Dallas v. Stanglin, 109 S. Ct. 1591, 1594 (1989) ("The dispositive question in this case is the level of judicial 'scrutiny' to be applied to the city's ordinance [regulating teenagers' associational rights].").

reached on the facts at issue, but more generally, the judicial process that determines the result. The Court must decide which standard of review and analytical or methodological approaches to use.[302] Some Court watchers have been quick to decry the substantive incursions that recent Supreme Court decisions have made on a spectrum of civil liberties.[303] Commentators have been less alert, however, to this more subtle, but ultimately more invidious, aspect of the recent rulings. In many cases, the Court's immediate substantive holdings, in terms of resolving particular factual controversies, were substantially less significant than the processes by which the Court reached such results. The Court's resolutions of process issues will have long-range significance that transcend differing factual contexts and substantive law. This phenomenon was noted in Justice Marshall's dissenting opinion in *Ward v. Rock Against Racism,* [304] which upheld regulations on musical performances in a public park:

> [T]he majority plays to our shared impatience with loud noise to obscure the damage that it does to our First Amendment rights. Until today, a key safeguard of free speech has been government's obligation

302. The significance of the issues concerning methodology, independent of the issues concerning particular factual outcomes, is underscored by the role that Justice O'Connor played in several important cases. In each of these cases, Justice O'Connor wrote a separate concurring opinion in which she rejected the majority's less exacting standards for scrutinizing the challenged government measure and agreed with the dissenters' view that the appropriate degree of scrutiny should be more demanding. Although Justice O'Connor applied the same more rigorous analysis employed by her dissenting Brethren to the facts at issue, she nevertheless arrived at the same result, upholding the challenged measure, that the majority (or plurality) had reached pursuant to a less stringent standard of review. *See, e.g.,* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3060-64 (1989) (O'Connor, J., concurring in part and concurring in judgment) (rejected plurality's alteration of *Roe v. Wade*'s analytical framework for reviewing abortion regulations, but concluded that challenged regulations should be upheld under *Roe* framework); Stanford v. Kentucky, 109 S. Ct. at 2982 (O'Connor, J., concurring in part and concurring in judgment) (agreed with dissent that "proportionality analysis" was essential element of eighth amendment scrutiny, but concluded that juvenile death penalty survived that analysis); Michael H. v. Gerald D., 109 S. Ct. 2333, 2346-47 (1989) *reh'g denied,* 110 S. Ct. 22 (1989) (O'Connor, J., concurring in part) (disagreed with plurality's "mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause," but, applying less rigid historical analysis, agreed with plurality that rights asserted by natural father and daughter to maintain relationship with each other are unprotected); *see also* County of Allegheny v. A.C.L.U., 109 S. Ct. 3086, 3120-24 (1989) (O'Connor, J., concurring in part and concurring in judgment) (agreed with plurality that "endorsement" test is appropriate standard for reviewing government display of religious symbol under the establishment clause of the first amendment, rejecting less strict standard advocated by four dissenters, but disagreed with three dissenters who, applying same stricter standard, concluded that both challenged displays violated the Establishment Clause; O'Connor concluded that menorah display did survive stricter scrutiny).

303. *See, e.g.,* Chemerinsky, *Foreword: The Vanishing Constitution,* 103 HARV. L. REV. 43 (1989); Olsen, *Comment: Unravelling Compromise,* 103 HARV. L. REV. 105 (1989).

304. 109 S. Ct. 2746 (1989).

> to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference.[305]

A. Narrowing Definition of Prima Facie Rights

As analyzed above, the judicial process employed under international human rights instruments, as typified by decisions under the European Convention, defines rights broadly in two respects: first, by including within the prima facie definition of rights a wide range of interests, including those not expressly protected by the governing instrument; and second, by imposing on government affirmative obligations to secure rights against infringements by both governmental and private actors. In both respects, the recent Supreme Court jurisprudence has displayed contrasting legal process developments: the range of unenumerated interests deemed to be protectable rights has been narrowed, and the government has been exempted from any affirmative duty to protect rights, even when the government's actions arguably have reduced the rights in question.

(1) Narrowing Range of Rights Secured

The Supreme Court's 1988-89 term constitutional rights decisions were characterized by the Court's shrinking conception of what interests are sufficiently important to be protected constitutionally as a prima facie matter. In several cases, the Court upheld challenged measures without even reaching the government's asserted justifications for such measures, because it concluded that no constitutionally protected rights were implicated.[306] Dissenting Supreme Court Justices, as well as lower court judges, maintained that what the Court majority dismissed as mere unprotected "interests" in fact constituted "rights" entitled to constitutional protection, at least as a prima facie matter.[307]

The Court's tendency to define narrowly the scope of prima facie protected rights dovetails with its tendency to review rights limitations pursuant to only undemanding judicial review standards. In legal process terms, the most immediate consequence of holding that an asserted

305. *Id.* at 2760 (Marshall, J., dissenting) (joined by Brennan, J. & Stevens, J.). Because Justice Blackmun concurred in the result only, *see id.*, four Justices rejected the majority's analytical approach.

306. *See infra* notes 308-19 and accompanying text.

307. Michael H. v. Gerald D., 109 S. Ct. 2333, 2354 (1989) (Brennan, J., dissenting); Webster v. Reproductive Health Servs., 851 F.2d 1071, 1081 (1988), *rev'd,* 109 S. Ct. 3040 (1989); Dallas v. Stanglin, 744 S.W.2d 165 (Tex. Ct. App. 1987), *rev'd,* 109 S. Ct. 1591 (1989).

right is a mere "interest" is that any government measure restricting its exercise need survive only a low level of judicial scrutiny to be held constitutional. In *Dallas v. Stanglin,* for example, the Court described this "rational-basis scrutiny" as "the most relaxed and tolerant form of judicial scrutiny," noting that "only the invidious discrimination, the wholly arbitrary act" would not survive such a lenient level of review.[308]

The Supreme Court's tendency to define prima facie rights narrowly contrasts with the legal process under the European Convention and other international human rights instruments. This general distinction applies to some of the specific asserted rights that the Supreme Court recently deemed to be unprotected interests. This divergence between U.S. and international law cannot be explained in terms of different language in the governing human rights instruments. Both the U.S. Constitution and international human rights treaties contain ambiguous terms that are subject to more or less expansive interpretation. While the European Convention expressly protects certain privacy rights,[309] this guarantee no more explicitly extends to matters of personal autonomy than does the fourteenth amendment's due process clause, which the Supreme Court has found implicitly to protect some aspects of personal autonomy.[310] Thus, the fact that adults' choice to engage in homosexual sodomy is protected under the Convention's privacy guarantee, but not under the Constitution's due process clause, cannot be justified on the basis of the words in these two provisions.

Interests that a Supreme Court majority or plurality deemed unprotected include the following: a young teenager's interest in associating with older teenagers and adults at a dance hall;[311] the interests of a "natural" father and his daughter in maintaining their relationship with each other;[312] the interest of a homeowner in not having police officers ex-

308. 109 S. Ct. 1591, 1596 (quoting New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976)).

309. European Convention, *supra* note 10, art. 8(1) states: "Everyone has the right to respect for his private and family life, his home and his correspondence." Art. 12 states: "Men and women of marriageable age have the right to marry and found a family . . . ."

310. Roe v. Wade, 410 U.S. 113, 158 (1973); Griswold v. Connecticut, 381 U.S. 479, 485 (1963); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1924).

311. *See* Dallas v. Stanglin, 109 S. Ct. 1591 (1989). The lower court had held this "interest" to be protected by the "freedom of association" implicit in the first amendment and other constitutional guarantees. Dallas v. Stanglin, 744 S.W.2d 165 (Tex. Ct. App. 1987), *rev'd,* 109 S. Ct. 1591 (1989). The Supreme Court in *Stanglin,* however, narrowed the compass of this associational right to include only two specific types of association: intimate human relationships and associations for the purpose of engaging in activities expressly protected by the first amendment—namely, speech, assembly, petition for the redress of grievances, and the exercise of religion. *Stanglin,* 109 S. Ct. at 1594 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984)).

312. Michael H. v. Gerald P., 109 S. Ct. 2333 (1989).

amine his home and surrounding property from a low-flying helicopter;[313] and a woman's interest in terminating her unwanted pregnancy.[314] Under the generous scope that the European Convention tribunals accord to privacy rights, each of these interests probably would be deemed protected, at least as a prima facie matter.[315] Moreover, prior Supreme Court cases had suggested that each of these unprotected "interests" were actually constitutionally protected rights.[316] Such a classification would not preclude the government from imposing limitations, but the limitations would have to survive a more invigorated form of judicial review to be sustained.

The Court's proclivity toward defining narrowly the scope of protected rights is illustrated by the plurality opinion in *Michael H. v. Gerald D.*[317] The plurality ruled that a natural father did not have any constitutionally protected interest in maintaining his previously initiated relationship with his child when the child's mother had been married to and cohabiting with another man at the time the child was conceived and born. The plurality held that the fourteenth amendment's due process clause did not protect this particular type of father-child relationship. The dissenters urged that the relevant right should be viewed more broadly as that of maintaining any natural parent-child relationship, and that this traditionally protected general right should subsume even relatively unconventional factual variations.[318] Consistent with its narrow

313. Florida v. Riley, 109 S. Ct. 693 (1989).

314. Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

315. *See supra* text accompanying notes 164-207.

316. Regarding the asserted right to social association that *Stanglin* rejected, see Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("right to freely associate is not limited to 'political' assemblies in the customary sense, but includes associations that 'pertain to the *social,* legal, and economic benefit' of citizens") (emphasis added). Concerning the unmarried father's claimed right to a relationship with his child that *Michael H.* rejected, see Lehr v. Robertson, 463 U.S. 248, 267 (1983) (father's biological link, combined with substantial parent-child relationship, guarantees him constitutional stake in ongoing relationship); Caban v. Mohammed, 441 U.S. 380, 393-94 (1979) (same); Quilloin v. Walcott, 434 U.S. 246, 255-56 (1978) (same); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972). Respecting the asserted right to remain free from police surveillance of domiciles from low-flying helicopters, which *Riley* rejected, see Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Camara v. Municipal Court, 387 U.S. 523, 528 (1967); Schmerber v. California, 384 U.S. 757, 767 (1966); Boyd v. United States, 116 U.S. 616, 630 (1886). Finally, regarding a woman's asserted right to choose an abortion that *Webster* rejected, see Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 426-27 (1983); Roe v. Wade, 410 U.S. 113, 152-56 (1973).

317. 109 S. Ct. 2333, 2341-46 (1989).

318. *See id.* at 2350-51 (Brennan, J., dissenting) (if such narrow, fact-specific approach had been used in past cases, Court would not have found fundamental rights in cases such as Griswold v. Connecticut, 381 U.S. 479 (1965), and Stanley v. Illinois, 405 U.S. 645 (1972)).

focus, the plurality opinion viewed the due process clause as protecting only "the unitary family," which it defined largely in terms of traditional marital relationships.[319] In so ruling, the plurality stressed the traditional common law "aversion to declaring children illegitimate, . . . thereby depriving them of rights of inheritance and succession."[320] The plurality summarily concluded that neither natural parents nor their children have a constitutionally cognizable right to maintain relationships with each other. The Court further intimated that children born out of wedlock may have fewer legal rights than other children. In all of these respects, the Supreme Court departed from rulings of the European Commission and Court, which have steadfastly protected the rights of children born out of wedlock, including their rights to relationships with their natural parents and other relatives.[321]

In what is probably the most controversial ruling of the 1988-89 Term, the Court in *Webster v. Reproductive Health Services*[322] significantly curtailed a woman's right to choose an abortion, which *Roe v. Wade*[323] had deemed to be a fundamental right. Only Justice Scalia expressly said that *Roe* should be overturned,[324] and Chief Justice Rehnquist's plurality opinion purported merely to narrow, rather than to overturn, *Roe.*[325] However, in Part II(D) of the plurality opinion, which was joined by Justices White and Kennedy, the Chief Justice ruled in effect that a woman has no fundamental right to choose an abortion by characterizing that right as a mere "liberty interest."[326]

The plurality's devaluation of the woman's recognized fundamental right to reproductive choice was underscored by their assessment of the challenged regulation pursuant to a rational basis test.[327] As Justice Blackmun noted in dissent, "[This] standard completely disregards the irreducible minimum of *Roe*: . . . that a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy."[328] For these reasons, notwithstanding the plurality's disclaimer that *Roe*

319. *See id.* at 2353 (Brennan, J., dissenting).

320. *Id.* at 2343.

321. *See supra* text accompanying notes 194-95 (discussing *Marckx* Case).

322. 109 S. Ct. 3040 (1989).

323. 410 U.S. 113 (1973).

324. *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring in part and concurring in judgment).

325. *Id.* at 3058.

326. *Id.*

327. *See id.* at 3057 (challenged regulations should be upheld because they "permissibly furthered" state's interest in potential fetal life).

328. *See id.* at 3076 (Blackmun, J., concurring in part and dissenting in part); *see also id.* at 3077 (refers to majority's level of review as "non-scrutiny").

was essentially "undisturbed" by their ruling,[329] both Justice Scalia[330] and Justice Blackmun[331]—whose opinion was joined by Justices Brennan, Marshall, and Stevens—agreed that the plurality had effectively overruled *Roe*. Thus, the scope of the implied privacy right has been substantially contracted. At best, a woman's right of reproductive choice has been markedly curtailed.[332] At worst, *Webster* may augur an even more significant contraction of the constitutional privacy right.[333] Certainly the plurality's invitation to future litigants to further narrow the scope of *Roe*'s holding[334] does not bode well.

In truncating the scope of the implied constitutional privacy right, *Webster* is consistent with the Supreme Court's immediately preceding decision on this issue, *Bowers v. Hardwick*.[335] *Bowers* held that constitutionally protected privacy does not encompass homosexual sodomy between consenting adults in a home.[336] *Bowers* is thus squarely inconsistent with the European Court's rulings in the *Dudgeon* and *Norris* cases.[337]

329. *Id.* at 3058.

330. *Id.* at 3069 (Scalia, J., concurring in part and concurring in judgment).

331. *Id.* at 3077 (Blackmun, J., concurring in part and dissenting in part).

332. As Justice Blackmun declared in dissent:

> At every level of its review [including] its intended evisceration of precedents and its deafening silence about the constitutional protections that it would jettison, the plurality obscures the portent of its analysis. With feigned restraint, the plurality announces that its analysis leaves *Roe* "undisturbed," albeit "modif[ied] and narrow[ed]." . . . But 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, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman's right . . . to terminate a pregnancy free from the coercive and brooding influence of the State . . . *Roe* would not survive the plurality's analysis, and . . . the plurality provides no substitute for *Roe*'s protective umbrella.
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> . . . .
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> . . . . Thus, "not with a bang, but a whimper," the plurality discards a landmark case of the last generation, and casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children.

Id. at 3076-77 (Blackmun, J., dissenting).

333. *See id.* at 3081-82 (Stevens, J., concurring in part and dissenting in part) (plurality's opinion is inconsistent with *Griswold v. Connecticut*, which protected right to use contraception as aspect of implied privacy right); *see also id.* at 3078 (Blackmun, J., concurring in part and dissenting in part) ("[T]he plurality pretends that it leaves *Roe* standing, and refuses even to discuss the real issue underlying this case: whether the Constitution includes an unenumerated right to privacy that encompasses a woman's right to decide whether to terminate a pregnancy.")

334. *See id.* at 3058.

335. 478 U.S. 186 (1986).

336. *Id.* at 191.

337. *See supra* note 184 and accompanying text.

(2) Government's Lack of Affirmative Obligation to Protect Rights

One of the Court's 1988-89 term decisions emphatically underscores its resolute position that the Constitution imposes no affirmative duty on government to safeguard any individual rights—even the paramount right to life itself—from interference. Instead, in *DeShaney v. Winnebago County Department of Social Services,* [338] the Court stressed that the Constitution forbids the government only from itself taking direct action that invades individual rights. In *DeShaney,* the Court ruled specifically that the fourteenth amendment's due process clause provided no cause of action against a state agency for failing to protect a young boy from his abusive father, even though various individuals repeatedly had reported past instances of the father's abusiveness to the agency.[339] The majority stated that the purpose of the due process clause "was to protect the people from the State, not to ensure that the State protected them from each other."[340] The Court also reiterated past holdings that the fifth and fourteenth amendment due process clauses "generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[341]

As the *DeShaney* dissenters pointed out, the state government had undertaken various affirmative actions that arguably made abused children worse off than they would have been absent these government measures.[342] At the very least, the dissenters reasoned, the state's creation of a system for dealing with child abuse imposed on it a corresponding duty to carry out its responsibilities under this system in a non-negligent fashion.[343] The state had centralized all responsibility for investigating reported instances of child abuse, and securing any necessary judicial remedies, in the Department of Social Services (DSS). Any other government bodies, doctors, or other individuals with a duty to report possible child abuse cases were required to channel their reports to the DSS, which had the sole responsibility for investigation and seeking possible remedies.[344] As the dissenting opinion observed:

338. 109 S. Ct. 998, 1003 (1989).

339. *Id.* at 1007.

340. *Id.* at 1003.

341. *Id.* (citing Harris v. McRae, 448 U.S. 297, 317-18 (1980)) (government has no obligation to fund abortions even though it funds childbirth, and even though woman has constitutional right to choose abortion over childbirth, with which government may not directly interfere).

342. *Id.* at 1012.

343. *Id.*

344. *Id.* at 1010.

> Wisconsin's child-protection program thus effectively confined [the abused son] within the walls of [his father's] violent home until such time as DSS took action to remove him. Conceivably, then, [abused] children . . . are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs.[345]

The Court's view that the government has no constitutional obligation to confer any aid, even when necessary to protect constitutionally secured rights, was also conveyed in its *Webster* decision. The *Webster* plurality made this point in upholding Missouri statutes that forbade any public employee to perform or assist an abortion, and which also forbade any public facility to be used for the purpose of performing or assisting an abortion, unless the abortion was necessary to save the mother's life. The majority reasoned that, by enacting these statutes, the state left "a pregnant woman with the same choices as if [it] had chosen not to operate any public hospitals at all," and that these statutes restricted a woman's ability to obtain an abortion only due to *her* action, that is, her choice to use a physician affiliated with a public hospital.[346] The Court's characterization of the government as having taken no affirmative action to thwart individual rights, however, was as inaccurate in *Webster* as it was in *DeShaney*; in both cases, individuals were more vulnerable to deprivation of fundamental rights as a result of the challenged government policy than they would have been absent government programs. In *Webster,* this result followed from the state's broad definition of "public" facilities, which in effect largely proscribed doctors in private practice from performing privately funded abortions at private institutions.[347] Thus, as

345. *Id.* at 1011 (Brennan, J., dissenting); *see also id.* at 1012:

> My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it. Today's opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to prevent . . . I cannot agree that our Constitution is indifferent to such indifference . . . .

346. *Webster*, 109 S. Ct. at 3052.

347. The Missouri statute defined "public facility" as "any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof." MO. REV. STAT. § 188.200(2) (1986); *see Webster,* 109 S. Ct. at 3068 n.1 (Blackmun, J., concurring in part and dissenting in part):

> [T]he State not only has withdrawn from the business of abortion, but has taken affirmative steps to assure that abortions are not performed by *private* physicians in *private* institutions. Specifically, . . . the Missouri statute prohibits the performance of abortions in institutions that in all pertinent respects are private, yet are located on property owned, leased, or controlled by the government. Thus, . . . no abortion may be performed at Truman Medical Center in Kansas City . . . even though the Center is a private hospital, staffed primarily by private doctors, and administered by a pri-

Justice Blackmun's dissent explained, the state's affirmative enactment left "the pregnant woman with far fewer choices [than if the state had not chosen to operate any public hospitals], or, for those too sick or too poor to travel, perhaps no choice at all."[348]

This negative rights-defining aspect of the Supreme Court's judicial process sets it apart from the international human rights trend, as exemplified by the European Convention tribunals. The latter consistently have recognized government's affirmative obligations to facilitate the exercise of individual rights, even to the extent of requiring the government to protect against private interferences.[349] Moreover, this tendency cannot be explained in terms of the express language of the international human rights instruments. The European Convention's privacy guarantee, for example, as distinguished from the privacy guarantees in other international human rights instruments, does not explicitly impose affirmative rights-protective responsibilities on the states parties. Nevertheless, the Convention tribunals have interpreted this provision as implicitly creating such responsibilities.[350]

B. Expanding Construction of Permissible Government Limits on Prima Facie Rights

The Supreme Court's recent tendency to circumscribe individual liberties by narrowing its definition of rights subject to prima facie protection is compounded by a series of analytical approaches that weaken the degree of scrutiny applied to rights-restricting measures. Throughout its 1988-89 Term, the Court employed these approaches in numerous cases concerning a wide range of individual freedoms. The Court consistently refused to apply strict or even "heightened" scrutiny to government deprivations of liberty.[351] Instead, it accorded strong deference to executive

vate corporation: the Center is located on ground leased from a political subdivision of the State.

As Justice O'Connor recognized, Missouri could try to enforce its public facilities ban against private institutions that used public water and sewage lines, or that leased state-owned equipment or land. She acknowledged that these and other potential applications of the public facilities ban could be unconstitutional, but declined to hold the provision facially unconstitutional. *Id.* at 3059 (O'Connor, J., concurring in part and concurring in judgment).

348. *Id.* at 3068 n.1 (Blackmun, J., concurring in part and dissenting in part).

349. *See supra* text accompanying notes 187-207.

350. *See supra* text accompanying notes 190-93.

351. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 530-32 (3rd ed. 1986) (under rational relationship test, Court asks only whether it is conceivable that classification bears rational relationship to governmental end that is not prohibited by Constitution; under strict scrutiny, Court requires close relationship between classification and promotion of compelling government interest; under intermediate, or heightened scrutiny, Court requires classification to be substantially related to important government objective).

and legislative branch decisionmakers and consistently upheld laws granting them wide discretion, notwithstanding that such discretion could be—or, indeed, had been—used to limit individual rights.

The Court routinely asserted that it was not reversing prior decisions that had subjected rights deprivations to more exacting levels of scrutiny.[352] It in fact, however, significantly limited and in effect overruled much prior precedent. Often, the Court achieved this result by relying on dicta,[353] distinguishable cases,[354] concurring opinions,[355] or

352. *Compare Webster,* 109 S. Ct. at 3058 ("This case . . . affords us no occasion to revisit the holding of *Roe* . . . and we leave it undisturbed) *with id.* at 3064 (Scalia, J., concurring in part and concurring in judgment) (plurality opinion "effectively would overrule *Roe v. Wade*") *and id.* at 3078 (Blackmun, J., concurring in part and dissenting in part) ("plurality pretends that it leaves *Roe* standing"); *compare Stanford,* 109 S. Ct. at 2975 n.1 ("we . . . reject[ ] the contention . . . that the sentencing practices of other countries are relevant [to eighth amendment analysis]") *with id.* at 2985 (Brennan, J., dissenting) ("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."); *compare Ward,* 109 S. Ct. at 2757 ("[W]e reaffirm today that a regulation of the time, place, or manner of protected speech . . . need not be the least-restrictive . . . means of [serving government interest].") *with id.* at 2760 (Marshall, J., dissenting) ("Until today, a key safeguard of free speech has been government's obligation to adopt the least intrusive restriction necessary to achieve its goals.").

353. *See* Florida v. Riley, 109 S. Ct. 693, 699 (1989) (Brennan, J., dissenting):

> The Court holds today that police officers need not obtain a warrant . . . before circling in a helicopter 400 feet above a home in order to investigate what is taking place behind the walls . . . . [T]he opinion relies almost exclusively on the fact that the police officer conducted his surveillance from a vantage point where, under applicable Federal Aviation Administration regulations, he had a legal right to be . . . .

See also id. at 700:

> In *California v. Ciraolo* . . . we held that whatever might be observed from the window of an airplane flying at 1000 feet could be deemed unprotected by any reasonable expectation of privacy. That decision was based on the belief that airplane traffic at that altitude was sufficiently common that no expectation of privacy could inure in anything on the ground observable with the naked eye from so high. . . . Seizing on a reference in *Ciraolo* to the fact that the police officer was in a position "where he ha[d] a right to be," . . . today's plurality professes to find this case indistinguishable . . . .

354. *See Ward,* 109 S. Ct. at 2761 n.1 (Marshall, J., dissenting):

> The majority's reliance on *Renton v. Playtime Theatres, Inc.* . . . is unnecessary and unwise. That decision dealt only with the unique circumstances of "businesses that purvey sexually explicit materials" . . . . Today, for the first time, a majority . . . applies *Renton* analysis to a category of speech far afield from that decision's original limited focus. Given the serious threat to free expression posed by the *Renton* analysis, . . . its broad application may encourage widespread official censorship.

See also National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1398 (1989) (Scalia, J., dissenting):

> Until today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment . . . . Today, in *Skinner,* we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court's opinion there because [of] the demonstrated frequency of drug

even dissenting opinions[356] from past cases. In these ways, the Court doubly camouflaged the extent of the new restrictions it imposed on individual rights. Not only is language regarding modes of analysis or methodology of review relatively unlikely to draw attention—in contrast with language setting out the actual holdings regarding the specific facts presented—but this analytical or methodological language appears particularly unexceptionable if it purports merely to follow established precedent. The Court's understated, process-oriented method of making significant substantive changes in constitutional law was indicted in Justice Blackmun's *Webster* dissent:

> 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," . . . . But 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 . . . .
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> Thus, "not with a bang, but a whimper," the plurality discards a landmark case of the last generation.[357]

As noted above, the Court's decreasingly strict scrutiny of rights-limiting measures is a logical corollary of its tendency to construe the scope of prima facie protected rights narrowly. The most significant judicial process consequence of deeming an asserted right to be merely an "interest" is that government limitations on the right or interest are reviewed only under the most lenient test, rather than a more vigorous form of judicial scrutiny.[358] Thus, in *Dallas v. Stanglin,* where the Court expressly held that the young teenagers' asserted right to associate with older teenagers and adults was not protected by the first amendment's implied freedom of association, it explicitly reviewed the challenged re-

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> and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm . . . . I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely.

355. *See* Skinner v. Railway Labor Executives' Ass'n., 109 S. Ct. 1402, 1414 (1989) (cites prior concurring opinion for proposition that exceptions to fourth amendment's warrant and probable cause requirements are permissible "when 'special needs, beyond the normal need for law enforcement, make [these requirements] impracticable' ").

356. *See Ward*, 109 S. Ct. at 2753 (cites prior dissenting opinion for proposition that municipality that owns performance facility may exercise proprietary right to select performances and control their quality); *id.* at 2755 (cites prior dissent for proposition that regulations of expression may be facially challenged only in "extraordinary" circumstances).

357. *Webster*, 109 S. Ct. at 3067, 3077 (Blackmun, J., concurring in part & dissenting in part).

358. *See supra* note 306 and accompanying text.

strictions on such association pursuant to a "rational basis" or minimal scrutiny test.[359]

The Court's lenient form of scrutiny was not reserved to cases in which it had expressly ruled the asserted right to be an unprotected "interest." Rather, even with respect to rights concededly within the scope of constitutional guarantees, the Court reviewed and upheld government limitations under a relatively undemanding standard of review. This pattern was evidenced most strikingly in several cases concerning limitations on speech. The first amendment right to free speech traditionally has been viewed as a "preferred freedom," with the consequence that any infringements on it are subject to the most exacting judicial scrutiny.[360] Nevertheless, in several speech cases decided during its 1988-89 term, the Court jettisoned crucial elements of this traditional strict scrutiny.[361]

The Supreme Court's deferential posture toward other government branches sets it apart from international human rights tribunals, such as the European Commission and Court. The Convention tribunals have accorded increasingly narrow "margins of appreciation" to determinations by government officials and instead have subjected those determinations to increasingly invigorated scrutiny.[362] With respect to each element of this more penetrating scrutiny, the Supreme Court has employed a contrastingly undemanding judicial process.

(1) Rejection of Necessity Standard

A key element of strict judicial scrutiny, which the European Commission and Court zealously enforce, is the demand that a government

359. *See Stanglin,* 109 S. Ct. at 1594 ("[I]t need only be shown that [challenged laws] bear 'some reasonable relationship to a legitimate state purpose.' ") (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973)); *see also id.* at 1596 ("only the invidious discrimination, the wholly arbitrary act . . . cannot stand" under rational basis scrutiny) (quoting New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976)).

360. *See* McKay, *The Preference for Freedom,* 34 N.Y.U. L. REV. 1182, 1184 (1959) ("[F]reedom of expression is so vital in its relationship to the objectives of the Constitution that inevitably it must stand in a preferred position."); Spece, *Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study,* 21 ARIZ. L. REV. 1049, 1062-67 (1979) (nature of right is an important factor in determining appropriate standard of judicial review).

361. *See* Board of Trustees of the State Univ. of N.Y. v. Fox, 109 S. Ct. 3028, 3032-33 (1989) (regulation on commercial speech need not be least restrictive means for advancing government end); Ward v. Rock Against Racism, 109 S. Ct. 2746, 2757 (1989) (time, place, or manner regulation of protected speech need not be least restrictive means of serving government interest); Thornburgh v. Abbott, 109 S. Ct. 1874, 1880-81 (1989) (prison may generally censor inmates' correspondence and receipt of publications without adhering to least intrusive alternative principle; this limitation applies only to outgoing personal correspondence).

362. *See supra* text accompanying notes 252-61.

measure limiting individual rights be *necessary* for promoting the government's countervailing interest.[363] By contrast, the Supreme Court has recently upheld rights-abridging measures that were clearly not necessary to advance the asserted government ends, but rather were at most reasonable or desirable.

During the Court's latest term, this aspect of its legal process first appeared in two decisions upholding mass drug testing programs. Under these programs, individuals were subjected to highly intrusive searches and seizures; they had to submit blood and urine samples for government inspection. These programs lacked both of the usual prerequisites for constitutional searches and seizures: judicially authorized warrants and probable cause (or at least some other level of individualized suspicion) to believe that each individual subjected to the invasive procedure had committed a crime, or was about to do so. In the first of these two cases, *Skinner v. Railway Labor Executives' Association,* [364] the Court said that exceptions to the usual fourth amendment requirements can be made when "special" government needs make them "impracticable."[365] As Justice Marshall noted in dissent, "The process by which a constitutional 'requirement' can be dispensed with as 'impracticable' is an elusive one."[366] Nevertheless, seven Justices concurred in this approach in upholding regulations requiring railroads to conduct drug tests after certain major train accidents.

In the companion case of *National Treasury Employees Union v. Von Raab,* [367] four dissenting Justices specifically questioned the majority's expansion of the "impracticability" rationale for abandoning fourth amendment protections.[368] In *Von Raab,* the challenged drug-screening program required urinalysis tests of all Customs Service employees who held or sought positions that directly involved drug interdiction, or which required carrying firearms or handling "classified" material.[369] As the majority recognized, this program "was not implemented in response to any perceived drug problem among Customs employees," and it had "not led to the discovery of a significant number of drug users."[370] Although Justices Scalia and Stevens had joined the majority opinion in

363. *See supra* text accompanying notes 211-13.

364. 109 S. Ct. 1402 (1989).

365. *Id.* at 1414.

366. *Id.* at 1423 (Marshall, J., dissenting).

367. 109 S. Ct. 1334 (1989).

368. *Id.* at 1398-1402 (Marshall, J., joined by Brennan, J., dissenting; Scalia, J., joined by Stevens, J., dissenting).

369. *Id.* at 1388.

370. *Id.* at 1394.

Skinner, they were unwilling to extend the newly-minted "impracticality" exception to the fourth amendment's individualized suspicion requirement to the *Von Raab* situation. As distinguished from the *Skinner* scenario, in *Von Raab* the government had made no showing that the testing program was causally related to ameliorating some actual drug problem or was even necessary.[371] Consequently, the four dissenters concluded, the Customs Service testing program imposed a "needless indignity" on "vast numbers of public employees."[372]

The Supreme Court's abandonment of the necessity standard was a consistent theme in its 1988-89 term decisions regarding other rights, in addition to those protected by the fourth amendment. This aspect of the Court's judicial process also characterized its decisions concerning the eighth amendment right to be free from cruel and unusual punishments,[373] the free speech rights of prisoners and those who seek to communicate with them,[374] a woman's right to choose an abortion,[375] the government's power to impose "time, place, and manner" restrictions on speech or expressive conduct,[376] and the government's power to regulate commercial speech.[377]

371. *See id.* at 1398 (Scalia, J., dissenting):

> I joined the Court's opinion [in *Skinner*] because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

372. *Id.* at 1400-01.

373. *See* Stanford v. Kentucky, 109 S. Ct. 2969, 2979 (1989) (rejected notion that death penalty imposed on individual who was under 18 at time of offense must be shown to promote societal goal of retribution or deterrence).

374. *See* Thornburgh v. Abbott, 109 S. Ct. 1874, 1876, 1883 (1989) (regulations restricting prisoners' receipt of incoming materials will be upheld so long as "reasonably related to legitimate penological interests"; prison may exclude materials even if not "likely" to lead to violence, so long as warden determines that they create "intolerable risk of disorder").

375. *See* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3055 (1989) (upheld requirement that doctors perform tests to determine fetal viability for any abortion performed at or after 20 weeks gestational age on ground that "these tests permissibly further the State's interest in protecting potential human life," although it was undisputed that viability was scientifically impossible at 20 weeks and many prescribed tests would endanger health of both fetus and mother).

376. *See* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2758 (1989) (so long as regulation not "substantially broader than necessary" to achieve government interest, it will not be invalidated simply because government's interest could be served adequately by narrower measure).

377. *See* Board of Trustees of the State Univ. of N.Y. v. Fox, 109 S. Ct. 3028, 3035 (1989) (commercial speech may be subject to regulations that may exceed what is necessary to serve government interest).

The Court's decision in *Stanford v. Kentucky*[378] vividly illustrates its abandonment of the necessity element of strict scrutiny. *Stanford* rejected a challenge to the imposition of the death penalty on individuals who were juveniles when they committed the crimes in question. In repudiating the contention that the juvenile death penalty should be invalidated unless it could be shown to advance a legitimate penological goal, the Court went much further than eschewing the requirement that the state's chosen means be *necessary* to promote its asserted ends. Rather, the Court refused to enforce a requirement that the state demonstrate *any* degree of means to end connection whatsoever.[379] Specifically, it said that evidence concerning the inefficacy of the juvenile death penalty in promoting penological goals would be relevant only if the evidence established conclusively that there was absolutely *no* means to end connection.[380] The Court thus applied the lowest level of scrutiny applicable to a government measure, the "rational basis" or "minimal rationality" test, although it did not expressly acknowledge that it was doing so.

(2) De-emphasis of Democratic Society Context

As noted above, the European Convention organs interpret the necessity requirement in the context of a democratic society.[381] They have declared that "hallmarks" of such a society are tolerance and pluralism.[382] The European Court's application of these criteria to homosexual conduct was a significant factor leading it to invalidate laws criminalizing such conduct in the *Dudgeon* and *Norris* cases.[383] The U.S. Supreme Court, by contrast, invoked no such benchmarks when it sustained a similar law in *Bowers v. Hardwick.*[384] Indeed, the majority and

378. 109 S. Ct. 2969 (1989).

379. *Id.* at 2979.

380. *See id.*:

> We also reject petitioners' argument that we should invalidate [the juvenile death penalty] on the ground that it fails to serve the legitimate goals of penology. According to petitioners, it fails to deter because juveniles, possessing less developed cognitive skills than adults, are less likely to fear death; and it fails to exact just retribution because juveniles, being less mature and responsible, are also less morally blameworthy . . . . If . . . evidence could conclusively establish the entire lack of deterrent effect and moral responsibility . . . the Equal Protection Clause . . . would invalidate these laws for lack of rational basis . . . . But . . . it is not demonstrable that no 16-year-old is "adequately responsible" or significantly deterred. It is rational, even if mistaken, to think the contrary.

381. *See supra* text accompanying notes 219-29.

382. *See supra* text accompanying notes 219-27.

383. *See supra* text accompanying notes 222-24, 253-56.

384. 478 U.S. 186 (1986).

concurring opinions in *Bowers* have been criticized for subverting both tolerance and pluralism.[385]

During the Court's most recent term, its relatively intolerant, nonpluralistic view of the interests and relationships that are sufficiently important to be deemed protected by the due process clause was manifested in *Michael H. v. Gerald D.*[386] The plurality repeatedly intimated adverse moral judgments against the petitioner, who had fathered a child during an adulterous relationship with a woman then still living with her husband. The plurality's characterization of this relationship as "extraordinary"[387] infected its constitutional analysis resulting in due process protection for only those interests or relationships that have been traditionally and historically protected under law.[388] Justice Brennan's dissent took the plurality to task for "ignor[ing] the kind of society in which our Constitution exists," which is characterized by tolerance and pluralism.[389] He stated:

> We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies . . . . In a community such as ours, "liberty" must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.[390]

(3) Rejection of Least Intrusive Alternative Requirement

Closely related to the Court's increasing refusal to demand that rights-limiting measures be necessary to promote a government interest is its growing refusal to require that the government promote an interest through the measure that least restricts individual rights.[391] In six 1988-89 Term decisions, involving a range of first and fourth amendment free-

385. *See id.* at 215 (Blackmun, J., dissenting); *see also* Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection,* 55 U. CHI. L. REV. 1181 (1988).

386. 109 S. Ct. 2333 (1989).

387. The plurality expressed its negative moral judgment on the relationships in question when it stated, "The facts of this case are, *we must hope,* extraordinary." *Id.* at 2337 (emphasis added).

388. *See id.* at 2341-42.

389. *Id.* at 2350.

390. *Id.* at 2357 (Brennan, J., dissenting); *cf.* United States v. Sokolow, 109 S. Ct. 1581, 1588, 1590 (1989) (Marshall, J., dissenting) (criticized majority for permitting law enforcement officials to conduct searches and seizures based solely on "imprecise stereotypes of what criminals look like," or on "irrelevant personal characteristics, such as race"; majority repeatedly alluded to defendant's unusual attire as apparent justification for search and seizure).

391. A variation on this standard requires the government to employ a *less* restrictive alternative, even if not the *least* restrictive one. *See supra* note 230.

doms, the Court expressly repudiated the least restrictive alternative requirement which it had previously enforced in these contexts. In this respect as well, the Supreme Court's judicial process is sharply distinguished from that employed by the European Convention organs and other international human rights tribunals. the least intrusive alternative requirement appears to be a universally enforced prerequisite for sustaining any rights limitation under international law, just as it was until recently under American law.[392]

In the *Skinner* case, which upheld mass drug testing of railroad employees, the Court relegated to a footnote its dismissal of "less drastic and equally effective means" for addressing the government's safety concerns, including training supervisory personnel to detect drug-impaired employees.[393] The majority cited previous fourth amendment cases in which it had declined to hold particular searches and seizures unreasonable on the ground that the government could have pursued its objectives through a less intrusive alternative measure.[394] The Court, however, never before had rejected categorically the less intrusive alternative analysis as an element of fourth amendment reasonableness. Moreover, the Court previously had *enforced* this requirement with respect to the few categories of searches that—like those at issue in *Skinner*—it had authorized on less than probable cause.[395] In addition, as the dissent noted, the *Skinner* majority countenanced "needlessly intrusive" aspects of the challenged testing process, which did not advance the government's asserted interest at all.[396] Specifically, the government conceded that the mandated urine tests, in contrast with the required blood tests, do not measure current impairment and therefore are wholly irrelevant to the government's safety goals.[397] Thus, by sanctioning such tests, the Court not only failed to require the government to use less or the least intrusive means for pursuing its end, but to the contrary permitted the government

392. *See supra* text accompanying notes 231-34.

393. *Skinner,* 109 S. Ct. at 1419 n.9.

394. *Id.*

395. *See, e.g,* New Jersey v. T.L.O., 469 U.S. 325, 343 (1985) (in holding that school officials could search student property on basis of "reasonable suspicion"—as distinguished from "probable cause"—that law or school rule had been violated, Court said students' privacy should be "invaded no more than is necessary"). For a comprehensive survey of the Supreme Court's rulings concerning the least intrusive alternative test in fourth amendment cases, see Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis,* 63 N.Y.U. L. REV. 1173, 1215-31 (1988).

396. *Skinner,* 109 S. Ct. at 1432 (Marshall, J., dissenting).

397. *Id.* at 1421.

to use "wholly excessive" means that did not promote its end in the slightest.[398]

The Supreme Court has recognized that the fourth amendment's requirement that any search or seizure be "reasonable" comprises two separate facets: the search or seizure must be reasonable in its inception—the government must have "probable cause" or some other specific justification for undertaking it—and it must also be reasonable in its execution.[399] Some Supreme Court precedents have indicated that the least intrusive alternative criterion should be a required element of both types of reasonableness.[400] The *Skinner* decision, however, refused to enforce the least restrictive alternative requirement as a prerequisite for finding a search or seizure reasonable in its inception.

In *United States v. Sokolow,*[401] the Court similarly declined to enforce the least restrictive means test as a requirement for finding a search or seizure reasonable in its execution. In *Florida v. Royer,*[402] the Court had held that an "investigative detention" (law enforcement officials' seizure of an individual for purposes of investigating some suspicion when they lack the "probable cause" required to arrest) violated the fourth amendment because it did not comply with the precept that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[403] The *Sokolow* majority, however, refused to apply this precept to the investigative detention at issue in that case and reinterpreted the quoted statement from *Royer* as having been "directed at the length of the investigative stop, not at whether the police had a less intrusive means to verify their suspicions."[404]

398. *See id.* at 1432 (Marshall, J., dissenting).

399. *See* Tennessee v. Garner, 471 U.S. 1, 8 (1985).

400. For an example of a case imposing the least intrusive alternative requirement as a prerequisite for finding that a search was reasonably initiated, see Delaware v. Prouse, 440 U.S. 648, 659 (1979). For an example of a case imposing this requirement as a prerequisite for finding that a search was reasonably executed, see Florida v. Royer, 460 U.S. 491, 500 (1983).

401. 109 S. Ct. 1581, 1587 (1989).

402. 460 U.S. 491 (1983).

403. *Id.* at 500.

404. *Sokolow,* 109 S. Ct. at 1587. *But see id.* at 1591 n.4 (Marshall, J., dissenting) ("[T]he manner in which a search is carried out—and particularly whether law enforcement officers have taken needlessly intrusive steps—is a highly important index of reasonableness under Fourth Amendment doctrine." (citing Winston v. Lee, 470 U.S. 753, 760-61 (1985))). Significantly, Chief Justice Rehnquist, who authored the majority opinion in *Sokolow,* dissented in *Royer,* and specifically repudiated *Royer*'s articulation of a least intrusive means requirement for carrying out investigative detentions. *See Royer,* 460 U.S. at 528 (Rehnquist, J., dissenting).

During its 1988-89 Term, the Court also abandoned the least restrictive means test in four first amendment contexts in which it previously had been enforced: regulations of prisoners' receipt of correspondence and publications, and regulations of prisoners' outgoing non-personal correspondence;[405] regulations of the time, place, or manner of speech or

405. *See* Thornburgh v. Abbott, 109 S. Ct. 1874, 1880-81 (1989) (regulations of prisoners' mail must only be "generally necessary" to legitimate government interest); *cf.* Procunier v. Martinez, 416 U.S. 396, 413 (1974) (censorship of prison mail would be permitted only if "the limitation of First Amendment freedoms [was] no greater than . . . necessary or essential"). In its zeal to eradicate the least restrictive alternative analysis from judicial review of prison regulations, the *Thornburgh* Court limited *Martinez* in two ways. First, it expressly overruled *Martinez* to the extent that *Martinez* had applied the least restrictive means analysis to regulations on prisoners' receipt of mail from non-prisoners. *See Thornburgh,* 109 S. Ct. at 1881. Second, in dicta, the Court said that even regarding the narrow category of regulations still governed by the *Martinez* standard—namely, regulations on prisoners' sending of personal correspondence to non-prisoners, *see id.* at 1881—this standard does not include the least restrictive alternative criterion.

> [T]he Court declined to apply the *Martinez* standard in [subsequent] "prisoners' rights" cases because . . . *Martinez* could be (and had been) read to require a strict "least restrictive alternative" analysis. . . .
>
> We do not believe that *Martinez* should . . . be read as subjecting the decisions of prison officials to a strict "least restrictive means" test. . . . *Martinez* required no more than that a challenged regulation be "generally necessary" to a legitimate governmental interest.

Id. at 1880.

expressive conduct;[406] regulations of commercial speech;[407] and limitations on freedom of association.[408]

The Court's reasoning in these cases is typified by *Ward v. Rock Against Racism,*[409] which ruled that content-neutral regulations on the time, place, or manner of speech should be sustained even if the government's goals could have been served through less speech-restrictive alternatives. *Ward* upheld New York City's regulations requiring that any musical performance at the Central Park Bandshell had to use city-furnished sound equipment run by a city-employed sound technician. The city's asserted justification for this regulation was to control sound vol-

406. *See* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2758 (1989) (such regulation must be narrowly tailored to serve government's interests, but need not be least restrictive means of doing so; only regulation "substantially broader than necessary" will be invalidated); *cf.* Frisby v. Schultz, 487 U.S. 474, (1988) (regulation of expressive conduct must "target[ ] and eliminate[ ] no more than the exact source of the 'evil' it seeks to remedy"); Boos v. Barry, 485 U.S. 312, 329 (1988) (invalidated government regulation of picketing because it was "not narrowly tailored; a less restrictive alternative is readily available"); United States v. O'Brien, 391 U.S. 367, 377 (1968) (first case enunciating test for constitutionality of regulations on expressive conduct; one requirement is that restriction on speech be "no greater than is essential to the furtherance of [government] interest").

407. *See* Board of Trustees of the State Univ. of N.Y. v. Fox, 109 S. Ct. 3028, 3033-34 (1989) (such regulations must be narrowly tailored to serve significant government interest, but this does not require eliminating all less restrictive alternatives); *cf.* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472 (1988) (government restrictions upon commercial speech may be no broader or more expansive than necessary to serve government interests); San Franciso Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 539 (1987) (same); Posadas de Puerto Rico Assocs. v. Tourism C. of P.R., 478 U.S. 328, 343 (1986) (same); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 644, 651 n.14 (1985) (same); *In re* R.M.J., 455 U.S. 191, 203 (1982) (same); Metromedia, Inc. v. San Diego, 453 U.S. 490, 507 (1981) (same); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (same). In light of this extensive prior case law, the dissenting justices in *Board of Trustees of the State Univ. of N.Y.* observed, the majority was able to reach its holding that least restrictive means analysis does not apply to commercial speech cases "only by recasting a good bit of contrary language in our past cases." *Board of Trustees of the State Univ. of N.Y.,* 109 S. Ct. at 3038 (Blackmun, J., dissenting).

408. *See* Dallas v. Stanglin, 109 S. Ct. 1591, 1596, 1597 (1989). The Court ruled that the form of "social association" involved in the case, interaction at a dance hall, was not a fundamental right, and therefore that regulations on such association were subject only to minimal scrutiny. It accordingly rejected the lower court's reasoning that the regulation should be invalidated on the ground that it was not the least restrictive means for accomplishing the government's goal of protecting young teenagers. *Cf. Stanglin v. Dallas,* 744 S.W.2d 165 (Tex. App. 1987). In another case decided during the 1988-89 Term, the Court rejected the less intrusive alternative requirement that had previously been an accepted element of statutory, as opposed to constitutional, interpretation. *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (rejected previous requirement that employer defendant in Title VII litigation, whose employment policy produced "disparate" adverse impact on protected minority groups, pursue business goals through less discriminatory employment policies, even if such alternative policies were more costly).

409. 109 S. Ct. 2746, 2757 (1989).

ume.[410] The city's sound technician controlled not only the sound's volume, however, but also its "mix," which is an essential aesthetic element of rock music.[411] For this reason, the Second Circuit Court of Appeals invalidated the regulation.[412] Applying the least intrusive alternative approach, the court of appeals found that there were various alternative means of controlling volume without also intruding on performers' ability to control the sound mix.[413]

In the *Ward* case, as in the others where it discarded the least restrictive alternative test, the Court substituted a requirement that the challenged measure be "narrowly tailored" to promote the relevant interest. Although the term "narrowly tailored" connotes the least restrictive alternative approach, the Court's explanation of the term makes clear that it is a nebulous, deferential criterion, which will result in upholding most government measures. In *Ward,* the Court said that the narrow tailoring requirement would be satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[414] In other words, the regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests."[415] But, as the dissent noted, "this means that only those regulations that 'engage in the gratuitous inhibition of expression' will be invalidated."[416] Even this attenuated tailoring requirement probably would not be enforced under the majority's analysis because the majority criticized the Second Circuit for evaluating the comparative efficacy and intrusiveness of the alternative means for achieving noise reduction.[417]

The *Ward* opinion also typifies the Court's approach in abrogating the least intrusive alternative analysis by using a relatively unsympathetic factual scenario as a vehicle for eroding a wide range of first amendment protections. These long-range adverse ramifications were described by the *Ward* dissent:

> The majority requires only that government show that its interest cannot be served as effectively without the challenged restriction . . . . It

410. *Id.* at 2756.

411. *Id.* at 2751-52 & n.1.

412. *Id.* at 2752.

413. *See id.* at 2752-53. The Second Circuit opinion is reported at *Rock Against Racism v. Ward,* 848 F.2d 367 (2d Cir. 1988).

414. *Id.* at 2758 (quoting United States v. Albertini, 472 U.S. 677, 689 (1985)).

415. *Id.*

416. *Id.* at 2762 (Marshall, J., dissenting) (quoting Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482, 1485 (1975)).

417. *Id.* at 2757.

> will be enough, therefore, that the challenged regulation advances the government's interest only in the slightest, for any differential burden on speech that results does not enter the calculus.
>
> . . . .
>
> Today's decision has significance far beyond the world of rock music. Government no longer need balance the effectiveness of regulation with the burdens on free speech. After today, government need only assert that it is most effective to control speech in advance of its expression.[418]

(4) Rejection of Proportionality Requirement

As discussed above, restrictions on international human rights are permitted only in accordance with a proportionality requirement.[419] Under this requirement, the extent to which the measure advances the government goal must be proportional to—not outweighed by—the extent to which the measure inhibits individual freedom. The fact that a challenged government measure is the least restrictive alternative for pursuing a government goal does not insulate the measure from invalidation. The end does not necessarily justify the means.

Until recently, the Supreme Court had enforced a similar standard. The Court's fourth amendment cases had held consistently that a government intrusion on privacy could not be justified on the sole ground that it was the least intrusive measure for effectively pursuing the government's goal.[420] The least intrusive alternative requirement was a necessary, but not sufficient, prerequisite for the government's invasion of individual rights.

In the 1988-1989 Term, however, the Court inverted these previous holdings in the context of asserted fourth amendment, as well as other, rights. Now a challenged measure need not be the least intrusive alternative for advancing the government's goal;[421] if the measure effectively promotes the goal, that alone validates it. The government is not required to show that its interest is promoted proportionately to the curb-

418. *Id.* at 2762, 2765 (Marshall, J., dissenting).

419. *See supra* text accompanying notes 235-36.

420. The Court repeatedly has stressed that it "has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." Katz v. United States, 389 U.S. 347, 356-57 (1967); *accord* United States v. Leon, 468 U.S. 897, 914-15 (1984); United States v. United States Dist. Court, 407 U.S. 297, 316-17 (1972); *see also* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.").

421. *See supra* text accompanying notes 393-98.

ing of individual rights. As Justice Marshall stated succinctly in *Ward,* "the majority enshrines efficacy but sacrifices free speech."[422] Likewise, specifically in the fourth amendment context, the Court recently has allowed exceptions to the warrant and individualized suspicion requirements on the ground that it would be "impractical" for the government to comply with these constitutional obligations.[423]

The 1988-89 Term decision in which the Justices most extensively discussed the role of proportionality analysis in reviewing a rights-limiting measure was *Stanford v. Kentucky.*[424] The *Stanford* plurality opinion held that the juvenile death penalty survived an eighth amendment challenge without any consideration of proportionality.[425] In previous eighth amendment cases, such analysis had comprised the questions whether the punishment imposed is proportionate to the defendant's blameworthiness and whether the punishment makes any measurable contribution to an acceptable penal goal.[426] Because Justice O'Connor wrote a separate concurrence stressing her view that the Court "does have a constitutional obligation to conduct proportionality analysis,"[427] and because the four dissenters agreed with this position,[428] a bare majority of the Court still adheres to it.[429] The four-Justice *Stanford* plurality, however, said that such analysis is at most *relevant* to judicial review of eighth amendment claims, but should never be *dispositive.*[430] The plurality staunchly maintained that once "the objective indicators of state laws or jury determinations evidenced a societal consensus" favoring any particular penalty, such as the juvenile death penalty, then the eighth

422. *Ward,* 109 S. Ct. at 2763 (Marshall, J., dissenting).

423. *See Von Raab,* 109 S. Ct. at 1392; *see also* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1414 (1989). As Justice Marshall noted in dissent:

> [R]eliance on the importance of diagnosing the causes of an accident as a critical basis for upholding the FRA's testing plan is especially hard to square with our frequent admonition that the interest in ascertaining the causes of a criminal episode does not justify departure from the Fourth Amendment's requirements. "[T]his Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime . . . ."

Skinner, 109 S. Ct. at 1328 (Marshall, J., dissenting) (quoting Katz v. United States, 389 U.S. 347, 356 (1967)).

424. 109 S. Ct. 2969 (1989).

425. *Id.* at 2980.

426. *Id.*

427. *Id.* at 2981.

428. *Id.* at 2987-88 (Brennan, J., dissenting).

429. *Accord* Penry v. Lynaugh, 109 S. Ct. 2934, 2955-58 (1989) (Justice O'Connor's majority opinion, holding that eighth amendment does not categorically prohibit execution of mentally retarded individuals, engaged in proportionality analysis and found that challenged penalty satisfied this analysis).

430. *Stanford,* 109 S. Ct. at 2980.

amendment challenge had to be dismissed, and the Court was not free to make any additional inquiries.[431]

(5) Permitting Broad Discretion, Only Loosely Constrained by Legal Standards

As outlined above, the European Convention organs and the Canadian courts demand that standards controlling government curtailment of individual rights be clearly delineated, in order to circumscribe official discretion.[432] By contrast, the Supreme Court's drift away from strict scrutiny entails its failure to enforce any similar requirement. In two cases decided during the 1988-89 Term, the Court expressly permitted the government to abridge fundamental free speech rights pursuant to open-ended, broadly-worded standards that left much room for the exercise, and hence abuse, of governmental discretion.

In *Ward v. Rock Against Racism,*[433] the Court upheld New York City's guidelines for regulating music performances in Central Park even though it recognized that the standards were "undoubtedly flexible" and that "the officials implementing them will exercise considerable discretion."[434] As Justice Marshall noted in dissent, this broad discretion was particularly problematic for two reasons. First, such discretion would afford officials leeway to make what were actually content-based regulations under the guise of making ostensibly neutral judgments about volume.[435] He pointed out that, throughout history, newer styles of music generally have been perceived as "noisier" than old, with the result that content could be censored on the pretext of regulating volume.[436]

A second reason why the detailed legal standards requirement should have been enforced especially zealously in *Ward,* Justice Marshall explained, is that the guidelines constituted a prior restraint on free speech.[437] Thus, they should have been viewed as presumptively unconstitutional and upheld only if accompanied by the requisite procedural safeguards, including narrowly drawn and definite standards.[438] Notwithstanding their general and vague character, however, the *Ward* guidelines were upheld by the majority.[439] The Court did not insist that

431. *Id.*

432. *See supra* text accompanying notes 244-51.

433. 109 S. Ct. 2746 (1989).

434. *Id.* at 2755.

435. *Id.* at 2764 (Marshall, J., dissenting) (because judgments that sounds are too "loud, noisy or discordant" can mask disapproval of music itself, government control of sound mixing equipment should be done only pursuant to detailed standards).

436. *See id.* at 2764 n.7 (Marshall, J., dissenting).

437. *Id.* at 2763.

438. *See id.* at 2763-65 (Marshall, J., dissenting).

439. *Id.* at 2760.

the regulations themselves explicitly limit official discretion. Instead, it was content to rest its approval upon the officials' testimony that, in practice, they interpreted the regulations' broad standards relatively narrowly.[440] The *Ward* majority emphasized that city officials actually interpreted the guidelines as prohibiting the purposeful determination that music had inadequate sound quality or volume based on its message. The guidelines themselves, however, contained no such express limitation.[441]

Thornburgh v. Abbot[442] was the second 1988-89 Term decision eviscerating the requirement that rights-restraining government action be undertaken only pursuant to specific, detailed standards. There the Court upheld regulations that gave prison officials broad discretion to control prisoners' receipt of publications and other materials if they determined that such materials might be "detrimental to the security, good order, or discipline of the institution or if they might facilitate criminal activity."[443] As the dissent noted, these "standards" are so ambiguous that they give prison officials virtually free rein to censor incoming materials.[444]

(6) Broad Deference to Government; Burden of Proof

The areas in which the Supreme Court recently has lessened the degree of scrutiny applied to rights infringements particularly manifest the Court's general tendency to defer to the challenged determinations of other government decisionmakers. Thus, in multiple decisions issued during its 1988-89 Term involving a range of constitutional rights, the Court consistently stressed that it should respect the judgments of executive and legislative officials at the federal, state, and local levels.[445] The Court essentially presumed government decisions to be correct and imposed substantial burdens of proof upon individuals who challenged such decisions. In these areas, too, the Court's legal process diverges from that of the European Commission and Court.[446]

440. *Id.* at 2756.

441. *Id.* at 2754-56.

442. 109 S. Ct. 1874 (1989).

443. 28 C.F.R. § 540.71(b) (1985).

444. *Thornburgh,* 109 S. Ct. at 1889 (Stevens, J., concurring in part and dissenting in part).

445. *See infra* notes 446-64 and accompanying text.

446. *See* Warbrick, *supra* note 8, at 699 (Supreme Court cases "show a remarkable solicitude for state autonomy," which paradoxically contrasts with European Court's lesser deference to national sovereignty).

The dissenting Justices in these cases viewed the majority's deferential posture as inconsistent with the Court's responsibility to enforce constitutional standards and safeguard individual rights. The Justices who advocated a more deferential stance minimized the importance of judicial review in our system and assumed government measures reflecting majoritarian values and preferences to be legitimate.

Perhaps the plainest statement of the often prevailing view that the Court should defer to the majoritarian branches of government, and strictly curtail its judicial review power, was contained in Chief Justice Rehnquist's dissenting opinion in *Texas v. Johnson.*[447] A narrow majority in *Johnson* overturned a criminal conviction for burning the American flag for expressive purposes.[448] Yet the view of the Court's appropriate role expressed by the Chief Justice in his *Johnson* dissent informed numerous majority or plurality opinions as well. He declared: "Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people . . . ."[449] This statement is starkly inconsistent both with prior Supreme Court pronouncements[450] and with declarations of international human rights tribunals.[451]

447. 109 S. Ct. 2533 (1989).

448. *Id.* at 2548.

449. *Id.* at 2555 (Rehnquist, C.J., dissenting). The opinion continued: "Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court 'is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.' " *Id.* (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (Marshall, C.J.)).

450. Ironically, a leading opinion eloquently articulating this point invalidated another form of obeisance to the American flag: a compulsory pledge of allegiance. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's . . . fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

See also id. at 642:

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. [It includes] the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .

451. *See* Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) at 24 (1981): "Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved." *Accord* Norris Case, 129 Eur. Ct. H.R. (ser. A) at 16 (1988).

Other cases decided during the Court's 1988-89 Term implementing a similarly broad deference to majoritarian values, and a correspondingly constricted judicial review, involved: regulation of prisoners' correspondence and receipt of publications;[452] control of the volume and sound mix of musical performances in a public park;[453] regulation of commercial speech;[454] limitations on the relationship between a natural father and his child;[455] surveillance of a home and surrounding property from a low-cruising helicopter;[456] and restrictions on a woman's right to choose an abortion.[457] In addition, four Justices voted to extend this deferential approach to legislative determinations that the death penalty could appropriately be imposed on individuals who were sixteen or seventeen years old at the time of their crimes,[458] to government-sponsored displays

452. *See* Thornburgh v. Abbott, 109 S. Ct. 1874, 1883-84 (broad discretion regulations gave prison wardens is justified; warden may exclude materials even if they are not "likely" to lead to violence, if they create "intolerable risk of disorder"; even if warden determined that only one page of book created such risk, entire book could be banned).

453. *See* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2759 (1989) (court of appeals erred in not deferring to city's reasonable determination that its interest in controlling volume would be best served by challenged regulations, even though other regulations may have promoted this interest with less impact on performers' artistic control over sound quality); *Id.* at 2760 (Marshall, J., dissenting) ("[T]he majority replaces constitutional scrutiny with mandatory deference.").

454. *See* Board of Trustees of the State Univ. of N.Y. v. Fox, 109 S. Ct. 3028, 3035 (1989) (such regulations will be upheld so long as there is "a fit between the [government's] ends and the means chosen to accomplish those ends . . . [W]e leave it to governmental decisionmakers to judge what manner of regulation may best be employed.").

455. *See* Michael H. v. Gerald D., 109 S. Ct. 2333, 2351 (1989) (Brennan, J., dissenting) ("[B]y describing the decisive question as whether [the asserted] interest is one that has been 'traditionally *protected by* our society,' . . . rather than one that society traditionally has thought important . . . , and by suggesting that our sole function is to '*discern* the society's views,'. . . the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States.").

456. *See* Florida v. Riley, 109 S. Ct. 693, 696 (1989) (burden of proof imposed on search victim to demonstrate that low-cruising helicopters were sufficiently uncommon that police surveillance from such helicopter violated reasonable privacy expectation).

457. *See* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3057 (1989) (plurality opinion) (state regulations should be upheld so long as they "permissibly further[ ] the State's interest in protecting potential human life"); *id.* at 3063 (O'Connor, J., concurring in part and concurring in judgment) (pre-viability abortion regulations permissible so long as they do not "unduly burden" woman's right to choose); *id.* at 3077 (Blackmun, J., concurring in part and dissenting in part) (plurality's proposed test constitutes rational basis review and "non-scrutiny").

458. *See* Stanford v Kentucky, 109 S. Ct. at 2977, 2979 (1989) (those who challenged juvenile death penalty under eighth amendment had "heavy burden" to establish national consensus against such penalty; focusing on numerous state laws permitting such penalty, plurality concluded that role of judicial review was exhausted by this determination); *see also id.* at 2977 (fact that theoretically authorized juvenile death penalty was actually imposed only rarely was irrelevant, so long as penalty was not "categorically unacceptable"). *But see id.* at 2986-87 (Brennan, J., dissenting) (Court has ultimate responsibility to evaluate appropriate-

of religious symbols on public property,[459] and to legislative determinations that burning the American flag to convey a political message is intolerably offensive.[460]

The Justices' polarized views about the appropriate degree of judicial deference to the majoritarian branches of government, and the scope and role of judicial review, were forcefully expressed in *Stanford v. Kentucky,*[461] the juvenile death penalty case. As noted above, the plurality rejected the contention that the Court should make independent determinations as to whether the penalty was proportionate to the offender's moral responsibility or to some legitimate penological goal.[462] The plurality explained that these determinations should be made only by popularly elected representatives:

> The audience for these arguments . . . is not this Court but the citizenry of the United States . . . . [O]ur job is to *identify* the "evolving standards of decency"; to determine, not what they *should* be, but what they *are.* We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society's apparent skepticism. In short, we emphatically reject petitioner's suggestion that the issues in this case permit us to apply our "own informed judgment," . . . regarding the desirability of permitting the death penalty for crimes by sixteen and seventeen-year olds.[463]

In sharp contrast, the four *Stanford* dissenters urged not only that the Court should make the determinations that the plurality deemed out of bounds, but also that it has a constitutional responsibility to do so:

> Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty in a particular class of cases . . . . Under Justice Scalia's positivist approach to defining rights, the Court abandons its proven and proper role when it hands back to the very majorities the Framers distrusted the power to define the precise scope of protection afforded by the Bill of Rights, rather than bringing its own judgment to bear on that question.[464]

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ness of death penalty under eighth amendment; plurality's approach entails abandonment of Court's proper role).

459. County of Allegeny v. ACLU, 109 S. Ct. 3086, 3146 (1989) (Kennedy, J., concurring in part and dissenting in part) (communities should be allowed to make "reasonable judgments" about accommodating or acknowledging holidays with both cultural and religious aspects); *see id.* at 3109 (majority opinion) (Justice Kennedy's proposed test would lower considerably level of scrutiny in establishment clause cases by imposing burden of "unmistakable" clarity that government had favored specific sects or undertaken "obvious" efforts to proselytize for particular religion).

460. *See* Texas v. Johnson, 109 S. Ct. 2533, 2550 (1989) (Rehnquist, C.J., dissenting).

461. 109 S. Ct. 2969 (1989).

462. *See supra* text accompanying note 431.

463. *Stanford,* 109 S. Ct. at 2979.

464. *Id.* at 2986, 2987 (Brennan, J., dissenting). Although Justice O'Connor concurred in

(7) De-emphasis of Temporal Trends and Actual Enforcement Practice

The *Stanford* case also graphically illustrates another facet of the current Court's drift toward lenient scrutiny of measures infringing individual rights: its tendency to assess the strength of a government interest by focusing on positive law enactments while de-emphasizing other sources of information—notably, actual enforcement practices. As the European Convention organs recognize,[465] the pattern of actual investigations and prosecutions may better reflect actual contemporary societal attitudes than the mere existence of legislation; many laws fall into desuetude over time and are out of harmony with prevailing community mores. Accordingly, the Supreme Court's de-emphasis of actual enforcement practices is one particular aspect of its general tendency to relegate temporal trends to an unimportant position. This larger trend also contrasts with the European Convention organs' tendency to emphasize evolving contemporary developments.[466]

The Supreme Court's de-emphasis of temporal trends in general and actual enforcement practices in particular were both apparent in *Stanford*. *Stanford* stressed states' statutory authorization of juvenile executions and correspondingly downplayed evidence that this authorization was rarely invoked.[467] The *Stanford* majority recognized that during the entire period from 1642 to 1986, juveniles accounted for only about two percent of all executions, and that no one who had been under seventeen when committing the crime had been executed since 1959.[468] The Court essentially deemed this evidence irrelevant, however, because it did not establish that the juvenile death penalty was "categorically unacceptable."[469] The Court thus elevated the importance of a state's mere theo-

the judgment, she expressly rejected the plurality's conclusion that the Court should merely defer to the national consensus about the appropriateness of the juvenile death penalty as reflected in legislation. In her view, the Court also had a responsibility to undertake a "proportionality" review. *See id.* at 2981 (O'Connor, J., concurring).

465. *See supra* text accompanying note 279.

466. *See supra* text accompanying note 262.

467. Stanford v. Kentucky, 109 S. Ct. 2969, 2981 (1989).

468. *Id.* at 2977.

469. *Id.* Other examples of the Court's willingness to sustain abridgements of constitutional rights based upon speculative, rather than actually demonstrated, government interests, are the cases of Dallas v. Stanglin, 109 S. Ct. 1591, 1595-96 (1989) (upholding city's prohibition on older teenagers and adults from using dance halls open only to younger teenagers based on Court's speculation that city could have concluded that younger teenagers "might" be susceptible to certain negative influences at a dance hall but not at a skating rink or other similar environments lacking an age restriction), and Florida v. Riley, 109 S. Ct. 693, 696-97 (1989) (absent any evidence as to how common it was for low-flying helicopters to cruise over homes and surrounding areas, plurality presumed it to be sufficiently common that someone whose property was surveilled in this fashion had no reasonable expectation of privacy; therefore no

retical power to impose a certain punishment over its actual decisions to invoke that power in concrete cases.

Stanford's overlooking of temporal trends in assessing the importance of asserted government interests was accentuated by its questionable assessment of the meanings inferable from state juvenile death penalty statutes. The majority acknowledged that of the thirty-seven states permitting capital punishment, fifteen decline to impose it upon sixteen-year-old offenders and twelve decline to impose it on seventeen-year-old offenders.[470] Reasoning that "a majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above," the majority concluded that "[t]his does not establish the degree of national consensus [opposing a punishment] sufficient to label [it] cruel and unusual."[471] The dissent pointed out that it cannot be assumed that a legislature that never specifically considered the issue made a conscious moral choice to permit juvenile executions. As the dissent further noted, of the states that squarely had addressed the issue, twenty-seven refused to authorize such executions, and only two explicitly had set an age below eighteen as the one at which a person may be sentenced to death.[472]

A decision from the 1988-89 Term that dramatically illustrates the Court's emphasis on history and tradition, and its corresponding discounting of evolving trends, is *Michael H. v. Gerald D.*[473] A natural father and his daughter urged that their interests in preserving their rela-

fourth amendment rights were implicated); *id.* at 698-99 (O'Connor, J., concurring) (same). Both dissenting opinions specifically noted the absence of evidence on this point and argued that the government should bear the burden of proof. *See id.* at 704 (Brennan, J., dissenting); 705 (Blackmun, J., dissenting).

470. *Stanford,* 109 S. Ct. at 2971.

471. *Id.* at 2976-77.

472. *Id.* at 2983 (Brennan, J., dissenting). In the juvenile death penalty context, the Court's tunnel-visioned focus on positive law, to the exclusion of actual practice, had the effect of diminishing the degree of judicial scrutiny, and correspondingly weakening the protection accorded the right at issue. Ironically, in another context—that involved in the *Ward* case—the Court used the opposite analytical technique to achieve the same result in terms of lowered judicial scrutiny and decreased rights protection. Specifically, in upholding government regulations controlling public musical performances, the Court focused on the government's alleged actual practice, to the exclusion of the statutory language. The regulations themselves did not constrain expressly governmental discretion to regulate musical expression. The Court nevertheless upheld the regulations based on the administering officials' testimony that in practice they interpreted these regulations relatively narrowly. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2756 (1989). The Court's contrasting uses of positive law and practice in these two cases suggests that it is more concerned with employing an analysis that will result in affirming the government decision in question, and less concerned with choosing a consistent analysis on a principled basis. This approach contrasts sharply with international human rights jurisprudence. *See supra* note 446 and accompanying text.

473. 109 S. Ct. 2333, 2341 (1989).

tionship were important enough that they should not be eliminated without a hearing. In rejecting this claim, the Court expressed a static view of constitutional freedoms. The plurality opinion relied heavily on the common law tradition of protecting the marital family from the stigma of "illegitimacy."[474] It also stressed that society traditionally has not protected the relationship rights of a natural father and his child when the child's mother is married to and living with another man.[475] As Justice Brennan commented in dissent, "the plurality opinion's exclusively historical analysis portends a significant and unfortunate departure from our prior cases and from sound constitutional decisionmaking . . . ."[476] Interpreting the due process clause pursuant to a dynamic process, rather than a static one, is consistent with the constitutional framers' intent.[477]

(8) Narrow Geographic Context

The Supreme Court's tendency to defer to local government authorities is both demonstrated and reinforced by the relatively narrow geographic context in which it evaluates government interests. This approach contrasts with the judicial process employed by the European Convention tribunals.[478] It was illustrated by two cases decided during the 1988-89 Term: the *Stanford* case and *Sable Communications v. Federal Communications Commission.*[479]

The *Stanford* plurality announced that the standards of other countries and in international human rights instruments were irrelevant to determining whether particular punishments are "cruel and unusual," so long as the American consensus legitimated the penalty.[480] This view is

474. *See id.* at 2342-43.

475. *See id.* at 2343.

476. *Id.* at 2349 (Brennan, J., dissenting).

477. *See id.* (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972) (constitutional concept of liberty was "purposely left to gather meaning from experience . . . [T]he statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.") (quoting National Ins. Co. v. Tidewater Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)). *See also Michael H.*, 109 S. Ct. at 2351:

> The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.

478. *See supra* text accompanying notes 280-85.

479. 109 S. Ct. 2829 (1989).

480. *See Stanford,* 109 S. Ct. at 2975 n.1 (citations omitted):

> 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, par-

symptomatic of the Court's increasing deference to the determinations of the challenged decisionmaker in any case. An aspect of such deference is the Court's reluctance to evaluate the strength of the local decisionmaker's asserted interests against a broader geographic context. By contrast, as the dissent pointed out, previous Supreme Court decisions "recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is . . . of relevance to Eighth Amendment analysis."[481] Accordingly, the dissent judged the appropriateness of the juvenile death penalty in the light of standards espoused not only by various states in the U.S., but also by other countries and international human rights instruments.[482]

The Court's relatively narrow view of the relevant geographic context for evaluating government interests also affected its decision in *Sable.*[483] This decision reaffirmed the notion that individual communities should be free to develop their own standards as to which sexually explicit material is "obscene" and therefore subject to censorship.[484] The particular factual setting in which *Sable* upheld this principle magnified the influence of the least tolerant, most parochial communities. Message senders challenged a federal statute prohibiting obscene interstate commercial telephone messages.[485] They argued that this legislation compelled them to tailor all their messages to the least tolerant community, thus effectively subordinating the free speech rights of all other Americans to the moral standards of the most narrow-minded. The Court rejected this argument and sustained the statute.[486] *Sable* thus marks a sharp departure from the geographic approach of the European Convention tribunals and the European Court of Justice, which have enforced

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ticularly 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.

481. *Id.* at 2985 (Brennan, J., dissenting) (citing Thompson v. Oklahoma, 108 S. Ct. 2687 (1988); Enmund v. Florida, 458 U.S. 782, 796-97 & n.22 (1982); Coker v. Georgia, 433 U.S. 584, 593 n.4, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 102-03 & n.35 (1958)).

482. *Id.* at 2985-86 & n.10 (Brennan, J., dissenting) (concluding that, "[w]ithin the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved").

483. Sable Communications v. FCC, 109 S. Ct. 2829 (1989).

484. *See* Miller v. California, 413 U.S. 15, 31 (1973) (established that obscenity should be determined according to "contemporary community standards").

485. 47 U.S.C. § 223(b) (Supp. 1988).

486. *Sable Communications*, 109 S. Ct. at 2835-36.

European-wide standards that reflect *more,* rather than *less,* rights-protective national standards.[487]

The distinction between the international and domestic legal process, in terms of geographic context, can be summarized as follows: the international human rights standard is set at the higher common denominator among differing national or international standards; the U.S. constitutional rights standard is set at the lowest common denominator, both among differing state standards, as in *Sable,* and among differing national or international standards, as in *Stanford.*

(9) Speculative Harm

Yet another manifestation of the Supreme Court's increasing deference to other government decisionmakers is its willingness to sustain measures infringing individual rights on the basis of mere speculation that the exercise of these rights may have adverse societal consequences and correspondingly that such measures might have a beneficial impact. In stark contrast to the European Convention organs and the Canadian courts,[488] the Supreme Court has not consistently demanded actual evidence of tangible societal harm resulting from the exercise of individual freedoms as a precondition for limiting them.

The *Von Raab* case[489] is a prominent recent example of the Court's upholding of rights-abridging measures based only on speculation, rather than actual evidence, of tangible harm. A narrow majority in *Von Raab* upheld the U.S. Customs Service's mass urinalysis drug screening program even though there had been no perceived drug problem among Customs employees and the screening had not led to the discovery of a significant number of drug users.[490] Instead, the majority reasoned that these intrusive searches, based on no individualized suspicion, could be justified by the government's "compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context."[491]

The *Von Raab* majority's failure to demand concrete evidence that the challenged testing program would address some actual Customs Service problem prompted Justices Scalia and Stevens to dissent.[492] Both

487. *See supra* text accompanying note 283.

488. *See supra* text accompanying notes 287-91.

489. 109 S. Ct. 1384, 1386 (1989).

490. *Id.* at 1398-1400.

491. *Id.* at 1395.

492. Justice Scalia forcefully indicted the majority's speculative justification for upholding the sweeping urinalysis requirement:

> Until today this Court had upheld a bodily search . . . without individualized suspi-

Justices had voted to uphold the mass drug testing program in *Skinner,* which had been justified on the basis of evidence concerning actual drug problems linked to railroad accidents. Justice Scalia's dissenting opinion in *Von Raab* roundly criticized the majority's response to the lack of any corresponding specific evidence in that case by referring generally to the "pervasive societal problem" of drug abuse: "[I]f such a generalization suffices to justify demeaning bodily searches, without particularized suspicion . . . then the Fourth Amendment has become frail protection indeed."[493]

Several other recent decisions parallel *Von Raab*'s justification of a constitutional rights infringement based on mere speculation, as opposed to actual evidence, that some societal benefit could result. *Skinner,* for example, sustained post-accident mass drug testing of railroad employees on the rationales that such tests would deter drug use and also identify drug-related causes of accidents, without any evidentiary support for either rationale. It was uncontested that no evidence had been adduced of the program's alleged deterrent value.[494] Moreover, as the *Skinner* dissenters noted, the "knowledge that some workers were impaired at the time of an accident falls far short of proving that substance abuse caused or exacerbated the accident."[495] In another example, the *Thornburgh* case upheld prison regulations allowing officials to ban an entire book on the ground that even one page violated administrative guidelines, without

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cion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous . . . environment. . . . Today, in *Skinner,* we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court's opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely.

. . . .

. . . The Court's opinion . . . will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees.

. . . .

. . . What is absent in the Government's justifications . . . is the recitation of *even a single instance* in which any of the speculated horribles actually occurred: an instance . . . in which the cause of bribe-taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.

Id. at 1398-1400 (Scalia, J., dissenting).

493. *Id.* at 1400 (Scalia, J., dissenting).

494. *See* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1422 (1989) (Stevens, J., concurring); *id.* at 1432 (Marshall, J., dissenting).

495. *Id.* at 1432.

any evidence that this "all-or-nothing" rule advanced any legitimate penological interest.[496]

The *Webster* case provides a further illustration of the Court's willingness to accept speculation about potentially averted harms as a justification for curtailing individual rights. The majority sustained Missouri's required viability tests on fetuses believed to be twenty weeks gestational age when the asserted justification was to avoid aborting viable fetuses.[497] Uncontradicted evidence, however, established that the earliest possible gestational age at which a fetus becomes viable is twenty-four to twenty-eight weeks.[498] Justice O'Connor's concurring opinion attempted to justify this ruling by asserting the state's interest in "possible viability."[499] But Justice Scalia mocked the sheer speculation inherent in this proffered rationale by surmising that the Court's next abortion opinion might approve a government measure designed to account for "the chance of possible viability."[500]

(10) No Good Faith Requirement

As just discussed, during its 1988-89 Term, the Court upheld many rights-infringing measures without any tangible evidence that such measures redressed an actual societal problem. Given this evidentiary vacuum, the asserted speculative justifications for such measures may well have been *post hoc* rationalizations and the measures might actually have been designed to advance some ulterior purposes. As the *Webster* dissenters noted, for example, the scientific consensus that fetal viability was impossible before twenty-four weeks gestational age indicated that Missouri's purpose in requiring viability tests of twenty-week-old fetuses could not actually be the purported one of protecting viable fetuses.[501] Rather, the state's actual purpose likely could have been to prohibit as many abortions as possible by imposing the maximum number of obsta-

496. *See* Thornburgh v. Abbott, 109 S. Ct. 1874, 1878 n.8 (1989); *id.* at 1891-92 (Stevens, J., concurring in part and dissenting in part):

> [T]he Court . . . defers to "findings" of a security threat that even prison officials admitted to be nonexistent.
>
> There is no evidence that delivery of only part of a publication would endanger prison security. Rather, the primary justification advanced for the all-or-nothing rule was administrative convenience. . . . But general speculation that some administrative burden might ensue should not be sufficient to justify a meat-ax abridgement of . . . First Amendment rights . . . .

497. Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3044 (1989).

498. *See id.* at 3055.

499. *Id.* at 3062 (O'Connor, J., concurring in part and concurring in judgment).

500. *Id.* at 3066, n.* (Scalia, J., concurring in part and concurring in judgment).

501. *Id.* at 3076 (Blackmun, J., concurring in part and dissenting in part).

cles to their performance.[502] But neither in *Webster* nor in any of its other cases sustaining government invasions of individual rights did the Court demand evidence that the government's asserted justification was made in good faith. Instead, in this respect, as in so many others, the Court simply deferred to the government decisionmakers.

In cases that expressly apply the most deferential level of scrutiny, "rational basis" review, the Court explicitly has acknowledged that it will not assess whether an alleged government justification was the actual, good faith rationale for a challenged measure.[503] In constitutional challenges to economic or business regulations, the Court has even supplied possible justifications that the government decisionmakers *might* have had in mind, absent any evidence as to what their real purposes actually were.[504] Putting aside the appropriateness of applying this facet of minimal scrutiny to economic regulations, it is clearly inappropriate to import such an extreme form of deference to regulations infringing on fundamental personal rights. Such a step is inconsistent with not only U.S. constitutional traditions but also, as discussed above, the European Convention organs' analysis of rights invasions.[505]

(11) De-emphasis of Importance of Government Interest

A traditional prerequisite for upholding a government measure infringing rights protected by the U.S. Constitution is that the countervailing government interest be very important. Such an interest is usually labelled "compelling."[506] International human rights instruments consistently have been interpreted to authorize rights-limiting measures only to promote important government goals.[507] The U.S. Supreme Court, however, recently has displayed a tendency to approve rights infringements on the rationale that they advance government interests which are merely "legitimate," rather than "compelling." Alter-

502. *See id.* at 3070 (Blackmun, J., concurring in part and dissenting in part).

503. *See* L. TRIBE, *supra* note 155, at 1443 ("In applying the rationality requirement, the Court has ordinarily been willing to uphold any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction . . . in state policy." (quoting Allied Stores v. Bowers, 358 U.S. 522, 530 (1959))).

504. *See id.*:

> [The Court's] remarkable deference to state objectives has operated in the sphere of economic regulation quite apart from whether the conceivable "state of facts" (1) actually exists, (2) would convincingly justify the classification if it did exist, or (3) was ever urged in the classification's defense either by those who promulgated it or by those who argued in its support. Often only the Court's imagination has limited the allowable purposes ascribed to government.

505. *See supra* text accompanying notes 292-93.

506. *See supra* note 299.

507. *See supra* text accompanying notes 294-300.

natively, the Court achieves the same result by conclusorily labeling as "compelling" government interests that traditionally have not been considered that important.

In *Webster,* for example, the majority upheld Missouri's second-trimester viability testing requirement on the ground that it "furthers the State's interest in protecting potential human life,"[508] even though *Roe v. Wade* had held that this interest did not become compelling until the third trimester.[509] Similarly, in *Thornburgh,* the Court sustained prison regulations that significantly abridged prisoners' free speech rights on the basis of administrative convenience,[510] a government interest that had never been deemed sufficiently important to justify limiting fundamental rights.[511] In the same vein, the *Skinner* and *Von Raab* cases upheld intrusive, suspicionless searches and seizures—mass urinalysis and blood testing to ascertain whether government employees had ingested drugs—on the ground that complying with the fourth amendment's individualized suspicion requirement would be "impracticable."[512] Yet, as Justice Marshall commented in dissent, "The process by which a constitutional 'requirement' can be dispensed with as 'impracticable' is an elusive one to me."[513]

Conclusion

A comparative analysis of the judicial process for resolving individual rights claims under international human rights law and U.S. constitutional law reveals a striking divergence. Recent U.S. Supreme Court decisions display a narrowing conception of the scope of rights subject to judicial protection and a correspondingly expanding view of permissible government restrictions. By contrast, recent international human rights jurisprudence manifests the opposite trends: toward a broader definition of judicially protectable rights and a narrower construction of permissi-

508. *Webster,* 109 S. Ct. at 3057.

509. Roe v. Wade, 410 U.S. 113, 165 (1973).

510. *See Thornburgh,* 109 S. Ct. at 1884; *see id.* at 1891-92 ("[T]he primary justification advanced for the all-or-nothing rule [permitting prison officials to ban entire publications if any portion of them ran afoul of regulations] was administrative convenience.") (Stevens, J., dissenting).

511. *See* Bullock v. Carter, 405 U.S. 134, 149 (1972) (administrative convenience or cost savings cannot justify burdens on fundamental rights); Shapiro v. Thompson, 394 U.S. 618, 633-34 (1969) (same); *see also* Craig v. Boren, 429 U.S. 190, 198 (1976) (these government objectives cannot justify burdens even upon non-fundamental rights).

512. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1414 (1989).

513. *Id.* at 1423 (Marshall, J., dissenting); *see also* Ward v. Rock Against Racism, 109 S. Ct. 2764, 2763 (1989) (Marshall, J., dissenting) ("[T]he majority enshrines efficacy but sacrifices free speech.").

ble limitations on these rights. The U.S. Supreme Court is thus moving away from judicial activism in individual rights cases at the same time that its counterparts in the international arena are moving toward such activism.[514]

This Article has shown that it would be consistent with U.S. foreign policy positions, as well as U.S. legal traditions, for state and federal courts to rely on international human rights developments in resolving process issues concerning the domestic protection of individual rights. It also has shown that, while the most recent Supreme Court process rulings in individual rights cases depart from their international counterparts, such rulings in earlier Supreme Court cases parallel those in contemporary international human rights law. Therefore, by interpreting process issues concerning individual rights claims in the light of emerging international norms, U.S. courts would be faithful both to backward-looking American constitutional traditions, and to the forward-looking international human rights movement.

514. *See* Warbrick, *supra* note 8, at 714 (European Court's increasingly active judicial review process will transform the Convention into a constitutional bill of rights rather than an international convention).