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THE TIME HAS COME FOR THE UNITED STATES TO RATIFY THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

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TABLE OF CONTENTS

I. INTRODUCTION

The United States plays an odd role in the international community. It is, simultaneously, its most involved and most reclusive member, seeking to maintain stability in a troubled world, yet remaining strangely apart from many of the legal institutions of that world. This odd role is exemplified by

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the United States' failure to ratify key United Nations treaties[1] or its doing so only after burdening the treaty with numerous reservations, understandings, and declarations ("RUDs").[2] In all this, the United States frequently reflects what has been aptly called "American Exceptionalism,"[3] a notion that, although somehow different from much of the world, the United States will nevertheless satisfy its international obligations without the bother of binding itself to international obligations. Thus, though an active participant in the drafting of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), and despite having signed it in 1980, the United States has let the agreement languish in that legal limbo to which the United States has frequently consigned such matters. Indeed, much of the American narrative on international law is marred by a startling parochialism, often inconsistent with its international leadership aspirations.[4] But why is that?

This Article will attempt to answer that question. Part II examines the remarkable venom that runs through much of the American narrative about CEDAW. It is odd that a United Nations convention would produce that reaction, but it is evident from the rants in the lowliest blogs to the statements made in the highest reaches of government. Part III develops the notion of American Exceptionalism more fully, as it helps to explain much of the

1. The United States has ratified neither the Convention of the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, nor the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. U.N. OFFICE OF LEGAL AFFAIRS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 1 APRIL 2009, Vol. I, pt. I at 286, 391, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009) [hereinafter MULTILATERAL TREATIES]. Moreover, it ratified the Convention on the Prevention and Punishment of the Crime of Genocide almost forty years after signing it. Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 166 (2006). Among signatory countries, aside from the United States, only Somalia has failed to ratify the Children's Convention, and only Iran, Somalia, and Sudan have failed to ratify CEDAW. MULTILATERAL TREATIES, *supra*, at 291.

2. CEDAW, like other Conventions, affords States Parties the opportunity to file such objections to various provisions of a Convention. However, article 28 prevents a State Party from filing one which is "incompatible with the object and purpose" of the Convention. CEDAW art. 28(2), 1249 U.N.T.S. 23.

3. *See generally* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); Risa E. Kaufman, *Human Rights in the United States: Reclaiming the History and Ensuring the Future*, 40 COLUM. HUM. RTS. L. REV. 149, 154 (2008) (book review).

4. For example, in 1994, John Bolton, later to become the U.S. Ambassador to the United Nations, said, "The United States makes the UN work when it wants it to work, and that is exactly the way it should be, because the only question, the only question for the United States is what is in our national interest." Indeed, later in that debate he famously said that were the United Nations headquarters to lose ten stories, "it wouldn't make a bit of difference." John Bolton, Address at the Global Structures Convocation (Feb. 3, 1994) (partial transcript available at http://www.democracy now.org/2005/3/31/john_bolton_in_his_own_words).

substantive content of that narrative. This part explores the sentiment justifying why CEDAW and those who implement it have been so deeply criticized: it is an international product, overseen and implemented by those from elsewhere.

This merges into the main argument against ratification—that CEDAW encroaches impermissibly on American sovereignty. As the argument goes, it displaces domestic norms with external ones, thus depriving Americans of decision-making authority over the content of their laws. But that is wrong structurally and substantively. By adopting those norms, they become domestic; indeed, no divide exists between "American" norms and "outside" norms, as laws migrate as surely as people do.[5] Thus, Part IV will address two requirements that need to be met before the United States can ratify CEDAW. First, it must accept a federalist construct in which dialogue takes place among the different forms of government: federal, state, and local. Doing so will necessitate an acknowledgement that no norms will be imposed on anyone, for this is not a hierarchical process.

Second, the United States must create the institutions that further that dialogue. Many models exist, and the United States must adopt an appropriate one. This Article will review some choices that other countries have made. More importantly, though, it will insist that scholars and policy-makers re-cast this dialogue, recognizing the inaptness of a persistent American Exceptionalism in the current world, but not deriding those for whom it has virtue.

II. CEDAW IN THE UNITED STATES

On July 17, 1980, the Carter administration signed CEDAW. Addressing the Senate several months later, President Carter noted that though it presented some questions of compatibility with United States law, he, the Department of Justice, and the Department of State saw no serious obstacles to ratification.[6] Unfortunately, despite those sanguine notes, no action was taken on the Convention until 1988, when it was "under review" during the Reagan and Bush administrations.[7] During 1988, the Subcommittee on

5. "Legal borders, like physical ones, are permeable, and seepage is everywhere." Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereigntism of the Nation-State*, 6 INT'L J. CONST. L. 33, 57 (2008).

6. President's Message to the Senate Transmitting the Convention on the Elimination of All Forms of Discrimination Against Women, 3 PUB. PAPERS 2715 (Nov. 12, 1980). *See generally* Julia Ernst, *U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 3 MICH. J. GENDER & L. 299 (1995).

7. Ernst, *supra* note 6, at 310.

Terrorism, Narcotics, and International Operations of the Senate Committee on Foreign Relations held a hearing on issues related to CEDAW.[8]

After the transition to the first Clinton administration, sixty-eight Senators sent a letter to the President in 1993, recommending ratification of the Convention.[9] Despite that, and despite the approval of ratification by the Senate Committee on Foreign Relations and the placement of the matter on the agenda for a full vote,[10] that Congressional session ended with no action taken. However, during that session, Senators Helms, Kassebaum, Brown, Coverdell, and Gregg filed a minority report, inveighing against the Convention as "yet another set of unenforceable international standards that would further dilute—not strengthen—international human rights standards for women around the world."[11]

CEDAW was revisited by the Foreign Relations Committee in 2002, and on July 30 of that year by a vote of twelve to seven, that committee again ordered it reported.[12] This time, though, the opposition was better mobilized and farther reaching, and its targets were more diverse. For example, two days after committee approval, the editorial page of the *Wall Street Journal* implored the country to "let Cedaw die."[13] Insisting that CEDAW would do nothing positive, the editorial proclaimed that it would "force upon America a militant feminist vision that the country long ago rejected."[14] The target was not only the abstract text of CEDAW itself, but also the foreign sources of the treaty and the foreigners who implemented it. Invoking horror notions, the editorial recounted stories of gender-based abuse from such countries as Saudi Arabia and Pakistan.[15]

But the editorial also trumpeted, now ironically, the success story of Afghanistan as a "brilliant example of a revolution in women's rights."[16] Obviously targeting the CEDAW Committee,[17] it attributed that success to

8. *Id.*

9. *Id.* Under the Constitution, sixty-seven votes are required for consent to ratify a treaty. U.S. CONST. art. II, § 2, cl. 2.

10. 140 CONG. REC. S13,927–28 (daily ed. Oct. 3, 1994).

11. *See* S. Exec. Rep. No. 107–9, at 15 (2002).

12. *Id.* at 4.

13. Kimberly A. Strassel, Editorial, *Let Cedaw Die: The Battle of the Sexes Doesn't Need a Treaty*, WALL ST. J., Aug. 1, 2002, http://opinionjournal.com/columnists/kstrassel/?id=110002066.

14. *Id.*

15. *Id.*

16. *Id. Cf.* On the Ground, Three Cheers for Afghan Women, http://www.kristof.blogs.nytimes.com/2009/04/15/three-cheers-for-afghan-women/ (Apr. 15, 2009, 13:53) (deploring a new Afghan law that "obliges women to sleep with their husbands on demand and bars them from leaving the home without their husbands' permission").

17. Article 17 of the Convention created a committee of twenty-three experts in the field of the Convention, to be elected by States Parties. CEDAW art. 17(1), 1249 U.N.T.S. 21. Under article 21,

the fact that the "U.S. went in and blew up the misogynist mullahs running the place," rather than resorting to a "20,000 page CEDAW report" on giving Afghan women access to better *burkhas*.[18]

The editorial is an easy target and would not be too troubling were that shrillness confined to such sources. But it is not. During the Senate committee's 2002 consideration of CEDAW, it received comments from the Secretary of State, the Department of Justice, and dissenting members of the committee, all strikingly similar to the *Journal*'s comments. For example, Colin Powell, though supporting "CEDAW's general goals" felt it nevertheless raised "troubling questions."[19] Specifically, the administration was concerned with the CEDAW Committee reports on Belarus, China, and Croatia.[20] Thus, again, CEDAW was consigned to a lower priority than other treaties, as the review process continued.[21]

The Department of Justice was somewhat more explicit. Again, emphasizing the need to act without "undue haste,"[22] it warned that the CEDAW Committee "has exploited CEDAW's vague text to advance positions contrary to American law and sensibilities."[23] Again, it asked the Senate committee to vote against sending the Convention to the full Senate prior to a complete review by the Department of Justice.[24] No vote took place within the full Senate, and the comments of the minority members of the Senate committee are instructive, sounding themes now familiar in this context.

First, Senators Helms, Brownback, and Enzi claimed that CEDAW would pave the way for private actions to be used to achieve malign public policies. For example, they cited a failed effort to achieve enlarged abortion rights as the kind of effort that CEDAW would support, with the goal of "enshrining unrestricted access to abortion in the United States."[25] Second, they said that CEDAW conflicted with deeply ingrained notions of self-government, thus

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committee members shall also make suggestions and general recommendations based on reports and information received from the States Parties. *Id.* art. 21, 1249 U.N.T.S. 22.

18. Strassel, *supra* note 13.

19. S. Exec. Rep. No. 107–9, at 17 (Letter from Colin L. Powell, Secretary of State, to Sen. Joseph R. Biden Jr. (July 8, 2002)).

20. Those reports all legitimately focused on the political resistance to full equality for women in those countries. *Id.*

21. *Id.*

22. *Id.* at 18 (Letter from Daniel J. Bryant on behalf of the Department of Justice, Office of Legislative Affairs, to Sen. Joseph R. Biden Jr. (July 26, 2002)).

23. *Id.*

24. *Id.*

25. *Id.* at 20–24 (additional views of Sens. Helms, Brownback, and Enzi).

"exalting international law over constitutionally-based domestic law and local self-government."[26]

Finally, the Senators attacked the CEDAW Committee itself, strenuously rejecting the "meddling in all of these areas" by that committee.[27] Moreover, they railed against both the committee members and the fact that they were "sent by dictatorships which oppress women."[28] That point was more fully developed by Senator Allen, who embellished on this ad hominem attack directed at the States Parties themselves. He recited the failures of various signatories, such as Afghanistan, China, Cuba, and Saudi Arabia,[29] but did not mention that CEDAW had been ratified by 185 States Parties.[30]

Again, this smacks of political posturing aimed at pleasing either real or perceived constituencies, but several critical facts remain. First, CEDAW has not been ratified by the United States, as is the case with other human rights treaties. Second, the sentiments expressed by these sources appear much more broadly in the American narrative in this area, as they have for perhaps centuries.[31] Finally, very distinct themes are present in that narrative, making CEDAW a likely candidate for such resistance.

Perhaps known to few CEDAW proponents, this debate is waged on a Manichean battleground. Focusing on China, Belarus, and Croatia, Colin Powell sounded notes heard frequently. He chafed at the CEDAW Committee Report[32] recommending that China decriminalize prostitution. However, he did not note that the recommendation was linked to health concerns and concerns about violence against women and problems of the trafficking and exploitation of prostitution.[33]

The report on Belarus commented on that country's reintroduction of symbols (such as Mother's Day) that reinforced sex-role stereotypes.[34]

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 27 (additional views of Sen. Allen).
30. MULTILATERAL TREATIES, *supra* note 1, at 284.
31. For example, Patrick Fagan, who has been cited extensively as an authoritative source on CEDAW, said that the U.N., through CEDAW, is "[i]nvolved in a campaign to undermine the foundations of society . . . and the legal and social structures that protect these institutions." Patrick F. Fagan, *How U.N. Conventions on Women's and Children's Rights Undermine Family, Religion, and Sovereignty* (The Heritage Foundation, Backgrounder No. 1407, 2001), *available at* http://www.heritage.org/Research/InternationalOrganizations/BG1407.cfm.
32. U.N. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women: Twentieth Session*, ¶¶ 285–291, U.N. Doc. A/54/38 (Part I) (May 4, 1999).
33. S. Exec. Rep. No. 107–9, at 16–17. Mr. Bryant's comments took that one step further. He characterized the report as calling for "legalized prostitution." *Id.* at 18.
34. U.N. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women: Twenty-second Session*, ¶ 361, U.N. Doc.

Again, the surrounding materials in that report concerned employment issues in Belarus and the difficulties faced by that country. Accordingly, the CEDAW Committee was troubled that the reintroduction of sex-role stereotypes could particularly hinder job opportunities for women in an already difficult economic setting, thus placing women at a particular disadvantage.

Finally, Mr. Powell took issue with the report on Croatia.[35] That report dealt with reproductive rights and stated that "the Committee is particularly concerned that services pertaining to women's reproductive health are the first to be affected as a result of the Government's financial constraints."[36] It went on to state concern about funding cuts for contraceptives and the refusal of some doctors, particularly at public hospitals, to perform abortions, based on conscientious objections.[37] While the Committee did not require Croatia to recognize a right of choice, as it already had, it did ask it to provide the same services on the same terms for reproductive health interests as for others.[38]

The abortion issue, unsurprisingly, has drawn particularly strong comments from CEDAW opponents. The Committee has been accused by some of pressuring State Parties into legalizing abortion.[39] Indeed, the note is frequently sounded that CEDAW has usurped rights to cultural and religious self-determination.[40] Yet, though these concerns may seem misplaced or simply silly, they should not be treated as prattle or otherwise marginalized.

A/55/38 (Part I) (May 1, 2000).

35. U.N. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women: Eighteenth Session*, ¶¶ 109, 117, U.N. Doc. A/53/38 (Part I) (May 14, 1998).

36. *Id.* ¶ 109.

37. *Id.*

38. *Id.* ¶¶ 109, 117.

39. A report prepared by Thomas W. Jacobson argued that the CEDAW Committee pressured seventy-six party nations to legalize abortion between 1995 and 2009. THOMAS W. JACOBSON, FOCUS ON THE FAMILY, CEDAW COMMITTEE RULINGS PRESSURING 76 PARTY NATIONS TO LEGALIZE ABORTION 1995–2009 (2009), *available at* http://www.nrlc.org/federal/foreignaid/CEDAWDecrees OnAbortionJacobsonApril2009.pdf. CEDAW has no such power, and all of the instances discussed are much like that from the CEDAW Committee's discussion of Belarus, where it expressed concerns about equality of treatment in health care and economic areas.

40. A 2002 statement from Women for Faith & Family treats these choices as matters of "cultural self-determination of nations." WFF Statement on CEDAW, http://www.wf-f.org/CEDAW.html (last visited Feb. 15, 2010). Indeed, the statement echoed an ancient debate in chastising the CEDAW Committee to interpret the Convention "adequately and acceptably . . . minimizing 'penumbra' interpretations." *Id.* The reference to *Griswold* is clear. Griswold v. Connecticut, 381 U.S. 479, 483 (1965). Setting aside the fact that the CEDAW Committee cannot coerce members to follow any recommendations, these criticisms treat gender identity as a matter somehow dictated by some static culture, religion, or government policy, and thus being beyond the reach of the Committee.

Opponents of CEDAW see it and its work as the symbolic representation of much that is wrong with the world. Embracing notions of moral purity, they reject something that recommends decriminalizing prostitution, removing impediments to abortion and eliminating national imagery that identifies women with hearth and home.[41] Seemingly ignoring legitimate contemporary problems, they yearn for a time and place without these illustrations of moral failure, perhaps believing that the United States either is there now, or will get there if the country simply resists such international meddling. In sum, they see CEDAW as unnecessary and see no reason for the United States to participate in a dialogue about other countries' problems. In all this, CEDAW's opponents are wrong.

III. AMERICAN EXCEPTIONALISM AND SOVEREIGNTISM

Rising to oppose Harold Koh's confirmation as the legal advisor to the Department of State, Senator John Cornyn assumed a role now familiar in American legal history. Koh, a major proponent of transnational normative thinking, would seem to be a perfect foil to Cornyn, and he was. Cornyn warned against his confirmation, for "many of his writings, his speeches, and other statements are in tension with some very core democratic values in this country."[42] According to Cornyn's view, the United States faced an ideological choice: either pledge unconditional allegiance to the U.S. Constitution, or be led dangerously by "some unsigned, unratified international treaty or an expansive notion of international common law which Professor Koh embraces and advocates."[43] These comments and others are laden with a sense of moral superiority, one that resists the integration of foreign norms within our system.

Indeed, five years earlier, Senator Cornyn proposed the Constitution Restoration Act of 2004.[44] That bill would have prohibited any court in the

41. In perhaps the most profound, but not atypical distortion of CEDAW, Chuck Colson, former counsel to President Richard Nixon, proclaimed it a sponsor of sex trafficking and prostitution: "CEDAW is a hindrance to ending sexual slavery. *This UN treaty demands that signatory nations recognize prostitution as a career choice for women*, and this invites sex trafficking on a massive scale." *BreakPoint Commentaries: A Job No Woman Would Choose: Hilary and Her "Sex Workers"* (BreakPoint radio broadcast Dec. 13, 2002) (emphasis added) (transcript available at http://www.breakpoint.org/commentaries/2974-a-job-no-woman-would-choose). Article 6 of CEDAW states: "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." CEDAW art. 6, 1249 U.N.T.S. 17.

42. 155 CONG. REC. S6,918 (daily ed. June 23, 2009) (statement of Sen. Cornyn). Senator Cornyn concluded, "We don't need another voice in the administration whose first instinct is to blame America." *Id.* at S6,919.

43. *Id.* at S6,918.

44. Constitution Restoration Act of 2004, S. 2082, 108th Cong. (2004).

United States from interpreting the U.S. Constitution by reference to "any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law."[45] But this is not a criticism of Senator Cornyn, for his views are simply a modern manifestation of the view that the laws of the United States are somehow not only better than those elsewhere, but that the United States is exempt from the laws that govern others in the international community. Holders of this view conclude that Americans need not subject themselves to the "international scrutiny" to which other nations are exposed.[46]

That sentiment has been expressed throughout American history, virtually from the inception of the republic,[47] and pointedly repudiates the work of the United Nations. Driven perhaps by multiple agendas,[48] opponents of the United Nations warn against the United States joining treaties and the resultant displacement, they claim, of domestic law. As Senator Everett Dirksen said, "We are in a new era of international organizations. They are grinding out treaties like so many eager beavers which will have effect on the rights of American citizens."[49] Thus, championing such sentiments, the American Bar Association and Senator John Bricker of Ohio sought to correct matters by amending the U.S. Constitution.

During the early 1950s, Senator Bricker attempted to amend the U.S. Constitution to limit treaty-making authority. It is a familiar aphorism in America that treaties are the supreme law of the land. That derives from the U.S. Constitution, and it was there that Bricker sought to amend it.[50] The proposed amendment went through several drafts, but in final form it stated that "no treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution or abridging or

45. S. 2082, § 201.

46. *See* Kaufman, *supra* note 3, at 154.

47. Professor Resnik has taken a keen interest in this topic, noting that as early as 1799, the state of New Jersey divorced itself from the laws of Britain in the Act of June 13, 1799, § 5, 1799 N.J. Laws 608. That law established freedom from Britain by prohibiting any use of British law in American courts after July 4, 1776. *See* Resnik, *supra* note 5, at 37–38.

48. For example, supporters of these efforts warned against changes potentially caused to domestic law by internationalism in the "so called field of civil rights." *Hearings Before a Subcomm. of the S. Comm. on the Judiciary on S.J. Res. 1 Proposing an Amendment to the Constitution of the United States Relative to the Making of Treaties and Executive Agreements and S.J. Res. 43 Proposing an Amendment to the Constitution of the United States, Relating to the Legal Effect of Certain Treaties*, 83d Cong. 145 (1953) [hereinafter *Hearings on S.J. Res. 1 & S.J. Res. 43*] (Statement of Frank E. Holman, former President, American Bar Association).

49. *The Bricker Amendment: A Cure Worse Than the Disease?*, TIME, July 13, 1953, at 20.

50. U.S. CONST. art. VI, § 2 (specifying that the Constitution, federal law and treaties "shall be the supreme Law of the Land").

prohibiting the free exercise thereof."[51] This provision was clearly intended to staunch a perceived tide of internationalism by limiting the impact of treaties on domestic law. It failed by a single vote, but the legal and political costs were considerable.[52]

The Eisenhower administration was, at best, ambivalent about internationalism. While technically resisting the amendment, its sympathies were with Bricker. Indeed, during the Senate hearing, Secretary of State John Foster Dulles indicated his opposition to ratifying the Genocide Convention, as well as his antipathy toward entering into future treaties.[53] This reflected the strain of thought captured by his statement that the United States should not use the treaty-making power "to effect internal social changes."[54] The fear was that a liberal agenda would be furthered by those international influences and the United Nations itself.[55] By this view, internationalism was in direct opposition to American sovereignty, and thus a threat to it.

A. American Sovereigntism

Sovereigntism draws from two fundamental notions within political thought: all sovereign nations (1) exercise control over their geographic territories, and (2) engage in some form of ongoing self-definition. Viewed in this light, many social, cultural, and political institutions participate in that dialogue, and the more pluralistic the society, the more complex the process of self-definition. Indispensable to that process is lawmaking, a process that orders the myriad relationships within civil society.

Lawmaking by organizations such as the United Nations facially challenges this notion of national sovereignty in that international treaties are the product of collective efforts among member States, not the judgment of individual ones. Certainly, member States accede to this form of lawmaking by joining the United Nations and by signing and ratifying treaties,[56] but it is

51. S.J. Res. 130, 82d Cong. (1952).

52. The administration's tepid opposition to the amendment signaled what became a persistent American resistance to human rights treaties and, as one commentator noted, "marked a regression in the nation's initial course of constructive engagement in the drafting process—a clear example of a national authority captive to the constraints of the federal system." Koren L. Bell, *From Laggard to Leader: Canadian Lessons on a Role for U.S. States in Making and Implementing Human Rights Treaties*, 5 YALE HUM. RTS. & DEV. L.J. 255, 274 (2002). Many have agreed with this assessment. *See, e.g.*, Resnik, *supra* note 3, at 1608–09.

53. *Hearings on S.J. Res. 1 & S.J. Res. 43*, *supra* note 48, at 886.

54. *Id.* at 824–25.

55. Bricker warned against entering that internationalist path, which would only lead to "more liberal social and economic policies and legislation in the United States." *See* Resnik, *supra* note 3, at 1607.

56. Member State compliance is subject, of course, to whatever RUDs are entered into.

nevertheless remarkable that these treaties apply then to members who have enormous diversity in laws, cultures, and social institutions. This challenge to wise treaty-making is intensified by the presence of federalist systems, with different subject areas falling within either national or local forms of jurisdiction.

In the United States, the division between state and federal jurisdiction was once thought to be clear. Thus, for example, the general area of family law was long considered to fall within the exclusive province of state law.[57] In many respects this is still true, as some matters, such as divorce, fall solely within state law. Elsewhere, however, this distinction has eroded, as conditions have dictated the need for federal intervention in areas such as child custody jurisdiction and the enforcement of support across state lines. Yet the sense still remains in many quarters that somehow states' rights are encroached upon by federal laws—worse yet, by international treaties.

Thus, as I have said here previously, CEDAW and the Convention on the Rights of the Child would seem to be veritable lightning rods for the assertion of a passionate form of sovereigntism, as they both deal with the legal structures of family relationships. But it is unclear how the *content* of CEDAW, if ratified, would offend American sovereignty.

Designed to eliminate discrimination against women in all its guises, the key element of CEDAW lies in its definition of "discrimination against women." It provides:

> For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[58]

Moreover, the Convention has no enforcement mechanisms, and many provisions are prefaced by the hortatory phrase that "States shall take all appropriate measures" to accomplish certain Convention goals.[59]

The drafting history indicates that Working Group members hotly debated many parts of the definition, and it went through multiple drafts.[60]

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57. "A region of the law which was formerly left exclusively to the states is now subject to federal regulation in many ways." HOMER H. CLARK JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, at xvii (2d ed. 1988).

58. CEDAW art. 1, 1249 U.N.T.S. 16.

59. *See, e.g.*, *id.* arts. 5–8, 1249 U.N.T.S. 17.

For example, the group considered whether to bar "preferences," but concluded not to. Similarly, by prohibiting discriminatory conduct that has either the *effect* or *purpose* of limiting women's rights, the group avoided problems that have plagued domestic courts dealing with legislation similarly striking out against discrimination. In sum, this critical term of the Convention is well crafted and, one would think, unthreatening.[61] But, if the United States were to ratify the treaty, it would then become part of domestic law. Though CEDAW is likely compliant with these laws, its origins lie in the nebulous international community, as do its enforcers.

Thus, the threats of CEDAW to the American psyche would seem to be three. First, its legal impact would seem, to some, to be of uncertain reach substantively, thus potentially effecting major changes in our law. Though this perception seems irrational and is probably false, it appears deeply felt. Second, CEDAW is a product of the United Nations and emanates from what is, to some, an offensive source. Finally, especially as has been decried shrilly in certain blogs, CEDAW is applied by those outside the United States. Outsiders would be telling Americans what to do, even though powerless to compel action. This would not further self-definition, but, as the thinking goes, thwart it.

1. The "Sovereignty" Shibboleth

Notions of sovereignty are frequently invoked in these dialogues, but used in maddeningly different ways. Indeed, it is often hard to assimilate these uses within any acceptable definitions of the word. Perhaps that is so because it has become loaded with many ideas it will not bear.

Catherine Powell has also noted this distorted usage.[62] Noting the differences in CEDAW discussions between Western and non-Western States, she detected an unusual assignment given to the role of culture by both. To her view and mine, Western States often "invoke 'sovereignty' as a shield against international criticism of cultural and religious practices."[63]

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60. *See* LARS ADAM REHOF, GUIDE TO THE *TRAVAUX PRÉPARATOIRES* OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 45–49 (1993). Indeed, the representative from the United States played an active role in those deliberations. *Id.*

61. For a good review of the various provisions of CEDAW, see Ernst, *supra* note 6, at 302–08. However, what follows article 1 simply extends its prohibition against discrimination in various fields, such as sexual trafficking (article 6), the right to vote (article 7), employment (article 11), as well as others. *See, e.g.*, CEDAW arts. 6, 7, 11, 1249 U.N.T.S. 17–18.

62. Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331 (2005).

63. *Id.* at 342–43.

Thus, the non-West is criticized for non-compliance with CEDAW because of cultural barriers, whereas the West invokes sovereignty in its resistance, especially in the United States.[64] Thus, whereas non-Western non-compliance is somehow the kind of cultural primitivism of which the "other" partakes, Western non-compliance is somehow rational when cloaked in the mask of sovereigntism.

This conclusion would seem hard to prove, save for one fundamental fact: almost all discussions of the United Nations generally, or CEDAW specifically, yoke these notions together exactly as stated above. For example, Bob Barr, lamenting the rise of internationalism, spoke of how it trenches on our indispensable notions of "national sovereignty."[65] For him, our "constitutionally guaranteed rights and freedoms" are imperiled by these threats to this "precious sovereignty—the very sovereignty that so many have shed blood protecting."[66] Used in that manner, the notion of sovereignty scarcely bears any resemblance to any familiar usage.

But the chorus of CEDAW critics frequently conflates the cultural with the structural in precisely that manner. The statements from the dissenting Senators and others surely reflect this, as do the statements of many others of like sentiment. One of the few student publications opposing CEDAW cited the familiar, often-cited critics, in arguing that it threatens "the fundamental role of the family, the freedom of religion, and the sovereignty of the U.S. governmental structures."[67] Yet if sovereignty speaks to the process of self-definition of which I have written, the very notion itself would seem to permit the acceptance of norms from any source, be those sources from within or outside the United States. Thus, the invocation of sovereignty would seem to be a coded signal to oppose international norms solely

64. For example, Syria, along with many other nations, objected to CEDAW because of its incompatibility with "provisions of the Islamic sharia." Indeed, further setting itself apart from the West, it also stated that accession to the Convention did "in no way signify recognition of Israel or entail entry into any dealings with Israel." Meeting of States Parties to the Convention on the Elimination of All Forms of Discrimination Against Women: Fourteenth Meeting, *Declarations, Reservations, Objections and Notifications of Withdrawal of Reservation Relating to* [CEDAW], at 28, U.N. Doc. CEDAW/SP/2006/2 (June 28, 2006). Indeed, the religious reservations made by the United Arab Emirates were so extensive that sixteen States Parties filed objections to those reservations, questioning the commitment of the UAE to the basic objectives and purposes of the Convention. *See id.* at 30–31, 55.

65. Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 HARV. J. ON LEGIS. 299, 323–24 (2002).

66. *Id.*

67. Rebecca L. Hillock, Comment, *Establishing the Rights of Women Globally: Has the United Nations Convention on the Elimination of All Forms of Discrimination Against Women Made a Difference?*, 12 TULSA J. COMP. & INT'L L. 481, 499 (2005).

because of their source, though ironically, the absorption of those norms would appear to be the very *exercise of* that sovereignty.

Sovereigntism as self-rule, then, is completely consistent with the ratification of a treaty such as CEDAW. The choice to ratify is exactly the kind of choice that sovereign nations make. In enacting its recent constitution, South Africa considered how its courts should deal with laws of foreign origin. It decided that such bodies "must" consider international law and "may" consider foreign law.[68] Similarly, the U.S. Constitution has elevated treaty law to the status of supreme law of the land, as previously mentioned. In both cases, constitutions have simply provided for incorporating those external laws, thus internalizing them at a level of national governance. And, thus far, discussion has been confined to whether sovereigntism is somehow a bar to the incorporation of international norms by national governments.

The incorporation process would seem unexceptional. But if the driving force behind sovereigntism is antipathy toward the international, perhaps the real sovereigntism being ostensibly defended is somehow one deeply content-based, as I have submitted. That is, perhaps advocates would candidly answer, if pushed, that it is not the process that is repugnant, but the resultant displacement of American legal notions produced at the national level. Perhaps in this ideological conflict, we are dealing with ever-decreasing circles of what is considered American.[69]

Alex Aleinikoff has then, seeking to localize sovereignty, considered it as "congressional sovereignty."[70] Since we frequently think of Congress as speaking for the United States, perhaps the adoption of international norms violates our sovereignty were those norms to collide with and displace domestic ones. Unfortunately for sovereigntists, that argument ignores too much. As Aleinikoff points out, the finding that a federal statute violates the Constitution is no breach of sovereignty, as the Constitution permits that potential result. Similarly, it permits the result that treaty law similarly trumps federal statutory law. As he says, the notion of congressional sovereignty "simply does not make sense in the American legal and political systems."[71] Similar to my incorporation argument, this is a structural argument addressing the conflict that arises when some form of international

68. S. AFR. CONST. 1996, s. 39.

69. Naturally, this is exactly what Catherine Powell and I refer to when we deal with the way the debate is pitched as an appeal to sovereigntism, rather than to the "other's" culturalism. Be that as it may, the question is still one of whether the term, so used, has any conceptual coherence.

70. T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989 (2004).

71. *Id.* at 1995.

law conflicts with that created by Congress. Our scheme of government dictates the result. Though some might prefer the domestic product, sentiment cannot dictate a legal dispute.

But is this too technical a response to sovereigntists? Might they not reply that scrupulously adhering to these requirements for supremacy may yield a law whose content cuts against American norms, a law that though technically inevitable, produces a hodgepodge inconsistent with who Americans are as a people, making the result somehow less "American"? Perhaps, but we are no longer talking sovereigntism, then, but some combination of content and structure that defies neat categorization, what may be called culturalism.[72]

Perhaps unwittingly then, CEDAW opponents ultimately invoke notions of "popular sovereignty" to support their opposition. Much of this detailed opposition ultimately invokes notions of family values and roles thought to be intimately woven into the fabric of American values. Patrick Fagan, writing for the Heritage Foundation, has given clearest expression to these notions.[73] Attacking what he calls the "U.N.'s Countercultural Agenda," he argues that both CEDAW and the Convention on the Rights of the Child undermine the fundamental role of the family in an enormous number of ways.[74] In all this, he argues that American values promoted and protected at the state level are undermined. In what I have called this ever-decreasing circle of what counts as American, he invokes a familiar notion that permeates the CEDAW debate: the voice of the people—a voice heard at the state level—should not be subordinated to either federally created norms or, worse, international norms ushered in through treaty ratification.[75]

But this notion of sovereignty creates a raft of insoluble problems. First, the invocation of "popular sovereignty" begs the question of "popular with whom?" Frequently, people proclaim things "popular" that simply represent things in which they believe. Second, even if the notion has validity, how is its content determined? Law creation by sovereign governmental structures is determinate, whereas this is not. Third, the concept of sovereignty assumes

72. Professor Powell would, hopefully, agree with this rubric, for short shrift is given to structural issues by CEDAW opponents, and a great deal of space is used in discussing the content of these perceived American norms.

73. Fagan, *supra* note 31.

74. *Id.* at 4–5. Fagan claims that these treaties change sexual norms, promote prostitution, redefine gender, attack religious freedoms, and undermine the rights and responsibilities existing between children and parents within the family structure. *Id.* at 17.

75. The criticism that CEDAW offends American federalism has been around since the beginnings of the debate. *See generally* Ernst, *supra* note 6, at 319–21; Rutkow & Lozman, *supra* note 1, at 182–85.

some mechanism through which it is exercised, whereas here we are talking about *volksgeist* at best.

Thus, the notion of popular sovereignty fails an essential sovereignty test. Self-definition in the legal sphere involves self-rule. We define ourselves in part through the law we create. However, inherent to this process is the view that some individual or institution has the "final say" on what the law is. But, as T. Alexander Aleinikoff has asked, "[i]n what sense do the people constitute the 'final say' in the U.S. constitutional scheme?"[76] Since, as I said, sovereignty can only be invoked through the use of cognizable legal mechanisms, and since the so-called voice of the people has no such mechanism, no final say is possible because there is no way in which it can take place. Citizens of a nation express themselves through their elected representatives, and if those voices do not reflect them properly, the recourse is to vote them out of office.

The call to sovereignty is, then, misplaced. No plausible theory of sovereignty supports CEDAW opponents, whose opposition ultimately degenerates into a kind of American chauvinism, ironically vaulting the state and local over the federal. However, since CEDAW is a human rights convention, its scope is expressly federal, calling for federal leadership as do other matters, such as civil rights and voting rights.

American Exceptionalism and sovereigntism are, then, linked. American Exceptionalists envision the United States as different from the rest of the world, and thus not required to join in international enterprises. Sovereigntism is the substantive position they advance in furtherance of those views, claiming a betrayal of much that is distinctly and enviably American, were the United States to capitulate to international norms and instruments.

IV. BRIDGING THE GAP TO THE PRESENT

Being right about these matters provides little solace to CEDAW proponents if it cannot further national acceptance of their aspirations. Many commentators have a variety of responses to this gridlock, but all sound in some form of re-education of the American people to shuffle off the shackles of Exceptionalism and begin a more cosmopolitan venture into internationalism.

Cass Sunstein uses the metaphor of "norms cascades" to describe the situation in which societies experience rapid shifts to new ways of thinking,

76. Aleinikoff, *supra* note 70, at 1995.

thus making the acceptance of new norms easier. Indeed, it is not simply easier, but as Sunstein notes, "the lowered cost of expressing new norms encourages an ever-increasing number of people to reject previously popular norms."[77] With this lowered political cost for adherence to new norms, more political leaders and citizens may be expected to engage in a new narrative, one in which internationalism has become acceptable.

As many of these commentators have observed, the issue is one of creating the political will to effect change whereby opposition will recede as that opposition increasingly yields social disapproval. Jessica Neuwirth drew an interesting contrast between the effect of CEDAW and that of the Beijing Platform for Action.[78] That platform grew out of the 1995 United Nations Fourth World Conference on Women. By all accounts, an incredibly well-attended and successful conference, it yielded a platform expressing the objective of ensuring "equality and non-discrimination under the law and in practice."[79] Unsurprisingly, Neuwirth concluded that "[t]he greater impact of the Beijing Platform for Action at the national level is integrally linked to the visibility of the Beijing process, which has in fact helped to illuminate the CEDAW process."[80]

Especially in the post-September 11 United States, CEDAW is not only not salient, but also may seem vaguely threatening. Since American leadership has not championed the international until very recently, it is hardly surprising the CEDAW interest has not taken on a life of its own—it is simply impractical to expect more. However, during the waning days of President Bill Clinton's second administration, he signed an executive order on U.S. policy and the implementation of human rights treaties[81] that, sadly, drew the most attention in vitriolic commentary on blogs. But that order provides one mechanism for bridging the gap from where we are nationally, to where we should be.

The executive order made a number of moves designed to rationalize and coordinate our national oversight of human rights treaties. First, it created responsibility in all relevant executive departments and agencies to "maintain a current awareness of United States international human rights obligations

77. CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 38 (1997).

78. Jessica Neuwirth, *Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination Against Women and through the Beijing Platform for Action*, 18 HARV. HUM. RTS. J. 19 (2005).

79. The Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, ¶ 231, U.N. Doc. A/CONF.177/20/Rev.1 (Jan. 1, 1996).

80. Neuwirth, *supra* note 78, at 46.

81. Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).

that are relevant to their functions."[82] That is terribly important, as these matters have seemingly floated in and out of national consciousness with neither rhyme nor reason. Adding to that, President Clinton reposed responsibility in the heads of those agencies to oversee coordination with other bodies and to take action in processing complaints and inquiries about human rights violations.[83]

Perhaps most importantly, though, the order created an Interagency Working Group on Human Rights Treaties to provide "guidance, oversight, and coordination with respect" to U.S. international treaty obligations.[84] Indeed, in addition to other functions, that agency was to have served an educational role by "developing plans for public outreach and education concerning the provisions of the ICCPR, CAT, CERD, and other relevant treaties, and human rights-related provisions of domestic law."[85] Surely, though it takes enormous effort to educate the American populace on our international obligations, this constituted a major step in undertaking that effort. It failed.

On February 13, 2001, President George W. Bush issued a directive establishing a Policy Coordination Committee on Democracy, Human Rights, and International Operations ("PCC").[86] That directive transferred all the work of President Clinton's interagency group to the newly formed PCC. Unfortunately, the PCC submitted reports sporadically, had no dedicated staff, and had no resources with which to monitor human rights compliance with other governmental bodies.[87] Worse and perhaps reflective of a lack of political will to take human rights seriously, during the 2008 Convention on the Elimination of all Forms of Racial Discrimination ("CERD") Committee Review, the United States engaged outside consultants to coordinate the writing and issuance of the required reports.[88] Thus, the PCC squandered an

82. *Id.* § 2(a), 63 Fed. Reg. 68,991.
83. *Id.* §§ 2(b), 3, 63 Fed. Reg. 68,991.
84. *Id.* § 4(a), 63 Fed. Reg. 68,991.
85. *Id.* § 4(c)(vi), 63 Fed. Reg. 68,992.
86. National Security Presidential Directive No. 1, Organization of the National Security Council System, http://www.fas.org/irp/offdocs/nspd/nspd1.htm (last visited Oct. 11, 2009).
87. *See* Kaufman, *supra* note 3, at 160–61.
88. *Id.* at 161. CERD requires that

> each State party [undertake] to submit to the Secretary-General of the United Nations . . . a report on the legislative, judicial, administrative or other measures which it has adopted and which give effect to the provisions of the Convention: (a) within one year after the entry into force of the Convention for the State concerned, and (b) thereafter every two years and whenever the Committee so requests. Article 9, paragraph 1, also provides that the Committee may request further information from the States parties.

Comm. on the Elimination of Racial Discrimination, Guidelines for the CERD-Specific Document to Be Submitted by States Parties Under Article 9, Paragraph 1, of the Convention, ¶ 1, U.N. Doc.

opportunity to do those things necessary to elevate the role of international law and make it more visible.

A. Federalism Dialogues

Professor Judith Resnik has written extensively about mechanisms for effecting law's migration, about the diverse ways in which international norms can become domesticated.[89] She notes, for example, the growing tide of CEDAW initiatives at the state and local level.[90] To some degree resisting the focus on the "national," she argues that these internationally originated norms require "local expressions, reiterated and obliged, through communities that come to see their own identity as at stake when deviations occur."[91] In much of this she is probably correct: no single access point exists for the importation of norms. Rather, the greatest gains are made by utilizing multiple points of entry, as with the Beijing Platform.

But if the challenge is to re-orient the United States toward accepting internationalism, such local iterations might be largely ineffective.[92] By contrast, in creating the interagency working group, President Clinton created a sensible structure for national monitoring, rationalization, and oversight of human rights obligations. Confining that effort to the federal level, however, would doom it to only partial success. Neither the local initiatives nor the federal one provide mechanisms for adding to the national narrative on internationalism; both seek only substantive compliance with accepted legal norms.

CEDAW opposition draws from a number of strains of thought, among which is states' rights thinking. By that view, certain matters are best left to the states to decide, and state sovereignty is breached by the vertical imposition of national standards upon the states. Envisioning a hierarchical system in which the federal government foists norms on the states, states' rights supporters resist CEDAW, in part, because they resist this imposition. Though that view may, as previously noted, be culturally coded, it still represents a potent anti-CEDAW force.

CERD/C/2007/1 (June 13, 2008).

89. *See, e.g.*, Resnik, *supra* notes 3 and 5. Her scholarship led the American Bar Association to confer upon her the Outstanding Scholar of the Year Award in 2008. Yale Law School, Biography of Judith Resnik, http://www.law.yale.edu/faculty/JResnik.htm (last visited Feb. 15, 2010).

90. Resnik, *supra* note 5, at 54–57.

91. *Id.* at 66.

92. As Lesley Wexler has noted, "while sub-federal integration may trigger a norm cascade in like-minded states and cities to adopt similar propositions, it seems unlikely to spur treaty ratification." Lesley Wexler, *Take the Long Way Home: Sub-Federal Integration of Unratified and Non-Self-Executing Treaty Law*, 28 MICH. J. INT'L L. 1, 41 (2006).

Beginning a fruitful dialogue on internationalism requires the establishment of what has sometimes been called dialectical federalism.[93] Whereas CEDAW opponents fear a bullying federal government's intrusions into state matters, dialectical federalists envision a give and take, interactive process in which neither party claims superiority over the other. That is essential, as such an institution like CEDAW is doomed from the onset absent guarantees of a process that will permit this kind of frank political dialogue.

1. An Example of Failed Federalism

I have mentioned the need for federal leadership in areas such as voting rights and civil rights. Examination of a domestic dispute may explain the manner in which such dialogues can take place. The passage of the Civil Rights Act of 1964 was a legal milestone in American history. However, after its passage, President Johnson rightly observed to Hubert Humphrey, "I want all those other things—buses, restaurants, all of that—but the right to vote with no ifs, ands, or buts, that's the key."[94]

Surely egregious mechanisms existed that denied the franchise, such as literacy tests, grandfather clauses, and poll taxes. Indeed, these mechanisms had even been refined, whereby devices such as Louisiana's "read and understand" requirement resulted in wanton denials of the voting rights of African-Americans.[95] But subtler, more devious devices also existed, such as the use of multi-member districts. Though too complex to explain here, that structure had the potential to create vote dilution, and had frequently been used to abridge the rights of minorities. However, the difficulty of proving discriminatory intent resulted in persistent vote dilution in affected districts. That ended with the passage of amendments to section two of the Voting Rights Act of 1965 in 1982.[96] With those amendments, plaintiffs were no longer required to prove discriminatory intent. Rather, the statute was now

93. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048 (1977).

94. MERLE MILLER, LYNDON: AN ORAL BIOGRAPHY 371 (1980).

95. *United States v. Louisiana* recounts a particularly loathsome instance. "Frdum Foof Spetgh" was deemed an acceptable response to the speech requirement of the Louisiana Constitution by a white voter. United States v. Louisiana, 225 F. Supp. 353, 384 (E.D. La. 1963). By contrast, when asked to interpret how rolling stock worked, a black voter's response that "it means if the owner of which does not have residence with the State, his rolling stock shall be taxed not to exceed forty mills on the dollar" was rejected by the registrar. *Id.*

96. Pub. L. No. 97-205, 96 Stat. 131 (codified as amended 42 U.S.C. §§ 1971, 1973 to 1973c).

violated by any act that resulted in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.[97]

In *Chisom v. Roemer*, a large group of black voters from Orleans Parish, Louisiana sued the Governor and a variety of state officials, alleging unlawful vote dilution.[98] Specifically, they asserted that because of the operation of that multi-member district, their votes were diluted for the election of judges to the state supreme court. The path of the litigation demonstrates a failure of governing that could have been avoided.

The United States intervened in the suit. Supporting the plaintiffs, it asserted that the districting was a "standard, practice or procedure that results in a denial or abridgement of the right to vote on account of race or color."[99] The Court agreed, as the *result* was certainly discriminatory. But the sole issue before the Court was whether the Act even covered the case, as Louisiana had prevailed below on the ground that judges did not count under the Act, since they were not "representatives" within its meaning. That is, section two provided a standard for testing vote dilution, whereby the decisionmaker is to employ a totality of the circumstances test to determine whether members of a group "have less opportunity than other members of the electorate to participate in the political process *and to elect representatives of their choice*."[100] The right to vote guaranteed in the chief section was then somehow limited by the term "representative."

The majority quite reasonably held that the term "representatives" designates "the winners of representative, popular elections."[101] After all, at stake was the meaning of the right to vote, and participatory democracy shuns the notion of denying or limiting that right based on whether the election is for legislators or others. It shuns the notion of a veritable whites-only ballot for some offices not of a legislative nature. But that is just the limit that Justice Scalia would have imposed. For him, the Court's job was not to "scavenge the world of English usage to discover whether there is any possible meaning of representatives which suits our preconception that the statute includes judges."[102] Rather, the term should be limited to those who represent the people, and under that requirement, judges simply did not count.

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97. 42 U.S.C. § 1973 (2006).
98. Chisom v. Roemer, 501 U.S. 380 (1991).
99. *Id.* at 387 (internal quotations omitted).
100. *Id.* at 388 (citing Voting Rights Act of 1965 § 2, 79 Stat. 437 (1965) (emphasis added)).
101. *Id.* at 399.
102. *Id.* at 410 (Scalia, J., dissenting).

Representing a sad failure of our political and legal institutions, this suit could have been avoided under a different structure of lawmaking, one utilizing the kinds of mediating devices called for here. Were some body present that coordinated federal and state law, Louisiana's law would have been examined in light of the amendments to section two, enacted nine years previously.[103] Presumably, that districting scheme would have been questioned and, hopefully, eliminated. Second, because this examination never occurred, a large group of people was disenfranchised and had to resort to legal action to regain that franchise. Moreover, that action was just one of potentially many that could have taken place in that state as well as others. Finally, that suit was a sad spectacle of litigation that dragged on to the Supreme Court, which obviously incurred all the costs and unfortunate delays in justice. But the question is, how can the CEDAW debate benefit from this lesson of the movement; what is to be done to create institutions that preclude these foolish conflicts?

B. Institutionalized Federalism: Rewriting the Narrative

CEDAW ratification can only be achieved if Americans first form structures to conduct proper dialogues on its impact throughout the country. Indeed, it is pointless to even hope for ratification unless these mechanisms for discussion among all levels of government are first constructed, for consensus is not politically feasible until antagonists recognize that rhetorical flailing has achieved nothing, neither preserving imagined American norms, nor successfully joining in a global narrative.

The United States has no formal mechanisms in place for conducting this dialogue. However, constructing viable mechanisms must proceed from a different view of American Exceptionalism. As Resnik has said, characterizing American Exceptionalism "in the 'beacon of liberty mode,' argues both the awkwardness of standing apart from this great human rights effort and the need to participate so as to press other nations 'for fuller compliance.'"[104] Thus far, failure to invest in that narrative has understandably filled proponents with a terrible sense of poignancy at how we have distanced ourselves from something so thoroughly in line with American ideals as CEDAW.[105]

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103. Naturally, that kind of examination would have taken place throughout the body of state law in the United States, thus averting the kinds of contests and crises that took place, as well as the woeful denials that undoubtedly went unnoticed and unaddressed.

104. Resnik, *supra* note 3, at 1657.

105. Resnik discusses the complete congruence between what we have done, what CEDAW stands for, and the sad irony of our resistance to the Convention. *Id.* at 1657–58.

Writing a profoundly personal piece online, psychologist Jonathan Haidt explored the deep divide within American political thought or, better, American political party thought.[106] Reacting to the perverse phenomenon of Republicans and Democrats talking at utterly cross purposes, he noted that when "Democrats try to explain away these positions using pop psychology they err, they alienate, and they earn the label 'elitist.' But how can Democrats learn to see—let alone respect—a moral order they regard as narrow-minded, racist, and dumb?"[107]

Haidt addressed that, in part, through the teachings of Emile Durkheim. Durkheim envisioned society as more than a collection of individuals, but as a kind of living entity that, as summed up by Haidt, required "tending and caring."[108] The Durkheimian conception of a society that resisted what Durkheim saw as a pervasive anomie (normlessness), rests on principles of self-control, duty, and loyalty to one's groups.[109] By Haidt's analysis, that mirrors much of the thinking of many social conservatives: they add to the moral mind the qualities of respect for authority and an appreciation of purity or sanctity.[110] Thus, the key to bridging this communication gap lies in appreciating this enlarged spectrum of moral concerns and participating in the resulting enlarged moral dialogue. Proponents of federalist structures necessary to conduct proper dialogue must take the lead in changing this narrative.

Naturally, it is difficult to locate just where the national narrative takes place. Certainly, though, our major news media and unquestionably the President play a major role in conducting and, if need be, restructuring this narrative. American Exceptionalism is strongest during periods of crisis as, for example, the Bricker Amendment proposed during the turbulent period after World War II illustrates. Other peaks similarly occurred during times of crisis and challenge, times during which, in Haidt's language, the necessity of "tending and caring" was most acute. At precisely such times, the need is greatest to narrow the gap between the parties, often in the rhetoric used to address the American people.

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106. Jonathan Haidt, *What Makes People Vote Republican?*, EDGE, Sept. 9, 2008, http://www.edge.org/3rd_culture/haidt08/haidt08_index.html.

107. *Id.*

108. *Id.*

109. Thus, Haidt quoted Durkeim, "Man cannot become attached to higher aims and submit to a rule if he sees nothing above him to which he belongs. To free himself from all social pressure is to abandon [him to] himself and demoralize him." *Id.* To Haidt and Durkheim, the family, not the individual, is the basic social unit for society, enabling people to act together to reach common goals. *Id.*

110. *Id.*

Presidential rhetoric is often carefully crafted to bring us together. For example, George W. Bush, facing wars on two fronts, frequently responded to challenges, saying that we would continue to "stay the course" until the job was done.[111] A simple expression, it nevertheless was designed to comfort, conveying a sense of resolve and persistence, yet moderation. However, during that period of usage, the United States somewhat lurched and drifted, and the rhetoric rang hollow with no useful content.

During the difficult era of the Great Depression and World War II, President Franklin Roosevelt conducted thirty "Fireside Chats." In each, he tried to inform and comfort the American people on a rich variety of topics ranging from his first program dealing with the bank crisis in 1933 to his famous declaration of war with Japan on December 9, 1941.[112] Throughout, he provided a voice for the country, directly addressing the people, speaking in a rhetoric of national pride, yet avoiding jingoism.

At the time of this writing, the United States faces the difficult extrication from two armed conflicts, enormous economic challenges, and the need to move on by better addressing the palpable needs of the American people for an improved quality of life.[113] Part of that venture involves ridding Americans of the closed-mindedness into which they have fallen nationally, and reconceptualizing American Exceptionalism as a beacon of liberty.

C. Mediating Federalism: An Example from Canada

Strikingly, the United States lacks both a national human rights compliance mechanism, as well as a way to coordinate federal and state agendas. Over one hundred countries worldwide have national human rights institutions ("NHRI").[114] Often inspired by the Paris Principles, these organizations differ from state to state, but share the attributes of permanence, independence, and establishment by constitutional mandate, legislation, or executive order.[115]

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111. *See, e.g.*, Stewart M. Powell, *Bush Alters Course on 'Stay the Course'*, TIMESUNION.COM, Oct. 24, 2006, http://www.timesunion.com/ASPStories/story.asp?StoryID=528347&TextPage=1.

112. *See generally* RUSSELL D. BUHITE & DAVID W. LEVY, FDR'S FIRESIDE CHATS (1992).

113. Indeed, the rhetoric of President Barack Obama was best exemplified by his slogan, "yes, we can." It emphasized in those three words much of the sense of the American mission to overcome and prevail.

114. Shubhankar Dam, *Lessons from National Human Rights Institutions Around the World for State and Local Human Rights Commissions in the United States* 2 (Kennedy Sch. of Gov't, Executive Session on Human Rights Comm'ns & Criminal Justice, Executive Session Paper No. 5, 2007), *available at* http://www.hrccj.org/pdfs/nhri.pdf.

115. *Id.* at 3. The Paris Principles, though not binding as international rules, set minimum standards for NHRIs. Those standards consist of competence and responsibilities, composition and independence, methods of operations and principles relating to their status as quasi-judicial bodies. *Id.*

This gap in U.S. institutions has not gone unnoticed internationally. As a party to CERD, the United States has filed the required reports with its committee.[116] After the filing of various periodic reports in 2008, the CERD Committee issued its concluding observations, concerns, and recommendations.[117] A far-ranging report, dealing with matters as varied as the aftermath of Hurricane Katrina and disturbing developments in the Supreme Court on affirmative action,[118] it strongly recommended the establishment of institutions to oversee and coordinate CERD efforts. First, it recommended that, in accordance with the Paris Principles, the United States "consider the establishment of an independent national human rights institution."[119] This institution would serve the functions previously discussed here in reference to the Interagency Working Group and the PCC.

Second, it "recommend[ed] that the State party establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the Convention at the Federal, state, and local levels."[120] Such a mechanism would address problems inherent in federalism, and naturally should not only exist for CERD purposes, but should also operate to assure compliance both with those treaties the United States has ratified and those hopefully ratified soon.

Canada has done this, despite a more complex federal scheme than that of the United States. The Canadian federal government cannot legislate on matters that fall within provincial jurisdiction,[121] though it has the exclusive power to ratify treaties.[122] As a result, cooperation with territorial and

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Principles Relating to the Status of National Institutions (The Paris Principles), G.A. Res. 48/134, ¶¶ 2–3, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

116. *See supra* note 88.

117. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

118. The Committee noted that article 2, paragraph 2 of CERD requires the adoption of special measures "when circumstances so warrant" as a tool to eliminate "persistent disparities in the enjoyment of human rights and fundamental freedoms," and that the Court's retreat on affirmative action was an avoidance of Convention obligations. *Id.* ¶ 15.

119. *Id.* ¶ 12.

120. *Id.* ¶ 13.

121. Under the Canadian constitution, a province has exclusive jurisdiction over "[m]atters of a merely local or private Nature in the Province." Constitution Act, 1867, art. 92, cl. 16, 30 & 31 Vict. Ch. 3 (U.K.), *as reprinted in* R.S.C. No. 5 (Appendix 1985). Lord Atkin established that to mean that only the province can enact legislation affecting the local implementation of treaties and also that federal-provincial cooperation was, therefore, imperative for the execution of treaties. For him, "while the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure." Attorney-General for Can. v. Attorney-General for Ont., [1937] A.C. 326, 354 (P.C.) (on appeal from Can.).

122. Attorney-General for Can. v. Attorney-General for Ont., [1937] A.C. 326. *See also*

provincial governments is essential to the successful implementation of treaties. Thus, Canada and the United States are studies in contrast—whereas the Canadian treaty power is constrained legally, that of the United States is constrained politically.

Describing this phenomenon of American federalism, Herbert Wechsler noted the political force exerted by the states. He saw the American system as "retarding or restraining new intrusions by the center on the domain of the states . . . necessitating the widest support before intrusive measures of importance can receive significant consideration."[123] The President, too, must heed this political reality, though he or she is the national repository of the spirit of federal government, as all actions must surmount the great "local sensitivity of Congress" before anything can be achieved.[124]

For both the United States and Canada, then, the institutional needs are similar, and in 1975, Canada established the Continuing Committee of Officials on Human Rights ("CCOHR").[125] The CCOHR's mandate was to coordinate intergovernmental actions on human rights issues generally and with respect to the elaboration, ratification, and implementation of international human rights treaties.[126] Emphasizing the need for the territories and provinces to willingly cooperate in those efforts, the CCOHR also acknowledged that its responsibility must not only be to actually participate in the worldwide human rights effort, but also to be seen doing so.[127]

The 1975 agreement rested upon the notion that success required the greatest cooperation among the three levels of government. For dialogue to be successful, the agreement was founded upon five bedrock principles that would facilitate the fullest involvement possible. First, the three levels of government would consult among themselves prior to either ratification or denunciation by Canada of an international human rights treaty. Second, each provincial and territorial government had the right to prepare its own report on human rights activities, and all reports would be included in the Canadian

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Constitution Act, 1867, art. 91, 30 & 31 Vict. Ch. 3 (U.K.), *as reprinted in* R.S.C. No. 5 (Appendix 1985) (delineating the areas of exclusive national legislative authority). *See generally* How Canada Works with the United Nations, http://www.pch.gc.ca/pgm/pdp-hrp/inter/un-eng.cfm (last visited Feb. 15, 2010).

123. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954).

124. *Id.*

125. *See* Continuing Committee of Officials on Human Rights [CCOHR], http://www.pch.gc.ca/pgm/pdp-hrp/canada/cmtt-eng.cfm (last visited Feb. 15, 2010) (stating that the Federal-Provincial Conference of Ministers Responsible for Human Rights met and agreed on provisions forming bedrock for the CCOHR on December 12, 1975).

126. *Id.*

127. Comm. on the Elimination of Racial Discrimination, *supra* note 117, ¶ 12.

submission. Third, the provinces and territories could have representatives as part of the Canadian delegation at any international meetings on the reports, most notably the U.N. meetings. Fourth, provinces and territories were given the right to defend or explain their laws or institutions, if challenged by any international body. Finally, provinces and territories were to be regularly informed by the federal government regularly of international developments in human rights.[128]

This system has operated without interruption since its establishment, and the various U.N. committees have consistently praised it for its compliance with reporting requirements and thoughtful participation in the vetting process.[129] Most significant, though, is the obvious byplay that has taken place between Canada and the committees with which it has dealt, a byplay requiring the successful implementation of the CCOHR agreement. Through this dialectical process, Canada first engaged in its nationwide dialogues, then presented that work product to the committees, which in turn vetted them and submitted their reports for consideration. After that, Canada reacted, either accepting those observations and adjusting appropriately, or in some way fashioning responses designed to satisfy its international obligations.[130]

The CEDAW Committee reports, despite the criticism of domestic opponents, represent sober assessments on Convention compliance. Indeed, in the case of Canada, they are as significant in what they do not say, as what they do. Sexually discriminatory laws are rife worldwide, with Mali requiring wives to be obedient, Northern Nigeria permitting wife beating, Kuwaiti women denied the franchise, and Pakistani women valued at half a

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128. CCOHR, *supra* note 125.

129. For example, the last CERD report noted that it "appreciates the extensive and detailed responses provided to the questions asked during the consideration of the report and the open and constructive dialogues with the delegation." Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Eliminations of Discrimination Against Women, Canada,* ¶ 2, U.N. Doc. CERD/C/CAN/CO/18 (May 25, 2007). Similarly, the CEDAW committee commented on the "large delegation" sent by Canada and appreciated the "open and constructive dialogue that took place between the delegation and members of the Committee . . . ." Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Eliminations of Discrimination Against Women: Canada*, ¶ 3, U.N. Doc. CEDAW/C/CAN/CO/7 (Nov. 7, 2008) [hereinafter *2008 Concluding Observations: Canada*].

130. Naturally, Canada is just the example used of how a federalist government can adjust to treaty requirements. *See generally* Elizabeth Sepper, *Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns under the Women's Discrimination Treaty*, 30 U. PA. J. INT'L L. 585 (2008). Ms. Sepper points out the responses of a number of states to the CEDAW reports.

person in attestation to financial obligations.[131] Canada, by contrast, has faltered in relatively minor ways.

The most recent CEDAW Committee observations on Canada reflect this, and also reflect the manner in which Canada has adjusted after the 2003 report.[132] Commenting on few substantive issues, the CEDAW Committee observations dealt largely with issues of political will. For example, it reiterated its concern, expressed previously in 2003, that "the federal government may lack the will and an efficient mechanism to ensure that the provincial and territorial governments establish legal and other measures to fully implement the Convention in a coherent and consistent manner."[133] Given the paucity of substantive issues raised, that may send an unclear message to Canada about just where that dialogue had failed. However, the fact remains that the dialogue exists, and the mechanism for communicating among levels of government, while perhaps imperfect, also exists.

The United States will accept CEDAW if proponents appeal to national pride in providing a beacon of liberty for the world.[134] The appeal should be cast in the rhetoric of taking a common stand against inequalities, wherever they may be found. But it is not just rhetoric; this is not a charade, but an appeal to the best in us. Thus, it should also be emphasized that CEDAW presents no threat to state sovereignty, as every state is likely compliant. Once it is demystified, much of the sense of threat experienced by many opponents will recede.

The establishment of a mechanism similar to Canada's will similarly begin to assuage fears and limit resistance, as recasting the dialogue as one among equals and providing maximum participation among the states also limits the notion of a bullying federal government dictating to them. Again, though, the establishment of this kind of mechanism is a precondition to treaty ratification, and must therefore precede that effort. These steps are simple, but the political challenges to ratification are still very real, and are a part of our national spirit that must be reexamined.

V. CONCLUSION

Culture is a social construct, and not a static, inevitable force of nature preventing change. For some countries, that construct has resulted in the

131. *See* Neuwirth, *supra* note 78, at 19.

132. *See 2008 Concluding Observations: Canada*, *supra* note 129.

133. *Id.* ¶ 11.

134. As Resnik and others have pointed out, we have many local iterations of CEDAW already. *See generally* Resnik, *supra* note 3 and accompanying text. However, since I am talking about altering the national narrative, that can only take place at the national level.

persecution and torture of women. Nicholas Kristof also wrote during the 2002 period during which the Senate committee reviewed the Convention, but from a very different perspective than some of the others examined here. Resisting Jesse Helms' claim that it enshrined a "radical anti-family agenda," Kristof saw CEDAW as rather providing the barest modicum of protection for women in many parts of the world. Thus, he asked, "Do we really want to side with the Taliban mullahs, who, like [then U.S. Attorney General] Mr. Ashcroft, fretted that the treaty imposes sexual equality? Or do we dare side with third-world girls who die because of their gender, more than 2,000 of them today alone?"[135]

But just as some places have cultures and ways hostile to women's rights, American Exceptionalism is also a cultural manifestation. The United States' wary resistance to internationalism prevents it from providing the leadership role in human rights that it can. Though a treaty ratification alone will not dramatically alter that national mindset, it can advance the norms cascade to move the United States just a little farther down the road to a more just society.

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135. Nicholas D. Kristof, Editorial, *Women's Rights: Why Not?*, N.Y. TIMES, June 18, 2002, at A23.