

Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?

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I. Introduction

United States reliance on constitutional norms in lieu of their counterparts in international human rights law threatens to leave Americans bereft of the rights protections enjoyed by citizens of peer countries. Although it may be shocking to think of the U.S. Constitu-

tion as an obstacle to the acceptance of human rights principles, an examination of U.S. reservations to human rights conventions proves that the Constitution is being assigned that very function.

In today's climate it would be exceptional for any country, much less the United States, to denounce forthrightly the international human rights norm of women's equality embodied in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).¹ The United States denies resisting women's equality and has attempted to hide its rejection of the international principle of equality for women behind the complexities of its Equal Protection Clause jurisprudence. This strategy entails disguising the significant differences between women's right to equal protection under U.S. law and the international principle of women's equality. Thus, the United States is proposing to append RUDs² to CEDAW, when and if it ratifies, that might superficially appear innocuous but would effectively nullify the CEDAW guarantee of equality.

In relying on invocations of constitutional principles to obscure the fact that it is refusing to accept the most basic principles of CEDAW, the United States is using a strategy that has already proved effective in the case of its RUDs to the International Covenant on Civil and Political Rights (ICCPR).³ The fact that the U.S. invocation of equal protection jurisprudence enabled it to avoid committing itself to the norm of women's equality in the ICCPR seems to have been overlooked both by domestic and international observers. Americans were apparently thrown off track because of their disinclination to critically appraise the rights in the U.S. Constitution. In U.S. culture the Constitution is viewed as a kind of sacred law and the guarantor of Americans' liberties. It is revered not only as the supreme law of the land, but a law that is unquestionably superior to all other laws, including conflicting principles of international law. Because the U.S. Constitution—the oldest constitution in the world that is still in force—has been so influential in shaping constitutionalism abroad, people outside the United States may likewise tend to accept without

1. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 19 I.L.M. 33 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

2. This acronym for "reservations, understandings, and declarations" is used to indicate the qualifications and clarifications that the United States routinely imposes when ratifying international human rights conventions.

3. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; adopted by the United States Sept. 8, 1992) [hereinafter ICCPR].

question constitutionally-based RUDs and share the view that this exceptional instrument should be accorded exceptional deference. That is, people both inside and outside the United States seem disinclined to suspect that a stated preference for resolving sex discrimination issues under the Equal Protection Clause might merely be a tactic for disguising a preference to stand by the status quo in U.S. law, a status quo that denies women the rights that they enjoy under international human rights law.

Of course, there are other reasons why observers do not associate the United States with resistance to the international norm of women's equality. The United States has been energetic in promoting human rights and condemning rights violations abroad. The dynamism of the U.S. women's movement and the renown—and in some cases notoriety—achieved by U.S. feminist leaders and writers has meant that U.S. culture has come to be associated with the feminist vanguard. Naturally enough, presumptions have been created that U.S. law coincides with human rights norms and that the protection of women's rights in the United States must therefore be far advanced. Few seem inclined to inquire whether the reality of the protections of women's rights in U.S. law, including constitutional jurisprudence, actually corresponds to this avant-garde image.

This Article suggests that such an inquiry is long overdue. Specifically, this Article argues that the constitutional grounds for the proposed U.S. reservations to provisions on women's equality in CEDAW, also known as the Women's Convention, deserve more critical appraisal than they have heretofore received. As will be shown, these reservations, commonly referred to in U.S. parlance as RUDs, relate to a larger, troubling pattern of U.S. legal parochialism in rights matters and a refusal to consider upgrading U.S. law on rights to meet higher international norms.

Part I.A. examines the rules on reservations to international treaties. Parts I.B. and I.C. consider CEDAW and the special problems of CEDAW reservations. Part II reviews the special status of the U.S. Constitution that makes it akin to an immutable sacred law. Part III describes how the devotion of Americans to their Constitution has created obstacles to the adoption of modern rights principles. Part IV reviews various types of RUDs that the United States has entered to human rights conventions and provides a context for evaluating the proposed RUDs to CEDAW. Part V discusses the deficiencies in protections for women's rights under current U.S. law and equal protection jurisprudence and shows that these shortcomings correlate with

the conditions that the United States has placed on its adherence to the international standard of full equality for women. It also contrasts women's rights under U.S. law with the higher rights standards provided by CEDAW. Part VI details the U.S. RUDs to the ICCPR and examines the international reaction to the U.S. position. Finally, in Part VII, the U.S. reaction to CEDAW and the proposed list of U.S. RUDs to CEDAW will be examined critically and their significance assessed.

A. Rules on Reservations to Treaties

To understand the problems in classifying and understanding the U.S. RUDs to the ICCPR and the proposed RUDs to CEDAW, it is necessary first to clarify certain basic issues involving treaty reservations. This clarification requires an introduction to the different types of treaty reservations.

One obvious way for a state to express disapproval of a treaty provision is to refuse to ratify the treaty. Another way is to ratify the treaty, but with a reservation that indicates that the state is not undertaking to be bound by the offending provision. Article 2(d) of the Vienna Convention on the Law of Treaties says that a reservation "means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."⁴ Subject to conditions that may vary from one treaty to another, states may enter reservations when ratifying treaties that restrict or modify the effects of the treaties. For example, Article 19(a) allows states to enter reservations unless "[t]he reservation is prohibited by the treaty."⁵ Further, Article 19(b) states that a reservation is allowed unless "[t]he treaty provides that only specified reservations, which do not include the reservation in question, may be made."⁶ However, even where reservations are permitted, they must meet another condition, set in Article 19(c) of the Vienna Convention, that a state may not formulate a reservation "incompatible with the object and purpose of the treaty."⁷ Rather than making such a reservation, a state should simply decline to become a party to the treaty.

4. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 333 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

5. *Id.* at 336.

6. *Id.* at 337.

7. *Id.*

Sometimes ratifying states may try to clarify their understanding of a treaty provision. The issue of where the boundary lies between treaty reservations and statements that are merely interpretative declarations is debated. Some scholars have proposed that there is no distinction between the two, claiming that interpretative declarations amount to reservations under another name.⁸ One author of a treatise on treaty law has proposed that a distinction should be made between interpretative declarations and reservations.⁹ Whereas by entering a reservation, a state purports "to exclude or to vary the legal effect of certain provisions of a treaty,"¹⁰ a state clarifies the true meaning of a treaty by making an interpretative declaration.¹¹ However, the same author recognizes that a state may make an interpretative declaration where a reservation is meant in order to avoid becoming entangled in the complex rules governing reservations.¹² That is, since interpretations can be entered with fewer constraints and consequences than reservations, there is an incentive to disguise reservations as interpretative declarations.

Sir Gerald Fitzmaurice distinguishes reservations, strictly speaking, from "declarations of a purely explanatory character" that do not affect the obligations of the treaty for the party concerned, even though these may also be loosely termed "reservations."¹³ By way of declarations, states may "say how they understand or propose to interpret or apply the provisions, either generally or in certain events."¹⁴ According to Sinclair, whether a statement is designated a "reservation" or not is less important than how it affects a state's obligations:

Whether this will amount strictly to an actual reservation or not will depend on whether, by way of special interpretation, the party concerned is really purporting, so far as its own obligations are concerned, to alter the substantive content or application of the provision affected; or whether the statement is truly interpretational, and merely clarifies some obscurity, or makes explicit something that in the clause is only implicit.¹⁵

In a treatise on treaty reservations, Frank Horn bases the distinction between interpretative declarations and reservations on how the

8. See SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 52 (1984).

9. T.O. ELIAS, *THE MODERN LAW OF TREATIES* 35 (1974).

10. *Id.*

11. *Id.*

12. *Id.*

13. SINCLAIR, *supra* note 8, at 52-53 (discussing the views of Sir Gerald Fitzmaurice).

14. *Id.* at 53.

15. *Id.*

conditions affect treaty norms.¹⁶ He describes a reservation as “a modification of the norm system expressed in a treaty,”¹⁷ and as a statement that introduces “a derogation from a norm.”¹⁸ According to Horn, a reservation is easy to identify when a statement excludes a treaty provision, thereby denying a norm,¹⁹ but is harder to distinguish from an interpretative declaration when it merely modifies the content of a norm.²⁰

Horn notes that statements are often hard to classify.²¹ Confusion may lead states to acquiesce when they confront another state’s obscure reservations or other statements, and even the states making reservations may have “true difficulties ascertaining the actual character of statements.”²² Most states, according to Horn, “do not react to reservations, interpretative declarations or statements of an obscure nature.”²³ Of particular importance for this Article is the situation in which a state declares, whether forthrightly or by implication, that its treaty obligations are limited by its domestic law. As Horn notes, “statements that declare a treaty to be applicable to the extent that its provisions do not contradict national legislation are often of an obscure nature.”²⁴ Moreover, declaring states often fail to explain exactly how domestic legislation differs from the treaty, leaving other states unsure about how they should react.²⁵

This Article assumes that the distinctions drawn by these scholars are valid and useful, and that Horn’s observations are particularly relevant. For the purposes of this Article, “reservations” will be used to mean statements that are intended to exclude or restrict the application or to modify the meaning of a treaty provision and alter the reserving state’s obligations under the treaty. “Understandings” or “declarations” will be used to mean statements that simply indicate how the state understands the language of the provision and how it intends to carry out its obligations. “Reservations,” as used here, derogate from treaty provisions; “understandings” or “declarations” present reasonable interpretations of treaty provisions consistent with the

16. FRANK HORN, RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES (1988).

17. *Id.* at 237.

18. *Id.* at 245.

19. *Id.* at 263.

20. *Id.*

21. *Id.* at 245.

22. *Id.* at 325.

23. *Id.* at 278.

24. *Id.* at 330.

25. *Id.*

object and purpose of the provisions. The acronym "RUD"²⁶ will be used here as a label of convenience for packages of U.S. statements on treaty obligations.

Careful scrutiny of U.S. RUDs is long overdue. As has been noted by Louis Henkin, a preeminent expert on human rights law, there are special reasons not to be complacent about reservations to treaties on human rights, because "[t]he object and purpose of the human rights conventions" is to have countries assume "obligations to respect and ensure recognized rights in accordance with international standards."²⁷ Allowing states to enter reservations that signal that they do not intend to comply with human rights conventions therefore defeats the purpose of setting universal norms in the area of human rights. Upholding domestic standards in lieu of international rights standards destroys the aims of human rights treaties. Concerned with compliance with the ICCPR, the Human Rights Committee in 1994 expressed the view that "reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law," because to do otherwise would mean that reservations could lead to "a perpetual non-attainment of international human rights standards."²⁸ The problematic reservations that gave rise to these comments again became an issue with regard to CEDAW.

B. CEDAW

Dissatisfied with the rights afforded women under existing human rights instruments, supporters worked to prepare a special convention to deal comprehensively with women's human rights.²⁹ CEDAW has been characterized as offering a "norm of nondiscrimination from a women's perspective[,] . . . a norm that acknowledges that the particular nature of discrimination against women is worthy of a legal re-

26. See *supra* note 2.

27. See Louis Henkin, *United States Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 343 (1995) [hereinafter *United States Ratification*].

28. *Id.* n.11 (citations omitted).

29. For background on the development of CEDAW, see Laura Reanda, *Human Rights and Women's Rights: The United Nations Approach*, 3 HUM. RTS. Q. 11 (1981). See also LARS A. REHOF, *GUIDE TO THE TRAVAUX PREPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* (1993). For a general assessment of the convention, see Sarah C. Zearfoss, *The Convention for [sic] the Elimination of All Forms of Discrimination Against Women: Radical, Reasonable, or Reactionary?*, 12 MICH. J. INT'L L. 903 (1991).

sponse.”³⁰ CEDAW “progresses beyond the earlier human rights conventions by addressing the pervasive and systemic nature of discrimination against women, and identifies the need to confront the social causes of women’s inequality by addressing ‘all forms’ of discrimination that women suffer.”³¹ As of July 1, 1996, 151 countries had ratified CEDAW.³²

Specifically, Article 1 of CEDAW prohibits discrimination against women, including “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 . . . 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.”³³ Article 2 requires ratifying states to pursue “by all appropriate means” a “policy of eliminating discrimination against women.”³⁴ Such obligations include the Article 2(a) undertaking for states “[t]o embody the principle of the equality of men and women in their national constitutions or other appropriate legislation,”³⁵ the Article 2(e) obligation “[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise,”³⁶ and the Article 2(f) obligation “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”³⁷ Article 5(a) calls for parties to take all appropriate measures:

(t)o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.³⁸

Article 16 calls on states to take “all appropriate measures to eliminate discrimination against women in all matters relating to mar-

30. Rebecca J. Cook, *State Responsibility for Violations of Women’s Human Rights*, 7 HARV. HUM. RTS. J. 125, 155 (1994) [hereinafter *State Responsibility*].

31. *Id.*

32. Christina M. Cerna, *Of Interest: Human Rights Letter from Washington*, 6 HUMAN RIGHTS INTEREST GROUP NEWSLETTER (American Soc’y of Int’l Law, Washington, D.C.) Winter 1996, at 4-6.

33. CEDAW, *supra* note 1, at 36.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 37.

riage and family relations.”³⁹ Article 16 proceeds to catalogue a series of issues in which the sexes are to have equal rights, such as the “same rights and responsibilities during marriage” in Article 16(1)(c), and the “same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children” in Article 16(1)(f).⁴⁰

CEDAW also specifies protections for the equality of women and men in a variety of areas, such as determining “the nationality of their children” in Article 9(2);⁴¹ having “[a]ccess to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality” in Article 10(b);⁴² and obtaining “bank loans, mortgages and other forms of financial credit” in Article 13(b).⁴³ Pursuant to Articles 17 to 21 of CEDAW, a committee was set up to monitor compliance with the convention.⁴⁴

One of the essential features of CEDAW is the positing of one uniform, international standard of equal rights for women.⁴⁵ To those familiar with current debates about whether human rights are or should be universal, it is notable that CEDAW does not qualify its endorsement of women’s equality by reference to the need to respect differences in culture, or in religion as a component of culture. The universalist position on human rights, which CEDAW assumes, was challenged by various non-Western delegations at the 1993 Vienna World Conference on Human Rights.⁴⁶ After debate, the conference endorsed the universality of human rights by affirming the duty of states, irrespective of “their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”⁴⁷ However, this endorsement of universality was equivocal since the conference document also asserted that “the significance of national and regional particularities and various historical, cultural

39. *Id.* at 41.

40. *Id.*

41. *Id.* at 38.

42. *Id.*

43. *Id.* at 40.

44. For an examination of the committee’s work, see Andrew C. Byrnes, *The “Other” Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT’L L. 1 (1989).

45. See CEDAW, *supra* note 1, at 33.

46. See Ann E. Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?*, 15 MICH. J. INT’L L. 307, 371-79, 401 (1994) [hereinafter *Universal Versus Islamic Human Rights*]; Donna J. Sullivan, *Women’s Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT’L L. 152, 157-59 (1994).

47. Vienna Declaration and Programme of Action, 1993 World Conference on Human Rights, U.N. Doc. A/CONF.157/24, at 3-5, reprinted in 32 I.L.M. 1661, 1665 (1993).

and religious backgrounds must be borne in mind.”⁴⁸ This equivocation has no counterpart in CEDAW. By unambiguously according priority to securing women’s human rights, even where they clash with local cultural patterns, CEDAW takes an uncompromising stance on women’s entitlement to equality.

One might expect that objections to CEDAW based on cultural relativist approaches to human rights would be made by Third World countries. Muslim countries, it might be assumed, would be especially prone to demand cultural accommodations.⁴⁹ In contrast, objections by the United States to CEDAW’s strong affirmation of women’s right to equality and its universalist stance on women’s human rights would not seem likely, nor would one expect that an American female senator would complain that CEDAW did not take into account cultural differences.⁵⁰ How and why CEDAW’s endorsement of women’s equality came to be resisted by the United States will be examined in the following discussion.

C. Different Types of Reservations to CEDAW

Article 28(2) of CEDAW states: “A reservation incompatible with the object and purpose of the present Convention shall not be permitted.”⁵¹ Despite this provision, more reservations with the potential to modify or exclude most of the terms of the convention have been entered to CEDAW than to any other convention.⁵² Although parties may record their objections to CEDAW reservations, abusive reservations are not discouraged by any mechanism in the convention enabling parties to challenge the reservations made by other states. In this regard, CEDAW differs from the race discrimination convention, Convention on the Elimination of Racial Discrimination (CERD), which includes a provision allowing a vote by two-thirds of the parties to CERD to declare a state’s reservation unacceptable for being incompatible with the object of the convention.⁵³ The relatively lax treatment of reservations to CEDAW suggests that the international

48. *Id.* at 1665.

49. The position of several Muslim countries at the 1995 Beijing Women’s Conference, where Muslim states were among those most energetically combatting the positions of delegates committed to securing equal rights for women, would provide just one example of Muslim countries’ opposition to international standards supportive of women’s rights. See 10 ASSOC. FOR MIDDLE EAST WOMEN’S STUD. NEWSLETTER, Nov. 1995, at 1-13.

50. See *infra* note 454 and accompanying text.

51. CEDAW, *supra* note 1, at 45.

52. Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT’L L. 281, 317 (1991).

53. Zearfoss, *supra* note 29, at 925.

community as a whole regards racial discrimination more seriously than sex discrimination. Indeed, a feminist critique of how the present system of international law incorporates male biases and ratifies male privilege makes the pattern of toleration of reservations to CEDAW seem an almost inevitable consequence of systemic sexism.⁵⁴ Thus, although the substantive provisions of CEDAW are strongly supportive of women's equality, the regime of reservations accommodates statements indicating that states intend to deviate from CEDAW norms. Of course, in discussing different countries' reservations to CEDAW, one does not want to be understood to be making the naive assumption that there is an automatic, perfect correlation between countries' CEDAW reservations and their treatment of women, or that countries which do not enter reservations are necessarily committed to protecting all the rights set forth in the convention.

Some of the most sweeping reservations to CEDAW have been entered by Muslim countries.⁵⁵ For example, in 1989 Libya made a vague reservation, stating that its accession to CEDAW "is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Shariah."⁵⁶ In 1984, Bangladesh made remarks that were not expressly classified as a reservation but effectively amounted to one. Bangladesh stated that it did not consider "as binding upon itself the provisions of articles 2.13(a) and 16.1(c) and (f) as they conflict with Sharia law based on Holy Quran [sic] and Sunna [the example of the Prophet]."⁵⁷ In so doing, Bangladesh posited the incompatibility of CEDAW provisions and Islamic law, and indicated that it would consider itself bound by the latter.

These vague "Islamic" reservations were completely open-ended. They amounted to a pronouncement that the countries would uphold any relevant domestic laws that were officially deemed to flow from Islamic requirements at the expense of conflicting CEDAW obligations. The reservations of Libya and Bangladesh give both countries

54. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

55. These have been discussed in a variety of law review articles, including Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 807, 843-44 (1992); Clark, *supra* note 52, at 299-300, 310-12; Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 687-91, 694-5, 701-06 (1990).

56. *Multilateral Treaties deposited with the Secretary-General: Status as of 31 December 1994*, at 165, U.N. Doc. ST/LEG/SER.E/13 (1995) [hereinafter *Multilateral Treaties*].

57. *Id.* at 162.

unfettered discretion in determining the extent to which they would be bound by the relevant CEDAW norms, essentially nullifying many CEDAW principles. Both countries seem to have been seeking the prestige that accompanies being a party to CEDAW, while entering reservations that would ensure that they were in reality committing themselves to nothing.

What seems to be missed in some comments on CEDAW reservations is that not all reservations are of this magnitude. The Islamic reservations, as well as the proposed U.S. reservations, are at one extreme. These reservations are distinct from those entered by countries that are essentially well-disposed towards the goals of CEDAW. Many of the objections in the latter category are not related to substantive provisions of CEDAW, but only to procedural sections like dispute resolution.⁵⁸ Other reservations are substantive but relatively minor in terms of their impact. Some examples can illustrate the differences between relatively innocuous reservations and those that prompt doubts about whether the ratifying state has actually accepted its obligations under CEDAW.

France entered several reservations upon ratifying CEDAW. For example, Article 16(1)(g) provides that husband and wife would have the same personal rights, "including the right to choose a family name, a profession and an occupation."⁵⁹ France indicated that it was entering "a reservation concerning the right to choose a family name."⁶⁰ The impact of this reservation was not hard to ascertain; even after ratification, French children would retain the name of their father.⁶¹ This was a carry over from France's patriarchal tradition. In this narrow respect, France would not be in compliance with CEDAW. Although a woman's right to pass on her name to her children is an issue of symbolic importance, the overall equality of Frenchwomen and their ability to function on a par with men in French society does not depend on equality in this matter. Since France indicated a willingness to accept the major anti-discrimination provisions of CEDAW, a reservation of this kind did not suggest that France was taking a stance opposed to the purpose of CEDAW.

Spain's 1984 ratification included one short declaration stating that CEDAW ratification "shall not affect the constitutional provisions

58. Zearfoss, *supra* note 29, at 925.

59. CEDAW, *supra* note 1, at 41.

60. *Multilateral Treaties*, *supra* note 56, at 164.

61. DOROTHY STETSON, *WOMEN'S RIGHTS IN FRANCE*, 100-01 (1987).

concerning succession to the Spanish crown.”⁶² The intent of this declaration is to accommodate the discriminatory rule that reserves the right of succession to King Juan Carlos for his son, Crown Prince Felipe, at the expense of his sisters Cristina and Elena, who are to be excluded from becoming rulers of Spain by reason of their sex. This “declaration” is actually a reservation in that it excludes CEDAW principles from applying to the succession to the throne, and continues discrimination against women in the royal family. Although this reservation appears potentially damaging to the image of Spanish women, it is sharply limited in terms of its immediate impact. Out of any generation, only a few Spanish bluebloods could ever be affected by this exception to CEDAW rules. Moreover, the power of the Spanish ruler has dwindled greatly since the days of Queen Isabella. Since the real seat of power in the Spanish government is the Prime Ministership, which is not restricted to males, a politically ambitious woman is not barred from rising to the top of the political hierarchy in Spain. Thus, this reservation created a relatively minor exception to Spain’s general commitment to uphold CEDAW principles.

In its 1980 ratification, the Netherlands recalled its objections to certain language in paragraphs 10 and 11 of the preamble on the basis that these provisions introduced “political considerations” that were “not directly related to the achievement of total equality between men and women.”⁶³ These “objections” registered by the Netherlands were unusual because they dealt with preambular statements about arguably irrelevant political issues instead of substantive issues. In any case, the “objections” in no way affected the willingness of the Netherlands to comply with CEDAW.

The 1981 Mexican ratification was accompanied by a declaration that CEDAW would be applied “in accordance with the modalities and procedures prescribed by Mexican legislation and that the granting of material benefits in pursuance of the Convention will be as generous as the resources available to the Mexican State permit.”⁶⁴ This remark seems appropriately classified as a declaration, although one might have qualms about whether some qualifications of CEDAW substantive provisions were potentially lurking in the way “Mexican legislation” would operate. The indication that limited Mexican re-

62. *Multilateral Treaties*, *supra* note 56, at 167.

63. *Id.* The CEDAW preamble includes language emphasizing the need to eradicate apartheid, colonialism, and neo-colonialism and affirmations of the need to strengthen nuclear disarmament. CEDAW, *supra* note 1, at 34.

64. *Multilateral Treaties*, *supra* note 56, at 166.

sources might constrain Mexico's ability to implement certain affirmative CEDAW mandates does not by itself entail derogating from CEDAW principles but simply advises that immediate implementation is not realistic.⁶⁵ Anyone acquainted with Mexico's difficult economic situation would appreciate that this declaration was one that Mexico could make in good faith.

For these countries, entering such relatively narrow reservations, objections, or declarations was not incompatible with the execution of obligations under CEDAW. These reservations differ significantly from the kind of sweeping reservations that the United States has proposed to enter if it ratifies CEDAW. One should bear in mind these distinctions when evaluating and classifying the U.S. RUDs with regard to the principle of equal rights for women and men. As the U.S. RUDs relate to the special, exalted status enjoyed by the U.S. Constitution, it is essential to review the role that devotion to the Constitution has played in shaping U.S. attitudes toward rights.

II. The U.S. Constitution as Sacred Law

A. Constitutional Venerability and Constitutional Mystique

Americans tend to regard the U.S. Constitution as the preeminent safeguard of their rights and freedoms. Given this, it would surprise many to discover that the Constitution has been recently deployed as a screen to filter out the more exigent standards for human rights that are afforded under international law. Americans seem disinclined critically to appraise the scope of the rights protections in the U.S. Constitution in light of modern human rights norms established in international law. Few appear prepared to adjust their thinking to accept the notion that the protections in the Bill of Rights may have become outmoded. An American who dares assert that reliance on the U.S. Constitution means that U.S. rights are falling significantly below modern international rights norms risks being charged with heresy.

How did Americans come by the idea that their Constitution was not to be judged by the standards of international law? The antiquity of the Constitution may be one factor. The U.S. Constitution was

65. For example, Mexico may have been worried about its ability "[t]o introduce maternity leave with pay or with comparable social benefits" as required by Article 11(2)(b) or to ensure to rural women the right "[t]o enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications," as required by Article 14(2)(h). CEDAW, *supra* note 1, at 39, 41.

composed in 1789 and is the oldest constitution remaining in force.⁶⁶ In contrast, most countries deemed it essential to rewrite their constitutions after World War II.⁶⁷ Viewed in its original eighteenth century context, the Constitution was a revolutionary breakthrough, a brilliant and eloquent exposition of daring new concepts. That it should have inspired such admiration and emulation around the world is not surprising. However, when viewed in relation to the constitutional accomplishments of other nations during the last decades of the twentieth century, this same document looks rather different. Having survived more than two centuries, the U.S. Constitution contains many features that relate to the problems of a bygone era. It refers to the slave trade and the slave populations of the south,⁶⁸ admonishes the Federal Government not to confer titles of nobility,⁶⁹ and prohibits laws working "corruption of the blood."⁷⁰ In contrast, it fails to address vital contemporary issues such as the "economic support systems and safety nets" that are needed in a modern welfare state and that are provided for in the constitutions of other North Atlantic nations.⁷¹

Speculation as to why the U.S. Constitution has survived without revision for more than two centuries prompts the conclusion that it possesses a different status than other constitutions. It is a venerable symbol of the nation. An original version on parchment is carefully preserved and impressively displayed in the National Archives beyond the huge doors in the columned south facade. The high-ceilinged, dimly-lit display chamber is reminiscent of the interior of a Greek temple, where one might expect to encounter a statue of the goddess Artemis. Americans from around the country come to gaze at the Constitution, the Bill of Rights, and the Declaration of Independence. They stand silently in line, often with young children in tow, awaiting their opportunity to approach the display cases and feast their eyes on

66. To celebrate its status as the oldest constitution, plans were made in 1994 to have a special annual constitutional day celebration. See *National Constitutional Center, Philadelphia, Receives National Park Foundation Grant for Constitution Day Celebration*, PR Newswire, July 18, 1994, available in LEXIS, Nexis Library, WIRES File.

67. See Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 516, 520 (1992). Glendon observes that most of the world's constitutions have been adopted since 1965. *Id.* Of course, the U.S. political system has been uniquely stable since the end of the eighteenth century, making rewriting the U.S. Constitution seem less urgent than rewriting constitutions in countries that have undergone major upheavals since 1789.

68. See U.S. CONST. art. I, § 2, cl. 3; art. I, § 9, cl. 1; art. IV, § 2, cl. 3.

69. See *id.* art. I, § 9, cl. 8.

70. See *id.* art. III, § 3, cl. 2.

71. Glendon, *supra* note 67, at 520; Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 516 (1992).

the faded script of the original documents.⁷² Although Americans consider this worshipful attitude normal, it is actually unusual.⁷³

How the Constitution is venerated is illustrated by the public consternation over the 1995 news that scientific examination revealed that the parchment and ink were deteriorating despite preservation in special cases with tinted glass and infused with inert gasses designed to keep the originals in optimum condition.⁷⁴ Further indication of how the documents are treasured is the nightly procedure of sinking the display cases underground into reinforced vaults so that the documents can survive even if the surrounding city of Washington is obliterated by a nuclear attack. Given the attention that is paid to preserving the documents, one could argue that the Constitution is treated more like a holy relic than a secular document laying out a scheme of government.

The term "sacred" is often used to characterize the Constitution. Thomas Grey has observed that the U.S. Constitution is not simply a "hierarchically superior statute"—being unlike state constitutions, which people tend to perceive in this manner—but that it is "a sacred symbol, the most potent emblem (along with the flag) of the nation itself."⁷⁵ As Grey points out, when Americans say "the Constitution," no one asks "which Constitution?"⁷⁶ If it is ultimately more like a sacred object than like a normal constitution, this could go some way toward explaining why the U.S. Constitution has survived so long. After all, sacred law is inherently difficult to change, because change is not easily reconciled with sacred status. As in the case of the King James version of the Bible, its very archaisms and obscurities may even enhance its prestige and authority. Grey seems right in characterizing the Constitution as "one of the totems of our tribe."⁷⁷ The mystique associated with this venerability may account for the widespread failure of Americans to consider adopting a new Bill of Rights.

Scholars who are exposed to modern rights concepts are more likely than other Americans to notice the gap that has opened between U.S. domestic law and international human rights, and to have

72. Richard B. Bernstein is among the scholars who have remarked on this pattern. See RICHARD B. BERNSTEIN WITH JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 3-4 (1993).

73. See Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 17 (1984).

74. Warren E. Leary, *Nation's Vital Documents Get Checkups*, N.Y. TIMES, Feb. 14, 1995, at C1.

75. Grey, *supra* note 73, at 3. See also sources cited *id.* nn.4-5.

76. *Id.* at 17.

77. *Id.*

a jaundiced perspective on the adequacy of the Constitution as a foundation for modern rights. For example, the distinguished international law scholar Richard Lillich has observed that "to the extent that the Constitution embraced slavery and countenanced the denial of women's rights, it actually was anti-human rights in content."⁷⁸ As Lillich has maintained, "[w]hile contemporary observers of the United States constitutional system praise its concern with individual human rights, it should be recalled that the Constitution itself does not begin to address such concerns in what one today would consider an acceptable manner."⁷⁹

Feminists seem more disposed than most to appraise the Constitution critically. For example, Mary Becker has written one of the rare negative evaluations of the merits of the Bill of Rights to appear in American law reviews.⁸⁰ Noting how the Constitution is venerated, she maintains that its invocation legitimizes the status quo and that it magnifies historical inequities and affirms women's subordinate status.⁸¹ The Bill of Rights, according to Becker's analysis, often "perpetuates or even magnifies social inequities rather than eliminating them. When this happens, the Bill of Rights becomes part of the problem, rather than the solution."⁸² Such critical perspectives are uncommon in a legal culture where the perfection of the Constitution tends to be taken for granted.

B. The Scantiness of Constitutional Rights Provisions

The rights adumbrated in the Bill of Rights are few. Many modern rights such as the right to privacy, the presumption of innocence, and freedom to travel are not set forth in the text of the Constitution, but instead have been developed by judicial rulings and are subject to change. Moreover, where rights are established in U.S. law, they are often weaker or less comprehensive than rights under the formulations in the international instruments.⁸³ In addition, Americans are lacking in protection for social welfare rights, such as the rights to

78. Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 54 (1990).

79. *Id.* Here, Lillich is endorsing comments made by Henkin in Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 407 (1979) [hereinafter *Rights*].

80. Becker, *supra* note 71, at 453.

81. *Id.* at 454.

82. *Id.* at 514.

83. The protections for equality in the ICCPR and CEDAW that are discussed in this Article exemplify how much stronger international standards of rights often are than those in U.S. domestic law. See discussions *infra* part V comparing U.S. law and relevant provisions of the ICCPR and CEDAW.

food, clothing, housing, decent working conditions, and health care.⁸⁴ In his 1944 State of the Union message, President Franklin Roosevelt, perceiving the deficiencies of the Bill of Rights, called for amending the Constitution to provide social and economic rights.⁸⁵ With his death, prospects for undertaking a project of this historic magnitude dwindled.

The disinclination of Americans to incorporate human rights norms into their Constitution means that they may have rights that lag behind the panoply of modern rights recognized in the constitutions of other Western nations. Moreover, Americans also lack the extensive rights now provided to citizens of newly democratized countries formerly notorious for their retrograde positions on human rights.⁸⁶

One reason why the deficiencies of the rights protections afforded in the Bill of Rights are overlooked is the national prominence and international prestige obtained by the Supreme Court's jurisprudence on rights and freedoms during the era of the Warren Court from 1954 to 1969.⁸⁷ In that era, the Court effectively federalized the Bill of Rights and made notable and widely-hailed contributions to modern rights concepts.⁸⁸ Progressive ruling on rights continued in the Burger Court. Writing in 1984, Grey presciently anticipated that "we may be approaching the end of a historically deviant period in which the federal courts have been a progressive force in American life."⁸⁹ One critic of the current treatment of rights questions sees in it a "static originalism," involving judicial reliance on so-called neutral principles that tend to ratify "existing distributions of wealth and power" that were acquired based on the domination and subordination of certain groups, without inquiry into whether the "existing distribution of entitlements" rested on injustice.⁹⁰ The progressive jurisprudence that to a considerable extent had compensated for the archaisms of the Bill of Rights seems to be at an end. Meanwhile, the American legal system disregards advances in rights jurisprudence in Europe that are based on ideas that Europeans originally took from the United States during the era of the Warren Court.⁹¹

84. See Henkin, *Rights*, *supra* note 79, at 416-18.

85. 90-I CONG. REC. 55, 57 (1944).

86. For examples of these provisions, see *infra* note 211.

87. Lillich, *supra* note 78, at 55-56.

88. *Id.* at 56.

89. Grey, *supra* note 73, at 24.

90. See Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 99-101 (1993).

91. See Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 543-44, 560 (1988).

In sharp contrast to the United States, democratic nations that are not alienated from the international legal system do not treat international human rights as a force threatening the integrity of their constitutions and domestic systems of rights. Instead, their constitutions may treat international human rights as friendly entities and endorse them by express constitutional provisions.⁹² A generally sympathetic British observer has noted that the United States “remains sadly isolated” from the direct impact of “the rapidly developing corpus of international human rights law.”⁹³ He expects that, absent improvements in the 1990s, the U.S. Constitution will be found deficient “as a charter of ordered liberty, suitable to the needs and values of the citizens of the United States in the twenty-first century.”⁹⁴ It is a sign of the insularity and parochialism shaping Americans’ vision of rights issues that few seem to be either interested in or perturbed by the relative weakness of the rights provisions in the U.S. Constitution.⁹⁵

A recent draft of a “Charter of Rights and Responsibilities”—a proposed bill of rights for the next century drawn up by Circuit Court Judge Richard Nygaard—can be read as an implicit criticism of the parsimonious rights protections currently afforded Americans.⁹⁶ Unlike the average U.S. judge, Nygaard is personally familiar with issues in drafting modern constitutions, which may explain his view that non-

92. For example, the Spanish Constitution of 1979 in Article 10(2), states “The norms relative to basic rights and liberties which are recognized by the Constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.” SPAIN CONST. art. 10 (2), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1996).

The 1992 Constitution of the Czech Republic provides in Article 10 that human rights treaties may override domestic law “Ratified and promulgated international treaties on human rights and fundamental freedoms to which the Czech Republic is obligated are directly binding and take precedence over the law.” CZECH CONST. art. 10, *reprinted in id.*

Germany, in Article 25 of its 1949 Basic Law, lays down the welcome mat for international law generally, regardless of whether it is in treaty form: “The general rules of international law shall be an integral part of federal law. They shall override the laws and directly establish rights and obligations” F.R.G. CONST. art. 25, *reprinted in id.*

93. Lester, *supra* note 91, at 539.

94. *Id.* at 560-61.

95. See Glendon, *supra* note 67, at 519. She introduced an article on a Bill of Rights symposium in Chicago by pointing out that, had the symposium been held at a university outside the United States, it would have almost certainly involved cross-national comparisons and considerations of how commitments to international human rights law had affected national legal systems. *Id.* In contrast, such international perspectives on rights are exceptional among U.S. lawyers and judges.

96. See generally Richard L. Nygaard, *A Bill of Rights for the Twenty-First Century*, 21 HASTINGS CONST. L.Q. 189 (1994).

U.S. models of rights are more complete and offer better guidance than their U.S. counterparts. However, such perspectives are unusual, and the idea that U.S. domestic rights protections should be responsive to modern trends in international law may strike many Americans as subversive. The background against which U.S. legal parochialism in rights matters has developed will be briefly outlined below to show how the U.S. refusal to accept the norm of equality is part of a much broader pattern.

III. U.S. Attitudes Towards International Human Rights Conventions

A. U.S. Ambivalence Towards Human Rights

Because the United States was one of the leaders in founding the United Nations, it is associated with the founding of the post-war system of international law in which human rights have figured prominently. The United States has long put great store by upholding democratic institutions and securing civil and political rights, and is regarded by many as the homeland of the values set forth in modern international human rights conventions. This impression that the United States cares deeply about human rights has been further enhanced by the vigorous, albeit selective, propagation of human rights as part of U.S. foreign policy and the linking of trade privileges to human rights performance. The State Department also publishes detailed reviews of the human rights situations in countries around the world.⁹⁷ Many outside the United States have come to associate human rights with U.S. culture, which has led governments of non-Western countries and cultural relativists to complain that the extension of human rights to non-Western countries necessarily involves American cultural imperialism.⁹⁸ Ironically, as those familiar with the U.S. record recognize, the United States has shown extreme reluctance to integrate modern human rights within its domestic legal system, and has remained largely estranged from the modern system of international human rights law.⁹⁹ In this regard, the U.S. position resembles that of the United Kingdom, which has not hesitated to preach to the newly democratizing nations of Eastern Europe about

97. See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (published annually).

98. See *infra* note 115; Mayer, *Universal Versus Islamic Human Rights*, *supra* note 46, at 315-18, 379-88.

99. See *infra* part III; Lester, *supra* note 91.

the need to incorporate European human rights in their domestic laws while refusing to do so itself.¹⁰⁰

The influence of groups and institutions opposed to human rights and their dire warnings about the dangers of international human rights has fostered an attitude of suspicion, if not downright hostility, towards the international conventions. Any U.S. president advocating ratification of human rights conventions must contend with a climate of negativity that has been created by forces determined to convince the U.S. public that it has everything to lose and nothing to gain by such ratification. Aspects of the history of the U.S. response to international human rights will be reviewed in the next section. This history helps explain the resistance the United States has shown toward ratifying CEDAW.

B. Opposition to Ratifying Human Rights Conventions

A review of U.S. attitudes towards human rights conventions reveals that the U.S. reaction to CEDAW was no aberration but was part and parcel of a traditional assumption that ratifying human rights treaties constituted a radical and dangerous project. The dismal record of the U.S. Senate and other institutions, like the American Bar Association, with regard to proposed ratifications of international human rights conventions has been addressed in Natalie Kaufman's thought-provoking study, which makes for discouraging reading for any advocate of strengthening the international system of human rights.¹⁰¹ In her study, Kaufman surveys the rhetoric of U.S. opponents of human rights and chronicles the tactics deployed to discredit human rights and to deprive any human rights conventions that achieved ratification of domestic effect. Kaufman's work reminds readers just how intensely appeals to parochial and ethnocentric sentiments have resonated in the U.S., and how these appeals have poisoned the well for those seeking to extend the benefits of human rights treaties to Americans. She demonstrates how the common assumption that U.S. constitutional rights are indubitably superior has been exploited to persuade Americans that international human rights would be, at best, useless and, at worst, dangerous threats to their freedoms.

100. See David Rose, *Rule of Law: Two-Faced Britain in the Dock over Human Rights*, THE OBSERVER, Oct. 1, 1995, at 16.

101. See NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* (1990). The ABA subsequently reversed its position and now supports international human rights and CEDAW ratification. See *infra* note 131.

For example, the ABA and Frank Holman, a former ABA president and an influential member of the ABA, played a prominent role in the 1940s and 1950s in persuading Americans to fear international human rights.¹⁰² Holman characterized human rights treaties as part of a Communist plot to destroy the American way of life.¹⁰³ To shield Americans from the nefarious impact of international human rights, a constitutional amendment was proposed by an ABA committee that would have prevented ratification of human rights treaties or at least would have limited their domestic impact.¹⁰⁴ With the support of the ABA, Ohio Senator John Bricker in 1951 tried to make it impossible for the United States to adhere to international human rights treaties by introducing a constitutional amendment to protect the "sacred rights enjoy[ed] under the Bill of Rights and the Constitution."¹⁰⁵ Recalling the special, sacred status of the U.S. Constitution, one can appreciate how senators might believe that any scheme of rights entailing an amendment of the U.S. Constitution must be unholy.

U.S. opponents of international human rights covenants have not minced words in proclaiming that the covenants menaced U.S. rights and freedoms. The proposed Covenant on Human Rights, which was later subdivided into the ICCPR and International Covenant on Economic, Social, and Cultural Rights (ICESCR), was anathema to Senator Bricker and his ilk. Demanding that the executive branch withdraw from work on the covenant, Bricker called it "a Covenant on Human Slavery,"¹⁰⁶ a legalization of "the most vicious restrictions of dictators."¹⁰⁷ It was also a "legal basis for the most repressive measures of atheistic tyranny,"¹⁰⁸ "a blueprint for tyranny,"¹⁰⁹ and "an attempt to repeal the Bill of Rights."¹¹⁰ Bricker's tirades were not unusual: a favorite argument of foes of ratification of human rights treaties is that ratification would jeopardize U.S. constitutionalism.¹¹¹ Again and again, supposed threats to the Constitution were espied

102. *Id.* at 16.

103. *Id.* at 16-19, 23.

104. *Id.* at 25.

105. *Id.* at 29. For further discussion of the notorious Bricker Amendment, see Henkin, *United States Ratification*, *supra* note 27, at 348-49.

106. KAUFMAN, *supra* note 101, at 64.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. See MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, *WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA?* 50-63 (1987).

and decried.¹¹² Frank Holman of the ABA suggested that “the covenant would destroy [both] the U.S. Constitution and legal system.”¹¹³ In an article published in the ABA Journal in 1951, William Fleming foresaw apocalyptic consequences and proclaimed that the covenant would whittle away American liberties and, even worse:

[T]he Declaration of Independence will be legislated out of existence The war of 1776 will have been fought in vain, the principles of the Revolution undone, self-government abolished, with the international bureaucracy as the new sovereign in the field of human rights taking the place of George III.¹¹⁴

Moreover, according to Fleming, the ideology of the covenant was alien to the United States. The Soviets had “scored” with the covenant, which he maintained was marked by “the heavy imprint of Eastern philosophy.”¹¹⁵

So effective have these strategies been that the United States has hesitated to ratify even those human rights conventions that stated basic principles to which no reasonable citizen of the modern world could take exception. One such example is the Genocide Convention, a convention signed under President Truman but not ratified until 1988, and then only with significant reservations.¹¹⁶ Opponents of human rights succeeded in drastically changing U.S. attitudes toward the Genocide Convention. While overwhelmingly supportive of the Genocide Convention initially, public opinion was subsequently persuaded to regard the convention with fear. As Kaufman remarks, the public image of the Genocide Convention was completely deformed due largely to ABA efforts, and the convention transformed “from a simple document outlawing a heinous offense to a subversive document undermining cherished constitutional rights.”¹¹⁷ This meant that the Genocide Convention could be dismissed as un-American. Wild charges were levied that the Constitution was imperiled by the Genocide Convention.¹¹⁸

112. *Id.*

113. KAUFMAN, *supra* note 101, at 69.

114. *Id.* at 70-71.

115. *Id.* at 72. This was a remarkable claim, given the historical origins of human rights, which derive from Western European and American thought. This has made them seem excessively “Western” in the eyes of many in non-Western societies. *See, e.g.,* Willy Wo-Lap Lam, *A New World Order Begins in Beijing*, SOUTH CHINA MORNING POST, Nov. 23, 1994, at 23, available in LEXIS, Nexis Library, ALLWLD File; William May, *Clash of Cultures Unfolds in Asian Media*, Japan Economic Newswire, Aug. 20, 1994, available in LEXIS, Nexis Library, ALLWLD File.

116. KAUFMAN, *supra* note 101, at 181-94, 206-10.

117. *Id.* at 62.

118. *Id.* at 49.

When the Senate was considering ratification of the Genocide Convention, Senator Jesse Helms demanded that a list of reservations be entered.¹¹⁹ However, he ultimately refused to support ratification of the convention even with extensive reservations.¹²⁰ The reservations included one assertion that nothing in the Genocide Convention required or authorized legislation or action prohibited by the U.S. Constitution as interpreted by our courts.¹²¹ Helms trumpeted that via this proviso, "we would put the international community on notice that we regard our system as a superior protection of human rights than [sic] any other system in the world."¹²² Helms is not unusual in automatically ascribing superiority to U.S. rights. In an analysis of arguments made in 1953 and 1979 in Senate hearings against ratifying human rights treaties, Kaufman found that the most common argument deployed was that international human rights would diminish basic rights.¹²³

C. Resistance to Enhanced Rights as a Motive for Opposing Human Rights Conventions

Statements by human rights opponents to the effect that U.S. rights were superior to those in human rights conventions were tinged with hypocrisy. Behind the combative rhetoric, which attempted to portray international human rights as a menace to American rights and freedoms, was an awareness that international law established a stringent norm of equality that U.S. law could not begin to meet. Regimes of de jure racial segregation and racially discriminatory laws remained in place throughout the 1940s and 1950s, and in some places persisted into the 1970s. The real problem was that U.S. law lagged behind international norms and denied rights to many Americans who would be in a position to claim equal rights if they enjoyed the protection of international law. Thus, Americans opposed to civil rights for Black Americans were naturally inclined to oppose international human rights.¹²⁴ However, it would have been impolitic to admit openly the goal of preserving a discriminatory system that denied rights to Black Americans. Only rarely were those condemning inter-

119. *Id.* at 148.

120. *Id.*

121. *Id.* at 209. The reservations proposed by Senator Helms and Senator Richard Lugar are listed *id.* at 209-10.

122. *Id.* at 184.

123. *Id.* at 177.

124. Thomas Buergenthal, *The United States and International Human Rights*, 9 HUM. RTS. L.J. 141, 144 (1988).

national human rights moved to confess that they were acting on the basis of opposition to expanded civil rights for Black Americans.¹²⁵ However, fear that Black Americans could find mechanisms offering them relief under international law for wrongs irremediable under domestic law was a major factor accounting for the otherwise strange delay in ratifying the Genocide Convention.¹²⁶

In 1951 the ABA published an article condemning the Human Rights Covenant, the precursor of the ICCPR and ICESCR, in part because the covenant promoted "extreme egalitarianism."¹²⁷ The opponents of human rights believed that the law should ideally accommodate racial discrimination and that international law was "extreme" in making non-whites more equal than they were entitled to be.¹²⁸ In other words, when Americans made objections to ratifying human rights conventions, they did not necessarily believe their own statements that international human rights would undermine superior U.S. protections for rights. The objections often seem to have resulted from an awareness that international human rights distributed rights and freedoms differently, bestowing them equally on all races and thereby threatening the privileged status of White Americans.

In the current U.S. legal order, where *de jure* racial discrimination is outlawed but the law permits sex discrimination to survive,¹²⁹ it is not surprising that the basis for objecting to international human rights has changed. Now, the objectionable "extreme egalitarianism" of international human rights lies in the provisions for full equality of the sexes. In the U.S. objections to CEDAW, there has been no express condemnation of the norm of equality for women, but there is much to indicate that objections to that norm have prompted the opposition to CEDAW ratification.

D. Political Components of United States Attitudes Towards Human Rights

Just as it is wrong to assume that U.S. culture is monolithically supportive of human rights, so one must not overgeneralize about U.S. hostility to human rights. To provide examples that show that the

125. For example, an ABA committee member did raise the specter of "subversive elements" teaching minorities that international law covered the area of civil rights. KAUFMAN, *supra* note 101, at 46.

126. *Id.* at 18, 43-46, 54-55, 56-59.

127. *Id.* at 70. It is not coincidental that the ABA in this period was itself involved in racially discriminatory practices. *Id.* at 25-26.

128. *Id.* at 70.

129. For an elaboration of this, see the discussion *infra* part V.A.

United States has often seemed more a foe than a friend of international human rights and has resisted modifying its laws to bring them into conformity with international standards is not to say that the U.S. response to international human rights has been uniformly negative. Many U.S. politicians and officials have strongly backed human rights, one of the most famous of whom was Eleanor Roosevelt, a prime mover behind the drafting of the Universal Declaration of Human Rights (UDHR).¹³⁰ U.S. non-government organizations, lawyers and law professors, religious and civil rights organizations, and feminist groups have sought to promote the acceptance of human rights and to achieve ratification of the international human rights conventions.¹³¹

The evidence suggests that Americans who are philosophically inclined to believe that the principles in human rights conventions are beneficial tend not to find that there are significant obstacles in the way of U.S. ratification.¹³² Notably, these individuals view the U.S. Constitution in a different fashion from the way that opponents of human rights do. Such Americans do not see the U.S. Constitution as a filter that is meant to screen out expanded rights, nor as an obstacle to U.S. citizens enjoying the full benefits of the protections offered by international human rights law. For example, President Kennedy, a supporter of human rights, was even prepared to assert that U.S. law was already in conformity with international human rights law, so that ratifying the conventions could entail no conflicts with the U.S. Constitution.¹³³

There are political dimensions to the cleavage between Americans who favor and Americans who oppose human rights. Democrats have been more inclined toward ratifying international human rights conventions than Republicans, who have tended also to oppose do-

130. KAUFMAN, *supra* note 101, at 71.

131. The American Civil Liberties Union (ACLU), Amnesty International, and the Lawyers Committee for Human Rights have been particularly active in this regard, and the ABA, notorious decades ago for its opposition to ratifying human rights treaties, has now also become supportive. Among the organizations listed by the National Committee on the United Nations Convention on the Elimination of Discrimination Against Women as supporting CEDAW ratification are the American Association of Retired Persons, the American Association of University Women, the ABA, the ACLU, Amnesty International, Black Women's Agenda, Inc., B'nai B'rith Women, the Episcopal Church (USA), the Lawyers Committee for Human Rights, the League of Women Voters, the National Organization for Women (NOW), and the Presbyterian Church. NATIONAL COMM. ON U.N. CEDAW, FACT SHEET, Oct. 1995.

132. See, e.g., HALBERSTAM & DEFEIS, *supra* note 111; Hoffman & Strossen, *infra* note 140; Henkin, *United States Ratification*, *supra* note 27; and the Lawyers Committee letter to Senator Pell, *infra* note 413.

133. HALBERSTAM & DEFEIS, *supra* note 111, at 173.

mestic laws and court decisions enhancing civil rights. Naturally, U.S. policy on human rights has been affected by shifts in control of the executive branch. For example, the Carter Administration was most active in support of international human rights, including CEDAW.¹³⁴ In contrast, during the Reagan Administration, Lillich saw “benign neglect’ or even outright hostility towards the development, clarification, and domestic enforcement of international human rights law.”¹³⁵ The Bush Administration took the long-delayed step of ratifying the ICCPR, albeit with significant reservations.¹³⁶ After President Clinton took office and the White House returned to Democratic control, the executive branch again advocated ratifying CEDAW.¹³⁷ However, regardless of shifts in support of ratifying human rights instruments, the U.S. practice of appending constitutional and other reservations seems to be a constant. Thus, the Clinton Administration, although friendlier to human rights than its Republican predecessors, has proposed significant RUDs to CEDAW.¹³⁸ The significance of U.S. RUDs to human rights treaties deserves examination, particularly as the RUDs bear on the U.S. effort to mislead the international community as to where U.S. law stands vis-à-vis the norm of women’s equality.

IV. U.S. RUDs and International Human Rights Conventions

A. U.S. “Cluttering” of Human Rights Conventions

Given the extent of opposition to U.S. ratification of human rights treaties, it is not surprising that the United States has ratified relatively few of them. Moreover, U.S. ratifications of human rights conventions have been something other than foursquare endorsements of the principles contained therein. U.S. ratifications have been accompanied by RUDs that often nullified U.S. commitments to abide by treaty norms.¹³⁹ The U.S. RUDs to human rights treaties are de-

134. Lillich, *supra* note 78, at 68.

135. *Id.* at 54.

136. See discussion *infra* part VI.A.

137. See *infra* notes 387-388.

138. See *infra* part VII.B.

139. M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1179-80 (1993).

scribed as being "designed to ensure that these treaties would have virtually no domestic legal effect in enhancing human rights."¹⁴⁰

Louis Henkin has characterized the practice of appending these RUDs as the "clutter[ing]" of treaties.¹⁴¹ Further, the result of this "cluttering" has been said "to confuse the precise nature, content, and international and domestic legal significance of treaties ratified by the United States."¹⁴² As will be indicated,¹⁴³ the murky and misleading language of the U.S. RUDs to the ICCPR and CEDAW equality provisions appears to have been intentionally crafted to confuse the international community about what exact obligations the United States was undertaking as to women's rights. Thus, the U.S. RUDs raise doubts about the good faith of U.S. treaty ratifications. For example, Cherif Bassiouni has charged: "The Senate's practice of de facto re-writing treaties, through reservations, declarations, understandings, and provisos, leaves the international credibility of the United States shaken and its reliability as a treaty-negotiating partner with foreign countries in doubt."¹⁴⁴ Louis Henkin has observed that the U.S. use of RUDs "has evoked criticism abroad and dismayed supporters of ratification in the United States. As a result of these qualifications of its adherence, U.S. ratification has been described as specious, meretricious, hypocritical."¹⁴⁵ Through the U.S. RUDs, Henkin concludes, the United States may be signalling to the rest of the world that the conventions apply only to other states, and that the United States may "sit in judgment on others, but will not submit its behavior to international judgment."¹⁴⁶

In sum, the RUDs entered by the United States to international human rights conventions have been so sweeping and so deleterious that they raise doubts about the good faith of U.S. ratifications, while making it hard for the outside world to estimate the degree to which the United States intends to adhere to international norms. The RUDs entered to the ICCPR are regarded as such a serious problem

140. Paul L. Hoffman & Nadine Strossen, *Enforcing International Human Rights Law in the United States*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 478 (Louis Henkin & John Lawrence Hargrove eds., 1994). According to Kaufman, the U.S. package of attachments to human rights covenants "makes a mockery of the international human rights consensus." KAUFMAN, *supra* note 101, at 197.

141. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 50 (1990).

142. Bassiouni, *supra* note 139, at 1174.

143. See discussion *infra* part VI.A.

144. Bassiouni, *supra* note 139, at 1173.

145. Henkin, *United States Ratification*, *supra* note 27, at 341.

146. *Id.* at 344.

by ICCPR supporters in the United States that they have even debated whether it would have been better for the United States not to have ratified the ICCPR at all rather than ratify it in a manner that nullified the convention.¹⁴⁷

B. The Rationales Behind the U.S. RUDs

While many RUDs flowed from opposition to principles in human rights conventions, not all were proposed in a spirit of animosity towards human rights. Instead, reservations were also proposed by human rights supporters in the belief that RUDs were essential to disarm Senate critics.¹⁴⁸ Americans wishing to promote ratification of human rights conventions have tended to think defensively, believing it necessary to load the conventions with reservations that they themselves might prefer to omit.

Louis Henkin has outlined the principles prompting the United States to enter the plethora of RUDs to international human rights conventions.¹⁴⁹ These principles include the rule that the United States “will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the U.S. Constitution”¹⁵⁰ and the rule that U.S. adherence to any human rights treaty should not require changes in existing U.S. laws, policies, or practices. These two rules can be confused, so that a preference for upholding the legal status quo becomes associated with upholding the Constitution. Moreover, RUDs might refer to the Constitution even where the domestic legal standard was not one compelled by the Constitution, but merely one held not to offend constitutional norms.¹⁵¹

Other principles listed by Henkin are that the United States will not submit to the jurisdiction of the International Court of Justice with regard to human rights conventions, that the U.S. system of federalism must be upheld, and that human rights conventions will be non-self-

147. See Bassiouni, *supra* note 139, at 1181.

148. See KAUFMAN, *supra* note 101, at 151.

149. See Henkin, *United States Ratification*, *supra* note 27.

150. *Id.* at 341-42.

151. Bassiouni, *supra* note 139, at 1177, and sources cited *id.* n.29. Henkin's assessment that defense of the Constitution and the status quo in U.S. law are central to U.S. RUDs to human rights conventions is shared by others. For example, according to Bassiouni, with regard to the conventions on genocide and torture, as well as the ICCPR: “The overriding concern of Senators like Jesse Helms, Orrin Hatch, and Richard Lugar, who have effectively prevented ratification of these treaties without the plethora of what are really amendments, was that no treaty be supreme to the Constitution or the domestic laws of the United States.” *Id.*

executing.¹⁵² Since these last principles relate to modalities of implementation and are less relevant for the comparisons of the U.S. RUDs to the substantive principles of equality central to this Article, they are de-emphasized in the following discussion.

C. Dissection of “Constitutional” Bases for U.S. RUDs

As befits the legal system of a nation given to Constitution-worship, in U.S. law it is treated as self-evident that international law may not override the Constitution.¹⁵³ In fact, the principle that the Constitution overrides international law has also been endorsed by the Supreme Court.¹⁵⁴ Despite this explicit policy that the U.S. Constitution will override any conflicting norms of international law, opponents of ratifying international human rights conventions have played on fears that such ratification could somehow undermine the Constitution.¹⁵⁵ Predictably, U.S. RUDs uphold the supremacy of constitutional principles even though these RUDs would seem to be redundant.

Henkin has noted that behind what is presented as a constitutionally-based reservation, there may be altogether different grounds for objecting to treaty provisions.¹⁵⁶ No threat to the Constitution need actually be present, and the real grounds for a constitutional reservation may amount to nothing more than a resistance to changing U.S. law to bring it up to international standards.¹⁵⁷ Furthermore, as will be discussed,¹⁵⁸ the “constitutional” objections to provisions in human rights treaties may relate not to any express text of the Constitution, but instead to contested judicial interpretations of constitutional requirements. The U.S. has chosen not to exploit domestic disputes over the validity of these constitutional interpretations to call for the rethinking of U.S. standards that fail to comply with international human rights law.

One must question whether the U.S. “constitutional” rationales for reservations to human rights treaties are not merely pretextual and ultimately contrived to give respectability to a preference for adhering to the norms of domestic law regardless of whether or not they are constitutionally mandated. That is, the “constitutional” reservations

152. Henkin, *United States Ratification*, *supra* note 27, at 341.

153. *Id.* at 342.

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

155. *See discussion supra* part III.B.

156. Henkin, *United States Ratification*, *supra* note 27, at 342.

157. *Id.*

158. *See infra* notes 174-178 and 403-412 and accompanying text.

might have been offered for much the same reason as the “Islamic” reservations made by Muslim countries to human rights treaties—to give respectability to policies of upholding domestic laws that are discriminatory or otherwise deficient by international human rights standards by associating these policies with sacred laws.¹⁵⁹

The U.S. proclivity to stand by outmoded domestic law in lieu of upgrading it to meet international standards is troubling to some non-governmental human rights advocacy groups. For example, the Lawyers Committee on Human Rights wrote to Senator Claiborne Pell, who was then the Chair of the Senate Foreign Relations Committee, to criticize the proposed U.S. reservations to the ICCPR and the U.S. approach to human rights.¹⁶⁰ The Committee stated that the RUDs meant the United States “would not commit itself to do anything that would require change in present U.S. law or practice.”¹⁶¹ The letter further stated that: “[t]he purpose of treaties generally is to undertake new obligations, in this case to conform U.S. behavior to basic international standards in human rights. The mere fact that a treaty establishes standards to which the United States does not currently adhere is not a reason for a reservation.”¹⁶²

To understand the difference between a reservation that is required to protect a constitutional principle and one to which there is no actual constitutional conflict requires the review of specific examples. Also, a distinction must be drawn between the unusual situation where there is a potential or actual conflict between upholding a constitutional right and adhering to a related international norm versus the far more common situation in which there is merely a difference between the lower rights protection afforded under U.S. domestic law, and the more exigent international human rights principles. In this last instance, there is no conflict between the U.S. and international standards since the Constitution does not impose ceilings on rights, but only floors—minimum acceptable levels of rights protections.

Without a background in the history of U.S. opposition to elevating U.S. rights to match international standards, one might expect that the United States would never enter RUDs when it encountered an

159. See Ann E. Mayer, *Rhetorical Strategies and Official Policies on Women's Rights: The Merits and Drawbacks of the New World Hypocrisy*, in FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 104 (Mahnaz Afkhami ed., 1995).

160. Lawyers Committee for Human Rights (LCHR), New York, *Statements on U.S. Ratification of the ICCPR*, 14 HUM. RTS L.J. 125 (1993).

161. *Id.*

162. *Id.* This view does not seem to have been adopted by the U.S. Senate or by the U.S. State Department.

international norm that offered more expansive protection than was offered under the U.S. Constitution. However, in a number of instances, the United States has treated lower constitutional standards as definitive, precluding adherence to the higher international norms.¹⁶³ When adherence to the Constitution is perfectly compatible with acceptance of the higher international norm, it is not the need to uphold constitutional supremacy that compels the United States to reject the higher international norm. The invocation of the Constitution in such a situation is simply a smoke screen to obscure the political decisions that prevent persons who would benefit from the higher international norms from being able to enjoy enhanced rights. Before considering this issue, some examples of important U.S. RUDs to human rights treaties will be reviewed to illustrate how constitutional obstacles to adopting human rights have been exaggerated.

D. The U.S. Reservation to Article 20 of the ICCPR: A Constitutional Conflict or a Policy Disagreement?

One of the few instances where many Americans who are supportive of ratifying human rights conventions would agree that following international human rights norms clashes with the U.S. Constitution involves Article 20 of the ICCPR,¹⁶⁴ which prohibits propaganda for war and the advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.¹⁶⁵ The United States entered a reservation to Article 20, reading the article not to "authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."¹⁶⁶

Plausible constitutional grounds exist for making this reservation. For example, the First Amendment prohibition against abridgements of the freedom of speech as interpreted by U.S. courts assumes that this freedom is an essential underpinning of other rights and precludes the kinds of curbs on hate speech envisaged in ICCPR Article 20.¹⁶⁷

163. See *infra* notes 179-186 and 347-354 and accompanying text.

164. ICCPR, *supra* note 3. See, e.g., KAUFMAN, *supra* note 101, at 164-70. See also the position on U.S. reservations to the ICCPR taken by the Lawyers Committee for Human Rights, which has been critical of most U.S. RUDs but agreed that the reservation to Article 20 was constitutionally required. Lawyers Committee for Human Rights, *supra* note 160, at 125.

165. ICCPR, *supra* note 3. Hereinafter, for the sake of convenience, the speech prohibited under Article 20 will be referred to as "hate speech."

166. *Multilateral Treaties*, *supra* note 56, at 126.

167. See KAUFMAN, *supra* note 101, at 164-69.

Thus, a “constitutional” reservation could seem necessary to avoid conflict with the First Amendment. However, one could push the analysis a step further and ask whether this reservation was actually compelled by the Constitution or whether this “constitutional” reservation simply shielded political choices that favor freedom of speech over equality rights behind a constitutional facade.

One motivation behind Article 20 is to curb expressions that have the proven potential of promoting attitudes and conduct which can be destructive of rights.¹⁶⁸ For example, World War II illustrated how hate speech could lead to genocide and other hideous crimes.¹⁶⁹ Obviously, the authors of the Bill of Rights, not having lived through the Nazi atrocities of World War II and being unaware of the impact that hate speech can have when disseminated via the modern media, could not have contemplated the threats to rights and freedoms posed by hate speech in the late twentieth century. In contrast, this was contemplated by Justice Robert Jackson, who served as a prosecutor at the Nuremberg Tribunal before returning to the Supreme Court. After being directly involved in sorting out the blame for the monstrous genocide and persecutions carried out by the Nazis, Justice Jackson stated that he would agree with curbs on freedom of speech if “hateful and hate-stirring attacks on races and faith” were involved.¹⁷⁰ Protecting such speech, he suggested, “belittles great principles of liberty.”¹⁷¹ Justice Jackson did not say that freedom of speech was undeserving of constitutional protection; he simply noted that in balancing competing rights, some compromise in First Amendment speech protection may be necessary to ensure that other rights are not destroyed.¹⁷² Justice Jackson was prompted to reconsider whether the line between permitted and prohibited speech had been drawn with adequate attention to the potential harms of hate speech. Following this line of thinking and depending upon one’s priorities, it is arguable that the effect of accepting the ICCPR’s Article 20 ban on hate speech is not to diminish rights, but only to curb certain limited kinds of harmful speech in the interest of protecting other rights.¹⁷³

In evaluating whether the ICCPR Article 20 conflicts with the U.S. Constitution, one should bear in mind that both Article 20 and

168. *Id.*

169. *Id.* at 165, 167.

170. Elizabeth Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT’L L. 57, 129 (1992).

171. *Id.*

172. *Id.*

173. *Id.* at 128.

the First Amendment are concerned with protecting rights, and when these two seem to clash, what is actually involved is a decision about balancing competing rights. Although the Constitution indicates that Congress shall make no law abridging freedom of speech, it does not say that this right is absolute and may never be curbed in the interest of protecting other rights. In fact, various curbs on the freedom of speech have been upheld by the Supreme Court as constitutional.¹⁷⁴ In accepting these curbs, the Supreme Court has necessarily become embroiled in policy decisions. The U.S. Constitution offers no advice on how to balance the concern for protecting freedom of speech against the contemporary concern for ensuring equality and non-discriminatory treatment.¹⁷⁵ The need to effect this balance is quite recent, and the question of whether the curbs on speech mandated by Article 20 of the ICCPR necessarily conflict with the First Amendment takes one beyond the purview of the text of the Constitution and the ideas of the Framers and into the realm of current policy disputes.

In judicial decisions interpreting the scope of the First Amendment, the United States has staked out its current position and given priority to freedom of speech over the equality rights that may suffer when hate speech remains unrestricted.¹⁷⁶ This position is at odds with that of other Western democracies, which also value freedom of speech but have decided that curbs on hate speech are necessary in the interest of protecting other rights and freedoms.¹⁷⁷ If one accepts the policies in current U.S. First Amendment jurisprudence, one may conclude that freedom of speech is so important that accepting Article 20 would be ill-advised. However, it is misleading to say that this conclusion is expressly compelled by the text of the Constitution or that Article 20 cannot conceivably be reconciled with any thoughtful reading of the First Amendment. There is an ongoing debate as to whether First Amendment principles should be interpreted to preclude curbs on hate speech that are designed to protect equality rights and other freedoms,¹⁷⁸ and the issues in this area are as much political as they are constitutional in nature.

174. *Id.* at 126.

175. Defeis, *supra* note 170, at 128. As Defeis has noted, "a comprehensive theory of equality did not develop side by side with First Amendment theory." *Id.*

176. *Id.*

177. *Id.* at 128-29.

178. For discussions of the issues being debated in this connection, see, e.g., *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* (Laura J. Lederer & Richard Delgado eds., 1995) [hereinafter *THE PRICE WE PAY*]; LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986); Alan Brownstein, *Regulation of Hate Speech at Public Universities:*

The case for there being a real constitutional obstacle to the acceptance of an international human rights principle is strongest where Article 20 is implicated. If there were reasons to doubt whether the U.S. RUDs to Article 20 of the ICCPR were essential to avoid a conflict with the Constitution, the "constitutional" underpinnings for other RUDs would turn out to be yet more tenuous.

E. The U.S. Reservation to Article 6(5) of the ICCPR

The constitutional basis for the U.S. reservation to Article 6(5) was nugatory. Article 6(5) barred the imposition of the death penalty for crimes committed by persons below eighteen years of age.¹⁷⁹ In making this reservation, the United States used domestic legal standards, which were approved but not required by constitutional jurisprudence, to screen out rights provided under international law. Despite this, the U.S. RUD refers to constitutional constraints:

[T]he United States reserves the right, subject to its Constitutional constraints [sic], to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.¹⁸⁰

This reservation was exceptional in its forthright wording.¹⁸¹ The United States did not pretend that it was compelled to make this reservation to protect rights guaranteed under the Constitution. The sole constraints on the death penalty that it would recognize were those imposed by the U.S. Constitution, meaning constraints that were set forth in Supreme Court decisions. Unlike other, more confusing U.S.

Are First Amendment Values Functionally Incompatible with Equal Protection Principles? 39 BUFF. L. REV. 1 (1991); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); Along Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887 (1992); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95; Rodney Smolla, *Rethinking First Amendment Assumptions about Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate Speech Restriction*, 78 IOWA L. REV. 737 (1993); Symposium, *Free Speech and Religious, Racial and Sexual Harassment*, 32 WM. & MARY L. REV. 207 (1991).

179. Defeis, *supra* note 170, at 126.

180. *Multilateral Treaties*, *supra* note 56, at 126.

181. Why was the United States unusually frank in this matter? Probably because no executions in the United States are carried out in secret and executions of juvenile offenders are likely to attract wide notice and international protests. Human rights non-governmental organizations (NGOs) like Amnesty International have shone spotlights on controversial U.S. death penalty cases for years. This being the case, attempted obfuscation in this area would be futile.

RUDs, this reservation was quickly perceived as a square rejection of international law in favor of adherence to a retrograde norm of domestic law, provoking criticism from human rights advocates and the international community.

F. Judicial Parochialism Regarding Rights: The Death Penalty Cases

Relevant Supreme Court decisions show that some Justices are dismissive of international rights principles.¹⁸² Well before the 1992 ratification of the ICCPR, the Supreme Court had interpreted the Eighth Amendment in *Stanford v. Kentucky*,¹⁸³ to allow the imposition of the death penalty for persons convicted under state law for crimes committed when they were below eighteen years of age.¹⁸⁴ In a divided decision, the majority dismissed the relevance of international human rights law regarding the death penalty.¹⁸⁵ In ruling that the Kentucky law allowing the death penalty to be imposed on juvenile offenders did not violate the Constitution, the Court majority did not look beyond the confines of the Constitution and the Anglo-American common law tradition, as noted in the dissent.¹⁸⁶

Of course, such a ruling did not mean that state laws barring the execution of juveniles—thereby affording them more protection than the Constitution required—were in violation of the Constitution. Similarly, the ICCPR Article 6(5) provision barring the execution of juvenile offenders does not contravene any provision of the U.S. Constitution. What was actually being served by the U.S. reservation to Article 6(5) was a policy of upholding U.S. domestic law and associated values in the face of international norms to the contrary. Thus, in making its reservation, the United States had no need whatsoever to refer to the Constitution. Perhaps the hope was that a constitutional reference would lend more dignity to the U.S. position.

The mentality informing the U.S. reservation to Article 6(5) has a counterpart in the parochial legal vision of Justice Antonin Scalia, the author of the majority opinion in *Stanford v. Kentucky*.¹⁸⁷ In the decision, Justice Scalia wrote as if respect for customary international law should not figure into constitutional adjudication, and the only concern should be whether the death penalty offended U.S. standards of

182. *See, e.g.*, *Stanford v. Kentucky*, 492 U.S. 361 (1989).

183. *Id.*

184. *Id.*

185. *Id.* at 377.

186. *Id.* at 389-90.

187. *Id.* at 361.

decency.¹⁸⁸ He effectively announced to the world his indifference to whether his constitutional rulings flouted the norms of international law. In contrast, the dissent urged that both international treaties like the ICCPR (which the United States had not yet ratified as of this ruling) and relevant legislation in other countries, should be taken into account in deciding whether imposition of the death penalty on juvenile offenders violated contemporary standards of decency.¹⁸⁹

Justice Scalia's dismissive attitude towards international law and international opinion was presaged by his dissent in *Thompson v. Oklahoma*,¹⁹⁰ where the majority held that imposing the death penalty on fifteen-year-old offenders was unconstitutional.¹⁹¹ This plurality opinion written by the liberal Justice Stevens gave weight to international human rights standards and legislation of other countries, treating these as relevant to the Court's determination.¹⁹² In dissent, Justice Scalia forcefully contended that the only values that mattered in deciding whether the death penalty was unconstitutional were domestic ones.¹⁹³ Being disposed to follow an originalism that ineluctably draws him back towards the eighteenth century and British legal tradition, Justice Scalia included in his "domestic values" several aspects of Anglo-Saxon common law, citing Blackstone's 1789 Commentaries, which discusses capital punishment of 15-year-old criminals.¹⁹⁴ Justice Scalia dismissed the idea that the Court could learn from the contemporary community of nations or from the views of human rights organizations:

The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this Nation. That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may

188. *Id.* at 361-88.

189. *Id.* at 389-90.

190. 487 U.S. 815, 859 (1988).

191. *Id.*

192. *Id.* at 830-31.

193. *Id.* at 877-78.

194. *Id.* at 864.

think them to be, cannot be imposed upon Americans through the Constitution.¹⁹⁵

Thus, Justice Scalia views the Constitution as a bulwark against international human rights law and other foreign influences where the sole impact of following international standards would be to raise U.S. standards. Scalia rejected the idea that U.S. constitutional jurisprudence could be judged deficient by the measure of international human rights standards or that it could be enriched and improved by reviewing international human rights perspectives. Given the ascendancy of the insular perspectives of Justice Scalia and his like-minded allies on the Supreme Court, reliance on domestic constitutional standards will tend to cause U.S. rights to drift further away from modern international norms.

G. Reactions to the U.S. RUDs to the ICCPR

Perhaps the post-World War II pre-eminence of the United States and a reluctance to take on such a potent adversary accounts for the limited number of states that have so far registered official objections to the U.S. RUDs to the ICCPR. Objections to the U.S. reservation to Article 6(5) of the ICCPR were made by only eleven states—Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain, and Sweden.¹⁹⁶ However, the United States appeared indifferent to the criticisms of these countries. Sweden diplomatically implied that the U.S. RUDs to the ICCPR gave Sweden cause to doubt the good faith of the U.S. ratification:

A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. . . . [T]he reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national legislation. Reservations of this nature contribute to undermining the basis of international treaty law.¹⁹⁷

During meetings on March 29 and 31, 1995, to review the reports submitted by parties to the ICCPR, the Human Rights Committee expressed its regrets over the extent of the U.S. RUDs, believing that “taken together, they intended to ensure that the United States has

195. *Id.* at 868-69 n.4.

196. *See Multilateral Treaties, supra* note 56, at 127-30.

197. *Id.* at 129-30.

accepted what is already the law of the United States.”¹⁹⁸ That is, the committee perceived that in ratifying the ICCPR the United States was only promising to uphold U.S. domestic law—not to go one inch beyond it in an attempt to meet international standards. The committee expressed particular concern over the reservations to Article 6(5)—the ban on the death penalty for juvenile offenders—and Article 7—the ban on cruel, inhuman, or degrading treatment.¹⁹⁹ The Committee expert from Cyprus seemed dissatisfied with the focus of the U.S. report to the Human Rights Committee, which in his view should have been on the “consonance” of U.S. human rights with the Covenant and the RUDs.²⁰⁰ He also questioned why the United States should deprive its citizens of protection under the Covenant.²⁰¹ Thus, some expert observers were beginning to recognize that certain U.S. RUDs were incompatible with adherence to international human rights conventions and that the United States was denying its citizens rights guaranteed under international human rights law.

That U.S. law was falling behind advances in international human rights was not acknowledged in the U.S. report to the Human Rights Committee.²⁰² In a passage in the report that could be seen either as a sign of chauvinistic naivete or calculated disingenuousness, the United States vaunted the strength of its constitutionally-based scheme of rights and portrayed the problem as being very different from the one seen by its critics. From the U.S. report, one might gather that the problem was that the ICCPR standards were lower than the strong rights guarantees provided in the U.S. Constitution, and that the ICCPR threatened to restrict fundamental human rights unless the principle of constitutional supremacy was upheld. The report claimed:

198. U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1413d mtg. at 3 [International Covenant on Civil and Political Rights. Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Comments of the Human Rights Committee.] U.N. Doc. CCPR/C/79/Add.50 (1995) [hereinafter ICCPR Reports].

199. *Id.* The United States had reserved to the Article 7 ban on cruel, inhuman, or degrading treatment, saying that it would be interpreted according to U.S. constitutional requirements. See *Multilateral Treaties*, *supra* note 56, at 126.

200. U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1402d mtg. at 7 [*Press Release: Human Rights Committee Continues Consideration of United States' Initial Report*]. U.N. Doc. HR/CT/401 (March 29, 1995) [hereinafter *Press Release: Human Rights Committee March 29 Mtg.*].

201. *Id.*

202. U.N. GAOR, Hum. Rts. Comm., [International Covenant on Civil and Political Rights. Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Initial Reports of States parties due in 1993. Addendum. United States of America.] U.N. Doc. CCPR/C/81/Add.4 (1994) [hereinafter ICCPR Initial Reports].

The United States was founded on basic principles of human rights from which it cannot deviate. In particular, the rights guaranteed in the U.S. Constitution, which substantially reflect the principles embodied in the Covenant, are the supreme law of the land. These guarantees represent a foundation that can never be broken. . . . In some instances, that foundation already provides greater protection than the Covenant. Therefore, the United States could never restrict fundamental human rights on the pretext that the Covenant does not recognize such rights or recognizes them to a lesser extent.²⁰³

Although the United States had expressed the view "that the provisions of the Covenant were fully represented in U.S. law,"²⁰⁴ this was not, the German expert noted, a view universally held even within the United States.²⁰⁵ The German expert perceptively observed that both the U.S. report and the U.S. delegation's answers represented a "Constitution-centric" view,²⁰⁶ a polite way of describing the U.S. stance that its Constitution was the touchstone of legitimacy for all other laws. For people from countries where there was no tradition of constitution-worship, the "Constitution-centric" U.S. perspective and the smug complacency about inferior U.S. domestic rights standards were doubtless a source of some puzzlement.

V. Women's Rights in U.S. Law

A. The Failure to Guarantee Women's Equality

The United States unwillingness to ratify treaties that would guarantee equal rights for women without the inclusion of RUDs has set back U.S. women's chances to obtain equality. U.S. domestic law on women's rights is deficient by modern international standards, and U.S. women are still obliged to fight for a guarantee of equality with men. Having declined to heed Abigail Adams's 1776 admonition to remember the ladies,²⁰⁷ the Founding Fathers wrote a Constitution from which women are completely absent. Even as amended subsequently, it provides no explicit guarantee of any rights for women except in the Nineteenth Amendment, which prohibits the use of sex to

203. *Id.* at 35-36.

204. U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1406th mtg. at 6 [*Press Release: Human Rights Committee Concludes Consideration of Initial Report of United States*]. U.N. Doc. HR/CT/405 (March 31, 1995) [hereinafter *Press Release: Human Rights Committee March 31 Mtg.*].

205. *Id.*

206. *Id.*

207. BERNSTEIN, *supra* note 72, at 129.

deny the right to vote.²⁰⁸ As one critic has argued, basic features of the Bill of Rights, as interpreted, may either fail to address problems facing women, or actually serve the interests of women's rights opponents.²⁰⁹ The private-public split affecting U.S. rights protections, and the pattern of affording negative rights rather than affirmative entitlements, mean that economic and educational rights protections that are vital to women remain outside the sphere of government responsibility, making women's disadvantages seem "natural" and pre-political.²¹⁰ As will be argued below, the equal protection standard that U.S. women are forced to rely on, *faute de mieux*, is distinctly inferior to the international norm of women's equality. When compared with the protections for women's rights that are afforded in typical modern constitutions, which contain strong affirmations of women's equality, the deficiencies in U.S. protection for the rights of women become obvious.²¹¹

208. U.S. CONST. amend. XIX.

209. See generally Becker, *supra* note 71. For example, the First Amendment has been interpreted to allow substantial government subsidies and tax and postage breaks for patriarchal religious organizations, which socialize children in ways that lead them to accept patriarchy as healthy. See *id.* at 479-81.

210. *Id.* at 456.

211. For example, the 1946 French Constitution in its preamble, "guarantees to the woman, in all domains, equal rights to the man." FR. CONST. pmb. The current 1958 French constitution confirms this commitment. FR. CONST. pmb.

Additionally, the 1949 Basic Law of the Federal Republic of Germany provides that: (1) all people are equal before the law, (2) men and women have equal rights, and (3) nobody shall be prejudiced or favored because of their sex, birth, race, language, social origin, faith, religion or political opinions. F.R.G. CONST. art. 3, *reprinted in* CONSTITUTIONS, *supra* note 92.

Also, the 1979 Spanish Constitution provides that: "Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion or any other personal or social condition or circumstance." SPAIN CONST. art. 14, *reprinted in id.*

The 1982 Canadian Charter of Rights and Freedoms provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." CAN. CONST. art. 15, *reprinted in id.*

The 1987 Constitution of the Kingdom of the Netherlands provides that "[a]ll persons in the Netherlands shall be treated equally in equal circumstances," and that "[d]iscrimination on the grounds of religion, belief, political opinion, race, or sex on any other grounds whatsoever shall not be permitted." NETH. CONST. art. 1, *reprinted in id.*

The 1992 Charter of Fundamental Rights and Freedoms of the Czech Republic provides that "[f]undamental human rights and freedoms are guaranteed to everybody without distinction to gender, race, color, language, belief, religion, political or other persuasion, national or social origin, membership in a national or ethnic minority, property, birth, or other status." CZECH CONST. (Charter of Fundamental Rights and Freedoms) art. 3, *reprinted in id.*

B. The Significance of the Defeat of the ERA

The U.S. Constitution lacks a guarantee of equal rights for women not because such a guarantee has never been contemplated, but because attempts to amend the Constitution to include such a guarantee have been repeatedly thwarted. In 1848, at the first Women's Rights Convention, the Declaration of Sentiments was formulated and issued by suffragists like Lucretia Mott and Elizabeth Cady Stanton and their allies.²¹² In the nineteenth century, women who were fighting for equality and the right to vote tried unsuccessfully to remove the words "men" and "male" from section 2 of the proposed Fourteenth Amendment and also to rework the proposed Fifteenth Amendment to include sex as a category protected against discrimination.²¹³ Since the 1920s there have been repeated calls for adopting an Equal Rights Amendment to the U.S. Constitution which would ex-

One cannot canvass the constitutional rights protections of the U.K., because the U.K. still lacks a written constitution. It is, however, bound by the European Convention for the Protection of Human Rights and Freedoms of 1950, which guarantees that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, Article 14 (entered into force Sept. 3, 1953).

The 1993 Constitution of the Republic of South Africa provides that "(1) Every person shall have the right to equality before the law and to equal protection of the law," and "(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language." S. AFR. CONST. art. 8, *reprinted in CONSTITUTIONS, supra* note 92.

Finally, the 1993 Constitution of the Russian Federation provides that "(1) All people shall be equal before the law and in the court of law, (2) The State shall guarantee the equality of rights and liberties regardless of sex, race, nationality, language, origin, property or employment status, residence, attitude to religion, convictions, membership of public associations or any other circumstances. Any restrictions of the rights of citizens on social, racial, national, linguistic or religious grounds shall be forbidden," and "(3) Men and women shall have equal rights and liberties and equal opportunities for their pursuit." RUSS. CONST. art. 19, *reprinted in id.*

212. The declaration decried the "absolute tyranny" that men exercised over women. *Reprinted in* JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF UNITED STATES WOMEN 383-87 (1991).

213. BERNSTEIN, *supra* note 72, at 131. *See also* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283 n.12 (1991) [hereinafter *Reflections on Sex Equality*]. Some who considered that § 1 of the Fourteenth Amendment might apply to women appeared to hope that its potential to afford rights to women would make the Fourteenth Amendment unpopular and could be used to defeat it. *Id.* In the same manner, it seems that some Southern conservatives opposed to civil rights for Black Americans hoped that, by adding sex to the 1964 Civil Rights Act, they could ensure its failure. *See infra* notes 239-244 and accompanying text.

pressly guarantee women's equality. In 1923 Alice Paul, a prominent feminist leader, drafted such an amendment with language that was notable for its positive phrasing: "Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation."²¹⁴ Proposals for an ERA also were seriously considered in 1946, 1950, 1953, and 1970.²¹⁵ The reasons why an ERA was thought necessary to secure U.S. women's rights have been carefully explained by legal scholars.²¹⁶ It was projected that under an ERA, gender would not be a permissible factor in determining legal rights except where a physical characteristic unique to one sex was involved.²¹⁷ President Kennedy favored the adoption of an ERA,²¹⁸ and, had he lived longer, the prospects for eventual ratification of an ERA might have been considerably brighter. Finally, a proposed ERA was submitted for ratification by the states in 1972.²¹⁹

Finding the prospect of eliminating sex-based distinctions appalling, conservative groups mobilized around the country to fight the ERA.²²⁰ Among other things, the ERA was portrayed as anti-family and threatening to morality and traditional values.²²¹ Stereotypes of men as the natural providers and women as dependents were deployed to discredit the notion that equal rights for women were desirable.²²²

214. BERNSTEIN, *supra* note 72, at 140. MacKinnon has lamented the subsequent shift in language from this affirmative statement to the later wordings, which involved a negatively-worded ban on discrimination by the government. Catharine A. MacKinnon, *Unthinking ERA Thinking*, 54 U. CHI. L. REV. 759, 770 (1987) (book review). It is noteworthy that the new Equal Rights Amendment being promoted by NOW has an affirmative wording. See Ellen O'Brien, *Resurrecting the Equal Rights Amendment*, PHILADELPHIA INQUIRER, July 30, 1995, at L1. The first paragraph of the new draft provides: "All persons shall have equal rights and privileges without discrimination on account of sex, race, sexual orientation, marital status, ethnicity, national origin, color, indigence, age or disability." *Id.* at L2.

215. Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 886 (1971).

216. See, e.g., *id.* at 884-85, 890-93.

217. *Id.* at 893.

218. See Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. SOUTHERN HIST. 37, 40 (1983).

219. JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 12 (1986).

220. *Id.* at 13.

221. See RENEE FEINBERG, *THE EQUAL RIGHTS AMENDMENT: AN ANNOTATED BIBLIOGRAPHY OF THE ISSUES 1976-1985* 17 (1986).

222. See Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1746 (1991) [hereinafter *The "No Problem" Problem*].

Legal scholar Deborah Rhode has noted how the opponents of the ERA drew on the support of Fundamentalist and Catholic constituencies that viewed women's equality as barred by the Bible.²²³ Not only did there prove to be a strong correlation between church membership and attendance and opposition to the ERA, but religion seems to have been a factor in converting people who originally supported the ERA to taking opposing stances.²²⁴ Opponents of women's rights have discovered that religious ideologies afford one of the few effective weapons that they can deploy against women's rights; the rise of well-funded and energetic religiously-oriented organizations opposed to women's rights continues to be a factor in keeping the United States from adopting more mainstream ideas about women's rights.

Republicans like Ronald Reagan, who wanted to court the support of the religious right, found it expedient to condemn the ERA.²²⁵ Thus, Reagan, who had originally supported the ERA, shifted positions after winning the Presidency in 1980.²²⁶ President Reagan used his bully pulpit to excoriate the ERA as an abomination and a menace to morals.²²⁷

With conservative forces and religious groups fully committed to the campaign against the ERA, it was finally defeated in 1982.²²⁸ Catharine MacKinnon notes the quiescence of U.S. women as the ERA was killed and contrasts it with the rebellion of Canadian women when they found out that the proposed Canadian Charter of Rights and Freedoms was not to contain firm guarantees of equality for women.²²⁹ She suggests that the passive reaction of American women may have been due to their being too submerged in the problems of sexism even to notice the loss of a possible solution.²³⁰ Women may also have been lulled into complacency by the prevailing assump-

223. *Id.*

224. Becker, *supra* note 71, at 475-76 & n.108.

225. See RONNIE DUGGER, *ON REAGAN: THE MAN & HIS PRESIDENCY* 234-35 (1983).

226. *Id.*

227. President Reagan expressed many objections to the ERA. These included his anticipation that after it was adopted one could see "sex and sexual differences treated as casually and amorally as dogs and other beasts treat them"; that women would have to share restrooms, barracks, and shower rooms with men; and that it would override essential statutes such as those based on the physical abilities of men and women. *Id.*

228. See MANSBRIDGE, *supra* note 219, at 13. For analyses of the reasons for the defeat, see *id.*; MARY FRANCES BERRY, *WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* (1986). See also the critique of Mansbridge by Catharine A. MacKinnon, *Unthinking ERA Thinking*, *supra* note 214.

229. MacKinnon, *Unthinking ERA Thinking*, *supra* note 214, at 759-60.

230. *Id.* at 770-71.

tions about the adequacy of rights protections that were already afforded by U.S. law, including the expanded reach of the Equal Protection Clause and the Civil Rights Act of 1964. Even women who favored the ERA may have wrongly assumed that an ERA was no longer essential to secure women's equality.

C. Women's Rights in Default of an ERA

Of course, if one is decrying the failure of the U.S. to give women a constitutional guarantee of equality, one should not be understood to be denying that real progress has been made over the last decades in enhancing women's rights. Legislation at the state and national levels and court rulings have contributed to gains women have made.²³¹ It is also true that U.S. women, along with others in the U.S., enjoy a high standard of protection for many civil and political rights. In this context, it is ultimately the incongruity of the refusal to guarantee women one of the most basic civil and political rights, equality, that becomes intriguing.

In the absence of any express constitutional guarantee of equality for women, United States courts since 1971 have found certain protections for women's rights in the Equal Protection Clause of the Fourteenth Amendment.²³² The Supreme Court's sudden "discovery" that the Equal Protection Clause extended to sex discrimination may have been stimulated by political developments in that era, including the expansion of women's rights that resulted from the Civil Rights Act of 1964 and ongoing debates about the proposed ERA.

The Equal Protection Clause is a problematic substitute for an ERA, providing no secure basis for assuring women's equality. One should recall that the Equal Protection Clause does not mention women's rights and that historically it was never intended to offer protections for women, having been formulated to secure the rights of Black American males in the southern states after the Civil War. In 1872, when the reach of the Equal Protection Clause was restricted to its original constituency, Myra Colby Bradwell, a woman mounting a constitutional challenge to an Illinois rule preventing women from becoming lawyers, did not seek relief under the Equal Protection

231. See generally HOFF, *supra* note 212, at 229-316.

232. The crucial turning point came in *Reed v. Reed*, 404 U.S. 71 (1971), which used an expanded interpretation of the Equal Protection Clause to invalidate an Idaho statute that favored males over females in appointing executors of decedents' estates.

Clause.²³³ Bradwell sued instead under the Privileges and Immunities Clause of the Fourteenth Amendment—only to be thwarted.²³⁴

In deciding the *Bradwell* case, the Supreme Court consulted Blackstone for guidance, as Justice Scalia would in *Thompson v. Oklahoma* one hundred and fourteen years later.²³⁵ In rejecting Bradwell's claim, members of the Court relied on sex stereotyping. In a concurring opinion, Justice Bradley admonished that man was woman's "protector and defender," that nature had destined men and women for different spheres, and that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."²³⁶ Today this sexist language is sometimes cited as quaint; in reality, remnants of sex stereotyping continue to influence judicial decisions on a woman's right to attend a previously all-male military academy.²³⁷ That is, the basic judicial attitudes in the *Bradwell* decision proved more durable than the specific conclusion that women should not be allowed to work as lawyers.

Although judges currently read the Equal Protection Clause to include women rather than according to its original intent, nothing in the Constitution as it now stands compels judges to accord rights other than the franchise to women. However, fashions in constitutional interpretation are subject to change. Should conservative forces again obtain control over both the Senate and the Presidency, they could succeed in packing the federal courts with more of their ideological allies. These judges could reinstate the pre-1971 precedents and rule that the Equal Protection Clause has been wrongly extended to support challenges to sex-based discrimination.

The process by which women's rights were belatedly read into the Fourteenth Amendment has a counterpart in the strange twist that led to the inclusion of sex in the wording of Title VII of the Civil Rights Act of 1964.²³⁸ In its final version, this statute constituted the most significant progress for women's rights since the adoption of the Nineteenth Amendment in 1920. However, like the Fourteenth Amendment, the Civil Rights Act as originally proposed was intended to remedy racial discrimination, not to provide a remedy for sex discrimination.

233. See *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873).

234. *Id.* at 138-39.

235. 487 U.S. 815, 864 (1988). See *supra* note 194 and accompanying text.

236. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

237. See discussion *infra* part V.E.

238. 42 U.S.C. 2000e (1988) (prohibiting employment discrimination on the basis of sex, among other categories).

The Civil Rights Act was bitterly opposed by conservatives in Congress. In the past, southerners had resorted to amendments to thwart proposed civil rights legislation,²³⁹ and this approach was tried again with regard to Title VII. Howard Worth Smith of Virginia, one of the ardent opponents of the Civil Rights Act in the House, proposed to insert wording that would extend coverage to women.²⁴⁰ Smith's comments in presenting the changed wording to Congress provoked amusement.²⁴¹ Smith's motives have been debated and may have been mixed. There is evidence suggesting that Smith intended the new language including sex as a joke and also as a means of fighting the passage of the Civil Rights Act, but other evidence suggests that Smith believed that chivalry required adding language to prevent White women from being placed at a disadvantage vis-à-vis Blacks.²⁴² With the addition of the word "sex" to the Civil Rights Act, southerners who had opposed the legislation as a whole became willing to support it,²⁴³ perhaps for motives as mixed as Smith's. Conversely, Representative Edith Green, a supporter of women's rights, opposed the amended version of the Civil Rights Act because of her awareness that the category of sex had been added not to help women, but to prevent passage of the legislation.²⁴⁴

This eleventh hour modification to the Title VII text has provided the basis for vast improvement in employment opportunities for women.²⁴⁵ However, rights that ultimately rest on a Congressman poking fun at the premises of the Civil Rights Act and subsequent devious political maneuvering by a phalanx of southern senators unsympathetic to civil rights are hardly as securely protected as rights that result from a genuine political commitment on the part of Congress. As Catharine MacKinnon has observed, "[t]hus has the legal entitlement to sex equality, tenuous and limited when there at all, ranged from anathema to afterthought."²⁴⁶

Among the consequences of the inclusion of sex only when the vote on the Civil Rights Act was imminent is the absence of legislative history to support the idea that Congress wanted to see an end to all

239. Brauer, *supra* note 218, at 46.

240. *Id.* at 44.

241. *Id.* at 48-49.

242. *Id.* at 44-45, 49-59.

243. *Id.* at 56.

244. LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 105 (1969).

245. *See id.* at 106.

246. MacKinnon, *Reflections on Sex Equality*, *supra* note 213, at 1284.

practices that discriminated against women. This has led the Supreme Court to observe that “the legislative history of Title VII’s prohibition of sex discrimination is notable primarily for its brevity.”²⁴⁷ Justice Rehnquist wrote that the last-minute addition of the sex discrimination prohibition meant that “we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex.’”²⁴⁸ For this reason, judges who are ill-disposed toward allowing women to challenge sex discrimination have more leeway in interpreting Title VII than they would if the legislative history was lengthier and less ambiguous in indicating how determined Congress was to see all barriers to women’s equality dismantled.

D. Protections for Women’s Rights Under the Fourteenth Amendment: The Deficiencies of the Intermediate Scrutiny Standard

Since Title VII only protects women from employment discrimination,²⁴⁹ women must resort to Fourteenth Amendment jurisprudence to challenge sex discrimination in other areas. Since expanding the Equal Protection Clause to cover sex, the Supreme Court has effectively established a hierarchy of equality claims, demarcating three separate tiers of scrutiny to apply to different categories of discrimination.²⁵⁰ The most exigent tier is for race discrimination, and plaintiffs seeking to overturn racially discriminatory classifications have a relatively easy time proving that these are unconstitutional.²⁵¹ In contrast, plaintiffs challenging classifications that result in sex-based discrimination must meet a heavier burden, since classifications based on sex need only withstand intermediate or “middle-tier” scrutiny.²⁵² Such classifications can be justified by showing that they are substantially related to achieving an important government interest.²⁵³ Members of the Supreme Court have disagreed about whether the treatment of

247. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

248. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

249. 42 U.S.C. § 2000e (1988).

250. See HALBERSTAM & DEFEIS, *supra* note 111, at 39.

251. *Id.* According to the Supreme Court’s jurisprudence, racial classifications are subject to strict scrutiny and can only be justified by showing of a compelling governmental interest. As has been noted, “[f]or all practical purposes, this compelling state interest is never found to be present by the Court,” which means that racial discrimination will always be deemed unconstitutional. *Id.*

252. *Id.* at 44. The third tier in the court’s analysis merely requires a rational relationship to a legitimate government objective to justify discrimination, *id.* at 39, but it is not relevant for the issues in this Article.

253. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) and the related discussion of the VMI and Citadel cases, *infra* part V.E.

sex discrimination should be more lenient than racial discrimination, with Chief Justice Rehnquist and former Justice Brennan representing opposite poles in this debate.²⁵⁴ The Supreme Court's middle-tier scrutiny of sex discrimination under the Equal Protection Clause has been criticized in a comparative study of U.S. law and CEDAW for its lack of clearly articulated standards.²⁵⁵ Interestingly, Senate supporters of the 1972 ERA had proposed that men and women be treated the same except where compelling social interests existed such as protecting the right of privacy and the need to recognize objective physical differences between the sexes.²⁵⁶ That is, Americans who supported equality for women thought that strict scrutiny should be used in sex discrimination cases.

Under the middle-tier or intermediate scrutiny standard, sex discrimination in state-sponsored military academies has survived constitutional challenges that would have been fatal under strict scrutiny.²⁵⁷ Several rulings that illustrate the intermediate scrutiny test and shed light on the significance of U.S. RUDs to the international norm of equality of the sexes will be briefly reviewed.

In the United States, the determination of what is or is not "constitutional" treatment of women proves to be responsive to political vagaries. For example, judicial attitudes changed when Reagan assumed the presidency in 1980 and the political winds shifted. In accordance with Reagan's attacks on the ERA, the Carter Administration policy of opening up the military to women was scuttled. Instead, a policy was adopted of reducing women's role in the military, segregating them in training, and excluding them from combat.²⁵⁸

Swaying to the right after the election of Reagan, the Court showed that it was prepared to change course under the guise of constitutional interpretation when challenges to sex discrimination were made. This new policy was quickly endorsed by the Supreme Court in *Rostker v. Goldberg*,²⁵⁹ a decision authored by Justice Rehnquist. Justice Rehnquist had previously dissented from decisions subjecting sex

254. See Lance Koonce, Note, *J.E.B. v. Alabama ex rel. T.B. and the Fate of the Peremptory Challenge*, 73 N.C. L. REV. 525, 529 n.45, 548-49 (1995).

255. HALBERSTAM & DEFEIS, *supra* note 111, at 44.

256. Brown, *supra* note 215, at 887.

257. See *infra* part V.E.

258. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 578 (1991) [hereinafter *The Pursuit of Manhood*].

259. 453 U.S. 57 (1981).

discrimination to heightened judicial scrutiny,²⁶⁰ and in *Rostker*, he upheld the military's policy of requiring men but not women to register for the draft.²⁶¹ Legislation like the women's exemption from draft registration reviewed in *Rostker*, which ostensibly protected women, had previously been perceived by the Court as unacceptable for "reinforcing stereotypes about the 'proper place' of women."²⁶²

The views of Justice Rehnquist, who became Chief Justice in 1986, regarding sex discrimination deserve consideration. According to his thinking, the military draft was designed to produce combat troops, but women were not eligible for combat positions.²⁶³ Therefore, as potential draftees, women were not similarly situated vis-à-vis men,²⁶⁴ and they were accordingly not entitled to equal treatment with men who were eligible for combat.²⁶⁵ Thus, excluding women from the requirement to register for the draft was not unconstitutional, because women were also excluded from combat. Justice Rehnquist reached the conclusion that women could be constitutionally excluded from the draft despite the fact that President Carter's call for women to be included in the draft had been supported by military officials.²⁶⁶ Ignoring the counsel of military experts, he took the position that the Court should defer to Congress in military matters.²⁶⁷ Since there was little reason to defer to Congress on a question like women's qualifications for the draft, one could speculate that Chief Justice Rehnquist's own conservative views and sex stereotyping may have prompted him to search for ways of confirming his view that women should be excluded from the draft, thus leading him to adopt the congressional position. The decision in *Rostker* has been vigorously condemned by legal scholars for its use of "one governmentally created inequality to justify another, and for exemplifying the influ-

260. Karst, *The Pursuit of Manhood*, *supra* note 258, at 578 n.290.

261. 453 U.S. at 83.

262. *Orr v. Orr*, 440 U.S. 268, 283 (1979).

263. *Rostker*, 453 U.S. at 76.

264. *Id.* at 78.

265. *Id.* at 78-79.

266. *Id.* at 79; *see also id.* at 90 (Marshall, J., dissenting).

267. *Id.* at 64-65. Congress had opposed drafting women, but had not researched the merits of excluding women from the draft. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 451 [hereinafter *Woman's Constitution*]. Instead, it merely relied on stereotypes about women's proper role. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 185 (1982). Congress had shown sensitivity to expressions of distaste by constituents who were upset at the notion of women entering "this 'man's world'." Karst, *The Pursuit of Manhood*, *supra* note 258, at 578 n.290.

ence of sex-role stereotyping on judicial thinking.”²⁶⁸ This ruling has been described as “part of a larger political order that serves to subordinate women to men’s uses.”²⁶⁹

Justice Rehnquist’s reliance on sex stereotyping in *Rostker* was not a one-time aberration. *Michael M. v. Superior Court*²⁷⁰ dealt with the constitutionality of a California law penalizing a man for having sex with a woman under eighteen, but not penalizing a woman who had sex with a man under eighteen.²⁷¹ In writing the opinion of the plurality, Justice Rehnquist again displayed his stereotypical assumptions about sex differences, which have been highlighted by Sylvia Law in a deft analysis.²⁷² The Court, according to Law, was predisposed to accept classifications that it believed reflected biological differences, and it only formally applied the intermediate scrutiny test.²⁷³

Rehnquist was unable to persuade the Court to uphold discrimination based on sex stereotyping in an important and closely-related 1982 case. In *Mississippi University for Women v. Hogan*,²⁷⁴ the newly-appointed Justice Sandra Day O’Connor led the Court away from Justice Rehnquist’s sex stereotyping. In ruling that male students were being unconstitutionally excluded from a state-sponsored nursing school, Justice O’Connor relied on precedents that provided a legal basis to challenge laws that aimed to “protect” women via the use of “archaic and stereotypic” generalizations about men and women.²⁷⁵ Justice O’Connor held that MUW’s policy was illegitimate because it made “the assumption that nursing is a field for women a self-fulfilling prophecy.”²⁷⁶

E. The Survival of Sex Stereotyping: The VMI and Citadel Cases

When sex discrimination linked to sex stereotyping passed constitutional muster in the Fourth Circuit decision in *United States v. Vir-*

268. See, e.g., Karst, *Woman’s Constitution*, *supra* note 267, at 450.

269. *Id.* at 451.

270. 450 U.S. 464 (1981).

271. *Id.* at 466.

272. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 999-1001 (1984).

273. See *id.* at 1001. Law argues that, although in theory bound to follow the intermediate scrutiny test, the Court in evaluating discriminatory laws “may become much more deferential when the Court perceives that a rule is based on ‘real’ differences between the sexes.” *Id.* at 1005.

274. 458 U.S. 718 (1982).

275. *Id.* at 725-26 & nn.10-12.

276. *Id.* at 730. The MUW charter exuded sex stereotyping, saying that the school aimed to instruct “girls” in occupations like stenography and needlework. *Id.* at 720 n.1.

ginia,²⁷⁷ the unpredictability of case outcomes under the middle-tier standard of the Fourteenth Amendment was illustrated. In that case, an equal protection challenge was brought against the policy of excluding women students from the Virginia Military Institute (VMI), a state-sponsored institution.²⁷⁸ The court accepted that Virginia had an important governmental interest in having the educational diversity that single sex institutions allowed,²⁷⁹ and it appeared persuaded that there were valid pedagogical reasons for keeping VMI all male.²⁸⁰ The court seemed to accept VMI's protests that admitting women would be destructive of its unique program and to agree that there were sound reasons for single-sex schools.²⁸¹ The court stressed that: "Men and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated. Indeed the evidence in this case amply demonstrated that single-genderedness in education can be pedagogically justifiable."²⁸²

VMI's adversative style of education—which involved physical and mental adversity, stress, deprivation of privacy, and minute regulation of behavior—was deemed to be effective for men but inappropriate for women.²⁸³ The court therefore anticipated that, if women were admitted, this would require adjustments that would fundamentally change VMI and preclude it from using its unique educational method.²⁸⁴

Despite its sympathy for VMI's rationale for excluding women, the court found that the existence of a state-sponsored all-male institution when there was no comparable all-female institution failed to serve the goal of providing diverse styles of education.²⁸⁵ The court held that unless Virginia would establish a comparable program for women in another school, VMI would have to admit women or forego its state support and become private.²⁸⁶

In a later ruling in *U.S. v. Commonwealth of Virginia*,²⁸⁷ the Fourth Circuit approved VMI's proposal to establish an alternate pro-

277. 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

278. *Id.* at 892.

279. *See id.* at 898-99.

280. *Id.* at 897-98.

281. *Id.*

282. *Id.* at 897.

283. *Id.* at 893.

284. *Id.* at 897-98.

285. *Id.* at 898-99.

286. *Id.* at 899.

287. 44 F.3d 1229 (4th Cir. 1995).

gram for women.²⁸⁸ The Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, an all-women liberal arts college, was ruled an acceptable substitute.²⁸⁹ Sex stereotypes were used in setting up the Mary Baldwin College Program as the women's alternative to the VMI program. It was deliberately designed to be a less rigorous program that would eschew the "adversative" elements of the VMI system.²⁹⁰ This was regarded as a needed adjustment, because it was assumed that women would need a supportive environment.²⁹¹ This 1995 decision was in effect using the same sex stereotypes about the "natural and proper timidity and delicacy" of females that Myra Bradwell had encountered when she sought admission to the bar over a century earlier.

The sex stereotypes employed in upholding the Mary Baldwin program are pernicious for women's rights. As Sylvia Law has remarked: "There is a great danger that affording legal respect to presumed sex-based differences will perpetuate those differences. Furthermore, general rules premised on assumptions of universal sex-based difference are unjust in relation to the individual men and women who do not fit the presumed norm."²⁹² One did not need to wait until Rebecca Marier graduated in June 1995 at the top of her West Point class—ranking first in the military, academic, and physical programs²⁹³—to have proof that women did not necessarily require a watered-down curriculum to excel.

Based on the reasoning of *Sweatt v. Painter*,²⁹⁴ the VWIL alternative would have failed if that separate facility were racially segregated and lacked equivalent intangibles, such as "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige."²⁹⁵ In the VMI case, the doctrine of "separate but equal" was accepted even though it

288. *Id.* at 1241.

289. *Id.* at 1234.

290. *Id.*

291. *Id.*

292. Law, *supra* note 272, at 968. She advocates a vision of equality in which the law would "respect each persons's authority to define herself or himself, free from sex-defined legal constraints," rather than enforcing a general vision of what men and women are "really" like. *Id.*

293. *First Woman is Top Graduate at West Point*, PHILA. INQUIRER, June 3, 1995, at A12.

294. 339 U.S. 629 (1950).

295. *Id.* at 634. For comparisons of the treatment under the Equal Protection Clause of schools segregated by race and those segregated by sex, see Note, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637 (1993).

was clear that Mary Baldwin was not equal to VMI in terms of vital intangibles. As the dissent noted in reviewing the disparities between the VMI and VWIL programs:

If every good thing projected for the VWIL program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI in terms of the great bulk, if not all of those criteria. Particularly is this obvious with respect to the intangibles such as prestige, tradition and alumni influence which the Supreme Court, looking for substantial equality of educational opportunities in *Sweatt*, thought "more important" even than tangible resources. . . . The student and eventual graduate of VWIL will not be able to call on the prestigious name of "VMI" in seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI. The catch-up game is an impossible one, as any honest reflection upon the matter must reveal.²⁹⁶

The court's refusal to rehear the VMI case provoked a dissent by Judge Diana Gribbon Motz.²⁹⁷ Noting the disparity that "separate but equal" treatment for Blacks was unconstitutional but separate and "concededly not even equal" treatment for women was constitutional,²⁹⁸ Judge Motz stressed that the VMI case could never withstand the strict scrutiny test.²⁹⁹ Even under the intermediate scrutiny standard, she found implausible VMI's assertions that sex-segregation and its "adversative" method were essential to its mission of producing citizen soldiers when co-educational U.S. military academies were producing citizen soldiers without resorting to VMI's type of "adversative" training.³⁰⁰ Furthermore, since the VWIL lacked "adversative" training, it could not be "substantially comparable" to the VMI.³⁰¹ Judge Motz lambasted the concession by the majority that the VWIL degree "lacks the historical benefit and prestige of a degree from VMI" as "almost epic understatement."³⁰²

296. *U.S. v. Commonwealth of Virginia*, 44 F.3d 1229, 1250 (4th Cir. 1995) (Philips, J., dissenting.) The majority conceded this point but said that the proposed VWIL would nonetheless offer opportunities for women that were "sufficiently comparable." *Id.* at 1241.

297. *U.S. v. Virginia*, 52 F.3d 90, 91 (4th Cir. 1995).

298. *Id.*

299. *Id.* at 92.

300. *Id.* at *6.

301. *Id.* at 93.

302. *Id.*

A similar issue was raised in *Faulkner v. Jones*,³⁰³ in which Shannon Faulkner claimed that she had been unconstitutionally denied admission to the Citadel, an all-male military academy sponsored by the State of South Carolina.³⁰⁴ The Fourth Circuit, following the VMI precedent, upheld an injunction ordering Faulkner's admission unless South Carolina established an alternate state-funded program for women.³⁰⁵ In noteworthy language, the *Faulkner* court rejected the principle of equal rights for women. The court asserted that the Equal Protection Clause does not mean that "all men are created equal," which in the court's view was an "overly generalized statement."³⁰⁶ Instead, in language that would sound ominous to the critics of the VWIL program at Mary Baldwin College, the opinion advised that "the clause accommodates the opposite notion; that people are created differently. Fundamental injustice would undoubtedly result if the law were to treat different people as though they were the same."³⁰⁷ The court continued by stating that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."³⁰⁸ In context, the court's message was that the sexes are so different that they should also be treated differently by the law. Since gender differences are as irrelevant as racial differences for deciding whether an applicant has the characteristics needed to qualify for admission to the Citadel—as proved by Shannon Faulkner's initially successful application when the Citadel assumed she was male—the court's emphasis on the importance of sex differences in this context reveals that members of the federal judiciary are unable to move beyond sex stereotyping. This is encouraged by equal protection jurisprudence itself, which, by subjecting sex discrimination to the more lenient intermediate scrutiny standard, implies that it is generally more reasonable and therefore easier to justify than race discrimination. The court seemed comfortable with these disparate standards for sex and race discrimination: "A regulation that classifies by gender, such as that at issue in this case, is not subject to the same strict scrutiny as is one that classifies on the basis of race or national origin due to the acknowledged differences between males and females."³⁰⁹

303. 10 F.3d 226 (4th Cir. 1993).

304. *Id.* at 226.

305. *Id.* at 232-33.

306. *Id.* at 230.

307. *Id.*

308. *Id.* The court also cited the ruling in *Rostker* that had allowed a classification requiring men but not women to register for the draft. *Id.*

309. *Id.* at 231. Of course, if one assumed that the court in the *Faulkner* case did not really intend to support sex discrimination but only realistic accommodation of sex differ-

Pretending that the two sexes occupy complementary roles that have been ineluctably predetermined by their sex differences is one way of making discrimination appear natural and, hence, fair. As Deborah Rhode has noted, one can justify sex inequality by adjusting definitions of "equality" to encompass the notion that each sex has distinctive attributes, roles, and rewards that are "separate but equal."³¹⁰

The variation in judicial attitudes that women seeking equal protection from U.S. courts may encounter is illustrated by the conflicting views of Judges Hamilton and Hall on the merits of Faulkner's suit. Judge Hamilton found the *Faulkner* decision too harsh—toward the Citadel. In a dissent pervaded by hostility towards Faulkner, as a woman whose "sole purpose is to gatecrash her way into the Corps of Cadets,"³¹¹ Judge Hamilton insisted that there was no demand for a Citadel-type education for women.³¹² The judge maintained that Faulkner had no "sincere desire to seek and obtain the type of discipline and leadership training afforded by the Citadel."³¹³ According to the judge, Faulkner was "more interested in publicity, notoriety, and purchasable opportunities of being the first female admitted to the Corps of Cadets."³¹⁴ It appears that for Judge Hamilton the real problem with Faulkner's suit was that she aspired to join an institution where, according to his sex stereotyping, women simply did not belong.

In contrast, Judge Hall was critical of the court's failure to order the integration of academies like VMI and the Citadel.³¹⁵ Judge Hall suspected that the VMI and Citadel cases "have very little to do with education. They instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later."³¹⁶ Judge Hall condemned the VMI court ruling for having

ences, one could also read the opinion as expressing an innocuous recognition that there are actual differences between women and men, such as women's ability to become pregnant and bear children. The broadness of the language, however, would easily lend itself to the accommodation of different rights for women based on stereotypes about women's different nature.

310. Rhode, *The "No-Problem" Problem*, *supra* note 222, at 1755.

311. *Faulkner v. Jones*, 51 F.3d 440, 456 (4th Cir. 1995). Appellants filed a motion for recall and stay of the June 5, 1995 mandate in this case pending their filing of a petition for writ of certiorari in the U.S. Supreme Court, but their petition was denied. 66 F.3d 661, *cert. denied*, 116 S. Ct. 352 (1995).

312. *Id.* at 451, 456.

313. *Id.* at 456.

314. *Id.*

315. *Id.* at 451.

316. *Id.*

failed to ascertain “the true purpose behind the state’s decisions to keep women out of VMI,”³¹⁷ a failure caused by the court neglecting to ask “the only question that matters: *Why* has the state decided to create or maintain this institution for the benefit of only one gender?”³¹⁸ Judge Hall seems to have grasped an essential point that judges too often fail to consider in applying intermediate scrutiny—the relationship between the particular instance of sex-based discrimination at issue and the perpetuation of a broader regime of masculine privilege.

Judge Hall’s grasp of this essential issue is reminiscent of Justice Harlan’s dissent in *Plessy v. Ferguson*.³¹⁹ Differing from his fellow Justices, Harlan insisted that it was necessary to consider the historical context in deciding whether segregation violated the Fourteenth Amendment. Harlan appreciated that the reason Louisiana had racially segregated railroad cars was not to stop Whites from sitting in Black cars, but rather to exclude Blacks from White cars.³²⁰ Similarly, in her *Faulkner* concurrence, Judge Hall called for Faulkner’s exclusion from the Citadel to be placed in historical and sociological context so that its discriminatory impact could be appreciated.³²¹ Again, the unwieldy intermediate scrutiny standard seems to have encouraged the other judges to discount the historical context of sex discrimination.

On May 26, 1995, the Justice Department filed an appeal with the Supreme Court that attacked the acceptance of the Mary Baldwin program by the district court and circuit courts.³²² In its appeal, the Justice Department challenged the constitutionality of excluding women from the rigorous military-style public educational program at VMI when the alternative was a program not equivalent.³²³ In particular, it claimed that the circuit court decision had invoked “harmful gender stereotypes to justify offering vastly different state-supported leadership programs to women and men.”³²⁴ A Supreme Court ruling on this important case is expected in June 1996.³²⁵

317. *Id.*

318. *Id.*

319. 163 U.S. 537, 552 (1896).

320. *Id.* at 557.

321. 51 F.3d at 451.

322. *See U.S. Asks Justices to Open Military School to Women*, REUTERS NORTH AMERICAN WIRE, May 26, 1995, available in LEXIS, Nexis Library, ALLWLD File.

323. *Id.*

324. *Id.*

325. *U.S. v. Commonwealth of Virginia*, 52 F.3d 90 (4th Cir. 1995), cert. granted, 64 U.S.L.W. 3465 (U.S. Oct. 5, 1995) (Nos. 94-2107 and 94-1941).

F. Women's Rights in Constitutional Jurisprudence: A Critical Assessment

Regardless of how the Supreme Court rules on the Justice Department appeal in the VMI case, American women still face problems under the intermediate scrutiny standard, as it allows judges to factor in sex stereotypes in deciding whether discrimination is unconstitutional. The results in the VMI and Citadel cases suggest that the methodology used under the Fourteenth Amendment is part of the problem. As has been noted, it is not an efficient tool for dealing with sex-discrimination in schools.³²⁶ The ways sex stereotyping influenced the rulings in the VMI and *Faulkner* cases confirm the skeptical remarks made by Chief Justice Rehnquist when the intermediate scrutiny standard was articulated in *Craig v. Boren*,³²⁷ where he complained about the vagueness of the standard and bemoaned that "important governmental objective" and "substantially related" were troublesome phrases that were "so diaphanous and elastic as to invite subjective judicial preferences or prejudices."³²⁸

Why does the U.S. Supreme Court stand by the clumsy and confusing intermediate scrutiny test? Perhaps it is because the test seems normal, given the current state of constitutional jurisprudence. As Horwitz has asserted, the current Court's jurisprudence is "surrounded by a thick undergrowth of technicality."³²⁹ He laments that: "[t]here is no recognition that the world is rapidly changing and that the Court's understanding of the role of law may be growing dangerously out of touch with American society."³³⁰ Instead, there are methodological obsessions: "[w]ith three or four 'prong' tests everywhere and for everything, with an almost medieval earnestness about classification and categorization; with a theological attachment to the determinate power of various 'levels of scrutiny.'"³³¹ This correlates with the Court's "hostility to constitutional change," which is in turn connected to "a particular conservative legal style," which Horwitz describes as "static originalism."³³² He further observes that: "Deeply rooted in the early religious culture that gave it birth, static originalism has been modern American legal culture's chief means of infusing the nation's founding political document with an objective authority

326. See Note, *supra* note 295, n.68.

327. 429 U.S. 190 (1976).

328. *Id.* at 221 (Rehnquist, J., dissenting).

329. Horwitz, *supra* note 90, at 98.

330. *Id.*

331. *Id.*

332. *Id.* at 99.

that modernism refuses to concede."³³³ This emphasis on formal systems, accompanied by pretensions to the achievement of content neutrality, is seen to accord "with the persistent yearning in American constitutional culture to separate law from politics."³³⁴ The result is the Court's creation of "increasingly general categories that are abstracted from concrete or particular power relations,"³³⁵ and "reified and abstract conceptions that are out of touch with life."³³⁶

While Horwitz wrote before *VMI* and *Faulkner* were decided, the results in these cases bear out his earlier analysis. With their preoccupation with the fine points of intermediate level scrutiny, both opinions are detached from and show no recognition of political realities. As Judge Hall noted, the question that should have been asked was why Virginia and South Carolina had established these schools for males only.³³⁷ However, in the course of grappling with components of intermediate level scrutiny, such as substantial relationships and government interests, other judges were distracted from this main issue.

As the military academy cases show, such an approach does not help courts focus on whether women are being denied equality. What the principle of equality offers women seeking equal rights differs significantly from what equal protection offers. One way of grasping the difference is by stepping back and asking how an ordinary person who has not been educated in equal protection jurisprudence would define equality. Such a person would be highly unlikely to define equality using anything like the standard that the Supreme Court has developed under the Equal Protection Clause. When one looks at the straightforward assertions of the equality of women in modern consti-

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 100. Horwitz's assessment that formalism and the attendant preoccupation with tiers of scrutiny lead the Court's analysis away from the real world has been borne out in a recent case, *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), dealing with whether intermediate or strict scrutiny should be applied to an affirmative action program created by the federal government. In his dissent, Justice Stevens pointed out that the majority's ruling that racially-based affirmative action plans had to withstand strict scrutiny or be ruled unconstitutional had the paradoxical consequence that the government could enact affirmative action programs more easily for women than racial minorities. *Adarand*, 115 S. Ct. at 2122 (Stevens, J., dissenting). Noting this anomaly, Justice Stevens aptly observed that, "when a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency." *Id.* I am indebted to Bert B. Lockwood, Jr., for pointing out the relevance of Justice Stevens' dissent.

337. See *supra* notes 315-321 and accompanying text.

tutions and international human rights law,³³⁸ one sees principles that correspond to what the ordinary person would understand by “equality”—that women are entitled to enjoy the *same* rights, freedoms, and opportunities as men.

The test for sex discrimination used by the Canadian Supreme Court provides a relevant standard for comparison with the U.S. intermediate scrutiny standard. The Canadian test conceives of discrimination in terms of whether a law or policy aggravates the disadvantages of a persistently disadvantaged group.³³⁹ Among other things, this “requires judges to look at women as they function in the real world to determine whether women’s . . . deprivation of power is due to their place in a sexual or gender hierarchy.”³⁴⁰ It is not surprising that the Canadian standard has developed in a context where there is a constitutional guarantee of equality for women and an admonition in the Canadian Charter of Rights and Freedoms that rights are to be “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”³⁴¹ Thus, the Canadian scheme starts with the norm of equality for women and places a heavy burden on the party seeking to justify discrimination by taking into account the real world situations in which women tend to be disadvantaged. Under this approach, it would be harder to justify excluding women from VMI and the Citadel and relegating women cadets to inferior institutions.

One should consider the implications of the absence of any constitutional safeguard for women’s equality—or any substitute that might potentially be afforded by ratifying CEDAW without qualifying its equality principles—in connection with the approach used to decide the VMI and Citadel cases. If one began with the notion that women are entitled to equal rights, would not the analysis and results in these cases be different? For example, Mary Becker maintains that an ideal constitution would contain a substantive sex equality provision and asserts that such a provision would at least “require judges to take into account detrimental impact on women when approaching other constitutional provisions as well as legislation and other governmental action.”³⁴² As Catharine MacKinnon has remarked, an equal rights provision could help provide a new constitutional emphasis that

338. See *supra* note 211.

339. Cook, *State Responsibility*, *supra* note 30, at 156.

340. *Id.*

341. CAN. CONST. (Constitution Act, 1982) pt.I (Canadian Charter of Rights and Freedoms), § 1.

342. Becker, *supra* note 71, at 457.

would lead to placing priority on rectifying the legal inequality of groups that are historically unequal in society.³⁴³ MacKinnon sees the equality principle as one that “allows critique of the social partiality of standards.”³⁴⁴ She has also called for placing equality analysis in the context of existing inequalities and asking “whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status.”³⁴⁵ It is reasonable to presume that starting from the notion that women should have equality would lead to conclusions different from those reached when starting from the principles of equal protection jurisprudence. The question that Judge Hall lamented that the courts had failed to ask—why the state had chosen to exclude women from a prestigious military academy³⁴⁶—would most likely have been asked if there had been an ERA in place or an equivalent guarantee of equality under a ratified human rights treaty such as CEDAW.

G. Summary: U.S. Law versus CEDAW Standards

United States law is seriously deficient when measured by CEDAW standards, as it fails to uphold the most fundamental of CEDAW principles—women’s right to equality. Women in the United States have never been guaranteed equality in rights, and the constitutional jurisprudence elaborating the middle-tier standard on which women depend for relief under the Equal Protection Clause falls short of an equality guarantee. It affords women limited, tenuous protections—in part because, as the recent cases show, many judges’ attitudes are imbued with sex stereotypes that can easily be factored into rulings under the middle-tier scrutiny standard. In contrast, Article 2(a) of CEDAW calls for constitutions and laws to embody the principle of equality and Article 5(a) calls for the elimination of prejudices based on stereotyped roles for men and women. In other words, U.S. law evinces the kinds of features that CEDAW is intended to correct, so that ratifying CEDAW holds the promise of leading to improvements in the rights of U.S. women. Of course, CEDAW ratification will only have a salutary effect on women’s rights if CEDAW is not nullified by a package of RUDs designed to ensure that U.S. women’s rights remain unchanged. Unfortunately for those who aspired

343. MacKinnon, *Reflections on Sex Equality*, *supra* note 213, at 1325.

344. *Id.* at 1326.

345. CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117 (1979).

346. *See supra* note 318 and accompanying text.

to see U.S. law move to adopt the principle of women's equality, the proposed RUDs, along with the RUDs previously entered to the ICCPR, were specifically designed to preserve the status quo.

VI. U.S. Reactions to the International Norm of Women's Equality

A. The U.S. RUDs to the ICCPR Equality Provisions

Curiously, little attention has been devoted to examining U.S. stances on the international norm of women's equality. This may account for the lack of strong protests over the U.S. "understandings" affixed to the ICCPR Article 2(1) and Article 26 equality provisions. These so-called understandings deserve consideration since the package of RUDs appended to CEDAW becomes intelligible only if one grasps the significance of the U.S. understandings previously affixed to these ICCPR articles. Article 2(1) requires each party to undertake to ensure that all individuals within its jurisdiction enjoy the rights afforded in the ICCPR "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."³⁴⁷ Further, Article 26 provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁴⁸

The United States did not offer a "reservation" to these provisions, which would have squarely indicated that the United States was not prepared to accept some or all of the guarantees of equality in Article 2(1) and Article 26. Instead, its comments were classed as an "understanding,"³⁴⁹ implying that the United States was merely attempting to clarify its interpretation of the equality mandate. However, rather than clarifying the U.S. position, the understanding muddied it. For example, the wording of the U.S. understanding included the assertion that:

[T]he Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive pro-

347. ICCPR, *supra* note 3, art. 2(1), 999 U.N.T.S. at 173.

348. *Id.* at 179.

349. *Multilateral Treaties, supra* note 56, at 126.

tections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status . . . to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.³⁵⁰

One is struck by the fact that the three separate tiers of scrutiny used in Equal Protection cases are neither mentioned nor adequately explained. Instead, they are collapsed into a single rational basis category. Furthermore, no accurate description is given of the impact of middle-tier scrutiny on women's ability to claim equal rights, and there is no acknowledgment that sex-based discrimination can survive constitutional challenges in situations where race-based discrimination would be ruled unconstitutional.

It seems unlikely that the U.S. State Department lawyers could not outline the three tiers of scrutiny accurately. It is also difficult to believe that the authors of this obscurely worded "understanding" actually imagined that equal protection jurisprudence, with its three tiers and confusing standards, afforded equality to people in the same sense as international law, so that nothing more than a clarification of U.S. standards was needed. In actuality, this understanding is a disguised reservation that would allow the United States to continue to follow equal protection jurisprudence instead of affording equality to U.S. women. The absence of any policy statement saying that the United States endorsed the principle of full equality for women and was committed to take all necessary steps to bring U.S. law up to international standards confirmed the intention to stand by the status quo. Indeed, the decisions in the VMI and Citadel cases, which were made after the ratification of the ICCPR, could be cited as proof that U.S. courts are sticking with the status quo, rather than consulting the equality principles of the ICCPR.

Although the U.S. Constitution is referred to in the "understanding," this reservation was not compelled by the Constitution because, as already noted, nothing in the Constitution precludes a higher standard of rights.³⁵¹ Middle-tier scrutiny merely sets criteria for ascertaining when discrimination can be upheld; it does not mean that affording women equal rights would be unconstitutional. In the absence of a constitutional reason compelling the United States to enter this understanding, the likely reason would be a preference to retain

350. *Id.*

351. *See supra* notes 162-163 and accompanying text.

laws denying U.S. women the full equality that they were promised under international law.

In an article defending the package of U.S. RUDs to the ICCPR, David Stewart, Assistant Legal Adviser for Human Rights and Refugees, U.S. Department of State, resorted to equivocations to obscure the U.S. position. Stewart denied that the United States was declining to accept any obligation to modify U.S. law and rejected the contention that there were broad and significant differences between U.S. law and major substantive requirements of the Covenant.³⁵² Interestingly, in his discussion of the U.S. understanding of Article 2(1) and Article 26 equality provisions, Stewart at no point mentioned women's rights—nor did he offer any details of how U.S. law treats sex-based discrimination.³⁵³ The standard of intermediate scrutiny, which was not accurately represented in the text of the U.S. “understanding,” was also never clarified in Stewart's discussion. Instead, Stewart confined himself to areas where patterns of discrimination in U.S. law would not be controversial.³⁵⁴

What the U.S. understanding entailed was probably not clear even to most Americans who read it.³⁵⁵ The ACLU assessment was more perceptive than most in finding the understanding misleading, calling it “an imprecise and erroneous statement of current national law [which] confuses well-established equal protection standards for different groups, merging them all into one vague and misleading test This understanding is thus at best superfluous, at worst a mis-

352. David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 14 *HUM. RTS. L.J.* 77, 78 n. 11 (1993).

353. *Id.* at 80-81.

354. Stewart conceded that in U.S. law “[d]iscrimination is only prohibited for specific statuses, and there are exceptions which allow for distinctions. For example, even under the generally protective Age Discrimination Act of 1975, age may be taken into account in certain circumstances.” *Id.* at 80. He also said that distinctions were permitted between citizens and non-citizens and different categories of non-citizens. *Id.* Since one would normally expect legal systems to make certain distinctions based on age and alienage, Stewart seems to have purposefully selected examples from categories that would not expose the deficiencies of U.S. equal protection jurisprudence to criticism.

355. For example, Hoffman and Strossen, who are otherwise very critical of U.S. RUDs to the ICCPR, which almost eliminate the possibility of it having domestic effect, do not seem to appreciate that full equality for women is one of the internationally guaranteed rights that is being excluded via the RUDs. See generally Hoffman & Strossen, *supra* note 140, at 477, and especially the list of ways that rights would have been expanded had the United States not imposed its package of RUDs on the ICCPR, *id.* at 492.

statement of our jurisprudence.”³⁵⁶ Although Stewart complained that the ACLU had missed the point in criticizing the U.S. understanding, because the difficulty lay in the ICCPR language, not in the U.S. understanding,³⁵⁷ the murkiness of the U.S. understanding was unmistakable. Significantly, the ACLU seems to have missed the real problem—that U.S. law did not comply with the international standard of equality for women and treated sex discrimination as less serious than racial discrimination. If such an “understanding” could be difficult for a U.S. organization to fathom, it is not surprising that observers in other countries could not grasp exactly what it meant.

With the support of other commentators, the ABA, which has reformed its once hostile attitude towards human rights, claimed that the U.S. understanding to the ICCPR articles 2(1) and 26 was unnecessary, both because U.S. law generally complied with the nondiscrimination requirements of the Covenant, and because the U.N. Human Rights Committee had stated that differentiation was permissible if the criteria were reasonable and objective and if the aim was to achieve a legitimate purpose under the Covenant.³⁵⁸ The ABA apparently shared the common misperception that U.S. equal protection jurisprudence was compatible with the ICCPR equality provisions, and that it was also in conformity with the Human Rights Committee’s interpretation of equality. In defending the U.S. understanding, David Stewart took comfort from the ABA position,³⁵⁹ and he used the ABA’s assertion that the understanding was unnecessary to buttress his contention that U.S. law measured up to ICCPR equality provisions.³⁶⁰ Further, Stewart cited the ABA for taking the position that Article 26 could not possibly intend to obliterate distinctions like those between citizens and non-citizens, since no state could comply with a standard that barred distinctions between citizens and non-citizens.³⁶¹ Again, the critical issue—the impact of the intermediate tier scrutiny standard on women’s rights—was sidestepped and a non-issue substituted.

356. David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1197 (1993).

357. *Id.*

358. *Id.* at 1196-97.

359. *Id.* at 1197.

360. *Id.*

361. *Id.*

B. The Muted International Reaction

The unintelligible version of U.S. equal protection jurisprudence contained in the U.S. RUDs to the ICCPR equality provisions seems to have effectively confused the international community. Other parties to the ICCPR do not seem to have recognized that the effect of the U.S. understanding would be to deny to U.S. women the full equality guaranteed them under the ICCPR Articles 2(1) and 26. It is noteworthy that in their objections to the U.S. RUDs to the ICCPR, representatives of countries that had objected to the U.S. death penalty reservation, including robustly feminist Scandinavian delegations, failed to register objections to this U.S. "understanding."³⁶² Sweden seems to have been the lone exception, but its own objection was confusing; it admonished that "some of the understandings made by the United States in substance constitute[d] reservations to the Covenant."³⁶³ Curiously, in the list of U.S. RUDs to which it registered objections, Sweden mentioned the U.S. understanding as it affected Article 2, but did not question its effect on Article 26.³⁶⁴

The significance or potential impact of the U.S. understanding on women's equality also seems to have been missed by the Fifty-third Session of the Human Rights Committee, according to the report of the meeting of March 29 and 31, 1995.³⁶⁵ The Committee specifically dealt with the official U.S. denials that its RUDs had canceled out ICCPR provisions and the U.S. efforts to persuade the Committee that the U.S. RUDs were not sweeping. Against all evidence, Conrad K. Harper, Legal Adviser in the U.S. Department of State, insisted that the U.S. RUDs were "limited, focused and justified" and that the U.S. had taken no "general reservations to the Covenant."³⁶⁶

Not surprisingly, the report the United States submitted to the Human Rights Committee on its compliance with the ICCPR³⁶⁷ was less than a full and frank account of the legal status of U.S. women. Troubling rulings like those in the VMI and Citadel cases were not cited, and the tendency of judges to use sex stereotypes in deciding whether discrimination was justified was not mentioned. In the section entitled "Equal rights of men and women," the test used under the intermediate standard of scrutiny was briefly referenced,³⁶⁸ with-

362. See *Multilateral Treaties*, *supra* note 56, at 127-30.

363. *Id.* at 129.

364. *Id.* at 130.

365. ICCPR Reports, *supra* note 198.

366. *Press Release: Human Rights Committee March 29 Mtg.*, *supra* note 200, at 6.

367. ICCPR Initial Reports, *supra* note 202.

368. *Id.* at 30-31.

out being described as intermediate or middle-tier. Further, nothing in the relevant section states that the United States allows sex discrimination where racial discrimination is prohibited.

In the same section, the report asserted, in a shocking misstatement of U.S. law, that "the U.S. Constitution explicitly guarantees men and women equality before the law through the Equal Protection and Due Process Clauses of the Fourteenth and Fifth Amendments."³⁶⁹ How could such a guarantee be given "explicitly" in constitutional provisions that had been drafted with no express reference to women and in contexts where it was obvious that women's rights were not covered?³⁷⁰ The belated and often grudging willingness of courts since 1971 to read some protection for women's rights into these constitutional provisions hardly amounts to an "explicit" constitutional guarantee. Of course, the absence of explicit constitutional guarantees makes the gains women have made subject to cancellation. This case law could be eroded in the same way the constitutional protection for women's right to abortion enunciated in *Roe v. Wade*³⁷¹ was weakened in cases like *Planned Parenthood v. Casey*.³⁷² Rights dependent on the whims of judges may be contrasted with the Nineteenth Amendment guarantee that the right to vote will not be denied on the basis of sex³⁷³—the only "explicit" constitutional guarantee ever possessed by U.S. women.

369. *Id.* at 30.

370. That the Fourteenth Amendment excluded women from its protection has already been discussed, *supra* part V.C. Obviously, the Fifth Amendment, having been drafted in the eighteenth century, when women were still classified with children and idiots and treated accordingly, was not intended to offer any guarantee of women's equality. That it had an equal protection component at all was an invention of the Supreme Court in *Bolling v. Sharpe*, 347 U.S. 497 (1954). The patently flimsy pretense that there was an equal protection principle in the Due Process Clause of the Fifth Amendment was necessitated because the Equal Protection Clause did not apply to the federal government. Since the Court had decided it should invalidate school segregation as mandated by the states under the Equal Protection Clause and realized that not invalidating the same kind of segregation in the federally-run schools in the District of Columbia would mean great embarrassment, it forced a reading of the Fifth Amendment to enable it to get consistent results in the cases challenging racial segregation by the federal as well as state governments. For a critical discussion of this unpersuasive reinterpretation of the Fifth Amendment, see DAVID P. CURRIE, *THE CONSTITUTION OF THE UNITED STATES: A PRIMER FOR THE PEOPLE*, 65-66 (1988). Although the Fifth Amendment might also be tortured to provide a basis for saying that it afforded something like an equal protection guarantee for women, even the most imaginative judicial construction could not convert Fifth Amendment due process into a provision "explicitly" affording a guarantee of equality for women.

371. 410 U.S. 113 (1973).

372. 112 S. Ct. 2791 (1992).

373. U.S. CONST. amend. XIV.

Although regretting the extent of the U.S. RUDs, the ICCPR committee did not challenge the false claim that the U.S. Constitution guaranteed women equality before the law. It offered no criticism of the understanding that had been entered to Articles 2 and 26 and expressed no concern over the impact this would have on U.S. women's ability to claim equality. The Chilean expert, Cecilia Medina Quiroga, came closest to opening the delicate subject of whether laws in the United States actually conformed to international standards when she ventured to ask a question about U.S. compliance with the equality provisions of Article 2. Noting that under the Covenant discrimination based on sex was as prohibited as discrimination based on race, Medina Quiroga asked if there were states in which women did not have the same rights as men and, if so, what measures the federal government would take to remedy this disparity.³⁷⁴ Apparently mollified by the assurances of the U.S. delegation, Quiroga dropped her questioning and professed that the United States had "a long tradition of democracy and of the promotion of human rights. It was true that many standards of the United States were higher than international standards. There were advantages to being a great country."³⁷⁵ While this last compliment was apparently not meant to be sarcastic, a person assessing this statement from a more cynical perspective could have taken it in a different sense: as a recognition that, as the most powerful country in the world, the United States had advantages in the sense of being able to get away with sweeping reservations to the ICCPR that, if entered by weaker states, would have, at a minimum, provoked inquiries—and probably condemnation.

From the reactions of other states, what Horwitz had decried as the "thick undergrowth of technicality"³⁷⁶ of U.S. constitutional jurisprudence seems to have functioned as an effective screen concealing a policy of denying women full equality. In speaking of lessons that he had learned in his work on constitutions in new democracies, Judge Richard Nygaard asserts that in our increasingly interdependent world, people must be able to rely on consistent rights standards:

[I]t is important that rights be expressed in identical standards to enable a constitutional lawyer or court in one country to use

374. *Press Release: Human Rights Committee March 29 Mtg.*, *supra* note 200, at 14. Medina Quiroga seems not to have perceived that it was the low standard of protection for women's rights afforded under the federal Constitution that allowed sex discrimination to be treated as less serious than race discrimination, and that it was the details of the equal protection standard that she should have been inquiring about.

375. *Press Release: Human Rights Committee March 31 Mtg.*, *supra* note 204, at 5.

376. Horwitz, *supra* note 90, at 98.

precedent from around the world to interpret the right at issue. Draftsmanship must guard against time-dated, time-bound, or idiomatic descriptions of rights, which can be distorted in the adversarial arena. General terms are no longer sufficient, and specifics cannot be left to the vagaries of a court to interpret. Detail is essential. . . . Information is now exchanged rapidly, and distance means nothing. As a consequence, and because it is very likely that a citizen of one country will know the rights of a citizen in another, I felt it imperative that the citizens of different countries within the constitutional community have identical rights. Equality within and among countries will tend towards a power equilibrium. Inequality will lead to instability. No country is now isolated³⁷⁷

Nygaard's observations are well-founded; they go some way toward explaining why the United States is able to get off lightly after entering RUDs that amount to rewriting its commitments under international human rights covenants on the matter of women's rights. The United States is isolated and insulated from international scrutiny by virtue of its hyper-technical equal protection jurisprudence. U.S. standards for judging the constitutionality of sex discrimination are as far as possible from the standardized norms that Judge Nygaard is calling for. Instead of stating a specific standard that is immediately recognizable as conforming or non-conforming to the modern norm of women's equality, the U.S. standard on women's rights is as idiosyncratic as it is complicated. Its interpretation is highly unpredictable, and its impact on individual cases is contested even among the federal judiciary and the Justices of the Supreme Court, who are its creators and guardians. Judge Nygaard does not—and, due to his judicial position, may feel that he cannot—attack U.S. rights formulations for failing to conform to modern standards. However, others might find that his assessment bears directly on the reasons why U.S. law on women's equality should be deemed deficient.

VII. The U.S. Response to CEDAW

A. The Impact of Political Shifts

Political developments have affected U.S. positions on the merits of ratifying CEDAW. Democrats, who tended to favor ratification of the ERA, have been more favorable to CEDAW ratification than Republicans. President Jimmy Carter, whose tenure in office was marked by enthusiastic promotion of human rights, signed CEDAW in

377. Nygaard, *supra* note 96, at 199.

July 1980.³⁷⁸ When CEDAW was first transmitted by the executive branch to the Senate, President Carter's Secretary of State Edmund Muskie wrote a letter describing the treaty.³⁷⁹ He did not propose any RUDs, although he left open the possibility that RUDs would be proposed by the Foreign Relations Committee, and indicated that there seemed to be broad backing for ratification.³⁸⁰ Secretary Muskie asserted that:

[CEDAW] is a significant accomplishment of the United Nations system and an important advance in the development of the international law of human rights. United States adherence to this Convention is in the national interest and in the interest of the world community. It is our hope that the United States, after full consideration by the Senate, will become a party to the Convention.³⁸¹

Notwithstanding Muskie's expression of support for CEDAW, the State Department prepared a memorandum identifying certain aspects of the treaty that could present problems, and it expressed the usual worries about potential conflicts with U.S. federalism and the U.S. requirement that state action exist for discrimination to be subject to regulation.³⁸² However, at that point in U.S. history, the political climate seemed auspicious for adopting the proposition that women should be guaranteed equal rights, and the ERA seemed to be on the verge of ratification.³⁸³ In comments on Article 2 of CEDAW, which contained the basic principle that discrimination against women should be eliminated, a State Department memorandum appears to have anticipated that compliance with CEDAW would be facilitated by the passage of the ERA, noting that the ERA had already been ratified by thirty-five of the required thirty-eight states, that the ratification period had been extended to June 1982, and that the President

378. HALBERSTAM & DEFEIS, *supra* note 111, at 32.

379. *Id.* app. E.

380. After describing CEDAW the letter said:

Specific language for implementing legislation or reservations is not being recommended at this time. When the Senate Committee on Foreign Relations wishes to take action regarding the Convention, interested agencies will meet upon request with the Committee and its staff to discuss the necessary language. If this approach is followed there will be no constitutional or other legal obstacles to ratification of the Convention by the United States. The Departments of Justice, Health and Human Services, Education, and Labor, the Equal Employment Opportunity Commission, and the U.S. Commission on Civil Rights concur with this assessment and are enthusiastic in their support of the Convention.

Id. at 138.

381. *Id.*

382. *See id.* app. F.

383. *See id.* at 17.

and the Congress "have acted affirmatively and to the fullest extent of their authority to effectuate its passage."³⁸⁴ However, the memorandum did not reckon with the impact that Reagan's election would have on the prospects for ratifying the ERA. In retrospect, the late months of 1980 may have constituted the high-water mark for official support for full equality for U.S. women. After Jimmy Carter left the White House, the executive branch withdrew its support of CEDAW ratification for twelve years.

The failure of U.S. women to organize a more energetic campaign on behalf of CEDAW seems puzzling. Perhaps the demoralizing impact of the 1982 defeat of the ERA explains why American women did not mobilize more effectively to press the Senate to move forward with CEDAW ratification. Another factor may have been the distractions of combatting campaigns to restrict women's reproductive freedoms, which preoccupied various U.S. feminist organizations in the 1980s as conservatives mobilized to overturn *Roe v. Wade*.³⁸⁵ The potential long-term importance of CEDAW ratification may therefore have fallen by the wayside.

Since the Reagan and Bush Administrations did not support ratification of CEDAW, neither bothered to develop a formal package of RUDs.³⁸⁶ Under President Clinton, the United States has again professed a commitment to ratifying CEDAW.³⁸⁷ However, even before the Republican successes in the elections of November 1994 and while Democrats still remained in control of Congress and the Senate Foreign Relations Committee, the Clinton Administration was recommending that ratification of CEDAW be accompanied by RUDs.³⁸⁸ The proposed RUDs once again comprised sweeping reservations that were designed to uphold U.S. law at the expense of CEDAW principles, and they were in sharp contrast to the limited reservations made by countries like France, Mexico, the Netherlands, and Spain.³⁸⁹

384. *Id.* at 140-41.

385. 410 U.S. 113 (1973).

386. See Laurel Fletcher et al., *Human Rights Violations Against Women*, 15 WHITTIER L. REV. 319, 335 (1994). Of course, as already discussed, *supra* part VI.A., the RUDs that the Bush Administration had attached to the ICCPR had negative implications for women's rights. One assumes that similar ones would have been appended to CEDAW if the Administration had decided it should be ratified.

387. The U.S. position is outlined in SENATE COMM. ON FOREIGN RELATIONS, REPORT ON CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, S. DOC. NO. 99-115, 103d Cong., 2d Sess. 8-9 (1994) [hereinafter SENATE CEDAW REPORT].

388. *Id.* at 5-8.

389. See *supra* notes 59-65 and accompanying text.

B. The Proposed U.S. RUDs to CEDAW

In discussing the proposed ratification of CEDAW, members of the U.S. Senate were reluctant to admit that U.S. law fell short of the standards required by international human rights law or to acknowledge that the package of RUDs had been designed to preserve the non-conforming standards of U.S. law.³⁹⁰ In September 1994, the report on CEDAW by the majority of the Senate Committee on Foreign Relations seemed to assume that U.S. domestic law already ensured women's equality.³⁹¹ The majority report asserted that "[e]xisting U.S. constitutional and statutory law and practice provide broad and effective protections and remedies for women against gender-based discrimination."³⁹² Thus, the report took the same complacent position as had been taken with regard to the equality provisions in the ICCPR, speaking as if U.S. law was sufficiently advanced to comply with international norms. The report asserted that: "[U.S. law] is largely consistent with the provisions of the Convention. In those few areas where U.S. law and the Convention differ, the administration has proposed a reservation or other form of condition to clarify the nature of the obligation being undertaken by the United States."³⁹³ That is, the report presented the proposed U.S. reservations as if they did not signify disagreement with the object and purpose of CEDAW.

In a 1994 letter attached to the report, Secretary of State Warren Christopher discussed the RUDs to CEDAW in detail.³⁹⁴ As part of the public record, this letter should be treated as official commentary on the U.S. RUDs. In his comments, the Secretary seemed to minimize disparities between U.S. law and the Convention.³⁹⁵ As a result, despite providing explanatory details that go far beyond the text of the RUDs, his letter provides no accurate portrayal of how U.S. law on women's equality compares with CEDAW norms.

As will be indicated, the list of RUDs aimed to ensure that CEDAW would be ineffective and that ratification would not obligate the U.S. to afford women any new rights.³⁹⁶ The issues raised by the RUDs deserve more thorough discussion and evaluation than can be offered in this Article, where the list of RUDs is only reviewed in cursory fashion to establish the pattern in the U.S. rejections of

390. See generally SENATE CEDAW REPORT, *supra* note 387.

391. See *id.* at 4-5.

392. *Id.* at 5.

393. *Id.* at 4.

394. See *id.* at 8-50.

395. See *id.*

396. See *infra* notes 398-436 and accompanying text.

CEDAW principles. As will be argued in what follows, the most significant reservation of all was the rejection of the principle of equality for women, which was not even listed among the RUDs, but was indicated in an accompanying letter by the Secretary of State.³⁹⁷ It is this reservation that is the main concern of this Article.

C. The Reservations

The first reservation warned that “[t]he United States does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States.”³⁹⁸ The reservation indicated that the U.S. would not be complying with aspects of CEDAW since “by its terms the Convention requires broad regulation of private conduct . . . under Articles 2, 3, and 5.”³⁹⁹ After assurance that the Constitution and U.S. laws “establish extensive protections against discrimination,”⁴⁰⁰ the reservation stated that the U.S. had priorities different from those of CEDAW, advising that “individual privacy and freedom from governmental interference in private conduct are also recognized as among the fundamental values of our free and democratic society.”⁴⁰¹

By this reservation, the United States indicated that it would continue to tolerate discrimination against women by private actors in the interest of protecting other values to which the United States accorded great importance. This would significantly reduce the impact of any CEDAW ratification. As is well known, much of the discrimination and mistreatment suffered by women occurs at the hands of private actors in so-called private spheres, meaning that CEDAW’s attempt to reach discrimination in private spheres is “uniquely important” for the goal of eliminating discrimination against women.⁴⁰² The

397. See *infra* notes 437-442 and accompanying text.

398. See SENATE CEDAW REPORT, *supra* note 387, at 51.

399. *Id.*

400. *Id.*

401. *Id.*

402. See Zearfoss, *supra* note 29, at 908-09. It has been a struggle at the international level to obtain recognition that regulating private actions is essential to protect women’s human rights. For background on the issue of how treating “private” discrimination affecting women as lying beyond the scope of state responsibility perpetuates women’s vulnerable, subordinate status and harms women, see Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law* in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85 (Rebecca J. Cook ed., 1994) [hereinafter HUMAN RIGHTS OF WOMEN]; Donna Sullivan, *The Public/Private Distinction in International Human Rights Law* in WOMEN’S RIGHTS,

U.S. philosophy on rights was therefore profoundly at variance with CEDAW. This philosophy was justified by U.S. constitutional jurisprudence that had developed in relation to a Constitution in which women's rights and interests had been ignored except in the Nineteenth Amendment.

The first reservation could also be traced to U.S. Supreme Court jurisprudence on issues such as the First Amendment rights to freedom of religion, speech, and association, which could pose constitutional obstacles in the way of carrying out various CEDAW obligations where non-governmental actors were involved. Because religious groups in the United States have been particularly active in combatting equal rights for women, the solicitude shown by the judiciary for protecting freedom of religion boded ill for women aspiring to equality.⁴⁰³ The common assumption that the right to religious freedom must outrank concerns for women's right to equality is contested by supporters of women's equality. In this connection, the lower ranking of the equality right may relate to the absence of an ERA that would signal that women's equality was a "fundamental value" that could not be lightly dismissed.⁴⁰⁴ Becker proposes that a strong constitutional provision on sex discrimination "might help judges balance other rights, such as free exercise of religion, against the right of women to social equality."⁴⁰⁵ CEDAW equality provisions could not substitute for a U.S. constitutional guarantee of equality and could not

HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 126 (Julie Peters & Andrea Wolper eds., 1995).

403. See Zearfoss, *supra* note 29, at 919.

404. *Id.* In this connection, a constitutional equality guarantee might prompt a more skeptical appraisal of the merits of according tax-exempt status to religious institutions that teach that women are inferior or that discriminate against women. Feminists have challenged this tax-exemption, asserting that withdrawing it would not violate freedom of religion. See Becker, *supra* note 71, at 481-82, 515; Rebecca J. Cook, *State Accountability Under the Women's Convention in Human Rights of Women*, in HUMAN RIGHTS OF WOMEN, *supra* note 402, at 240-41. Becker suggests that the tax provisions on the housing allowance or housing costs exemption for "ministers of the gospel," postage subsidies for religious organizations, and awards of government contracts should be reconsidered in the case of religions that discriminate on the basis of sex in hiring. Becker, *supra* note 71, at 483-84. An equality guarantee for women could potentially also provide a basis for challenging the currently proliferating plans for states to provide school students with vouchers for education at private religious schools that discriminate against women or teach students that women are inferior. For preliminary assessments of the debates on the constitutionality of school voucher plans, see Note, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, 81 GEO. L.J. 711 (1993); Note, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J.L. & SOC. PROBS. 424 (1995); Note, *Religious Groups in the Educational Marketplace: Applying the Establishment Clause to School Privatization Programs*, 82 GEO. L.J. 1869 (1994).

405. Becker, *supra* note 71, at 515.

encourage judges to give greater weight to women's right to equality if, from the outset, the United States ratified CEDAW with the caveat that the existing hierarchy of rights would continue. This is another area where standing by judicial interpretations of the U.S. Constitution blocks any rethinking of the U.S. position on women's rights and precludes taking steps to attack sex discrimination that are called for in CEDAW. Although such balancing of rights takes place with reference to the Constitution, the lines drawn in such exercises in distinguishing between public and private areas do not follow specific constitutional prescriptions, but rather are the product of what are ultimately political choices.⁴⁰⁶

Article 5 of CEDAW imposes obligations on states to take action to eliminate prejudices and customary and other practices that are based on the idea of women's inferiority or stereotyped sex roles.⁴⁰⁷ In the case of the U.S. reservation affecting CEDAW Article 5, as in the case of the U.S. reservation to the ICCPR prohibition of hate speech, there was a potential conflict between a treaty provision and policies set forth in U.S. constitutional jurisprudence. Judicial interpretations of the First Amendment would require that priority be given to the protection of freedom of speech over the protection of women's equality by prohibiting speech that would tend to degrade women and reinforce their subjugation. The priorities that allow unfettered speech to promote the idea of women's inferiority embodies the outcome of a balancing exercise that is like the balancing that results in protection of hate speech directed at ethnic, religious, and other minorities on First Amendment grounds.⁴⁰⁸

The Secretary of State clarified that the United States would not undertake to regulate speech pursuant to CEDAW. He indicated that the article is not construed—by which he seemed to mean that it should not be construed—as requiring states to take action against those who advocate “the idea of inferiority of [sic] the superiority of either of the sexes.”⁴⁰⁹ The policy is in line with the established preference in U.S. law of favoring First Amendment freedoms over laws curbing speech that feminists would tend to see as damaging to the cause of women's rights—a preference that has, as noted, a political dimension.⁴¹⁰ This controversial U.S. policy of giving more weight to

406. See Zearfoss, *supra* note 29, at 918 n.71.

407. SENATE CEDAW REPORT, *supra* note 387, at 25.

408. See *infra* notes 167-178 and accompanying text.

409. SENATE CEDAW REPORT, *supra* note 387, at 27.

410. See Defeis, *supra* note 170, at 128; JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 143-45 (1994).

freedom of speech than to the deleterious effect of allowing speech that reinforces notions of women's inferiority is similar to its policy of rejecting curbs on hate speech and has been subject to sharp criticism.⁴¹¹

However, not all of the limits that the United States set on governmental action pursuant to CEDAW were so closely connected with policies associated with constitutional jurisprudence. Comments by the Secretary of State, as amplified in the Analysis of Provisions and Explanation section of his letter, indicated that some of the laws guiding the U.S. rejection of CEDAW's reach to the private sphere were merely federal statutes.⁴¹² Although one could argue that the circumscribed reach of these statutes could have been shaped to some extent by concerns not to infringe constitutionally protected rights, the wording of the reservation indicates that the United States did not intend to take any steps to eliminate private discrimination against women, even where expanded governmental regulation would not infringe constitutional limits.

The wording of the reservation on private conduct was therefore broader than strictly necessary to avoid conflicts with the Constitution. For that purpose, it would have sufficed to state that the United States would carry out CEDAW mandates except in cases where there was a conflict with constitutional principles. The Lawyers Committee, which found the reservation "undesirable" as a "broad limitation that implies a lack of political commitment to observe international standards" proposed that, at most, the United States could put forward "a reservation saying that under this article the United States is not required to forbid private discrimination protected by the Constitu-

411. See generally CATHARINE A. MACKINNON, *ONLY WORDS* (1991); ANDREA DWOR-KIN & CATHARINE A. MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* (1988). MacKinnon's ideas were relied on by the Supreme Court of Canada in *Regina v. Butler*, 89 D.L.R. 4th 449 (1992). It ruled that violent, dehumanizing, and degrading materials portraying women as objects for sexual exploitation threatened the achievement of true equality between men and women, which justified restricting the freedom of expression where certain types of pornography were involved. For general background on the tensions in this area, see also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); *THE PRICE WE PAY*, *supra* note 178.

412. He stated that Title VII of the Civil Rights Act does not apply to private employers with fewer than 15 employees, religious institutions, or tax-exempt private clubs, and that Title IX of the of the Education Act Amendments of 1972 does not apply to private institutions that receive no federal funds or to certain types of private institutions that do receive federal funds. Moreover, he noted that in U.S. law "religious organizations are generally not subject to gender discrimination laws." SENATE CEDAW REPORT, *supra* note 387, at 19.

tion.”⁴¹³ Another proposal for a reservation to deal with possible constitutional objections in this connection was: “Nothing in this [treaty] requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”⁴¹⁴ By entering an unnecessarily broad reservation, the United States effectively sent a message that it would not rethink the tolerance that U.S. law had traditionally showed for private discrimination against women.⁴¹⁵

The second reservation stated that the United States “does not accept an obligation under the Convention to assign women to all military units and positions that may require engagement in direct combat.”⁴¹⁶ This “reservation” was unnecessary to avoid conflicts between U.S. law and CEDAW. The most directly relevant CEDAW provision is probably Article 7, which requires states parties to take appropriate measures to eliminate discrimination against women in public life, but it has not been interpreted as prohibiting all discrimination against women in the military.⁴¹⁷ This is a rare situation where the U.S. “reservation” is actually of lesser magnitude. The statement seems to be more in the nature of an understanding designed to clarify a certain vagueness in the equality provisions of CEDAW that might potentially be construed as requiring elimination of bars to women serving in combat. Again, the Lawyers Committee objected to the reservation, asserting that the United States should at a minimum offer a commitment “to continuing current efforts to open all combat positions to women.”⁴¹⁸

The third “reservation” was also unnecessary and reinforced the impression that the Clinton Administration was trying to placate conservative opponents of CEDAW ratification by attaching reservations that precluded conservatives from arguing that CEDAW entailed accepting ideas that they had anathematized. This reservation asserted that the United States was not accepting “any obligation under the Convention to enact legislation establishing the doctrine of comparable worth as that term is understood in U.S. practice.”⁴¹⁹ CEDAW did

413. Senate CEDAW Hearing Before the Senate Comm. on Foreign Relations, 103d Cong., 2d Sess. 77 (Sept. 27, 1994) (Lawyers Committee letter to Senator Claiborne Pell, September 26, 1994, in attached section: Appendix—Legal Analysis) [hereinafter Lawyers Committee letter to Senator Pell].

414. Fletcher, *supra* note 386, at 339.

415. See Lawyers Committee letter to Senator Pell, *supra* note 413, at 79.

416. SENATE CEDAW REPORT, *supra* note 387, at 51.

417. See Fletcher, *supra* note 386, at 343.

418. Lawyers Committee letter to Senator Pell, *supra* note 413, at 80.

419. SENATE CEDAW REPORT, *supra* note 387, at 51.

not require use of the doctrine of comparable worth to set remuneration.⁴²⁰ Since there could be no need to exclude an obligation that CEDAW did not impose, what was involved was actually a clarification, not a reservation. Again, this understanding was probably categorized as a reservation in order to sound more reassuring to suspicious U.S. conservatives. The Lawyers Committee's observation that this reservation was unnecessary seems warranted.⁴²¹

The fourth reservation advised that the United States did not accept the obligation under Article 11(2)(b) to introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances.⁴²² This did amount to a reservation—one that revealed a disinclination to upgrade domestic U.S. laws to international standards. This U.S. policy left U.S. working women in a situation where they could be penalized for bearing children,⁴²³ and bereft of maternity leave protections established by other North Atlantic countries.⁴²⁴ The U.S. preference for maintaining the status quo, regardless of whether there was a constitutional reason for doing so, again suggests that the real reason for CEDAW reservations might be a general disinclination to consider upgrading U.S. laws.

D. The Understandings

The understandings included the usual indication that the federal government would act in accordance with the U.S. system of federalism in implementing CEDAW.⁴²⁵ The Lawyers Committee found this reservation undesirable and denied that the language was constitutionally required.⁴²⁶ Whether such RUDs regarding the U.S. scheme

420. *Id.* at 36. It could be argued that comparable worth was implied under CEDAW provisions such as Article 11(1)(d) which establishes the right "to equal remuneration, including benefits, and to equal treatment in respect of work of equal value." *Id.*

421. Lawyers Committee letter to Senator Pell, *supra* note 413, at 80.

422. SENATE CEDAW REPORT, *supra* note 387, at 51.

423. The Lawyers Committee noted that there was no federal law providing for paid leave after childbirth or requiring an employer to reinstate a woman who had taken maternity leave without loss of seniority or allowances. In comments on this reservation, the Lawyers Committee pointed out that there was a significant gap in U.S. law regarding paid maternity leave as compared with laws in Germany, France, Italy, Canada, Austria, Belgium, the Netherlands, Luxembourg, the United Kingdom, Ireland, Denmark, Finland, Greece, Portugal, Japan, Sweden and Spain. Lawyers Committee letter to Senator Pell, *supra* note 413, at 81.

424. *Id.*

425. SENATE CEDAW REPORT, *supra* note 387, at 51-52.

426. See Lawyers Committee letter to Senator Pell, *supra* note 413, at 81. The Committee argued that the Constitution gave the federal government power to carry out its treaty

of federalism are needed in the case of CEDAW has been challenged by scholars.⁴²⁷

Another "understanding" stipulated that the United States would not accept "any obligation under the Convention, in particular under Articles 5, 7, 8, and 13" to adopt legislation or any other measures to restrict individual freedom of speech, expression and association "to the extent that they are protected by the Constitution and the laws of the United States."⁴²⁸ This understanding was an attempt to exclude and modify relevant CEDAW provisions, and thus should have been classified as a reservation. The rationale for this understanding was related to the first reservation, indicating that the United States would not follow the CEDAW provisions on regulation of private conduct or undertake measures that could infringe rights established under the First Amendment.⁴²⁹ The Lawyers Committee did not take issue with the U.S. position, apparently accepting the balancing of rights as established in U.S. law and therefore considering it appropriate to have an understanding that emphasized that the freedoms of speech, expression, and association under the First Amendment could not be restricted.⁴³⁰

The United States also entered an understanding to Article 12, which mandated equal access to appropriate health care services, including those related to family planning, and ensured access to maternity care for free when necessary.⁴³¹ The United States understood this article as allowing it to decide which health care services should be provided and when it was necessary to provide them for free.⁴³² Of course, such health care services are vital for women in general, and free services are vital for poor women in particular. A poor Third World country might be expected to indicate that there would be economic obstacles in the way of implementing Article 12. However, when an affluent country like the United States declines to guarantee such services to women who need them, it is not due to the impossibility of providing the services but is the result of the policy makers discounting the needs of women. The understanding added to Article 12

obligations, and that the matters involved in CEDAW were subject to the treaty and legislative powers of Congress and the jurisdiction of the federal courts. *Id.*

427. See, e.g., HALBERSTAM & DEFEIS, *supra* note 111, at 54-56; Zearfoss, *supra* note 29, at 930.

428. SENATE CEDAW REPORT, *supra* note 387, at 51-52.

429. See *infra* notes 398-402 and accompanying text.

430. See Lawyers Committee letter to Senator Pell, *supra* note 413, at 82.

431. *Id.*

432. SENATE CEDAW REPORT, *supra* note 387, at 52.

was yet another revelation of the low ranking of women's well-being in the calculations of those who formulate U.S. policy.

An understanding that had not figured in the original list of proposed RUDs was added at the last minute by a voice vote in the Senate Foreign Relations Committee on September 27, 1994.⁴³³ This understanding, proposed by Senator Jesse Helms, clarified the United States view that nothing in CEDAW created a right to abortion and that abortion should in no case be promoted as a method of family planning.⁴³⁴ Since abortion was not mentioned in CEDAW, this understanding was unnecessary and most likely proposed to appease adamant foes of abortion and please the conservative Senator's domestic constituency.

E. The Declarations

As is usual in its human rights treaty ratifications, the United States also declared that CEDAW would be treated as non-self-executing.⁴³⁵ This simply meant that it would not take effect domestically unless and until implementing legislation was passed.

The final declaration indicated that the United States declined to be bound by the dispute resolution provision of Article 29(1), which requires compulsory submissions of disputes under CEDAW to the International Court of Justice (ICJ).⁴³⁶ The U.S. position regarding this article was not exceptional, since many other countries had indicated that they also did not intend to follow Article 29(1). However, for those interested in a stronger CEDAW system, it was disappointing to learn that the United States would be continuing its practice of refusing to submit to the jurisdiction of the most prestigious international forum to resolve human rights claims. In ruling out ICJ jurisdiction, the United States was hardly setting an example that would advance the effectiveness of women's human rights.

F. Disguising the Significance of the Proposed U.S. RUDs to CEDAW

All of the proposed U.S. RUDs to CEDAW deserve to be individually dissected at length, but the cursory review offered here sim-

433. *See id.* at 3.

434. *Id.* at 52.

435. *Id.* The controversial U.S. position that human rights treaties should be non-self-executing, which reflects the reluctance to allow Americans to sue based on them, is too large a topic to be adequately examined in this Article. For an introduction to the literature, see Bassiouni, *supra* note 139, at 1180 n.39.

436. SENATE CEDAW REPORT, *supra* note 387, at 52.

ply highlights the overall U.S. pattern of refusing to adjust its laws to conform to CEDAW norms. The central concern of this Article is whether the United States was effectively rewriting the convention via RUDs that were incompatible with the object and purpose of guaranteeing full equality to women and eliminating all forms of discrimination against women. The survey of RUDs to the ICCPR and CEDAW shows that the answer must be yes. However, the U.S. State Department attempted to hide U.S. resistance to upgrading its law to meet the international norm of equality for women.

The most interesting aspect of the list of CEDAW RUDs is the area of U.S. law not covered. What is missing becomes clear when the RUDs are contrasted with the understanding that had been entered to the ICCPR Articles 2(1) and 26 that expounded on how the United States understood the principle of equality. As has already been discussed,⁴³⁷ the U.S. understanding to the ICCPR referred, albeit only vaguely and evasively, to the differentiations that were allowed under the Equal Protection Clause. A grasp of the impact of the U.S. constitutional standard of intermediate scrutiny of sex discrimination was essential to understand the impact of the U.S. RUDs. It was not coincidental that the intermediate scrutiny standard was not set forth in the text of the U.S. RUDs to CEDAW. Laying out the three tiers of scrutiny in the U.S. RUDs would have made it all too obvious that U.S. law fell below international standards.

Although the RUDs do not mention the middle-tier standard, provision had to be made for its continuing application. Inconspicuous passages in the Secretary of State's accompanying letter specified that the United States will continue to follow the middle-tier standard after CEDAW ratification. After reading through initial sections of the Secretary of State's letter explaining the RUDs, one finally encounters the first mention of "intermediate scrutiny" in a passage under the rubric "Relevant U.S. Law."⁴³⁸ Admitting that this standard is "not as searching as the strict scrutiny that courts apply to racial or ethnic distinctions," the Secretary nonetheless asserted, using a phrase employed in *Mississippi Univ. for Women v. Hogan*,⁴³⁹ that this standard required "that gender-based distinctions be supported by an 'exceedingly persuasive justification.'"⁴⁴⁰ Taken out of context, this language conveys the impression that middle-tier scrutiny is more

437. See *supra* note 349 and accompanying text.

438. See SENATE CEDAW REPORT, *supra* note 387, at 15.

439. 458 U.S. 718 (1982).

440. SENATE CEDAW REPORT, *supra* note 387, at 15 (quoting *Hogan*, 458 U.S. at 724).

demanding than it actually is. Under the rubric "Article-by-Article Analysis" in a discussion of Article 1 of CEDAW, the Secretary revisited the topic of U.S. equal protection standards, and he stated the principle of intermediate scrutiny, that "a gender-based distinction can withstand constitutional challenge if it serves an important objective and is substantially related to the achievement of that objective."⁴⁴¹ He indicated that the State Department was assuming that the definition of discrimination in Article 1 of CEDAW did not intend to classify such distinctions as discriminatory, and that Article 1 was therefore consistent with U.S. law.⁴⁴²

This statement, which bears directly on U.S. willingness to comply with CEDAW, and which should have appeared in the text of the U.S. RUDs, appears highly disingenuous. There is much in CEDAW that clearly affirms the Article 1 call for full equality for women, which has no counterpart in U.S. constitutional law. The treatment of women under U.S. domestic law was not constrained by any guarantee of equality for women, and it was not purged of discriminatory features and sex stereotyping. That being the case, one plausible reason for the knowledgeable legal experts from the State Department to assert that U.S. law on discrimination measured up to CEDAW standards was a wish to hide the disparity between U.S. and international standards.

Of course, the ultimate motive of those who sought to hide the gap between equal protection and equality for women may have been something other than a wish to deceive. Facing daunting difficulties due to the prevailing hostility towards human rights in the Senate, they may have felt compelled to try to reassure suspicious conservatives that endorsing CEDAW would not mean a treaty substitute for the defeated ERA. It is understandable that sincere supporters of human rights who would like the U.S. to play a more constructive role in the international human rights system could think that, as a matter of political strategy, it was prudent to minimize the disparity between U.S. equal protection jurisprudence and international law in order to discourage resistance to the idea that the U.S. should become a member of the CEDAW system.

The gap between U.S. law and CEDAW should have been apparent to legal experts, but for any reader unversed in U.S. law and unfamiliar with the patterns of double-talk about CEDAW, the official U.S. "apology" for its treatment of women would be confusing. It

441. *Id.* at 20.

442. *Id.*

would take more time than the average person would be likely to spend to unravel these statements and discover that they amounted to a roundabout way of declaring the U.S. intent to continue following its domestic equal protection jurisprudence, a standard that could change with shifts in domestic judicial trends.

The Secretary of State also cited cases in ways that would have been misleading for an international audience. In mentioning cases that U.S. feminists would point to as proving the deficiencies of U.S. equal protection jurisprudence, he cited them as if they supported his contention that U.S. law was already in substantial compliance with CEDAW norms. For example, in a section on the effect of CEDAW ratification on women in the military, he chose to mention the case of *Rostker v. Goldberg*,⁴⁴³ in which Justice Rehnquist had used sex stereotyping in delivering an opinion upholding the male-only draft.⁴⁴⁴ Secretary Christopher made no mention of Rehnquist's use of sex stereotyping. Moreover, in his discussion of co-education, the Secretary cited the outcomes of both the first round of the VMI cases and the decision in the Citadel case as if they were positive developments.⁴⁴⁵ However, the reasoning of these cases actually undermines official U.S. claims to possess laws in conformity with CEDAW principles guaranteeing women equal rights. The outcomes of the cases, which allow discrimination based on sex stereotyping and assert that barring women from access to prestigious institutions is constitutional even when no truly equivalent institutions are available for women, are not only at variance with general CEDAW principles but also seem to conflict with Article 10, which calls for ensuring equal rights for women in education.⁴⁴⁶

443. 453 U.S. 57 (1981).

444. SENATE CEDAW REPORT, *supra* note 387, at 23. The decision is discussed *supra* notes 259-269 and accompanying text.

445. SENATE CEDAW REPORT, *supra* note 387, at 32-33. In the Secretary's defense, these cases were included at a stage when the outcomes made it possible to argue that the courts were protecting women's rights by ordering women to be admitted to these all-male state-sponsored academies unless suitable alternatives could be offered. Thus, one could say that, at the time the Secretary's letter was composed, it was unclear whether the courts would rule that women could be excluded from these institutions even when the alternatives were as inferior as the programs at Mary Baldwin and Converse College turned out to be. However, there was enough in the reasoning offered in the first rounds of these cases to signal to a critical eye that sex discrimination was being tolerated where racial discrimination would have been condemned and that some judges were thinking in terms of sex-stereotypes, which could only be harmful to women's rights.

446. Article 10 of CEDAW does not require coeducation, but it is at odds with the VMI and Citadel cases in calling in section (a) for the same conditions for access to studies and in calling in section (b) for the elimination of any stereotyped concept of the roles of men

In his discussion of Article 2 of CEDAW, which required parties “to pursue by all appropriate means . . . a policy of eliminating discrimination against women,” the Secretary asserted that the United States “condemns and seeks to eliminate discrimination against women.”⁴⁴⁷ However, the package of RUDs that the United States was proposing to CEDAW and had already entered to the ICCPR indicated that the United States would not seek to move against discrimination that was tolerated by U.S. law and revealed that the government considered the status quo sufficient for U.S. women. The failure of the United States to commit to any further measure to eliminate discrimination against women was glossed over. In a serious mischaracterization of U.S. laws, the Secretary maintained that:

The principle of equality between men and women is reflected in the Fourteenth Amendment to the Constitution, as well as in federal and state legislation. . . . While few would argue that gender-based discrimination does not exist in the United States or that there is no room for additional legislative and other steps in this regard, it is not open to serious debate that the legislation and other measures currently in force in the United States are sufficient to meet the general requirements set forth in Article 2.⁴⁴⁸

In reality, the Fourteenth Amendment does not “reflect” any principle of equality between men and women, and therefore U.S. law is not in compliance with Article 2. As the foregoing analysis of the U.S. RUDs to CEDAW has shown, the United States was declining to follow Article 2(a) of CEDAW, which calls on states to undertake “[t]o embody the principle of the equality of men and women in their national constitutions or other appropriate legislation.”⁴⁴⁹ Relying on his mischaracterization of U.S. law and the fanciful claim that the Fourteenth Amendment afforded U.S. women an equality guarantee, Secretary Christopher asserted that CEDAW Article 2 would not require the United States to enact an Equal Rights Amendment to the Constitution.⁴⁵⁰ That is, no ERA was needed to secure equality since the Constitution already, according to him, “reflected” equality between men and women. His tortured explanation about why no ERA would be required in the wake of any U.S. ratification of CEDAW was most likely intended as a gesture to mollify conservative Senators who

and women in all forms of education by encouraging coeducation. See CEDAW, *supra* note 1, at 38-39.

447. SENATE CEDAW REPORT, *supra* note 387, at 22.

448. *Id.*

449. See *supra* notes 438-442 and accompanying text.

450. SENATE CEDAW REPORT, *supra* note 387, at 22.

might decide to oppose ratifying CEDAW on the grounds that it would require reviving the defeated ERA project. However, the Secretary's reassurance on this point was superfluous. What would apply in the United States upon CEDAW ratification was not CEDAW itself but CEDAW as eviscerated by the set of proposed U.S. RUDs to CEDAW and the RUDs previously entered to the ICCPR, which were designed to ensure that U.S. law would not be altered. Although some of the Secretary's comments seemed to suggest that there might be official recognition that U.S. laws affecting women leave room for improvement,⁴⁵¹ nothing in the package of RUDs indicated that the United States was prepared to question any of its laws or to undertake any reforms whatsoever to bring them in line with CEDAW. Having excluded and modified fundamental CEDAW obligations via its RUDs to the ICCPR and the package of RUDs that it proposed to enter upon ratification of CEDAW, the United States committed itself to nothing more than following existing U.S. law.

The gap between the self-congratulatory posture that the U.S. adopts when speaking to the international community about its human rights accomplishments and the altogether less prepossessing reality of the U.S. domestic rights situation is exemplified by comments that were made in 1993 by a spokesperson for the U.S. Department of State after the Vienna human rights conference. The comments were to the effect that the United States was perturbed by other countries' use of culture to justify denying rights to women. The United States charged:

Some governments excuse the fact that women have a lesser status than men by pointing to culture and tradition. However, culture and tradition cannot excuse gross and systematic violations of human rights. One of our primary goals at the World Conference on Human Rights was to stress that human rights are universal. As Secretary Christopher said in his speech to the conference, "We cannot let cultural relativism become the last refuge of repression." We cannot allow women to be the exception to the fundamental principle of human rights universality. The United States affirms the principle of cultural diversity, but does not believe that cultural tolerance should be used to justify abuse of human rights.⁴⁵²

One would not have surmised from this attack on appeals to cultural relativism that the United States followed the parochial notion that the rights in the U.S. Constitution should set the maximum limits

451. *Id.*

452. 1993 U.S. Dept. of State, Dept. of State Dispatch, vol. 4, No. 41, Oct. 11, 1993, available in LEXIS, Nexis Library, ALLWLD File.

on rights to prevent U.S. women from claiming human rights afforded them under international conventions, or that the United States was a country where appeals to culture could block the ratification of an international human rights convention. Yet, as the debates on CEDAW ratification heated up, cultural relativism was explicitly invoked by U.S. conservatives in the Senate to justify their rejection of CEDAW.

G. Opposition to CEDAW in the Senate Foreign Relations Committee

CEDAW opponents in the Senate include powerful senators like the arch-conservative Jesse Helms, who, after the Republican victories in November 1994, became the new chair of the Senate Foreign Relations Committee. He was belatedly joined in his opposition to CEDAW by Senator Nancy Kassebaum. When the Senate Foreign Relations Committee met on September 29, 1994, Senator Kassebaum addressed Senator Helms and offered this negative evaluation of CEDAW:

I would like to express my thoughts on this convention. Certainly I am sure all of us, indeed, Senator Helms, would like to end any discrimination that may be apparent against women, but I'm going to vote no on this convention. I have some serious problems with such a broad convention as applying to all the countries around the world and just have to wonder what is meant by mandate all appropriate measures to ensure equal rights to family benefits, financial credit, and participation in all aspects of cultural life.⁴⁵³ I don't know that it serves the United Nations well to somehow, somehow to [sic] be engaging in a convention that doesn't allow for differences in cultural, different cultural (pause) principles, more or less, mores, religions and I, I'm sympathetic to wanting to end any discrimination in financial credit, benefits and so forth, but I am not sure that it is necessarily something that should consume the time of the United Nations on this broad agenda. For that reason I am voting no.⁴⁵⁴

453. The reference is to Article 13 of CEDAW, which says states "shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life," and specifies that these include family benefits, financial credit, and participation in recreational activities, sports and all aspects of cultural life. See CEDAW *supra* note 1, at 40. This is a non-controversial provision of CEDAW, one to which no U.S. reservation had been entered and where none would have been anticipated.

454. This transcript of the Senator's remarks was provided to me by an individual who was present and transcribed Kassebaum's remarks from a tape recording that she made. This individual prefers to remain anonymous. The "aaaa's" with which the Senator liber-

These comments, which bear the hallmarks of having been hurriedly thrown together, failed to set forth any coherent convincing explanation for Kassebaum's rejection of CEDAW.⁴⁵⁵ On the one hand, ignoring the State Department's lecture that cultural relativism should not be used to make women's rights the exception to the principle that human rights are universal, Senator Kassebaum seemed to find CEDAW objectionable for affording protection for women's rights according to a universal standard that might not be acceptable to all cultures and all religions. That is, she seemed to find it too broad and general, not sufficiently accepting of local variations and cultural diversity. Senator Kassebaum also seemed to be objecting that the U.N. should not be writing treaties that delved into matters like the extension of credit, perhaps on the theory that such matters were local concerns in which the international organization was improperly meddling. Thus, her remarks simultaneously asserted that the convention was too broad and too specific.

Senator Kassebaum's remarks were largely rewritten for the section of the Foreign Relations Committee report which presented the minority's reasons for rejecting CEDAW. The minority members insisted that they shared "the majority's strong support for eliminating discrimination against women,"⁴⁵⁶ an assertion that strained credulity when pronounced by someone like Senator Helms who is notorious for his opposition to human rights and for his fights against civil rights in general and women's equality in particular.

After giving lip service to the idea that discrimination against women was wrong, the minority members indicated that their concern resulted from the notion that CEDAW would be ineffectual and therefore harmful to the authority of human rights.⁴⁵⁷ The minority also claimed to be unpersuaded that CEDAW was a proper or effective means of pursuing the objective of eliminating discrimination against women, and it expressed fear that "creating yet another set of unenforceable international standards will further dilute respect for international human rights."⁴⁵⁸ Because CEDAW depended on voluntary compliance, the minority was "hesitant to invest much hope that it will

ally punctuated her remarks, which were faithfully transcribed, have been eliminated here. Transcript on file with author.

455. I have requested clarification from Senator Kassebaum on this matter but have received no answer.

456. SENATE CEDAW REPORT, *supra* note 387, at 53.

457. *Id.* at 53-54.

458. *Id.* at 53.

lead to real changes in the lives of women."⁴⁵⁹ It warned of the need to guard against treaties that overreach, since by promising more than can be delivered "we risk diluting the moral suasion that undergirds [sic] existing covenants on fundamental human rights."⁴⁶⁰

It was odd for the minority to bemoan the lack of effectiveness of CEDAW while simultaneously seeking to prevent the United States from joining CEDAW and having a voice on the committee, where it could potentially work to strengthen the CEDAW system. Not only was the United States proposing to reject many of the basic substantive principles in CEDAW, but, by insisting that the treaty was to be non-self-executing and refusing to submit to the ICJ regarding disputes arising under CEDAW, the United States had signalled its preference that CEDAW be toothless and ineffectual. The same minority, which was asserting its concern that CEDAW would not be sufficiently strong and professing worry that CEDAW principles were unenforceable, had shown no interest in excising any of the U.S. RUDs that weakened CEDAW. In light of the Senate's history of condemning international human rights, its reluctance to ratify human rights treaties, and its use of RUDs to nullify commitments under human rights treaties, the expression by the minority of concern about the erosion of "the precious moral authority"⁴⁶¹ essential to protect human rights rang hollow.

The minority also disputed the notion that a primary value of CEDAW was to establish a widely accepted set of international standards for protecting the rights of women. The minority seems to have been persuaded that there was no international acceptance since more than fifty countries had entered reservations to aspects of CEDAW.⁴⁶²

459. *Id.*

460. *Id.*

461. *Id.* at 54.

462. These included the Islamic reservations of Libya and Bangladesh, which, the minority complained, were "so broad as to appear to be at variance with the object and purpose of the treaty itself." *Id.* The Islamic reservations made by Libya and Bangladesh were singled out for the Senators' particular disapprobation, without any explanation of why no mention was made of similar Islamic reservations by countries like Egypt and Morocco, close and valued friends of the United States, and Kuwait, on whose behalf the United States had led the Gulf War coalition. However, the discrepancy can be accounted for assuming that the aim of the minority was to cast aspersions on states that had imposed Islamic reservations and to associate CEDAW with countries that had negative images or were not close allies, thus leading to a preference for citing only CEDAW parties like Libya and Bangladesh.

The objection that the minority made to the breadth of the Bangladeshi and Libyan reservations seemed extremely odd in the light of the CEDAW reservations that the United States was proposing, which were at least as broad as the Bangladeshi and Libyan

Furthermore, the minority fretted that there had been “an apparent inability to prohibit even the broadest reservations,” indicating that in the view of the minority, “CEDAW may reach beyond the necessarily restrictive scope of an effective human rights treaty.”⁴⁶³

The minority also complained of a “disturbing trend” of diverting resources by the executive branch and non-governmental organizations to focus on U.S. ratification of treaties rather than promoting norms represented by those treaties “in the countries where they are under attack.”⁴⁶⁴ Of course, the minority did not acknowledge that U.S. women’s rights were under attack, in part by conservative politicians like Senator Helms and his ideological allies, or that the CEDAW guarantee of equality could help U.S. women achieve the equal rights that they had been struggling for since the nineteenth century. Rejecting the view that the United States must be a party to CEDAW in order to criticize or encourage other governments in their practices regarding women, the minority scoffed at the notion of conceding “to countries such as Libya the moral high ground on women’s issues simply because they have signed an unenforceable convention.”⁴⁶⁵ How the United States could claim the moral high ground in this regard was not explained.

The final comments in the minority report are worth quoting in full:

We believe that the evolution of internationally accepted norms regarding human rights and dignity is important and must be carefully encouraged. It must, however, take place within an international system of sovereign nations with differing cultural, religious and political systems. Pushing a normative agenda beyond that system’s ability to incorporate it leads, we believe, to what is represented by this convention: a document with 136 signatures, a committee that meets for two weeks a year, and a slow erosion of the precious moral authority that is the essential [sic] to the protection of fundamental human rights.⁴⁶⁶

ones. Like the Islamic reservations, the U.S. RUDs to the ICCPR and CEDAW had the damaging feature of upholding domestic law at the expense of treaty obligations. Despite professing disapproval of the breadth of CEDAW reservations, not only had the Senate minority not objected to the breadth of the U.S. RUDs to CEDAW, but it had insisted on adding yet another “understanding” to the list. Thus, the minority was choosing exceedingly weak grounds for launching an attack on Bangladesh and Libya on a matter where the United States itself was particularly vulnerable to criticism.

463. SENATE CEDAW REPORT, *supra* note 387, at 54.

464. *Id.*

465. *Id.*

466. *Id.*

This last paragraph abounded in paradoxes, not the least of which was the concern for the slow erosion of the precious moral authority of human rights incongruously professed by Senators who were showing no desire to strengthen the international human rights system. Furthermore, in objecting to ratifying CEDAW because the principle of equality for women was not widely accepted, the minority seemed to misconstrue the nature and purpose of human rights treaties.

Naturally enough, human rights conventions focus on problem areas. Thus, it would have been odd to have a Convention on the Elimination of All Forms of Discrimination Against Men, a hypothetical "CEDAM." Around the globe, states have not discriminated against men as a class nor treated them as subordinate, inferior beings entitled to fewer rights than women. If the idea behind human rights treaties was to devise treaty provisions based on states' current conduct of affairs, with the aim of universal compliance without strain or significant adjustments, a treaty like this hypothetical CEDAM might make sense. However, human rights treaties are designed to protect those who need protection. Pressures to draft CEDAW had emerged precisely because women's rights, which were outlined in general ways in treaties like the ICCPR, were being so pervasively violated that persons concerned with rectifying the abuses decided that a separate, specialized treaty was needed to address the problem of discrimination against women. The rationale was that establishing a universal norm of non-discrimination on the basis of sex was vital. Thus, it was strange, indeed, for the minority to object to CEDAW on the grounds that countries were still discriminating against women in violation of CEDAW principles.

Even more mystifying was the minority's concern that CEDAW had to confront a system of nations with different cultural and religious systems. Of course, appeals to differences in cultural and religious systems had been precisely what was behind the "Islamic" reservations to CEDAW entered by countries like Libya and Bangladesh, which the minority report seemed to decry and the toleration of which it had suggested might "cheapen the coin" of human rights treaties generally. The expected corollary would have been that the minority would insist on upholding the international norms of CEDAW against delinquent Muslim states. But Kassebaum's statement on September 29, 1994, had suggested that she might find CEDAW objectionable because CEDAW was offensive by the standards of U.S. culture and religion. If that were the basis for the objections by the committee minority, it would mean adopting the same stance as

Libya—to the effect that culture and religion could override CEDAW, a stance the minority purported to find objectionable. Of course, the two positions could be reconciled by assuming the ethnocentricity of the minority on the committee. If this were so, cultural and religious objections to CEDAW based on U.S. or Christian values would be legitimate, but reservations based on “Islam” mooted by Muslim countries would not deserve respect. Even if this ethnocentric outlook explains the seeming inconsistency in the minority’s positions, it remained unarticulated. The minority became, it seems, entangled in a web of inconsistencies.

The determined opposition of conservatives like Senator Helms to CEDAW might seem odd in light of the sweeping RUDs that the United States was proposing to add. What accounts for the persistent opposition by Helms and others to ratifying a convention that had already been aborted by the list of RUDs appended to it, as well as the Secretary of State’s letter indicating that the domestic Fourteenth Amendment standard would continue to set the limit on women’s rights? One can surmise two reasons. First, conservatives had a long history of being hostile to human rights treaties, regardless of their capacity to change U.S. law.⁴⁶⁷ From the standpoint of conservatives, it has been a virtual article of faith that ratification threatens the U.S. Constitution and legal order. One recalls that Senator Helms remained opposed to ratifying the Genocide Convention even after important RUDs had been appended at his insistence.⁴⁶⁸ Secondly, Senators like Helms can also win points with their conservative constituencies by opposing a convention that aims at guaranteeing equal rights to women. Profoundly suspicious of international law, many conservative voters are unlikely to approve of U.S. ratifications of human rights treaties like CEDAW even if they have been neutralized in advance by RUDs.

Because the majority on the Foreign Relations Committee favored ratifying CEDAW, a resolution favoring ratification went to the Senate after a thirteen to six vote.⁴⁶⁹ However, the Senate vote on CEDAW ratification that had been expected in October 1994 was blocked by a secret manoeuver permitted under Senate rules that is known as a “hold.”⁴⁷⁰ After the Republican victories in November

467. See generally KAUFMAN, *supra* note 101.

468. See *supra* notes 120 and accompanying text.

469. See SENATE CEDAW REPORT, *supra* note 387, at 3.

470. I have been unable to find anyone who can identify the Senator who imposed the “hold.”

1994 and the conservative tilt of the new Senate, the likelihood of any favorable Senate vote on CEDAW ratification seemed to have diminished considerably. Indeed, the amendment to the Foreign Relations Revitalization Act of 1995 adopted on August 1, 1995, showed that the Senate was not in sympathy with women's rights. The amendment instructed the U.S. delegates to the Beijing Women's Conference that they were to promote the importance of motherhood, to uphold the traditional family as the fundamental unit of society, and to define gender as the biological classification of the two sexes.⁴⁷¹ The passage of this amendment, which gratified conservatives, revealed how the U.S. Senate's thinking about women's rights aligned with the views of the Vatican and conservative Muslim countries, both of which likewise objected to the notion that the different roles assigned men and women in society were not biologically determined but socially constructed, and also insisted upon protection of the traditional family.⁴⁷²

In circumstances where a ratification proposal might well fail if CEDAW were submitted to the full Senate for consideration, it was doubtful whether all CEDAW proponents would even want to risk a vote on the Senate floor. In any event, even if CEDAW were ratified, it could offer no prospect of enhanced rights for U.S. women as long as the present package of RUDs, along with the relevant commentary by the Secretary of State, precluded CEDAW from having any effect on domestic standards.

VIII. Conclusion

Countries are expected not to make reservations to international treaties that allow them to escape their treaty obligations and adhere instead to conflicting standards in their domestic laws, and particularly not where the reservations are ones that will defeat the object and purpose of the treaty. Reservations based on a preference for upholding domestic law are often too vague and open-ended for other states parties to know the precise nature of the deviations that will ensue and whether or not the reservations are compatible with the treaty in question. Ignoring the objections to such reservations, the United States has found that the international community will be more tolerant of treaty reservations upholding the supremacy of domestic laws where the appeal is to institutions that enjoy a special, sacred status

471. For discussion of this amendment, see 141 CONG. REC. S10,973 (July 10, 1995) (amendment of Sen. Hutchison); 141 CONG. REC. S10,961 (July 10, 1995) (statement of Sen. Hutchison).

472. See *supra* note 49.

like the U.S. Constitution. Not willing to accept the CEDAW norm of equality for women, the United States has proposed to enter significant constitutional reservations when and if it ratifies CEDAW, just as it did to provisions in the ICCPR.

Referring to the U.S. Constitution to enter obscure and confusing treaty reservations would, of course, be unnecessary if the United States either intended to meet CEDAW standards or if it were prepared to state candidly and clearly where it would not meet CEDAW obligations. The U.S. constitutional reservations are associated with a pattern of dissimulation and obfuscation designed to disguise non-conforming features of relevant U.S. laws. Analysis of official U.S. statements accompanying these reservations reveals that, instead of accurately describing the impact of constitutional norms on women's rights, these statements attempt to present domestic law as if it were closer to complying with CEDAW norms than it actually is. There seems to be a sense that describing the principle that sex discrimination can be justified according to a more lenient standard than racial discrimination could expose the United States to international criticism. By its lack of candor about the extent to which its law deviates from international law, the United States has demonstrated that it appreciates the superior normative force that international human rights standards have obtained, despite its unwillingness to accommodate these via reforms in its domestic laws.

Analysis reveals that in most areas the Constitution by itself is not so much at fault for the problems that the United States has had in complying with international human rights norms as are underlying policies of preserving the status quo. The United States upholds domestic legal norms in conflict with international human rights law even where the international standards do not conflict with the Constitution but simply offer a different, higher standard of protection for women's rights. Thus, the United States proposed to follow its equal protection jurisprudence even after ratifying CEDAW, despite the fact that the Constitution would not be violated if the United States adjusted its laws to enable it to adhere to the CEDAW norm of equality. The United States has created a range of CEDAW RUDs that suggest that, behind the invocations of its Constitution, there lurks a banal preference for upholding domestic laws and policies that afford weaker protections for women's rights than are found in international law.

Even where adopting CEDAW rights principles could seem to jeopardize a constitutional principle, as is the case in relation to some

First Amendment issues, certain distinctions must be made. Analysis shows that there is a difference between cases where a fundamental principle of the constitutional scheme is at stake and ones where at issue are judge-made rules with a heavy political component that may shift with political trends and changing ideological orientations of judges. Thus, when the United States says that the Constitution requires giving priority to freedom of speech or freedom of religion over the kind of equality rights assured by CEDAW, this position does not simply flow from the text of the Constitution. Instead, political choices are arguably being rationalized behind a constitutional facade.

Invoking the U.S. Constitution is for the most part sufficient to quell doubts and debates about whether U.S. rights standards are falling behind advances elsewhere, because the Constitution has been sacralized to the point that Americans cannot readily conceive of the possibility that it might have become outmoded in its rights guarantees. Americans will thus tend to presume that the disparities between the Constitution and international law reveal deficiencies in the latter.

In the aftermath of the U.S. decision to invoke constitutional standards to override the norm of full equality for women, questions needed to be asked about the functions and meaning of the U.S. Constitution. This was only one in a series of instances where the Constitution had shown its serviceability as a bulwark that conservative forces opposed to enhancing rights could deploy against international law. Taking measure of this situation, would Americans approve of the treatment of their Constitution as a device for circumscribing their rights, an obstacle to integrating the higher rights protections that were afforded to other peoples under international law? Are they unswervingly committed to the proposition that the Constitution—or, more accurately, its hypertechnical jurisprudence—must govern at the expense of international human rights law, regardless of whether this means setbacks for their own rights?

Other questions were prompted by the U.S. reliance on the Constitution to assure that CEDAW, if ever it were ratified, would not afford U.S. women equality. The inadequacy of the rights principles set forth in the Constitution in the wake of the defeat of the ERA was part of the problem. In the absence of an ERA, the jurisprudence applying the intermediate scrutiny standard under the Equal Protection Clause is proving itself a poor substitute for a provision setting forth women's right to equality. The prestige enjoyed by the U.S. Constitution seems to have obscured how Equal Protection Clause

rulings have reaffirmed existing inequalities and relied on sex stereotyping. Should any constitution devoid of principles that could ensure equality for over one half the nation remain as the definitive, supreme standard of rights? Should the deficiencies in such an instrument suffice as the pretext for denying U.S. women the equality they would be guaranteed under CEDAW? Or, did the whole CEDAW debacle illustrate the need to think more daringly and to consider carefully Judge Nygaard's proposal for a new Bill of Rights?

One also wonders about the tolerant stance of the international community vis-à-vis U.S. RUDs, many of them constitutional, to human rights conventions. The United States seems to have benefited from a widespread presumption that, as the most assertive proponent of human rights on the world scene, it must be in substantial compliance with international human rights law—despite its insistence on upholding domestic standards that varied significantly from the relevant provisions of international law. It seems high time for the international community to reconsider its indulgent attitude vis-à-vis U.S. non-compliance with international norms generally and, more specifically, to challenge the tactics being used by the United States to evade any commitment to the principle of women's equality. In short, it seems time to start taking human rights seriously.

The comments of Eckart Klein, the German expert who along with other Human Rights Committee members examined the first U.S. ICCPR report, provide a fitting capstone to this discussion. After reviewing the U.S. approach to the question of its obligations under the ICCPR, Klein made the following thoughtful observations:

The United States representatives had consistently focused on the United States Constitution in their answers to the Committee, reflecting their Government's view that the Constitution already met all its obligations under the Covenant, with allowance made for the reservations. The United States was right to be proud of its Constitution, including the Bill of Rights, but it was not the only decisive norm. The whole point of signing an international treaty was to enable a country to open up to ideas and trends from the outside . . .

The democratic argument that the people did not want a change had been put forward. But it was precisely the constitutional thinking of the United States which had taught the world that there were limits to the will of the majority. Human rights in particular could not always be left to the discretion of majorities. The signing of human rights treaties must represent the Government's recognition of its duty to guide its people and strive for change wherever needed. The world needed the United States to lead the way in the promotion and protection

of human rights, and it would do so best by fully accepting international standards and its own international human rights responsibilities.⁴⁷³

473. U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1406th mtg. at 7-8, U.N. Doc. CCPR/C/SR.1406 (1995).

