U.S. Ratification of CEDAW: From Bad to Worse?

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"[T]he full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields . . . ."[1]

Introduction

Discrimination against women flourishes in the United States today.[2] However, so does discrimination against the poor, the disabled, the elderly, Jews,[3] immigrants (especially Hispanics and Latinas), African Americans, and anyone with an Arabic-sounding last name. This pervasive discrimination continues despite the fact that the United States has laws that are enforced to varying degrees, on both state and federal levels, which prohibit

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1. Convention on the Elimination of All Forms of Discrimination Against Women pmbl., *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW].

2. *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing gender discrimination as it affects women of color).

3. On June 10, 2009, fifty years after the end of World War II, a white supremacist entered the National Holocaust Museum in Washington, D.C. and opened fire, killing a security guard and wounding several visitors. The accused is a published author who believes Jews are conspiring to defile the white race, and that the Holocaust never happened. *See* Mimi Hall, Marisol Bello & Brad Heath, *Suspect on Anti-Hate Groups' Radar*, USA TODAY, June 11, 2009, at 3A.

such discrimination.[4] The subject of this Article is whether the United States would benefit, or suffer, from ratification of a treaty that purports to end all forms of discrimination against women.

It has been nearly thirty years since President Jimmy Carter signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[5] and more than ten years since President Bill Clinton formulated proposed Reservations, Understandings, and Declarations (RUDs) to CEDAW.[6] The Senate Foreign Relations Committee last met and reported on the treaty in 2002.[7] Despite this progress, the so-called "Women's Convention"[8] has yet to achieve the advice and consent of the U.S. Senate,[9] a necessary step for any treaty on the path to ratification.[10] Many women's rights advocates will no doubt call upon President Obama[11] to pick up the torch carried by

4. *See, e.g.*, 42 U.S.C. § 2000e (2006) (prohibiting employment discrimination based on race, color, religion, sex, and national origin); CONN. GEN. STAT. ANN. § 46a-64 (West 2009) (prohibiting discrimination in public accommodation by reason of sex or race); Title VII of the Civil Rights Act of 1964.

5. CEDAW, *supra* note 1. President Carter signed CEDAW in 1980 and submitted it to the Senate that same year. *See* Julie A. Minor, *An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women*, 24 GA. J. INT'L & COMP. L. 137, 137 (1994).

6. In both 1994 and 2002, the U.S. Senate Committee on Foreign Relations approved eleven Reservations, Understandings, and Declarations which "gutted" the "clean" treaty signed by President Carter in 1980. Janet Benshoof, *How International Law Could Radically Change the Definition of Gender Equality in the United States: CEDAW and Reproductive Rights*, *in* GLOBAL JUSTICE CENTER WHITE PAPER SERIES: "NEW VISIONS FOR INTERNATIONAL LAW AND U.S. FOREIGN POLICY" 4 (2008), http://www.globaljusticecenter.net/projects/us-foreign-policy/CEDAWReproductiveRights.pdf. For a discussion of the text of the RUDs proposed by President Clinton, see *infra* notes 96–114 and accompanying text.

7. *Treaty Doc. 96-53; Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the U.N. General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on July 17, 1980: Hearing Before the S. Comm. on Foreign Relations*, 107th Cong. (2002) [hereinafter *2002 Hearing*]. The report is about 150 pages and details arguments in favor of and in opposition to U.S. ratification of CEDAW. It contains formal statements submitted by many groups, including, but not limited to, the following: the American Bar Association, *id.* at 85–86; Hadassah, the Women's Zionist Organization of America, *id.* at 93; the American Association of University Women, *id.* at 85; Amnesty International USA, *id.* at 86–89; NOW Legal Defense and Education Fund, *id.* at 105–10; the Heritage Foundation, *id.* at 127–40; the Family Action Council International, *id.* at 122–25; American Life League, *id.* at 140; and the Family Research Council, *id.* at 143–44.

8. Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 643 (1990).

9. *See 2002 Hearing*, *supra* note 7, at 1 (statement of Sen. Joseph R. Biden, Jr., Chairman, S. Comm. on Foreign Relations).

10. U.S. CONST. art. II, § 2.

11. Barack Obama was elected the forty-fourth president of the United States in November 2008, and took office on January 20, 2009. Peter Baker, *Obama Takes*

the Democratic Presidents who preceded him and make ratification of CEDAW a priority for his administration.[12] The goals of the Women's Convention are indisputably laudable. Ending discrimination in any form, against any group, can do nothing but improve the state of humanity.

The question that must be asked, unfortunately, is whether ratification of CEDAW by the United States[13] would, in fact, actually do anything to eliminate discrimination against women in this country. The broader underlying question, of course, is whether international law influences a nation's behavior or simply reflects it, particularly in respect to human rights treaties.[14] If nothing else, the nature and content of the RUDs that were formulated by the Clinton administration[15] may so severely conflict with CEDAW's object and purpose that any ratification would be meaningless. Furthermore, ratification under these conditions and in the current circumstances could not have a meaningful impact on the lives of women in the United States if enabling legislation is not forthcoming.[16] In fact, ratification could have a negative effect on the United States' human rights record in general[17] and on the lives of U.S. women specifically.[18]

Oath, and Nation in Crisis Embraces the Moment, N.Y. TIMES, Jan. 20, 2009, at A1. Presidents Jimmy Carter and Bill Clinton, like President Obama, were elected as Democrats.

12. *See, e.g.*, Benshoof, *supra* note 6, at 2 ("The overwhelming mandate for change given to the new Obama administration is a transformational event which presents an opportunity for the United States to embrace a new vision of its role in the world and in promoting global justice.").

13. *See infra* note 39 (discussing the definition of ratification and accession).

14. *See* LOUIS HENKIN, HOW NATIONS BEHAVE 88 (2d ed. 1979) ("Nations act in conformity with law not from any concern for law but because they consider it in their interest to do so, and fear unpleasant consequences if they do not observe it. . . . Nations would probably behave about the same way if there were no law.").

15. *See infra* notes 97–114 and accompanying text.

16. CEDAW, like other human rights treaties, is not considered by the United States to be self-executing and would thus require enabling legislation before it would have any effect whatsoever. *See* Minor, *supra* note 5, at 142 (stating the proposition that "treaties should be construed in a 'broad and liberal spirit'" but noting that "the courts have not approached human rights treaties in this way, almost uniformly holding that human rights clauses are non-self-executing." (quoting Asakura v. Seattle, 265 U.S. 332, 342 (1924))); *see also* Julian G. Ku, *Medellín's Clear Statement Rule: A Solution for International Delegations*, 77 FORDHAM L. REV. 609, 613 (2008) (explaining the position of the Restatement of Foreign Relations Law of the United States that "unless there is a manifestation of an intent toward non-self-execution, the background presumption is that all treaties are self-executing.").

17. *See generally* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (presenting empirical research indicating that countries' human rights performances may actually decrease rather than increase after ratification of human rights treaties).

This Article explores the possibility that ratification of CEDAW ought not be a priority for the Obama administration because women will continue to face discrimination, and may actually fare worse, if the treaty is ratified. Until the United States as a nation, and its citizens as individuals, truly internalize the goals of CEDAW and accept its anti-discriminatory purposes as the norm, ratification may do more harm than good.[19]

Part I of this Article provides the history, background, and context for CEDAW, including the proposed RUDs, and discusses the United States' failure to ratify CEDAW. Part II examines the type of enabling legislation that would be necessary for CEDAW to take effect in the United States even if it is ultimately ratified. Part III analyzes the United States' failure to ratify CEDAW and whether that failure means anything in the day-to-day lives of U.S. women. Part IV asks whether the time for a women's treaty may have already come and gone. The final Part of this Article concludes that internalization of the treaty's objects and purposes, rather than pro forma ratification, should be the goal of the United States.

I. The Evolution of CEDAW and the United States' Response

Expressions of concern about equality for women have been clearly articulated for as long as there have been international human rights instruments.[20] The preamble to the United Nations Charter specifically reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . . ."[21] However, many in the international community came to see this approach to women's equality via

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18. *See infra* notes 163–172 and accompanying text (discussing the possibility that ratification of CEDAW might give the United States an opportunity to institutionalize discrimination against women in this country).

19. *See* Hathaway, *supra* note 17; *infra* notes 161–169 and accompanying text.

20. *See* Dorota Gierycz, *Human Rights of Women at the Fiftieth Anniversary of the United Nations*, *in* THE HUMAN RIGHTS OF WOMEN: INTERNATIONAL INSTRUMENTS AND AFRICAN EXPERIENCES 30, 31 (Wolfgang Benedek et al. eds., 2002) (describing, inter alia, the Universal Declaration on Human Rights, the International Covenants on Human Rights, and the two Optional Protocols to the International Covenant on Civil and Political Rights—known collectively as the International Bill of Human Rights—as formulating "contemporary legal standards" that "are derived from universally recognized principles, which state that human rights are attributed to human beings only; that they are attributed to all human beings equally . . . and that they are rights of which no person can be deprived, and which no one can take away or violate without legal consequences.").

21. U.N. Charter pmbl.

general human rights treaties as "fragmentary"[22] and felt the need for a treaty that focused exclusively on eliminating discrimination against women.[23]

CEDAW encompasses many provisions that were originally contained in other conventions, declarations, and covenants that addressed human rights issues specifically as they pertained to women.[24] It is clear from such initiatives as the Universal Declaration of Human Rights,[25] the International Covenant on Civil and Political Rights,[26] the International Covenant on Economic, Social and Cultural Rights,[27] and the World Conference of the International Women's Year,[28] that the international community had previously attempted to define human rights issues as being equally relevant for women and men.[29] CEDAW,

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22. United Nations Division for the Advancement of Women, Short History of CEDAW Convention, http://www.un.org/womenwatch/daw/cedaw/history.htm (last visited October 12, 2009) [hereinafter Short History].

23. *Id.* The U.N. website states unequivocally:

> Equality of rights for women is a basic principle of the United Nations. . . . By the terms of the Charter, the first international instrument to refer specifically to human rights and to the equal rights of men and women, all members of the United Nations are legally bound to strive towards the full realization of all human rights and fundamental freedoms. The status of human rights, including the goal of equality between women and men, is thereby elevated: a matter of ethics becomes a contractual obligation of all Governments and of the UN.

Id.

24. Cook, *supra* note 8. Cook explains:

> The Women's Convention is one of a series of treaties inspired by a vision of the importance of protection of human rights through international law. It is historically proximate to the International Convention on the Elimination of All Forms of Racial Discrimination . . . and a jurisprudential partner to the two Covenants that give effect to the Universal Declaration of Human Rights [referring to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights].

Id. at 644–45.

25. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, art. 7, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

26. International Covenant on Civil and Political Rights art. 1, *adopted* Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

27. International Covenant on Economic, Social and Cultural Rights art. 3, *adopted* Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3.

28. World Conference of the International Women's Year, G.A. Res. 3520, U.N. GAOR, 30th Sess., Supp. No. 34, at 95, U.N. Doc. A/10034 (1975).

29. For other international instruments that specifically refer to protecting women, see the Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135; the Convention on the Nationality of Married Women, *done* Feb. 20, 1957, 309 U.N.T.S. 65; and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *opened for signature* Dec. 10, 1962, 521 U.N.T.S. 231. For a first-hand account of the evolution of the international community's approach to women's rights as human rights and the United States' role therein, see ARVONNE FRASER, SHE'S NO

then, was hailed as "provid[ing] in a single document the current international consensus on a diverse set of topics."[30] However, even a generation ago there was concern about whether CEDAW alone was enough to have any practical impact on the quality of women's lives.[31] Implementation of CEDAW by states parties has long been an area of concern.[32]

One forerunner to CEDAW was the Declaration on the Elimination of Discrimination Against Women,[33] adopted by the United Nations in 1967.[34] The Declaration has been described as a "statement of moral and political intent"[35] and, unlike a treaty, it had no legal effect.[36] The 1960s and 1970s saw an increased awareness of the need for human rights treaties, most of which expressly provided that men and women are equal.[37] The United Nations adopted CEDAW on December 18, 1979, and it entered into force on September 3, 1981.[38] One hundred eighty-six

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LADY: POLITICS, FAMILY, AND INTERNATIONAL FEMINISM (Lori Sturdevant ed., 2007).

30. NATALIE KAUFMAN HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN 46 (1983). The United States has not ratified CEDAW yet, suggesting that it does not join in any such consensus.

31. *See id.* at 47.

32. *Id.* Writing more than twenty-five years ago, Professor Hevener noted that "[t]he next crucial step is the further development of strategies for the implementation of the rules and principles set forth in [CEDAW]." She proposed three steps toward implementation: first, she urged more states to ratify CEDAW; second, she recommended that more attention be paid to the World Plan of Action and the Copenhagen Programme of Action, "two non-treaty instruments which are highly significant policy statements;" and third, "although a great deal can be done at the national level, regional and global intergovernmental and nongovernmental groups, have a continuing and essential role to play in stimulating and supporting national action as well as implementing within their agencies and programs the proposals and objectives presented in these instruments." *Id.* at 47–48.

33. Declaration on the Elimination of Discrimination Against Women, G.A. Res. 48/104, U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

34. Short History, *supra* note 22.

35. *Id.*

36. *Id.*

37. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 25, pmbl. (stating the United Nations "reaffirm[s] . . . the equal rights of men and women . . ."); International Covenant on Economic, Social and Cultural Rights, *supra* note 27, art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."); International Covenant on Civil and Political Rights, *supra* note 26, art. 3 (mirroring the statement in the International Covenant on Economic, Social and Cultural Rights).

38. For an excellent overview of CEDAW, see Andrew Byrnes, *The Convention on the Elimination of All Forms of Discrimination Against Women*, *in* THE HUMAN RIGHTS OF WOMEN: INTERNATIONAL INSTRUMENTS AND AFRICAN EXPERIENCES, *supra* note 20, at 119, 119–20. In this piece, Byrnes argues:

> Although there had been many statements in international instruments promising equality and non-discrimination on the basis of sex – some in

countries have ratified or acceded[39] to it,[40] which is more than ninety-five percent of the members of the United Nations.[41] The remaining non-states parties are currently limited to Iran,

> binding instruments, others in non-binding declarations – there was no comprehensive and detailed charter of equality for women under international law. . . .
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> . . . .
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> The Convention can be viewed from a number of perspectives. It is a political manifesto, clearly declaring the right of women to equality and non-discrimination; it is also an international legal instrument (a treaty), as well as providing a framework or point of reference for policy-making, lobbying and social activism.

Id.

39. Ratification is the formal process by which a "legislature confirms the government's action in signing a treaty" and the government may "become bound by the agreement." DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 274 (3d ed. 2003). Accession is the "process of becoming a party to, or legally bound by, a treaty without formal action." *Id.* at 3.

40. United Nations, United Nations Treaty Collection: Convention on the Elimination of All Forms of Discrimination Against Women, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Nov. 28, 2009) [hereinafter UNTC: CEDAW]. The following countries are states parties to CEDAW as of this writing: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia & Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan A. Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts & Nevis, Saint Lucia, St. Vincent & the Grenadines, Samoa, San Marino, Sao Tome & Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The Former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain & Northern Ireland, United Republic of Tanzania, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Zambia, and Zimbabwe. *Id.*

41. Rebecca L. Hillock, *Establishing the Rights of Women Globally: Has the United Nations Convention on the Elimination of All Forms of Discrimination Against Women Made a Difference?*, 12 TULSA J. COMP. & INT'L L. 481, 483 (2005).

Somalia, Sudan, the United States, and very few others.[42]

CEDAW "calls for Parties to eliminate discrimination against women in all areas of life, including health care, education, employment, domestic relations, law, commercial transactions, and political participation."[43] Discrimination is defined to encompass every distinction made on the basis of sex that would interfere with women's rights to equality with men in any area of life.[44]

The substantive terms of the treaty are contained in its first sixteen articles.[45] In addition to defining prohibited

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42. *Compare* UNTC: CEDAW, *supra* note 40 (listing states parties to CEDAW), *with* United Nations Member States, http://www.un.org/en/members/index.shtml (last visited Nov. 28, 2009) (listing United Nations member states). The remaining U.N. members that have not yet ratified CEDAW are Nauru, Palau, and Tonga. *Id.*

43. LUISA BLANCHFIELD, THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): CONGRESSIONAL ISSUES, at summary (2008).

44. CEDAW, *supra* note 1, art. 1. The full definition of discrimination is as follows:

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

Id.

45. Articles 17 through 30 establish the Committee and set forth the administrative and procedural mechanisms for CEDAW itself. *See* CEDAW *supra* note 1, art. 17. *See infra* notes 64–69 and accompanying text (discussing the Committee's composition and functions). Article 17 provides that the Committee consists of "twenty-three experts of high moral standing and competence in the field covered by the Convention." CEDAW *supra* note 1, art. 17. Each state party may nominate one of its nationals, and the selection is made by secret vote among states parties. *Id.* Article 18 requires each state party to prepare and submit to the Committee a report on its efforts at compliance with CEDAW within one year after ratification of or accession to the Convention; after the inaugural year, reports are due every four years. *See id.*, art. 18. Article 19 permits the Committee to set its own procedures and elect its own officers, and Article 20 describes when and where the Committee should normally meet (every two years at the U.N. headquarters). *See id.* arts. 19–20. Article 21 requires the Committee, through the Economic and Social Council, to report annually to the General Assembly, and Article 22 permits the Committee to request reports from specialized agencies whose work overlaps with the subject of CEDAW. *See id.* arts. 21–22. Article 23 is significant in that it clearly states that any state party may make provisions that provide more protections for equality between men and women than are provided in CEDAW, and that such enhanced protections will in no way be seen to conflict with CEDAW. *See id.* art. 23. Article 24 requires all states parties to take every domestic measure necessary to fulfill their obligations under CEDAW. *See id.* art. 24. Articles 25 through 30 address the details of opening CEDAW for signature, assigning the depository for CEDAW, designating the Secretary General as the recipient of requests to revise CEDAW, establishing the dates of entry into force for CEDAW, addressing the method for resolving disputes about CEDAW among states parties, and identifying the languages in which CEDAW is authenticated

discrimination, CEDAW provides that states parties must condemn that discrimination and agree to eliminate it by enacting and enforcing appropriate legislative and constitutional measures;[46] commits states parties to take similar measures to "ensure the full development and advancement of women;"[47] protects and permits affirmative measures taken to eliminate discrimination against women even if those measures involve temporary discrimination against men;[48] requires states parties to undertake the elimination of cultural, social, and political stereotyping of men and women while recognizing maternity as a legitimate social function;[49] and requires states parties to take measures to end trafficking in women as well as exploitation and prostitution of women.[50]

Part II of CEDAW provides that states parties must ensure women the right to vote and the right to fully participate in their countries' governments;[51] must ensure that women have an equal right to represent their country at the international level;[52] and must give women "equal rights with men to acquire, change, or retain their nationality" and that of their children.[53] Part III

(which is standard in any treaty implementation). *See id.* arts. 25–30.

46. CEDAW *supra* note 1, art. 3.

47. *Id.*

48. *Id.* art. 4. This provision is similar to affirmative action that is permissible in the United States to redress certain past patterns of discrimination.

49. *Id.* art. 5. Article 5 requires states parties to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and . . . 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 . . . ." *Id.* It also requires states parties to "ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children . . . ." *Id.*

50. *Id.* art. 6 (requiring states parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women").

51. *Id.* art. 7. ("States parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and . . . shall ensure to women, on equal terms with men, the right: [t]o vote . . . [t]o participate in the formulation of government policy and the implementation thereof . . . [and t]o participate in non-governmental organizations and associations concerned with the public and political life of the country.").

52. *Id.* art. 8 ("States parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.").

53. *Id.* art. 9(1) ("States Parties . . . shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.").

requires that women have rights equal to men in the areas of education,[54] employment,[55] and health care,[56] and that women be granted full participation in economic and social life (including the ability to obtain credit).[57] Particular forms of discrimination encountered by women in rural areas are also addressed in Part III.[58] Part IV of the treaty requires states parties to guarantee women rights equal to men in all areas of the law and of civil life,[59] and to "eliminate discrimination against women in all matters relating to marriage and family relations."[60]

Undoubtedly, CEDAW has had some beneficial impact

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54. *Id.* art. 10(a), (c), (d), (g) (stating that states parties shall "ensure, on a basis of equality of men and women" access to educational opportunities from pre-school through higher education, in rural as well as urban areas, the elimination of stereotypes, and equal access to scholarships and grants, continuing education, sports and physical fitness, and family planning information).

55. *Id.* art. 11(1)–(2) (stating that states parties are required to ensure "[t]he right to work as an inalienable right of all human beings" and are required to take measures "to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work").

56. *Id.* art. 12(1)–(2) (stating that states parties shall ensure "access to health care services, including those related to family planning" and guarantee services "in connexion [sic] with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation").

57. *Id.* art. 13(a)–(c) (stating that women should be guaranteed equal rights to "family benefits," to "bank loans, mortgages and other forms of financial credit," and "to participate in recreational activities, sports and all aspects of cultural life").

58. *Id.* art. 14(1)–(2) ("States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families . . . . States Parties shall . . . ensure . . . that [women] participate in and benefit from rural development . . . .").

59. *Id.* art. 15(1)–(2) ("States Parties shall accord to women equality with men before the law. . . . States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity."). Importantly, if somewhat incongruently, this article further provides that "States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile." *Id.* art. 15(4).

60. *Id.* art. 16(1)(b)–(h). Specifically, CEDAW provides that states parties shall ensure that women have the same rights as men to choose whether and to whom they will marry, as well as

> [t]he same rights and responsibilities during marriage and at its dissolution . . . [t]he same rights and responsibilities as parents . . . [t]he same rights to decide freely and responsibly on the number and spacing of their children . . . [t]he same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children . . . [t]he same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation [and t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Id.

around the globe. In one specific example, the South African Constitution utilized CEDAW to set the framework for reproductive health rights for women.[61] Within other states parties, CEDAW has been utilized to bring domestic actions to enforce women's rights to be free from discrimination.[62] It is indisputable that in some parts of the world, CEDAW has had, and continues to have, important beneficial impacts on the lives of women who previously had no right to be free from discrimination, and whose cultures, perhaps, did not previously consider such a right worth codifying.[63]

The Committee on the Elimination of Discrimination Against Women (Committee) was established under Article 17 of CEDAW "for the purpose of considering the progress made in implementation of [CEDAW] . . . ."[64] The Committee was thus charged with monitoring states parties' compliance, or progress toward compliance, with CEDAW's requirements.[65] Every state

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61. *See* S. AFR. CONST. 1996 ch. 2, § 27 (guaranteeing a right to reproductive health care services); *see also* Charles Ngwena, *An Appraisal of Abortion Laws in Southern Africa from a Reproductive Health Rights Perspective*, 32 J.L. MED. & ETHICS 708, 715–16 (2004) ("[I]n Section 27, the [South African] Constitution acknowledges a right to health care services, including reproductive health services. . . . Section 27 implicitly impresses upon the state that the provision of abortion services is not a privilege but a right which imposes a corresponding duty on the state and that abortion services are as important as any services. . . . In this way, the South African Constitution has internalized the values and obligations that are expected of governments under article 12 of the [International Covenant on Economic, Social and Cultural Rights], article 12 of CEDAW and article 16 of the African Charter on Human and People's Rights . . . in respect of the right to health.").

62. Nora O'Connell & Ritu Sharma, *Treaty for the Rights of Women Deserves Full U.S. Support*, 10 HUM. RTS. BRIEF, Winter 2003, at 22, 22 ("In Turkey, CEDAW was used to rescind a government policy that forced female students to undergo virginity exams. In Tanzania, the High Court cited CEDAW in striking down a law that prevented women from inheriting clan land from their fathers. . . . In Colombia, courts have cited CEDAW in their rulings to provide legal recourse to female victims of domestic violence. . . . India's ratification of CEDAW was followed by an increase in girls' education."). These authors urge the United States to ratify CEDAW because "[t]he United States has much to offer as new democracies look for guidance on how to bring women's rights into the 21st century." *Id.*

63. It is probably also true, however, that in some states, particularly developed Western states, CEDAW has had no quantifiable impact. *See* Minor, *supra* note 5, at 143 ("Thirteen years after entering into force, it is clear that the Convention has not brought about the revolutionary changes in women's rights that its provisions mandate.").

64. CEDAW, *supra* note 1, art. 17(1).

65. *See id.* arts. 18–21. The Committee has been accused of activism and its work was the subject of concern when the Senate Foreign Relations Committee last considerated CEDAW. *See, e.g.*, *2002 Hearing*, *supra* note 7, at 11–13 (statement of Rep. Jo Ann Davis) ("It is the work product of this implementing committee that I want to focus my testimony upon today . . . ."). The Committee's work has also

party has the right to nominate a representative for membership on the Committee.[66] States parties are required to submit reports on their implementation of CEDAW,[67] and the Committee reviews those reports.[68] For states parties, the reporting process is the only measure of their compliance with CEDAW.[69]

Like most treaties, CEDAW contains no provision whereby an individual or non-governmental organization (NGO) may bring a complaint for violation of the treaty.[70] In 1976, when CEDAW

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been criticized by Rebecca Hillock, who wrote that the Committee has put forth a "radical feminist agenda" and "has made it very clear . . . that where religious, traditional, or sacred norms clash with their [sic] radical feminist interpretation of the Convention, those norms will be targeted for reinterpretation and deletion by the countries who [sic] implement them." Hillock, *supra* note 41, at 503, 507–08. Whether, as Hillock argues, this "radical feminist agenda" justifies the United States' refusal to ratify CEDAW is not the subject of this Article. As Senator Barbara Boxer said, "the Committee cannot in any way force any government to change its laws or adopt the opinions that they [sic] are expressing. If we have to clarify that, we will. We will take care of that problem." *2002 Hearing*, *supra* note 7, at 7 (statement of Sen. Barbara Boxer).

66. CEDAW, *supra* note 1, art. 17(2) ("Each State Party may nominate one person from among its own nationals.").

67. *Id.* art. 18(1) (requiring states parties to submit reports on the measures they have adopted "to give effect to the provisions of the present Convention" for review by the Committee).

68. *Id.* art. 21(1) (stating that the Committee will review the reports and make "suggestions and general recommendations" for the states parties). Such a report and review procedure is not uncommon for human rights treaties, and the reports form the basis for much of Oona Hathaway's research on the human rights records of states parties. *See* Hathaway, *infra* note 157. While the Committee reports have no binding effect, they were the subject of much of the U.S. Senate's concerns about the effect ratification of CEDAW would have on U.S. sovereignty. *See, e.g.*, *2002 Hearing*, *supra* note 7, at 7 (statement of Sen. Barbara Boxer) ("I also understand there are concerns the CEDAW committee established by the treaty somehow interferes with the sovereignty of the United States.").

69. The lack of enforcement mechanism is a drawback that is typical of human rights treaties, and that lies at the heart of many frustrations with international human rights law in general. There are no repercussions in terms of money or power for noncompliance with human rights treaties. *See* Hathaway, *supra* note 17, at 1938. This lack of consequences can be seen in the list of 186 states parties to CEDAW. *See* UNTC: CEDAW, *supra* note 40. Many of the countries on that list have notoriously bad human rights records, particularly when it comes to women, yet they are all, unlike the United States, parties to CEDAW. *See* Hathaway, *supra* note 17, at 1938 (suggesting that ratification by non-democratic states may be associated with worse human rights practices).

70. *See* CEDAW, *supra* note 1. The very entities that are protected by human rights treaties, individual citizens, generally have no means by which to bring complaints about a lack of enforcement or implementation on the part of the states parties to the treaty. *Cf.* Tom Obokata, *Smuggling of Human Beings from a Human Rights Perspective: Obligation of Non-State and State Actors Under International Human Rights Law*, 17 INT'L J. REFUGEE L. 394, 403 (2005) ("The traditional view is that States are the bearers of obligations under international law. This derives from the idea that States are the subject of international law with direct rights and responsibilities.").

was in the drafting phase, some U.N. delegates proposed adding a complaints procedure.[71] Other delegates, however, argued successfully that such a complaints procedure was inappropriate in a women's treaty.[72] In 1993, the World Conference on Human Rights in Vienna "acknowledged the need for new procedures to strengthen implementation of women's human rights."[73] An Optional Protocol[74] was adopted by the United Nations in 1999, entered into force in 2000, and has so far been ratified by ninety-nine states parties.[75] The Optional Protocol is significant because of its creation of a process whereby individuals and groups, rather than only states parties, may lodge complaints of violations of CEDAW with the Committee.[76] Other articles of the Optional Protocol detail the manner in which complaints may be received by the Committee and provide for protection of the identities of individuals or groups that submit complaints.[77] The United

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71. *See* United Nations Division for the Advancement of Women, History of an Optional Protocol, http://www.un.org/womenwatch/daw/cedaw/protocol/history.htm (last visited Oct. 2, 2009).

72. *See id.* ("During the drafting of CEDAW, a complaints procedure was suggested .... Some delegates argued that complaints procedures were needed for 'serious international crimes' such as apartheid and racial discrimination, rather than discrimination against women.").

73. *Id.*

74. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women art. 2, *opened for signature* Dec. 10, 1999, 2131 U.N.T.S. 83 [hereinafter Optional Protocol].

75. United Nations, United Nations Treaty Collection: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-8-b&chapter=4&lang=en (last visited Nov. 30, 2009) [hereinafter UNTC: Optional Protocol]. For an in-depth examination of the Optional Protocol, see Bal Sokhi-Bulley, *The Optional Protocol to CEDAW: First Steps*, 6 HUM. RTS. L. REV. 143, 143 (2006) (arguing that "the primary purpose of the [Optional Protocol] is to attain improved *enforcement* of women's rights." (emphasis added)).

76. *See* Optional Protocol, *supra* note 74, art. 2 (explaining that complaints are referred to as "communications" and they may be submitted to the Committee "by or on behalf of individuals or groups of individuals").

77. *Id.* arts. 2–3, 6. It is worth noting that no reservations are permitted to the Optional Protocol, unlike the treaty itself whose reservation procedure has been the subject of criticism. *See* Cook, *supra* note 8, at 643–44 (pointing out that "[t]he rate and extent of ratification are tempered, however, by recognition of the acute problem of substantive reservations. The volume of reservations brings this Convention among the most heavily reserved of international human rights conventions, with at least 23 of 100 states parties making a total of 88 substantive reservations."). Professor Cook noted, nearly twenty years ago:

> Legal assessment of reservations to the Women's Convention is currently based on a body of law permeated by uncertainties and varied, sometimes inconsistent, theoretical approaches situated at different points on the spectrum between aims of universal application of the Convention and of preservation of its integrity. Women continue to experience discrimination in the very areas that states parties to the Convention have committed

States, obviously, is not a party to the Optional Protocol because it is not a party to the treaty itself.[78]

The United States has a history of resisting ratification of human rights treaties in general.[79] The resistance to CEDAW is just one example.[80] For as long as there have been human rights treaties, the United States, and particularly the Senate, has balked at joining or committing to them.[81] At the heart of U.S. resistance to human rights treaties may be the notion of sovereignty and the all-encompassing supremacy of the U.S. Constitution, and its delineation of state and federal powers,[82] or

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> themselves to eliminate. Discrimination is particularly subversive of the Convention when states parties justify it by reference to reservations made under the regime of the Convention itself.

Id. at 707–08; *see also* Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT'L L. REV. 605, 613–19 (2002) (discussing CEDAW's reservation procedure).

78. *See* UNTC: Optional Protocol, *supra* note 75.

79. For example, the United States has not yet ratified the International Covenant on Economic, Social and Cultural Rights, one of the three pieces of the International Bill of Rights, despite the fact that it was signed by President Jimmy Carter in 1977. *See* United Nations, United Nations Treaty Collection: International Covenant on Economic, Social and Cultural Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Oct. 20, 2009) (showing the United States signed the treaty on October 5, 1977). The United States has also failed to ratify the Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3. *See* United Nations, United Nations Treaty Collection: Convention on the Rights of the Child, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Oct. 15, 2009). For all human rights treaties and their participants, see United Nations, United Nations Treaty Collection: Multilateral Treaties Deposited with the Secretary General, http://treaties.un.org/Pages/ParticipationStatus.aspx (last visited Oct. 3, 2009). *See also* NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 2 (1990) ("The major argument of this book is that current opposition to human rights treaties is a legacy of the 1950s.... Although the current political, social, legal, and economic environment differs significantly from that of the 1950s, the articulated opposition to human rights treaties in the United States Senate has changed very little.").

80. *See* KAUFMAN, *supra* note 79, at 2.

81. *See Proposing an Amendment to the Constitution of the United States Relative to the Making of Treaties and Executive Agreements: Hearings Before the S. Comm. on the Judiciary*, 82d Cong. 475 (1952) (statement of Sen. John W. Bricker) [hereinafter *Treaties Hearings*] ("My purpose in offering this resolution is to bury the so-called Covenant on Human Rights so deep that no one holding high public office will ever dare to attempt its resurrection."); *see also* Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard—Explanation, Example, and Avenues for Change*, 4 N.Y. CITY L. REV. 59, 68 (2001) (arguing that "[b]y failing to ratify many other human rights treaties, and by incorporating self-defeating reservations into those that we have ratified, the United States has not abandoned Senator Bricker's vision" of rendering international human rights treaties useless).

82. *See* U.S. CONST. arts. I–IV.

of the Declaration of Independence, with its guarantee of certain "unalienable" rights for "all Men."[83]

In 1951, Senator John Bricker vowed to "bury" even the possibility of the United States agreeing to any human rights treaty.[84] By 2000, Senator Jesse Helms was still vilifying the United Nations and touting U.S. sovereignty as superior to international law.[85] There appears to be a persistent fear within the United States that human rights treaties will weaken U.S. sovereignty, or somehow change the face of the country altogether. Indeed, human rights treaties have been demonized in the U.S. Senate as having the potential to change the face of the nation.[86]

One example of this deeply ingrained suspicion about U.S. involvement in international law can be seen in the following quote, which demonstrates a 1950s era perspective:

> By and through treaty law-making the federal government can be transformed into a completely socialistic and centralized state. It only requires that the present provisions of the Declaration on Human Rights be incorporated into a treaty . . . to change the relationship between the states and the federal government and to change even our Constitution and our form of government. . . . It is not an overstatement to say that the republic is threatened to its very foundations.[87]

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83. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

84. *Treaties Hearings, supra* note 81, at 475 (statement of Sen. John W. Bricker). Senator John Bricker represented Ohio in the U.S. Senate from 1947–59. Bricker, John, Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000820 (last visited Oct 3, 2009).

85. *See, e.g.*, Sean D. Murphy ed., *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 348, 351 (2000) ("[The American people] see the UN aspiring to establish itself as the central authority of a new international order of global laws and global governance." (quoting Senator Helms)). The divisiveness of Senator Helms' positions on many issues can be seen in the fact that in June 2009, a full year after his death, "[t]wenty-six North Carolina legislators sat out a vote . . . honoring the late U.S. Sen. Jesse Helms, showing that the Republican remains a polarizing figure a year after his death. . . . Most of the holdouts were black Democrats." Emery P. Dalesio, *26 NC Lawmakers Sit Out of Helms Resolution Vote*, ABC NEWS, June 9, 2009, http://abcnews.go.com/US/wireStory?id=7798698. Senator Jesse Helms represented North Carolina in the Senate from 1973–2003. Helms, Jesse, Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000463 (last visited Oct. 14, 2009).

86. *See, e.g.*, KAUFMAN, *supra* note 79, at 116 (describing the range of arguments raised in Senate hearings against human rights treaties as "abrogation of states' rights by the federal government, . . . advancement of communism[,] . . . deterioration of U.S. sovereignty, moving toward world government[,] and weakening of the U.S. constitutional system, including constitutional protection of individual rights").

87. *Id.* at 9 (quoting FRANK HOLMAN, TREATY LAW-MAKING (1950)) (detailing the history of Frank Holman's "crusade" to keep the United States out of the

Whether concerns about federalism are legitimate or are instead a political agenda in disguise[88] may never be known, but the fact remains that the U.S. Senate is reluctant to grant its advice and consent to human rights treaties in general, and to CEDAW in particular.[89]

Sovereignty, of course, lies at the heart of every international agreement.[90] Why states comply with treaties when there is no enforcement mechanism is the subject of much debate.[91] In very general terms, states do what works in their own best interests. Machiavelli observed that "a prudent ruler cannot keep his word, nor should he, where such fidelity would damage him, and when the reasons that made him promise are no longer relevant."[92] In the case of human rights treaties, the reasons for a

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international human rights arena completely). Raising the possibility of socialism is still a political "kiss of death," as the Clintons learned in relation to health care in the 1990s. *Cf.* Heidi Przybyla, *Socialism Threat Has Long History for Health-Care Overhaul Foes*, BLOOMBERG.COM, Sept. 14, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayd_OJxPgHII ("In 1993, the health-insurance industry tried to scuttle President Bill Clinton's proposed overhaul by funding ads featuring a fictional couple who decried a 'government takeover' of health care."). For a comprehensive analysis of federalism concerns, see Margaret E. McGuinness, *Foreword*, 73 MO. L. REV. 921 (2008). "To the minds of Holman and Bricker, the sweeping precedent set by [the Supreme Court in *Missouri v. Holland*, 252 U.S. 416 (1920)] would permit international legal commitments to blanket the sky – not unlike the migration of the passenger pigeons of yore – blotting out the police powers of the states and overshadowing the limitations on congressional and presidential power." *Id.* at 925.

88. Federalism concerns in this context bring to mind the old rallying cry of states' rights as a justification for institutionalizing and permitting racial segregation in the United States. *See* KAUFMAN, *supra* note 79, at 185 ("A second persistent threat that opponents to the Genocide Convention posed was its effect on states' rights. In the 1950s this argument was developed as a defense of racial segregation and state jurisdiction over acts of racial violence. Fears were expressed that the federal government would, through the Genocide Convention, legitimize intervention in race riots, lynchings, and other violence against blacks.").

89. *See 2002 Hearing*, *supra* note 7, at 7 (addressing concerns regarding ratification of CEDAW); KAUFMAN, *supra* note 79, at 29–36 (discussing the history of Congress' opposition to human rights treaties).

90. HENKIN, *supra* note 14, at 89 n.* ("I know of no satisfying jurisprudential explanation as to why a nation cannot totally reject international law. The most plausible reason is rooted in 'consensus': ultimately, all nations desire 'the system,' whatever they may think of it. . . . And, in fact, no modern nation has rejected 'the system,' and governments (if not academics) have stopped asking why they are subject to international law.").

91. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 3 (1995) (suggesting a "managerial model" as a theory to explain why nations comply, relying "primarily on a cooperative, problem-solving approach instead of a coercive one"). As the authors acknowledge, a complete lack of sanctions is problematic: "It is less easy to give a succinct and satisfying description of this alternative to sanctions," and thus most of their book is "devoted to the attempt." *Id.* at 3.

92. NICCOLÒ MACHIAVELLI, THE PRINCE 61–62 (Quentin Skinner & Russell Prince eds., Cambridge Univ. Press 1988) (1532).

nation to commit are less clear than in, for example, a trade agreement wherein the states parties stand to gain or lose money depending on their compliance. Human rights treaties are distinguishable from other types of treaties because the benefits of the treaty flow to individual citizens rather than to the state itself, leaving the state no tangible or quantifiable incentive to comply.[93] But compliance, to the extent that it is an issue at all in human rights treaties, is only an issue after a state has ratified a treaty. At this point, because ratification is not in the foreseeable future, compliance with CEDAW is a non-issue for the United States.

II. Is Ratification a Possibility?

The U.S. Constitution provides that the President may make only those treaties which are consented to by two-thirds of the Senate.[94] Thus, President Carter's signature of CEDAW in 1980 has had no legal effect whatsoever because the Senate has yet to consent.[95] Similarly, the RUDs proposed by President Clinton and subsequently approved by various Senate Committees on Foreign Relations, in 1994 and again in 2002, are of no practical or legal effect.[96] The RUDs are, however, indicative of the United States' reasons for declining to ratify CEDAW.

President Clinton proposed the RUDs in his efforts to move CEDAW through the Senate.[97] In their broadest sense, the United States' reservations would render CEDAW inapplicable in the United States (if it were ever ratified) insofar as it contains any provisions that might conflict with, or in any way affect, domestic

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93. Economic sanctions, for example, are not available for a breach of a human rights treaty, as they might be for a breach of a trade agreement. *See* Riddle, *supra* note 77, at 624 ("Human rights treaties are different from contract-like treaties because there are no direct advantages or disadvantages to the state parties.").

94. U.S. CONST. art. II, § 2, cl. 2.

95. Presidents are free to sign treaties; however, they will not enter into force until they are ratified by the Senate. *See* Harfeld, *supra* note 81, at 75 ("States express their support for the principles of a treaty by signing the agreement, but they only become domestically liable through ratification, which communicates a state's commitment to provide for, and protect those rights within their own legal system.").

96. *See id.* For a discussion of the RUDs, see *Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before S. Comm. on Foreign Relations*, 103d Cong. 5–15 (1994) [hereinafter *1994 Hearing*] (statement of Jamison S. Borek, Deputy Legal Advisor, U.S. Dep't of State) (detailing the legal effects of the Clinton RUDs).

97. *See* Benshoof, *supra* note 6, at 4 ("The Senate Committee on Foreign Relations in 1994 and again in 2002 appended some eleven 'reservations, understandings and declarations' (RUDs) to the original clean CEDAW signed by President Carter in 1980.").

law.[98] Sovereignty has long been the banner under which objections to human rights treaties have ridden.[99] It has been said that the proposed RUDs "substitute[] a narrow definition which would preclude women from using CEDAW to challenge laws,"[100] indicating that they are designed to make CEDAW less objectionable in the United States.[101]

Specifically, the RUDs address several areas of concern. The first reservation explicitly gives existing U.S. law priority over CEDAW in that it proposes that the "Constitution and laws of the United States establish extensive protections against discrimination. . . . However, individual privacy and freedom from governmental interference in private conduct are also recognized as among the fundamental values of our free and democratic society."[102] Therefore, the proposed reservation specifies 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."[103] In response to Article 7(b) of CEDAW, regarding performance of public functions,

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98. These reservations reflect a common fear "that the Convention infringes upon the sovereignty of the United States and seeks to implement a radical agenda that would undermine 'traditional' moral and social values, including marriage, motherhood, family structure, and even Mother's Day." United Nations Association of the United States of America, Convention on the Elimination of All Forms of Discrimination Against Women, http://www.unausa.org/CEDAW (last visited Oct. 12, 2009). The United States generally attaches RUDs to human rights treaties that make clear the nation's refusal to be bound by treaty terms that are inconsistent with domestic law, or terms that provide either more or less protection than domestic law. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (observing that the United States attaches RUDs based on the principles that "[t]he United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution. . . . [Additionally,] adherence to an international human rights treaty should not effect—or promise—change in existing U.S. law or practice.").

99. *See* Minor, *supra* note 5, at 142 n.43 ("A state sacrifices a degree of autonomy by ratifying any international agreement. However, human rights treaties do not offer a commercial advantage to states that would make this sacrifice worthwhile." (paraphrasing Cook, *supra* note 8, at 650)); *see also* PATRICK NERHOT, LAW, WRITING, MEANING: AN ESSAY IN LEGAL HERMENEUTICS 30 (Ian Fraser trans., 1992) ("Justice . . . starts to operate as a power external to the parties at dispute, and to belong to the sovereign.").

100. Benshoof, *supra* note 6, at 4.

101. For an outline of the U.S. position, see *1994 Hearing*, *supra* note 96, at 5–14. For a full discussion of the relative merits of the reservation process itself, see Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307 (2006). Again, it is worth noting that the Optional Protocol to CEDAW permits no reservations. *See* Optional Protocol, *supra* note 74, art. 17.

102. *1994 Hearing*, *supra* note 96, at 9.

103. *Id.*

the proposed reservation specifies that "the United States does not accept an obligation under the Convention to assign women to all military units and positions which may require engagement in direct combat."[104]

Article 11 of CEDAW addresses economic equality.[105] The United States has proposed a reservation to that article which states that because equal pay for equal work is already protected by U.S. law, "the United States does not accept any obligation under this Convention to enact legislation establishing the doctrine of comparable worth as that term is understood in U.S. practice."[106] A similar reservation is proposed to that section of Article 11 that addresses maternity leave, to the effect that "the United States does not accept an obligation under article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances."[107]

In response to Articles 1 through 30 of CEDAW, the U.S. government articulated its understanding that it would ensure fulfillment of obligations under the treaty to the extent within its jurisdiction,[108] and that the United States would not be subject to the jurisdiction of the International Court of Justice.[109] In response to Articles 5, 7, 8, and 13, there is an understanding that freedoms of speech, expression, and association are already protected in the United States, so no further action need be taken under CEDAW.[110] In response to Article 12, there is an understanding that the United States will not allow CEDAW to dictate when or how free health-care services are to be provided in relation to "family planning, pregnancy, confinement and the post-natal period."[111]

In what has been called "the most deceptive RUD, unopposed by CEDAW supporters,"[112] the United States addresses the

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104. *Id.* at 10.

105. *See* CEDAW, *supra* note 1, art. 11.

106. *1994 Hearing*, *supra* note 96, at 10.

107. *Id.* at 11.

108. *Id.*

109. *Id.* at 13.

110. *Id.* at 12.

111. *Id.*

112. Benshoof, *supra* note 6, at 4. This reservation is referred to as "deceptive" because of its inclusion of the term "as a method of family planning," which is how virtually all abortions are characterized in the United States. *Id.* Why CEDAW supporters in the Senate have not objected to the inclusion of this term is a mystery. Perhaps abortion is simply too hot a topic for any elected politician to comfortably handle.

possibility that CEDAW might at some point be used as the basis for a right to abortion. However, "[n]othing in the Convention . . . requires states parties to guarantee access to abortion. This Convention is 'abortion neutral.'"[113]

The RUDs, particularly the one that addresses women's reproductive freedom, have been characterized as "gutting" CEDAW to make it more palatable to the U.S. Senate, where even CEDAW's supporters have accepted the RUDs.[114] The argument is that in their efforts to move CEDAW forward, the U.S. Senate and executive branch proposed RUDs that effectively leave the U.S. government in complete control of how the treaty is interpreted and implemented in this country if it is ever ratified. Whether motivated by concerns about sovereignty or about political expediency, it is difficult to see these RUDs as doing anything but weakening CEDAW's impact if and when it is ever ratified in the United States.

The U.S. Constitution is unambiguous in stating that treaties are the supreme law of the land.[115] In the United States, no one branch of government alone has the power to enter into treaties.[116] Enabling legislation is the only clear indication that both the executive and the legislative branches agree that the United States will be bound by treaty obligations.[117] Without enabling (or implementing) legislation, the "treaty" is nothing more than an indication by one branch of the government (the executive) that the United States intends to be bound by the document's provisions. There is no enforceable agreement without signature by the President, advice and consent by the Senate, and, in the

113. *1994 Hearing*, *supra* note 96, at 13.

114. Benshoof, *supra* note 6, at 4. ("Most *supporters* of ratification of CEDAW, including [then] Vice President Elect Joe Biden, state that ratification of CEDAW would not impose any new burden on the government. This is only true because these Democrats are supporting the seriously politically compromised gutted CEDAW; which if ratified is a step backward in developing equality law, not forward." (internal footnote omitted)).

115. U.S. CONST. art. VI, cl. 2.

116. Foster v. Neilson, 27 U.S. 253, 314 (1829), *overruled in part on other grounds by* United States v. Percheman, 32 U.S. 51 (1833) ("Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.").

117. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 111(3) (1987); VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN THE UNITED STATES § 10:9 (2d ed. 2009).

case of a non-self-executing treaty[118] such as CEDAW, enabling legislation.

In 2002, the Senate Foreign Relations Committee met and reported on the ratification of CEDAW.[119] Then-Senator Joseph Biden chaired the committee and, after recounting the many delays in moving forward with CEDAW, pointed out that "[t]ime is a-wasting."[120] Senator Biden reiterated proponents' usual assurances that CEDAW would "impose a minimal burden" on the United States because "[t]he U.S. Constitution and existing Federal laws will satisfy the obligations of the treaty."[121] Senator Barbara Boxer, to whom Senator Biden relinquished control of the hearing in deference to her expertise on the treaty, agreed with Senator Biden that "the ratification would not require the United States to change or adopt any laws."[122] However, the ensuing remarks, both in favor of and in opposition to ratification of CEDAW, reveal the likelihood that no one can predict with any certainty how CEDAW would actually be interpreted, applied, or enforced in the United States. For example, there still seems to be an ongoing debate over whether ratification would mean the end of Mother's Day as discriminatory.[123]

However, even if the Senate were to somehow reach consensus on the treaty and grant its consent, CEDAW would only become effective in the United States upon passage of enabling legislation.[124] It is the enabling legislation, rather than CEDAW,

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118. *See infra* notes 143–148 and accompanying text for a discussion of non-self-executing treaties.

119. *2002 Hearing*, *supra* note 7, at 1.

120. *Id.* at 3 (statement of Sen. Joseph R. Biden, Jr.). Note that a full seven years have passed since Senator Biden made this statement. Time continues to be "a-wasting."

121. *Id.* Senator Biden further said, "[t]he United States will need to enter a handful of reservations to a treaty where it is inconsistent with our Constitution or current Federal law, as we do with nearly every treaty, but the United States will not need to enact any new laws to be in compliance with this treaty." *Id.* at 3–4. It is not clear whether Senator Biden was aware that reservations had already been proposed by President Clinton.

122. *Id.* at 7 (statement of Sen. Barbara Boxer).

123. *See id.* at 12–13. Mother's Day may not be as relevant as reproductive rights, but the threat of outlawing it was undoubtedly designed to appeal to Americans' traditional values. Even Senator Boxer, perhaps the Senate's strongest advocate for ratification of CEDAW, found it necessary to say, on the record, "as a mother and a grandmother and a United States Senator from the largest state, I love Mother's Day, and this committee is not going to change my view on that . . . ." *Id.* at 13. With women's equality on the line, it seems somewhat alarming that the Foreign Relations Committee found it appropriate to discuss the merits of Mother's Day.

124. *See* Minor, *supra* note 5, at 142.

that would confer upon individual citizens the right to enforce the treaty's terms in the United States.[125] Given the historical reluctance on the part of the Senate to even grant consent to ratification of human rights treaties, compounded by its failure to enact subsequent enabling legislation, it seems safe to say that CEDAW is not likely to become a part of U.S. law any time soon.[126]

It seems clear that the United States, despite having moved forward in so many ways, is reluctant to proceed with CEDAW.[127] Several reasons may underlie this reluctance, or hesitance, to move forward in step with most other nations in the world on this treaty. It may be sovereignty or it may be the agenda of those who, like the late Senator Helms, see this treaty as capable of forcing unacceptable changes onto the United States.[128] The reasons for the reluctance, however, may be less important than the effect of it. It seems safe to say that until the United States internalizes the anti-discrimination norms exemplified in CEDAW, any attempts at ratification are misguided.

Some scholars have suggested ways that CEDAW might be used to improve women's positions, both domestically and internationally.[129] Certainly it has provided a progressive framework for constitutional protections for women's rights to equality in those countries that have incorporated CEDAW's

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125. *Id.* This issue is relevant because even with the Optional Protocol, individual citizens are not authorized by CEDAW to file domestic lawsuits based on alleged discrimination. *Cf. supra* notes 74–76 and accompanying text.

126. It is worth noting along these lines that the United States proved utterly incapable of amending the Constitution to contain an Equal Rights Amendment for women. The Equal Rights Amendment, http://www.equalrightsamendment.org/ (last visited Nov. 30, 2009).

127. Minor, *supra* note 5, at 137.

128. *See supra* note 81–86 and accompanying text.

129. *See, e.g.*, Lisa A. Crooms, *Families, Fatherlessness, and Women's Human Rights: An Analysis of the Clinton Administration's Public Housing Policy as a Violation of the Convention on the Elimination of All Forms of Discrimination Against Women*, 36 BRANDEIS J. FAM. L. 1, 5 (1997–98) (proposing that public housing benefits for poor people in the United States have created a phenomenon of fatherlessness that would be in violation of CEDAW should the United States ever ratify the treaty); *see also* Vedna Jivan & Christine Forster, *What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism Through Women's Use of CEDAW*, 9 SING. Y.B. INT'L L. 103, 123 (2005) ("[W]omen's use of domestic litigation strategies, enhanced by the use of CEDAW and both facilitated and supported by the women's movement and N.G.Os, has a crucial role to play in removing the cultural practices that discriminate against women."); O'Connell & Sharma, *supra* note 62, at 22 (explaining how "CEDAW has made a tangible impact on women's lives in countries where it has been ratified" and listing Turkey, Tanzania, Colombia, and India as examples of states parties in which CEDAW has been utilized to improve women's lives).

objects and purposes into their constitutions.[130] But how domestic courts may utilize international agreements represents "the classic problem of effective human rights treaty implementation."[131]

It is by no means clear that ratification of CEDAW would immediately or automatically produce a change in circumstances for women in the United States. Look, for example, at the basic need for childcare: working mothers throughout the United States need safe, affordable childcare.[132] Nothing in U.S. law or the Constitution recognizes this need; there is no right to childcare in this country.[133] Now, assume that the current administration makes CEDAW a priority, obtaining the advice and consent of the Senate, and introducing implementing legislation. It is almost impossible to envision that enabling or implementing legislation. If, at best, it directs domestic courts to honor the United States' international obligations under CEDAW (as President George W. Bush declared in an executive memorandum regarding the International Court of Justice's jurisdiction in relation to the Vienna Convention on Consular Relations),[134] U.S. women might petition domestic courts to recognize a right to childcare.[135] It is not clear, however, where U.S. courts could look for guidance in fashioning such a right. There is nothing in our legal or social culture to serve as precedent. Indeed, our Constitution is generally one of negative rather than positive rights.[136] A negative

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130. Jivan & Forster, *supra* note 129, at 109–10.

131. *Id.* at 103.

132. For an excellent discussion of the struggle for childcare in this country, see Martha F. Davis & Roslyn Powell, *The International Convention on the Rights of the Child: A Catalyst for Innovative Childcare Policies*, 25 HUM. RTS. Q. 689, 690 (2003), pointing out at the outset that "despite long years of attention to this issue, efforts to identify a legal source for a broad right to childcare have been largely unsuccessful—or at least, have lacked momentum."

133. *Id.* at 705.

134. *See* Medellín v. Texas, 128 S. Ct. 1346, 1355–56 (2008) ("[N]ot all international law obligations automatically constitute binding federal law enforceable in United States courts.").

135. CEDAW does not specifically guarantee childcare, but its guarantees of equal rights in the areas of employment and education would certainly lend themselves to interpretation as grounds for arguing that a right to childcare is implicit within CEDAW. *See* CEDAW, *supra* note 1, arts. 10–11.

136. For example, pursuant to the U.S. Constitution, citizens are guaranteed the right to be free from warrantless searches of their homes. *See* U.S. CONST. amend IV. The guarantee is expressed in terms of what the government may not do, rather than in terms of what the government must do. *See id.* CEDAW itself may be framed in terms of positive rights, such as the article protecting women's right to reproductive freedom, but the United States' RUDs are framed in negative terms, specifically, "[n]othing in the Convention . . . requires states parties to guarantee access to abortion." *1994 Hearing*, *supra* note 96, at 13. Perhaps the United States, because of its constitutional framework, is uncomfortable with the

right in this context might be one that would "require government to abstain from denigrating (rather than requiring governments to intervene on behalf of) human dignity."[137] From the U.S. Constitution to modern labor laws, our system is designed to require that government not act, rather than that it act.[138] The United States lacks a framework for finding and enforcing an affirmative right to childcare. Ratification of CEDAW is not likely to change these structural characteristics of our system.

Similarly, if CEDAW is ratified with the current RUDs, women's reproductive rights would clearly be unchanged in the United States. The RUDs specifically ensure that nothing in the treaty may be construed to provide any right to an abortion.[139] Reproductive rights remain an issue for women in the United States, even more than thirty-five years after *Roe v. Wade*.[140] Ratification of CEDAW with the existing RUDs would do nothing to change that situation. Conversely, ratification and full implementation of CEDAW, absent the current RUDs, "would require a wholesale shift in abortion jurisprudence from privacy analysis to an equality analysis and the resulting increased scrutiny of restrictions on access to abortion through an equality lens."[141] The treaty has not moved toward ratification, even with the RUDs in place to weaken (if not "gut") its impact. Ratification of CEDAW without the RUDs does not appear to be within the realm of possibility and is only being suggested by a very few scholars.[142]

To further complicate any meaningful progress on CEDAW, human rights treaties have long been considered to be non-self-

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positive rights framework of CEDAW. For an excellent discussion of how constitutions might be framed in positive terms, see Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 TUL. J. INT'L & COMP. L. 49 (2007).

137. Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the "International Bill of Rights,"* 16 IND. J. GLOBAL LEGAL STUD. 437, 440 (2009).

138. See generally the works of John Locke, John Stuart Mill, and John Rawls for in-depth discussion of the origins and relative merits of positive versus negative rights. *See also* RONALD DWORKIN, LAW'S EMPIRE (1986) (discussing theories of legal rights).

139. *See 2002 Hearing*, *supra* note 7, at 25 (statement of Rep. Carolyn B. Maloney) ("The CEDAW treaty has been certified as abortion-neutral by the State Department; Senator Helms led the way in making this explicit back in 1994, adding a formal understanding to the treaty that notes it does not guarantee any right to abortion.").

140. 410 U.S. 113 (1973).

141. Benshoof, *supra* note 6, at 3.

142. *See, e.g.*, *id.* ("[T]his paper focuses on the impact and importance of implementation of a clean, reservation-free CEDAW . . . .").

executing.[143] CEDAW in particular must be viewed in this manner because nothing in the terms of the treaty itself provides otherwise. "'Courts in the United States are bound to give effect to . . . international agreements of the United States' unless the agreement is non-self-executing."[144] Thus, there is every reason to believe that implementing or enabling legislation will be needed before CEDAW could have any effect, even if it is ratified by the United States.

Implementing legislation was at the heart of a recent Supreme Court decision, *Medellín v. Texas*.[145] Leading up to *Medellín*, the International Court of Justice decided that the United States violated the rights of Mexican nationals by failing to inform them of their rights under the Vienna Convention.[146] Chief Justice John Roberts, at least, made it clear that he views with suspicion any treaty that purports to be self-executing (and probably most that do not).[147] Writing for the majority, the Chief Justice reiterated that even though treaties "may comprise international commitments . . . they are not domestic law unless

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143. *See* Henkin, *supra* note 98, at 346 ("The United States has been declaring the human rights agreements it has ratified to be non-self-executing."); *see also* KAUFMAN, *supra* note 79, at 114 ("[S]elf-executing treaties need no implementing legislation to be effective and can be cited and applied by domestic courts."). Human rights treaties have never been so treated by U.S. courts. *See* Minor, *supra* note 5, at 142 (stating that courts have "almost uniformly" held "that human rights clauses are non-self-executing").

144. Ku, *supra* note 16, at 613 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 111(3) (1987)). Conversely, then, courts are *not* bound to give effect to treaties that are non-self-executing unless implementing legislation has been enacted.

145. 128 S. Ct. 1346 (2008).

146. *Id.* at 1352. The Vienna Convention right in question was Medellín's right to contact the Mexican consulate to inform it of his detention after he was arrested for murdering a girl in Texas. *Id.* at 1354.

147. *Id.* at 1358. At his confirmation hearings, Justice Roberts said "looking at foreign law for support [of an interpretation of the U.S. Constitution] is like looking out over a crowd and picking out your friends. You can find them, they're there. . . . I think that's a misuse of precedent, not a correct use of precedent." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005)). Justice Alito, at his confirmation hearings, stated:

> I don't think that it's appropriate or useful to look to foreign law in interpreting the provisions of our Constitution. I think the Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world. . . . The Framers did not want Americans to have the rights of people in . . . Europe . . . . They wanted them to have the rights of Americans . . . .

Confirmation Hearings on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 471 (2006). These are not the statements of Justices who will look favorably on enforcing international law.

Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."[148]

CEDAW's terms indicate that it is not self-executing,[149] so any analysis must assume that, like other human rights treaties, it is not. *Medellín* supports the notion that it takes a very clear statement of intent before a treaty will be considered self-executing, and that enabling or implementing legislation will be required before any U.S. court will consider CEDAW enforceable in this country.[150] But again, it is almost impossible to imagine what any implementing legislation might look like regarding CEDAW, especially given all of its current RUDs.[151] All of these concerns make it difficult to predict what a domestic court might be able to do to enforce the terms of the treaty, and thus difficult to predict what benefit the treaty might actually confer on women in the United States.

III. Is CEDAW Necessary or Desirable?

Because international law does not lend itself easily to enforcement, it is not always possible to determine whether, let alone why, states abide by it. Adherence to international law can be defined as "behavior as to which there is—on the part of the actor, the victim, and others—a sense of obligation, and a sense of violation when it fails."[152] Note, however, that "[l]aw is not an end in itself: even in the most enlightened domestic society it is a means—to order, stability, liberty, security, justice, welfare."[153] Passage of CEDAW should be seen not as the end, but as a means toward internalization of the its goal of elimination of all forms of discrimination against women.[154] Without internalization of these norms, ratification will be hollow at best and, at worst, will enable the United States to sit back and maintain the discriminatory status quo.[155] "In international society . . . law observance will

148. *Medellín*, 128 S. Ct. at 1356 (omission in original) (quoting Igartua–De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005)).

149. CEDAW, *supra* note 1, art. 2(f).

150. *Medellín*, 128 S. Ct. at 1356.

151. *See supra* notes 102–114 and accompanying text.

152. HENKIN, *supra* note 14, at 14 n.*.

153. *Id.* at 90.

154. See *supra* note 44 for CEDAW's full definition of discrimination.

155. See Hathaway, *supra* note 17, at 1989, stating:

> [N]ot only is treaty ratification not associated with better human rights practices than otherwise expected, but it is often associated with worse practices. Countries that ratify human rights treaties often appear less likely, rather than more likely, to conform to the requirements of the

depend more closely on the law's current acceptability and on the community's—especially the victim's—current interest in vindicating it."[156]

Human rights treaties are different from other treaties in that the subject of the treaty is an individual rather than a state.[157] However, while there may not be benefits to the state in terms of money or power,[158] compliance with human rights treaties does increase a state's stature in the international community; its reputation, if you will.[159] A state's compliance with a human rights treaty "occurs due to state concern about both reputational and direct sanctions triggered by violations of the law."[160] There are, then, some reasons why the United States, and especially President Obama,[161] might want to pursue ratification of CEDAW. Even if any effect of ratification is more symbolic than practical, the value of "bragging rights" should not be underestimated. It is less clear, however, that ratification on these terms would be a good thing, especially in light of empirical research that raises serious questions about whether ratification of human rights treaties raises or lowers a country's actual performance in relation to human rights.[162]

In her seminal work, Professor Oona Hathaway asked

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treaties than countries that do not ratify these treaties.

Id.

156. HENKIN, *supra* note 14, at 93.

157. *See* HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 201 (2000); *see also* Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. OF CONFLICT RESOLUTION 588, 592 (2007) (explaining that while in the past, international law scholars believed that states entered into treaties solely for their own benefit, recent theories have turned to other explanations, particularly in regard to human rights).

158. *See* Hathaway, *supra* note 17, at 1938.

159. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1825, 1827 (2002). Professor Guzman proposes several theories about why countries comply with treaties, and discusses "reputational sanctions" as depending on the nature and severity of the non-compliance, explaining the "possibility that states will suffer a reputational loss when they violate implicit obligations . . . ." *Id.* at 1861.

160. *Id.* at 1827.

161. President Obama is the first African American to be elected president of the United States, and his family background includes Christians and Muslims, blacks and whites. *See* Organizing for America, Know the Facts, http://www.barackobama.com/factcheck/2007/11/12/obama_has_never_been_a_musl im_1.php#practicing-christian (last visited Oct. 13, 2009). Discrimination is surely a subject with which he is all too familiar, and he may be highly motivated to take the United States off the list of countries like Iran, Sudan, and Somalia that have also failed to ratify CEDAW. *See supra* note 42 and accompanying text.

162. *See* Hathaway, *supra* note 17.

whether countries actually comply with the requirements of human rights treaties they join.[163] The answer, too often, is no.[164] Not only does entry into human rights treaties not improve a state's behavior, there is some evidence that doing so decreases, rather than increases, an entering state's human rights performance.[165] One explanation for this troubling result is that it is relatively easy and risk-free for countries to join human rights treaties and then to simply ignore them.[166] They reap the benefits of being able to profess allegiance to high human rights standards (thus exercising their bragging rights), and enhance their reputations in the international community. However, both monitoring and enforcement of human rights treaties are notoriously weak, so there may be no negative consequences for those countries whose participation in such treaties is nominal, at best.[167]

For U.S. women, Professor Hathaway's research may indicate that ratification of CEDAW could do more harm than good. If the

163. *Id.* at 1938. Many scholars have cited Professor Hathaway, yet it seems that no one has attempted to duplicate her research. It remains the most significant piece of empirical research in this field.

164. *Id.* at 1940.

165. *Id.*

166. *Id.* at 1942. In a subsequent piece, Professor Hathaway analyzed why countries join human rights treaties from the perspective of cost. *See* Oona Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003). In that piece, Professor Hathaway proposed that the cost of commitment may be seen from one of three perspectives. First, every nation pays a price in terms of its own sovereignty when it joins a human rights treaty, because joining the treaty requires the state to "surrender power to inspect the relationship between the state and its citizens." *Id.* at 1826. Second, countries may join human rights treaties for the "genuine commitment to the ideas such treaties embody." *Id.* Third, and perhaps most importantly for the United States' purposes, "the cost of commitment varies according to the degree to which countries' [human rights] ratings diverge from the treaties' requirements.... [A]ll things being equal, the further their practices diverge from the requirements of the treaty, the less likely countries will be to join." *Id.* Whichever theory is employed to understand why countries join human rights treaties, Professor Hathaway is clear that "the internal enforcement process is an important factor that should not be overlooked." *Id.* at 1834. In a democratic nation such as the United States, the tools of domestic enforcement may be much more readily available than in a non-democratic country, which would raise both the cost and the benefits of commitment to a treaty such as CEDAW.

167. Hathaway, *supra* note 17, at 2020 ("[B]ecause human rights treaties are generally only minimally monitored and enforced, there is little incentive for ratifying countries to make the costly changes in actual policy that would be necessary to meet their treaty commitments."). For example, Afghanistan, Colombia, and Mexico are cited as having particularly poor human rights records despite having ratified the Convention Against Torture. *See* Hathaway, *supra* note 166, at 1822. For a specific critique of the flaws in CEDAW, see Minor, *supra* note 5, at 137. CEDAW's reservation procedure is analyzed in Cook, *supra* note 8, at 643.

United States ratifies CEDAW in name but not intent, for symbolic purposes only, any current discussion about discrimination against women in the United States will most likely end abruptly.[168] The United States would not need to do anything more[169] than submit periodic reports[170] to the Committee,[171] and would have no motivation to even talk about ending discrimination. Supporters of CEDAW in the United States like to point out that its ratification would require no changes to existing U.S. law because the Constitution and federal laws already protect women from discrimination.[172] If so, then post-ratification compliance by the United States would require nothing more than periodic reports to the Committee, of which the United States could become a member upon ratification.[173] Nothing would change: no new laws, no new basis for litigation, no policy reform. The only logical effect of symbolic ratification for women in the United States would be that there would no longer be a reason for the country as a whole to engage in any

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168. That there is a current dialogue is reflected by the number of articles written on the subject of the United States' failure to ratify CEDAW (many of which are cited herein) if not by any action on the part of our government. *See, e.g.*, Benshoof, *supra* note 6 (analyzing the United States' reservations to CEDAW in light of family planning).

169. Opponents of CEDAW warn of domestic litigation to enforce it, but regarding the reluctance of United States courts to enforce treaties, see Minor, *supra* note 5, at 141–43. "Human rights treaties have historically enjoyed little success in the United States, in part because American courts have not interpreted their provisions liberally." *Id.* at 141; *cf.* HEVENER, *supra* note 30 (noting many international treaties that include provisions for women's rights focus on changing the conceptualization of women's roles, as opposed to changing currently implemented law).

170. CEDAW, *supra* note 1, art. 18 (requiring reports from states parties at the conclusion of their first year as members of CEDAW, and every four years thereafter).

171. *See supra* notes 64–69 and accompanying text.

172. *See* American Association of University Women, Treaty for the Rights of Women (CEDAW) Resource Kit, www.aauw.org/About/international_corner/ CEDAW-Resource-Kit.cfm (last visited Sept. 20, 2009) (describing the United States' involvement with the development of CEDAW and encouraging ratification). The argument is designed to make CEDAW appear more palatable to its opponents: the United States is portrayed as already protecting women from discrimination, so ratification of CEDAW would be symbolic but harmless. Interestingly, opponents use similar reasoning when they argue that the Constitution already provides all of the protection U.S. women might need, so ratification of CEDAW is unnecessary. *See infra* note 189 and accompanying text. This issue may be the one area where opponents and proponents agree.

173. CEDAW, *supra* note 1, arts. 17–18; *see also* United Nations Association of the United States of America, Myths and Realities About CEDAW, www.unausa.org/Page.aspx?pid=935 (last visited Oct. 12, 2009) (noting that ratification of CEDAW would not "impose a radical feminist agenda upon the United States.").

conversation about the fact that women in the United States continue to experience discrimination on the basis of sex. Ratifying CEDAW could amount to sweeping the problem under the carpet, which generally does more harm than good.

States comply with treaty obligations for several reasons. Compliance with treaty obligations has been explained by reference to "efficiency, interests, and norms,"[174] meaning that states comply with treaties when it is efficient to do so, when it is in their interests to do so, and when they have internalized the treaty's norms so that compliance requires no change in behavior.[175] In the case of human rights treaties, only norms can prompt meaningful compliance because there is no state interest, as there might be with, for example, a trade agreement.[176] The United States appears unready to embrace the norms reflected in CEDAW.[177] Ratification "to appease a domestic or international constituency, with little intention of carrying [the treaty] out"[178] would be meaningless at best.

The United States has declined to move toward ratifying CEDAW for nearly a decade.[179] This failure to ratify indicates that perhaps the United States does not see a need to endorse CEDAW's goal of eliminating discrimination against women. Until CEDAW's goals gain widespread acceptance by, and become a priority for, the U.S. community, ratification would be nothing more than legalism: law for law's sake, rather than law as a means toward the end of discrimination against women.

Could CEDAW shape U.S. behavior for the better? Again, Professor Hathaway has studied the extent to which "international law shapes state behavior beyond simple decisions to ratify."[180]

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174. CHAYES & CHAYES, *supra* note 91, at 4.

175. *Id.* at 4–8.

176. The United States, for example, would protect no economic interest by ratifying CEDAW. Where there is no money to be made or lost, the level of attention paid to treaty compliance undoubtedly decreases. *See supra* notes 92–93 and accompanying text.

177. See *supra* notes 112–113 and accompanying text, discussing the United States' proposed RUD pertaining to abortion.

178. CHAYES & CHAYES, *supra* note 91, at 9.

179. The last activity occurred with the Senate Foreign Relations Committee Hearing on July 30, 2002, and the movement towards ratification has been stalled with the Committee since that time. *See* Amnesty International USA, Support Treaty for the Rights of Women (CEDAW), http://www.amnestyusa.org/women/cedaw/history.html (last visited Oct. 12, 2009).

180. Hathaway, *supra* note 157, at 589. Professor Hathaway's extensive empirical research addresses three specific human rights treaties: the Convention Against Torture, the International Covenant on Civil and Political Rights, and CEDAW, and is not limited to those treaties' treatment by the United States. *Id.* at

Professor Hathaway's research shows that "whether states will commit to a treaty depends in significant part on whether they expect to comply with it once they join."[181] She concludes that the notion of human rights treaties as "cheap talk with virtually no impact on state practice . . . ignores" the possible effectiveness of domestic rather than international enforcement of the human rights treaty's obligations.[182] Professor Hathaway does observe that "[w]here powerful actors can hold the government to account, international legal commitments are more meaningful. Where there are no such constraints, even formally binding treaties may be ignored with relative impunity."[183] Ultimately, she concludes that "all other things held equal, the more likely a country is to change its human rights behavior as a consequence of committing to a treaty, the less likely it will be to ratify the treaty in the first place."[184] That is, her research indicates that countries wait to ratify human rights treaties until they are committed to complying with those treaties.[185]

This research might explain the United States' reluctance to ratify CEDAW. It may not be that the country is not ready to embrace CEDAW's norms, it may simply be that the United States recognizes that ratification would require changing its behavior and it is not yet ready to make that commitment.[186] Regardless of whether changed behavior must precede or follow ratification, the United States is apparently not ready to do either.

Professor Hathaway's later findings indicate that ratification of human rights treaties may have a positive impact on states' human rights records: treaties tend to be complied with once ratified.[187] Therefore, it is also possible that an argument in

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181. *Id.* at 590.

182. *Id.* at 593.

183. *Id.*

184. *Id.* at 594.

185. *See id.* at 590 ("[T]he anticipated positive and negative effects of international laws on states deeply influence the choice of states to accept international legal commitments in the first place. Because international treaties are not binding on states unless they choose to be bound, the effects of treaties depend on who agrees to be bound. And who agrees to be bound, in turn, depends on the treaties' likely effects.").

186. Note that Hathaway refers to "commitment" to the treaty as separate from "simple ratification." *See id.* Note also that, as referenced earlier, one argument made by supporters of U.S. ratification is that no new laws would need to be enacted to bring the United States into compliance with CEDAW. This argument indicates an unwillingness to acknowledge that change may, in fact, be required under this treaty. *See supra* note 172 and accompanying text.

187. Hathaway, *supra* note 17, at 2011 ("[L]arge numbers of countries do

opposition to U.S. ratification of CEDAW is recognition that ratification would, or should, affect the nation's behavior.[188] But again, if this is the reason, it is not articulated in the arguments of CEDAW opponents (or supporters) who claim that CEDAW is unnecessary because the U.S. Constitution already provides all of the protections women need against discrimination.[189] In fact, Professor Hathaway's findings seem to refute this argument against U.S. ratification of CEDAW.[190] The logic of such an argument in opposition to ratification seems circular, at best. It makes no sense that both supporters and opponents of U.S. ratification of CEDAW argue that no action is required to bring the United States into compliance with the treaty's requirements.

Commitment to CEDAW ought to alter U.S. policy, law, and behavior towards women, and until the United States is prepared to make those changes, ratification would be hollow and harmful; it would not be a benign gesture. Thus, the logical argument in opposition to CEDAW is not that it is unnecessary, but that, as Professor Hathaway observes, it will require changes in the United States—changes the country is apparently not yet ready to make.

Professor Hathaway's research and conclusions lead to the inquiry of which comes first, ratification or state behavior that reflects compliance with the treaties that have been ratified.[191] Her findings "suggest that not only is treaty ratification not associated with better human rights practices than otherwise

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actually comply with the terms of the human rights treaties they ratify . . . .").

188. *See supra* notes 169–173 and accompanying text.

189. The Heritage Foundation, for example, takes the position that "American women are free, legally and culturally, to pursue opportunities and relationships of their choosing. Americans should continue to fight incidental discrimination, while preserving the security afforded by the U.S. system of rights enshrined in the U.S. Constitution and protected under federal and state laws." Grace Melton, *CEDAW: How U.N. Interference Threatens the Rights of American Women*, HERITAGE FOUND., Jan. 9, 2009, www.heritage.org/Research/Family/bg2227.cfm.

190. *See supra* notes 163–178 and accompanying text. If the United States was already in compliance, it would have internalized the treaty's norms and would have no reason to resist ratification. Professor Hathaway's research does not indicate that countries resist ratification based on their compliance, but that countries resist ratification because they are aware that they are not in compliance; therefore, change would be required in order to bring resistant countries into compliance. *See* Hathaway, *supra* note 157, at 594 ("[T]he more likely a country is to change its human rights behavior as a consequence of committing to a treaty, the less likely it will be to ratify the treaty in the first place.").

191. *See* Hathaway, *supra* note 17, at 1989 (describing the relationship between ratification and human rights practices as interesting, but inconclusive as to causation); *see also id.* at 1992 ("[M]ultivariate quantitative analysis, no matter how carefully done, is a useful but imperfect tool for examining complex questions of human action.").

expected, but it is often associated with worse practices."[192] Her findings do not, however, reveal why this is so. She states that the data "cannot tell us whether the patterns that we observe are due to the impact of treaties or instead to factors that are associated both with ratification and with countries' human rights ratings."[193] Ultimately, the United States is right to refrain from ratifying a treaty with which it is unable or unwilling to comply, a practice perhaps engaged in more frequently by countries that have poor records of abiding by laws in general.[194] "[R]atification of treaties can serve to offset pressure for real change in practices."[195] This argument is another way of saying that a hollow ratification of CEDAW would stop the conversation about the ways in which women in the United States are discriminated against, and about the best way to end that discrimination.[196]

Some commentators suggest that the United States would help women everywhere if it took the step of ratifying CEDAW, and that the United States should lead by example.[197] However, as Professor Hathaway notes, "the current treaty system may create opportunities for countries to use treaty ratification to displace pressure for real change in practices."[198] There is a general "pressure" on countries to ratify human rights treaties as an expression of their "commitment to human rights norms."[199] Ratification of CEDAW could take the pressure off of the United States, and it would then be less likely to "improve its practices" than it otherwise might.[200] Even if, over time, ratification of CEDAW were to have a positive effect, "this process can take decades to lead to tangible change."[201] U.S. ratification would likely not only do little to hasten, but could even postpone, perhaps indefinitely, any benefit from the treaty, and could prevent the

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192. *Id.* at 1989.

193. *Id.*

194. *Id.* at 2013.

195. *Id.*

196. Hollow ratification would also be an unreasonable and unnecessary act of deception and disingenuousness on the part of the United States.

197. *See, e.g., 2002 Hearing, supra* note 7, at 85 (statement of American Bar Association) ("Senate action now will demonstrate to the world that, despite the events of September 11 and their aftermath, this country remains committed to human rights advancement, encouraging both the further development of emerging democracies and the promise of democratic principles and participatory government in countries where freedom is newly won.").

198. Hathaway, *supra* note 17, at 2022.

199. *Id.* at 2020.

200. *Id.*

201. *Id.* at 2022.

United States from serving as a good example anywhere around the world.[202] If the United States is not yet ready to commit to the goals of CEDAW it should not ratify the treaty; doing so without a commitment to the treaty's purposes could do more harm than good. Professor Hathaway's findings should caution the United States against ratification of CEDAW with anything less than full commitment to its objects and purposes.

An analogy can be drawn here to the theory of "legal cooptation" that underlies critical legal scholarship in certain domestic arenas. Legal cooptation occurs when a previously marginalized group experiences apparent successes via legislation or judicial decisions. Professor Orly Lobel defines legal cooptation as "a process by which the focus on legal reform narrows the causes, deradicalizes the agenda, legitimizes ongoing injustices, and diverts energies away from more effective and *transformative* alternatives."[203] Examples of legal cooptation in the United States arguably occurred with both the labor movement and the civil rights movement.[204] "In both periods, critics have understood victories as limited and symbolic, deradicalizing and cooptating a more comprehensive vision."[205] On these terms, both the National Labor Relations Act[206] and the Civil Rights Act of 1964[207] are viewed as "failed successes" that resulted in "the pacification of the social movement and the decline of a reform vision."[208] The theory of legal cooptation concludes that social movements are harmed by

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202. The notion of the United States as a world leader in the human rights arena may well be outmoded in light of invasions and violence in Iraq and Afghanistan.

203. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 939 (2007). Professor Lobel describes the effect further:

> The law entices groups to choose legal strategies to advance their social goals but ultimately proves to be a detrimental path. . . . Consequently . . . the turn to the law actually reinforces existing institutions and ideologies. As they engage with the law, social reform groups become absorbed by the system even as they struggle against it.

Id. Professor Lobel ultimately warns that extralegal cooptation carries the same risks as legal cooptation and thus should be approached with caution by groups seeking social movement and change. *Id.* at 942. Professor Lobel cites many authorities for the origins of the theory of legal cooptation, among the most interesting of which may be FRANCIS FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (Vintage Books 1979) (1977).

204. Lobel, *supra* note 203, at 942.

205. *Id.*

206. 29 U.S.C. §§ 151–69 (2006).

207. 42 U.S.C. §§ 2000a to 2000h-6 (2006).

208. Lobel, *supra* note 203, at 940.

such failed successes and that "the limits of social change are not confined to legal reform, but in fact are as likely (if not more so) to occur in the realm of extralegal activism."[209] Therefore, the theory is that truly progressive or transformative social progress is more likely to occur without, rather than with, laws that purport to require such change.[210]

The detrimental effects of legislation on the labor and civil rights movements are detailed by Professor Lobel, who concludes that despite these failed successes, the legal system is a valid arena for social change because, ultimately, "alternative extralegal strategies are in fact vulnerable to the same types of limitations"[211] as legal strategies. Those limitations include draining the resources and energies of a social movement, limiting and fragmenting the issues of the social movement, and concerns regarding "lawyering and professionalism, crowding-out effects, institutional limitations, and legitimation."[212] Legal cooptation may not be a ringing endorsement of either legal or extralegal strategies for invoking social change.

The theory of legal cooptation supports a cautious approach to U.S. ratification of CEDAW. Here, symbolic support of a treaty whose norms have not yet been internalized could result in yet another failed success, a hollow victory that stops far short of addressing the real problem of ongoing discrimination against women in this country. As has been pointed out in relation to civil rights legislation and litigation, not all forms of discrimination lend themselves to resolution by litigation:

> One of the glaring failures of the civil rights movement was to provide a mechanism for economic equality.... The civil rights movement, historically, has always failed in that area because it was always the most difficult. Whites didn't mind giving up public accommodations or seats on the bus, but

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209. *Id.*

210. *See id.* at 946–47 (noting that, after *Brown v. Board of Education*, 343 U.S. 483 (1954), and enactment of the Civil Rights Act of 1964, "despite the enthusiasm around legal reform, race theorists gradually began to challenge the apparent success of judicial victories... as well as legislative victories.... Civil rights organizations were criticized for concentrating on issues that were more susceptible to remedy by litigation, such as school segregation and workplace discrimination, rather than attacking redistributive problems that were of greater importance to the people they were supposedly serving."). Professor Lobel cites several excellent sources for further discussion of whether the civil rights movement had a real, rather than a symbolic, impact on racism in America. Lobel, *supra* note 203, at 947 nn.35–37.

211. *Id.* at 949.

212. *Id.*

when it comes to money or jobs, they would not do it.[213]

The same might be said of men and women in the United States. The manner in which women are discriminated against may not lend itself to a strictly legal solution because it is widespread and pervasive, while legal solutions tend to be of limited scope and narrow focus.[214] Ratifying CEDAW is not likely to mean an end to the subtle and pervasive forms of discrimination faced by women on a daily basis, such as wage disparity and the lack of safe, affordable childcare for working mothers. Cooptation, with its concomitant deradicalization and narrowed focus,[215] may be the likely, and undesirable, result of ratification without internalization of the treaty's goals. Cooptation, ultimately, could end the conversation about discrimination against women in this country.

Social scientists and legal scholars also refer to the theory of resource mobilization in analyzing the progress (or lack thereof) of social movements.[216] Pursuant to this theory, social change only

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213. Harold Norris, *A Perspective on the History of Civil Rights Law in Michigan*, 1996 DETROIT C.L. MICH. ST. UNIV. L. REV. 567, 599 (omission in original) (quoting Denise Chrittendon & Linda Jones, *NAACP: 80 Years of Challenge*, DETROIT NEWS, July 7, 1989, at E1). Caution towards legal cooptation, however, does not mean that litigation is never a good approach to social problems. Litigation is certainly preferable to mandatory alternative dispute resolution. *See* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075–76 (1984). Professor Fiss points out:

> By viewing the lawsuit as a quarrel between two neighbors, the dispute-resolution story that underlies ADR implicitly asks us to assume a rough equality between the contending parties. . . . Many lawsuits do not involve a property dispute between two neighbors . . . but rather concern a struggle between a member of a racial minority and a municipal police department over alleged brutality, or a claim by a worker against a large corporation over work-related injuries. In these cases, the distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant.

Id. at 1076.

214. *Cf.* Lobel, *supra* note 203, at 952 (illustrating the narrowed focus that can accompany legal strategies, Professor Lobel points out that "many today believe that the focus of the labor movement's New Deal reordering sacrificed the interests of women and minorities in the name of an united front supporting the enactment of the [National Labor Relations Act], while others believe that the turn toward narrow, identity-based rights-claiming since the 1960s has been detrimental to the cause of broader workplace justice.").

215. *See supra* text accompanying notes 203–209.

216. *See, e.g.*, Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 12 (2001) (describing the "American approach" to social movement literature as that of "resource mobilization"). Professor Rubin concludes:

> Social movements literature emphasizes that the ideas and values we care about most—equality, free speech, religious freedom, due process, the

occurs when a group has more in common than a set of grievances against a majority.[217] Minorities obtain and wield political power over stronger majority groups when they are bound together by common ideologies and are thus motivated to engage in resource mobilization.[218] Under this theory, discrimination against women will end, when it does, as a result of social change rather than of legal reform.[219] In this manner, even a relatively disenfranchised minority can bring about social change in ways that are more meaningful than the failed successes so frequently wrought by strictly legal reforms.[220] In order to keep the conversation about discrimination alive in the United States, it may be time to look at women and their interests through a lens that captures more than sex alone can explain.

IV. Has the Time for a Women's Treaty Passed?

That women in the United States continue to face discrimination cannot be reasonably disputed. Rape, domestic violence, and forced prostitution are some of the more horrific abuses that thrive in the United States today,[221] but there are

> prohibition of slavery and torture—were fought for, bled for, and died for. They are the glories of our current civilization, not because we possess the pallid virtue of perceiving these principles as they float about in some sort of transcendental nimbus, but because we possess the effulgent virtue of maintaining and re-creating them amid the chaos and danger of ongoing circumstances.

Id. at 83. For a full examination of resource mobilization theories, see THE DYNAMICS OF SOCIAL MOVEMENTS: RESOURCE MOBILIZATION, SOCIAL CONTROL, AND TACTICS (Mayer N. Zald & John D. McCarthy eds., 1979).

217. *See* Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. PA. L. REV. 173, 198 (2001) ("Commentators have applied resource mobilization theory to study the ways in which marginalized groups assemble necessary resources to obtain political rights or social status."). The question thus may be whether U.S. women in the twenty-first century have enough in common to be considered a cohesive group. *See infra* notes 223–231 and accompanying text.

218. *Cf.* Kathleen Valtonen, *From the Margin to the Mainstream: Conceptualizing Refugee Settlement Processes*, 17 J. REFUGEE STUD. 70, 89 (2004) (explaining how minority and majority groups alike can "mobilize social resources to advocate, initiate and implement anti-oppressive policy," thereby accomplishing their goals of ending the disfavored policy).

219. *See* Rubin, *supra* note 216, at 14 (explaining that social reforms are the true impetus for change). Professor Rubin also explains that "[t]he crucial aspect of social movements, therefore, is that they enable people to generate new ideologies and re-define their own identities." *Id.* at 14; *cf.* Lobel, *supra* note 203, at 940 (arguing that social change often occurs "in the realm of extralegal activism" rather than as a result of legal reform).

220. *Cf.* Valtonen, *supra* note 218, at 89 (describing how refugees who "possess no political leverage initially . . . work through community organizations" to challenge societal norms).

221. See, for example, Jonathan Abel, *Downfall of a Sex Slave Ring*, ST.

other pervasive abuses that are ongoing: from wages to housing to childcare and health care, women face subordination on a daily basis.[222] While feminist jurisprudence suggests that the way to address such subordination (or discrimination) is via a feminist approach,[223] there may be reason to believe that many other factors, such as race, socioeconomic status, age, citizenship, or immigration status, contribute at least as much as sex to women's subordination.[224]

It may thus be time to ask whether there is a commonality of interests that justifies a treaty designed to end discrimination against women. To identify women as a group on the basis of sex[225] alone may be to ignore those things that social scientists identify as forming the basis for group interests. "[O]rganizations or associations exist to further the interests of their members . . . ."[226] Without something more than sex to connect

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PETERSBURG TIMES, Mar. 15, 2009, at B1, *available at* 2009 WLNR 4989945, detailing the plight of a Guatemalan woman who was smuggled into the United States thinking she would work as a housekeeper, but who was instead forced into prostitution by her smugglers. Nearly two months later, the same newspaper reported that police were seeking more victims of a local sex slave ring, the operators of which were accused of luring women to a private residence, holding them against their will, and forcing them to work as prostitutes and exotic dancers. Jamal Thalji, *Sex Slavery Victims Sought*, ST. PETERSBURG TIMES, May 13, 2009, at B1, *available at* 2009 WLNR 9105318.

222. *See* Crenshaw, *supra* note 2, at 1245–46 (stating that women who go to shelters for battered women often have many other kinds of oppressive issues affecting their lives that cannot be dealt with in isolation).

223. *See, e.g.*, Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1, 2 (1987–88) ("To be a feminist today, I think it is fair to say, is to believe that we belong to a society, or even civilization, in which women are and have been subordinated by and to men, and that life would be better, certainly for women, possibly for everybody, if that were not the case. . . . To be engaged in feminist legal thought is to be a feminist who locates both her inquiry, and her activity, in relation to the legal system."). *See generally* Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989–90) (providing a substantive overview of feminist jurisprudence).

224. *See* Crenshaw, *supra* note 2, at 1242 (arguing that race and class, among other factors, can be as important in group identity as gender).

225. The word "sex" is used to identify the physical characteristics of women as opposed to men. The word "gender" connotes the social and cultural, rather than the physical, characteristics. *See* Mari Mikkola, *Feminist Perspectives on Sex and Gender*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2008), http://plato.stanford.edu/archives/fall2008/entries/feminism-gender/ ("Most people ordinarily seem to think that sex and gender are coextensive: women are human females, men are human males. Many feminists have historically disagreed and have endorsed the sex/gender distinction. Provisionally: 'sex' denotes human females and males depending on biological features (chromosomes, sex organs, hormones and other physical features); 'gender' denotes women and men depending on social factors (social role, position, behaviour or identity).").

226. MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS

them, women may not share the characteristics that Aristotle recognized as being inherent in the formation of groups among humans:

> [P]eople make their way together on the basis that they will get some advantage from it, and so as to provide themselves with some necessity of life; and the political community too seems both to have come together in the beginning and to remain in place for the sake of advantage . . . .[227]

In the current U.S. political and social cultures, it is possible that age, race, and poverty have at least as much to do with logical group formation as does sex.

Factors such as age, race, socioeconomic status, immigration status—and usually a combination thereof—probably contribute as much as sex to the discrimination faced by a "typical" woman in today's United States.[228] Poverty, for example, brings with it a set of problems that cross the lines of sex, race, national origin, age, citizenship, or immigration status.[229] Typical problems associated with poverty include the need for food, shelter, and health care. These needs apply to poor men as well as poor women, whites as well as blacks, legal as well as undocumented immigrants, and the young as well as the elderly. In fact, poverty rather than sex has been the basis underlying those few lawsuits that have been brought in U.S. courts concerning a possible right to childcare.[230] It is not at all clear that ratification of CEDAW, even if accompanied by the Senate's advice and consent and enabling legislation, would actually address the type of discrimination that is so pervasive in modern U.S. culture.

The Universal Declaration on Human Rights and the U.S. Constitution have not managed to end discrimination. Ratification of CEDAW is no more likely to be successful, and may, in fact, serve to end the conversation about discrimination against women and to perpetuate the "identity politics" that foster the

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AND THE THEORY OF GROUPS 6 (1965).

227. ARISTOTLE, NICOMACHEAN ETHICS 218 (Christopher Rowe trans., Oxford University Press 2002) (translating Book VIII, ch. 9, lines 1160a10–13).

228. *See, e.g.*, Crenshaw, *supra* note 2, at 1242 ("[T]he violence that many women experience is often shaped by other dimensions of their identities, such as race and class."); *see also* CEDAW, *supra* note 1, pmbl. (recognizing the importance of other factors by stating that "in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs . . . .").

229. *Cf.* Davis & Powell, *supra* note 132, at 690 (noting that no reported cases have argued that an employer's denial of childcare discriminated against women or constituted a denial of state or federal constitutional rights).

230. *Id.*

divisions between men and women.[231] It seems at least possible as of this writing that same-sex civil marriage soon could become legally and culturally acceptable in the United States.[232] A treaty that exists solely to address the rights of one sex may have seen its day come and go. By refusing for so long to ratify CEDAW, the United States may have missed its opportunity to do so with any real meaning. Ratification at this point might be meaningless.

Professor Martha Davis and Roslyn Powell have suggested that human rights treaties might be utilized in U.S. courts even though the United States is not a party to those treaties.[233] In arguing for a right to childcare, Davis and Powell demonstrate that CEDAW, the International Convention on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child, all, on some level, provide a basis for the proposition that working parents are entitled to decent, affordable childcare.[234] If each treaty covers this area, it is less clear what CEDAW adds to the mix. It is also worth noting that the United States is not a party to any of these treaties; it is one of only two U.N. member states that have not ratified the Convention on the Rights of the Child.[235]

Davis and Powell make a convincing argument that domestic courts ought to recognize the norms embodied in the Convention on the Rights of the Child in order to provide a meaningful right to childcare in the United States, which compares unfavorably to almost every other developed country in this area.[236] Further,

231. Crenshaw, *supra* note 2, at 1242 ("Race, gender, and other identity categories are most often treated in mainstream liberal discourse as vestiges of bias or domination—that is, as intrinsically negative frameworks in which social power works to exclude or marginalize those who are different.").

232. *See, e.g.*, Tim Craig, *D.C.'s Gay Marriage Bill May Be Flashpoint*, WASH. POST, Sept. 11, 2009, at A1 (describing how, at the time of the article's publication, "[s]ame-sex marriages are performed in Massachusetts, Connecticut, Iowa and Vermont. They will be legal in New Hampshire in January. The Maine legislature has approved same-sex marriage, but a referendum will be held on the measure in November.").

233. Davis & Powell, *supra* note 132, at 712 ("[R]egardless of whether or not the United States ultimately ratifies the [Convention on the Rights of the Child], the treaty's key principles have achieved near-universal acceptance around the globe. Women's rights advocates should insist that, at the very least, the United States acknowledge this global consensus by making childcare a national priority here as well. Doing so would be a significant first step toward recognizing the profound interrelationship of parents' work and children's well-being and the importance of childcare as a human right.").

234. *Id.* at 691–92.

235. *Id.* at 691.

236. *Id.* ("By focusing exclusively on domestic law, however, women's rights advocates have failed to appreciate the strength of international legal norms that

"CEDAW encourages provision of necessary supportive services to parents, and urges the 'establishment of a network of childcare facilities' in participating states."[237] It is difficult to imagine what the U.S. Congress or state legislatures would come up with in terms of implementing legislation that could accommodate this one provision of CEDAW.[238] Every working parent in the country would suddenly be guaranteed access to appropriate childcare. It is hard to imagine a more important accomplishment, but clearly it has less to do with the parent's sex than with economics, employment, and education, to name just a few factors.[239] Furthermore, it seems beyond the realm of possibility that the United States will ever recognize such a right; to do so would be completely out of character for a country that has consistently declined to even guarantee access to food, shelter, and health care for its children.[240]

Ultimately, ratification without a willingness to actually implement CEDAW would be hollow at best and dangerous at worst. As long as the United States maintains its place among dubious company in refusing to ratify the treaty, there is room for an ongoing conversation about the country's position toward the treaty's goals and purposes. After ratification, we could anticipate another thirty years of inaction before there is any movement toward implementing legislation. Who knows what other problems may require our attention by then. If drinkable water, for example, continues to disappear, access to childcare may be the least of our concerns. The time for a women's treaty may have already come and gone.

Conclusion

Women in the United States lead lives of abundance compared to women in many other parts of the world. Most of us

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impose an obligation on governments to address childcare needs."). Professor Davis and Ms. Powell go on to write that "[t]he United States lags far behind the rest of the world in ensuring that its families have access to childcare as a way to provide economic opportunity for men and women alike, to equalize gender differences in the workplace, and to meet the developmental needs of its children." *Id.* at 692. Families, men, women, and children are all affected by childcare; it is not just a "women's issue."

237. *Id.* at 691–92.

238. *See supra* notes 143–151 and accompanying text.

239. *See* Davis & Powell, *supra* note 132.

240. *See id.* at 691 (explaining that the United States has declined to sign the Convention on the Rights of the Child, which "squarely imposes on the state an obligation to assist parents in [the upbringing and development of the child], particularly when parents are working").

are educated, are able to vote, live in houses with electricity and running water, and have the right to choose whether and when we will become mothers. We go to work at jobs where many of us earn more money than some of our male colleagues; we seek and are elected to public office. We are doctors, lawyers, judges, legislators, senators, CEOs, and Secretaries of State. Yet discrimination against women persists even here.[241] We are the victims of domestic violence, slavery, and prostitution. We are paid less than equally qualified men, and are still in the minority of positions of power. Our relative reproductive freedom is decided by courts and legislatures that remain male-dominated.

However, many other groups, whose members include or are even dominated by women, also continue to face discrimination in the United States. Poor and middle class people in this country struggle daily to survive without adequate food, shelter, or health care.[242] A low-income African or Latina immigrant woman in the United States may share more concerns with a similarly situated immigrant man than she does with a middle class white woman like me. Anyone with an Arabic-sounding last name is likely to face discrimination every day in this country, regardless of sex, age, or immigration status. The elderly in this country, the majority of whom are women, are discriminated against in terms of health care, housing, and employment, for reasons that have nothing to do with sex. And many African Americans, regardless of age, sex, religion, or socioeconomic status, have had unfortunately common experiences with invidious, hateful

241. President Obama's first nomination to the United States Supreme Court was a Latina, Judge Sonia Sotomayor. The media made much ado about Justice Sotomayor's past statement "that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Judge Sonia Sotomayor, A Latina Judge's Voice, Judge Mario G. Olmos Memorial Lecture at the University of California, Berkeley, School of Law (October 26, 2001), *in* 13 BERKELEY LA RAZA L.J. 87, 92 (2002). As a candidate for the Supreme Court, her race, sex, and ethnicity were the subject of as much popular attention as were her judicial experience or her legal background. This symptom of ongoing identity politics is not the sign of a nation that is ready to commit to the type of equality that is envisioned by CEDAW.

242. Harvard Medical School researchers found that 45,000 deaths per year can be attributed to lack of health insurance. Reed Abelson, *The Cost of Doing Without*, N.Y. TIMES, Sept. 18, 2009, at A22. In a graphic illustration of this abhorrent statistic, in February of 2007, twelve-year-old Deamonte Driver died when bacteria from an abscessed tooth spread to his brain. His infected tooth was not extracted because his family (headed by a single mother) had neither public nor private health insurance. *See* Mary Otto, *For Want of a Dentist*, WASH. POST, Feb. 28, 2007, at B1. The United States is unique among industrialized, western nations in not having any form of universal health care.

discrimination.[243]

Ratification of CEDAW is not the answer to the discrimination that is so prevalent in the United States today. Adding yet another layer of legal protections for women will not change behavior. Only social movement can accomplish what the Constitution and laws of this country, and the variety of existing human rights documents, have not yet accomplished. Ratification with the currently proposed RUDs would be more likely to set our country back than to move us forward toward ending discrimination.

It is certainly true that "the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields . . . ."[244] In order for the United States to make meaningful progress in this direction, the conversation about equality must be at least maintained and, ideally, should be reinvigorated. Ratification of a treaty designed to advance women's equality may serve only to silence that conversation. Women ought to learn the lessons of the civil rights and labor movements in this country, and resist the urge to push for a treaty that will have no meaning in our lives. We would do well to urge our President, the Senate, and the Judiciary to work for real change rather than for the "failed success" that CEDAW could bring.

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243. This situation is particularly true for young African American men, who are statistically more likely to be arrested, convicted, and imprisoned than any other demographic group in the United States. *See, e.g.*, Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477 (2009) (describing the "mass incarceration" of the African American community—particularly men).

244. CEDAW, *supra* note 1, pmbl.