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Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties

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LEGISLATING HUMAN RIGHTS:
THE CASE FOR FEDERAL LEGISLATION TO
FACILITATE DOMESTIC JUDICIAL
APPLICATION OF INTERNATIONAL HUMAN
RIGHTS TREATIES

*David Sloss**

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INTRODUCTION

In scholarly discourse about rights, it is often assumed that democracy is bad for rights. Rights protect individuals. Democratically enacted laws reflect the will of the majority. The “tyranny of the majority,” as John Stuart Mill warned long ago, threatens the rights of individuals.¹

It is not necessarily so. There are important examples in recent US history where majoritarian democracy produced legislation strengthening protection for individual rights. The Civil Rights Act of 1964,² the Voting Rights Act of 1965,³ the Americans with Disabilities Act of 1990,⁴ and the Religious Freedom Restoration Act of 1993⁵ are just a few examples of rights-enhancing federal legislation supported by broad-based democratic majorities.⁶ Of course, in the past two decades Congress also enacted important legislation, such as the Antiterrorism and Effective Death Penalty Act of 1996⁷ and the Prison Litigation Reform Act of 1995,⁸ that restricted protection of individual rights.

Even so, this Article contends that: (1) the time is ripe for federal legislation to facilitate domestic judicial application of international human rights treaty obligations; and (2) such legislation would yield substantial domestic and foreign policy

1. See JOHN STUART MILL, ON LIBERTY 62–63 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a (2006)).

3. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971 (2006)).

4. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 (2006)).

5. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb (2006)). The Supreme Court invalidated the statute in part in *City of Boerne v. Flores*, 521 U.S. 507, 533–36 (1997), but the statute remains in force insofar as it applies to the federal government.

6. See *infra* notes 171–74 (providing data on bipartisan support for the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Americans with Disabilities Act of 1990).

7. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 18 U.S.C. § 1 (2006)).

8. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended at 18 U.S.C. § 3626 (2006)).

benefits for the United States. The first claim may seem shocking, even preposterous. In the 2010 elections, Republicans scored one of the biggest electoral landslides in the past century.⁹ Moreover, Republican lawmakers are generally hostile to the domestic judicial application of international human rights law, as evidenced by recent legislative efforts at both the state¹⁰ and federal¹¹ level to bar judicial reliance on international law to resolve domestic controversies.

Granted, the current Republican-controlled House of Representatives is unlikely to support legislation promoting domestic judicial application of international human rights treaties. Nevertheless, two points merit emphasis. First, electoral majorities can change very quickly.¹² Hence, within the next few years, Democrats could possibly control the House, the Senate, and the Presidency, as they did in the 111th Congress (2009–10).¹³ Second, and perhaps more importantly, the composition of the federal judiciary changes much more slowly than the composition of Congress. At present, a majority of federal judges have ideological predilections making them unreceptive to claims for vigorous domestic judicial enforcement of international human rights norms.¹⁴ Hence, if the United States is going to take positive steps toward greater judicial protection

9. See Chris Cillizza, *Election 2010: Republicans Net 60 House Seats, 6 Senate Seats and 7 Governorships*, WASH. POST THE FIX BLOG (Nov. 3, 2010, 8:24 AM), <http://voices.washingtonpost.com/thefix/morning-fix/2010-election-republican-score.html> (“Historically, the Republican gains mark the biggest midterm election seat swap since 1938 when Democrats lost 71 House seats. It has already eclipsed the 1994 Republican tidal wave in which the GOP netted 52 seats.”).

10. See Aaron Fellmeth, *International Law and Foreign Laws in the U.S. State Legislatures*, ASIL INSIGHTS (May 26, 2011), <http://www.asil.org/pdfs/insights/insight110526.pdf>.

11. See, e.g., Constitution Restoration Act, H.R. 1070, 109th Cong. (2005); see also Mark Tushnet, *The “Constitution Restoration Act” and Judicial Independence: Some Observations*, 56 CASE W. RES. L. REV. 1071 (2006) (discussing proposed federal legislation).

12. See *infra* notes 168–69 and accompanying text (supporting this claim).

13. In the 2008 elections, Democrats gained a 261–174 majority in the House, and a 57–2–41 majority in the Senate, with the two independents caucusing with the Democrats. See JENNIFER E. MANNING, CONG. RESEARCH SERV., R40086, MEMBERSHIP OF THE 111TH CONGRESS: A PROFILE 1 (2010).

14. See *infra* notes 161–63 and accompanying text (stating that the majority of judges on the US Courts of Appeals were appointed by Republicans and that the median federal appellate judge is moderately conservative according to empirical studies).

of international human rights within the next decade, the impetus is likely to come from legislation, not litigation.

The remainder of this Article proceeds in three parts. Part I shows that current US practice falls short of international human rights standards. Over the past decade, the United States has violated several distinct human rights treaty provisions. However, it is beyond the scope of this Article to engage in a comprehensive analysis of US compliance with its human rights treaty obligations. Instead, Part I focuses on three specific issues: life without parole sentences for juvenile offenders; felon disenfranchisement laws; and prison conditions in maximum security prisons.

Part II explains why the United States should comply with its international human rights treaty commitments. First, in areas where US policies and practices have strayed from core American values, domestic implementation of international human rights law would help align domestic policies with those core values. Second, the US failure to comply with its human rights treaty obligations has significant diplomatic and foreign policy costs.

Part III considers different possible pathways to achieve US compliance with its human rights treaty obligations. The analysis suggests that state governments, the federal executive, and the federal judiciary—acting separately or in combination—are unlikely to adopt the measures needed to achieve US compliance with its human rights treaty obligations. Accordingly, federal legislation is necessary. Part III contends that Congress should enact federal legislation to expand the availability of judicial remedies for international human rights treaty violations in the United States. The Appendix includes draft legislation to this effect.

Before proceeding further, one caveat is necessary. US policies in the War on Terror have been the target of intense criticism. Many critics allege that specific US counterterrorism measures violate US treaty obligations under human rights and/or humanitarian law treaties.¹⁵ Although I am sympathetic

15. The literature in this area is quite extensive. *See, e.g.*, David Weissbrodt & Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 *L. & INEQUALITY* 353 (2008); Leila

to those criticisms, the focus of this Article is different. I hope to persuade the reader that a variety of US policies and practices unrelated to the War on Terror are inconsistent with the nation's human rights treaty obligations and that there are sound reasons to adopt legislation to enhance compliance with those treaty obligations. The draft legislation in the Appendix specifically exempts issues related to the War on Terror, in part because those issues are already the subject of legislative debate. In contrast, for the past decade or more, Congress has devoted scant attention to the types of human rights violations that are the primary subject of this Article.

I. US NONCOMPLIANCE WITH HUMAN RIGHTS TREATY OBLIGATIONS

The United States ratified the International Covenant on Civil and Political Rights (“ICCPR”)¹⁶ in 1992, followed by the Convention against Racial Discrimination¹⁷ and the Convention against Torture¹⁸ in 1994. When it ratified these treaties, the United States adopted reservations and understandings (“RUDs”) to limit the scope of its treaty obligations. One key goal of the RUDs was to ensure that the United States could achieve compliance with its treaty obligations simply by implementing pre-existing statutory and constitutional law. Presidents George H.W. Bush and Bill Clinton assured the Senate that the United States could comply fully with its treaty obligations—as modified by the RUDs—without having to make

Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007).

16. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; see U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES OF OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2011, at 383 (2011), available at <http://www.state.gov/documents/organization/169274.pdf>.

17. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. TREATY DOC. NO. 95-18, 660 U.N.T.S. 195 (1978) [hereinafter Race Convention]; see U.S. DEP'T OF STATE, *supra* note 16, at 447.

18. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (1988) [hereinafter Torture Convention]; see U.S. DEP'T OF STATE, *supra* note 16, at 472.

any changes in domestic legal norms. The Senate relied on those assurances as a basis for its consent to treaty ratification.¹⁹

As of 1994, it was probably true that the United States could have achieved full compliance, or almost full compliance, with its treaty obligations by aggressively implementing the human rights protections then available under federal statutory and constitutional law. However, since that time, many states have adopted laws and policies that are in tension with the nation's human rights treaty obligations²⁰ and the federal government has done little to counter those trends. Meanwhile, Congress has enacted several statutes restricting the availability of judicial remedies for individuals whose constitutional and statutory rights are violated.²¹ Additionally, the federal courts have adopted narrowing interpretations of both substantive rights and judicial remedies,²² thereby restricting the scope of protection available under statutory and constitutional provisions that Presidents Bush and Clinton relied upon as a basis for assurances that the United States would comply with its human rights treaty obligations. The net effect of these developments is that the US record of compliance with human rights treaty obligations is worse today than it was in 1994.

Numerous aspects of US policies and practices do not satisfy international human rights standards.²³ This Part

19. See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 *YALE J. INT'L L.* 129, 139–42, 175–88 (1999) (providing detailed support for the claims made in this paragraph).

20. See *infra* notes 24–29, 43–45, 77–87 and accompanying text.

21. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 18 U.S.C. § 1 (2006)) (restricting the availability of federal habeas corpus relief for individuals convicted of crimes in state courts); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321–66 (1996) (codified as amended at 18 U.S.C. § 3626 (2006)) (restricting the availability of judicial remedies for prisoners who allege violations of their constitutional rights); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended at 18 U.S.C. § 1101 (2006)) (providing for expedited removal of so-called “criminal aliens”).

22. See generally Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 *N.Y.U. L. REV.* 681 (2009); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 *SUP. CT. REV.* 343 (2002); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 *IND. L.J.* 223 (2003); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 *TEX. L. REV.* 1097 (2006).

23. See, e.g., U.N. Comm. against Torture, Conclusions and Recommendations of the Committee against Torture: United States of America, U.N. Doc.

addresses three issues: (i) life without parole for juvenile offenders, (ii) felon disenfranchisement laws, and (iii) conditions in maximum security prisons. These examples illustrate the ways in which US policies and practices unrelated to the War on Terror are inconsistent with US obligations under international human rights treaties.

A. *Juvenile Life Without Parole*

As of early 2010, there were more than 2500 individuals serving life without parole (“LWOP”) sentences in the United States for crimes they committed as juveniles.²⁴ The US Supreme Court ruled in May 2010 in *Graham v. Florida* that the Eighth Amendment prohibits LWOP sentences for juveniles who committed non-homicide offenses.²⁵ The Court’s ruling effectively reversed the LWOP sentences of 123 juvenile offenders.²⁶ That still leaves more than 2400 juvenile offenders convicted of homicide offenses who are serving LWOP sentences. As of 1992, when the United States ratified the ICCPR, there were fewer than 500 juvenile offenders serving LWOP sentences.²⁷ As of 1976, when the ICCPR first entered into force internationally, there were fewer than twenty juvenile offenders serving LWOP sentences.²⁸ Thus, the magnitude of the problem has increased exponentially over the past few decades.²⁹

CAT/C/USA/CO/2 (July 25, 2006) (evaluating US compliance with the Torture Convention); U.N. Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008) (evaluating US compliance with the Race Convention); U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) [hereinafter Concluding Observations: Human Rights Committee] (evaluating US compliance with the ICCPR).

24. See NAT’L CONFERENCE OF STATE LEGISLATURES, JUVENILE LIFE WITHOUT PAROLE 16 (2010), available at <http://www.ncsl.org/documents/cj/jlwopchart.pdf> (reporting a total of 2574 juvenile offenders serving life without parole (“LWOP”) sentences in the United States).

25. See *Graham v. Florida*, 130 S. Ct. 2011, 2014–15 (2010).

26. See *id.* at 2023–24.

27. See AMNESTY INT’L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES (2005).

28. See *id.*

29. The annual number of juvenile LWOP sentences peaked in about 1996–97 and began declining after that. See *id.*

Article 24(1) of the ICCPR provides: “Every child shall have . . . such measures of protection as are required by his status as a minor.”³⁰ Although the United States adopted various reservations to limit the scope of its treaty obligations when it ratified the ICCPR, it did not adopt any reservation to Article 24(1).³¹ Hence, Article 24(1) imposes a legally binding treaty obligation on the United States.³² The Human Rights Committee, which is the treaty body created by the ICCPR to oversee treaty implementation, has expressed the view that “sentencing children to [a] life sentence without parole is of itself not in compliance with [A]rticle 24(1) of the Covenant.”³³

The Committee’s conclusion that juvenile LWOP violates Article 24(1) is not dispositive because the ICCPR does not grant the Committee authority to issue final, authoritative treaty interpretations. Even so, other authorities support the Committee’s view that a ban on juvenile LWOP is a “measure of protection” required by Article 24. First, the Supreme Court’s opinion in *Graham* contains a lengthy passage explaining why—due to unique features of juvenile offenders—the imposition of LWOP sentences for juvenile offenders constitutes “cruel and unusual punishment” in violation of the Eighth Amendment.³⁴ The Court’s rationale also supports the conclusion that special psychological and emotional characteristics of children mean that a ban on LWOP sentences for juvenile offenders is required under Article 24.

Second, Article 31(3)(b) of the Vienna Convention on the Law of Treaties stipulates that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” must be considered in

30. ICCPR, *supra* note 16, art. 24(1).

31. See *ICCPR: Declarations and Reservations, United States*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-4&chapter=4&lang=en#EndDec (last visited Jan. 6, 2012) (showing the US reservations to the ICCPR).

32. The United States did adopt a reservation to Article 10, stipulating that “the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of Article 10.” See *id.* However, that reservation does not purport to restrict or modify US obligations under Article 24. See *id.*

33. Concluding Observations: Human Rights Committee, *supra* note 23, para. 34.

34. See *Graham v. Florida*, 130 S. Ct. 2011, 2026–30 (2010).

ascertaining the correct interpretation of the treaty.³⁵ Since entry into force of the ICCPR, states throughout the world have prohibited the imposition of LWOP sentences for juvenile offenders. More than 190 nations are parties to the Convention on the Rights of the Child, which expressly prohibits the imposition of “life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.”³⁶ Moreover, a comprehensive survey of domestic laws and practices shows that “only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and [one other state], ever impose the punishment in practice.”³⁷ Thus, consistent state practice since entry into force of the ICCPR manifests near-universal agreement that a ban on LWOP sentences for juvenile offenders is a “measure of protection” required by their status as minors, and hence required by Article 24 of the ICCPR.

The United States’ failure to comply with Article 24 is attributable to several factors. First, there has been a trend in state criminal justice policies throughout the United States towards progressively harsher sentences for criminal offenders. This trend began before the United States ratified the ICCPR and has continued since. The Supreme Court could apply the Eighth Amendment to curb the harshest consequences of this trend, but the Court has imposed few Eighth Amendment constraints on state criminal sentencing practices outside the death penalty context.³⁸ Congress could invoke its treaty

35. Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331.

36. U.N. Convention on the Rights of the Child art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3.

37. *Graham*, 130 S. Ct. at 2033 (citing MICHELLE LEIGHTON & CONNIE DE LA VEGA, SENTENCING OUR CHILDREN TO DIE IN PRISON: GLOBAL LAW AND PRACTICE 4 (2007) (unpublished manuscript)). The Court’s opinion in *Graham* cites Professors Leighton and de la Vega for the proposition that Israel also imposes LWOP sentences on juvenile offenders. An Israeli colleague assures me that this is not true. Thus, the United States may be the only state in the world that actually imposes LWOP sentences on juvenile offenders.

38. See, e.g., *Ewing v. California*, 538 U.S. 11 (2003) (rejecting the Eighth Amendment challenge to California’s “three strikes” law); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (holding that a mandatory life sentence for drug possession did not violate the Eighth Amendment); *Rummel v. Estelle*, 445 U.S. 263 (1980) (holding that a mandatory life sentence under a Texas recidivist statute did not violate the Eighth Amendment). Under the Court’s analysis in *Graham*, the Court looks for “objective

implementation power, as recognized in *Missouri v. Holland*,³⁹ to constrain state criminal justice policies that are inconsistent with US treaty obligations, but to date Congress has shown little inclination to do so. Moreover, some commentators assert that Supreme Court decisions in *United States v. Lopez*⁴⁰ and *United States v. Morrison*⁴¹ raise doubts about the scope of Congress' treaty implementation power under *Missouri*.⁴²

B. Felon Disenfranchisement Laws

According to the best available data, “more than 5 million citizens will be ineligible to vote in the midterm elections in November [2010], including nearly 4 million who reside in the 35 states that still prohibit some combination of persons on probation, parole, and/or people who have completed their sentence from voting.”⁴³ Felon disenfranchisement laws affect three groups of people: those currently in prison, those released on probation or parole, and those convicted felons who have fully served their sentences and have been released for re-integration into the community. Non-incarcerated felons “make up approximately three-quarters of the disenfranchised

indicia of society's standards . . . to determine whether there is a *national* consensus against the sentencing practice at issue.” *Graham*, 130 S. Ct. at 2022 (emphasis added) (quoting *Roper v. Simmons*, 543 U.S. 551, 552 (2005) (internal quotation marks omitted)). The Court found a consensus against juvenile LWOP for non-homicide offenses. *See id.* at 2023–26. However, the Court would be hard pressed to find a national (vice international) consensus against juvenile LWOP for homicide offenses. Therefore, the Court is unlikely to rule that juvenile LWOP for homicide violates the Eighth Amendment.

39. 252 U.S. 416 (1920) (holding that Congress has the power to enact legislation designed to implement a treaty, even if the legislation would be invalid in the absence of a treaty).

40. *United States v. Lopez*, 514 U.S. 549 (1995).

41. *United States v. Morrison*, 529 U.S. 598 (2000).

42. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (urging the Supreme Court to overrule *Missouri*); Nicholas Quinn Rosenkrantz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005) (also advocating a reversal of *Missouri*, but for different reasons). *But see* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) (defending the continued vitality of the Court's holding in *Missouri*).

43. NICOLE D. PORTER, THE SENTENCING PROJECT, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997–2010, at 3 (2010).

population”⁴⁴ “While a number of other countries . . . deny voting rights to prison inmates, the United States is unique in restricting the rights of nonincarcerated felons”⁴⁵

Under Article 25 of the ICCPR, “[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions . . . [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage”⁴⁶ The “distinctions mentioned in [A]rticle 2” include distinctions based on race.⁴⁷ In the United States, “[r]acial disparities in the criminal justice system . . . translate into higher rates of disenfranchisement in communities of color, resulting in one of every eight adult black males being ineligible to vote.”⁴⁸ Given the disproportionate impact of felon disenfranchisement laws on black males, such laws are arguably inconsistent with the US treaty obligation to “ensure” the right to vote “to all individuals within its territory . . . without distinction of any kind”⁴⁹ Indeed, the Human Rights Committee has concluded that felon disenfranchisement laws in the United States “do not meet the requirements” of the ICCPR.⁵⁰ However, that conclusion must be qualified because the United States ratified the ICCPR subject to an “understanding” that the treaty permits “distinctions based upon race . . . when such distinctions are, at minimum, rationally related to a legitimate governmental objective.”⁵¹

Setting aside the racially discriminatory impact of felon disenfranchisement laws, there is a compelling argument that a

44. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 778 (2002).

45. *Id.*

46. ICCPR, *supra* note 16, art. 25.

47. *See* ICCPR, *supra* note 16, art. 2.

48. Porter, *supra* note 43, at 3. **Error! Hyperlink reference not valid.** One detailed study concluded that, due to the racially discriminatory impact of felon disenfranchisement laws, those laws “played a decisive role in [some] US Senate elections in recent years. Moreover, at least one Republican presidential victory would have been reversed if former felons had been allowed to vote.” Uggen & Manza, *supra* note 44, at 777.

49. ICCPR, *supra* note 16, art. 2.

50. *See* Concluding Observations: Human Rights Committee, *supra* note 23, para. 35.

51. *See* ICCPR: *Declarations and Reservations, United States*, *supra* note 31.

subset of such laws are inconsistent with US treaty obligations under Article 25 of the ICCPR.⁵² Article 25 prohibits “unreasonable restrictions” on the right to vote. The United States did not adopt any reservation to Article 25;⁵³ hence, the treaty prohibition on “unreasonable restrictions” is binding on the United States as a matter of international law. Over the past decade, the Supreme Court of Canada,⁵⁴ the South African Constitutional Court,⁵⁵ the Australian High Court,⁵⁶ and the European Court of Human Rights (in cases originating in the United Kingdom and Austria)⁵⁷ have all held that laws disenfranchising *incarcerated prisoners* impose unreasonable restrictions on the prisoners’ voting rights.⁵⁸ None of those cases involved disenfranchisement of convicted felons who had been released from prison.

In contrast, as noted above, non-incarcerated felons “make up approximately three-quarters of the disenfranchised population” in the United States.⁵⁹ Twelve states in the United States maintain laws that deprive at least some ex-offenders of the right to vote even after they have fully served their sentences.⁶⁰ If disenfranchisement of incarcerated prisoners is unreasonable, as held by foreign and international tribunals, then the US practice of disenfranchising ex-felons who have

52. See generally Reuven Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT’L L.J. 197 (2011) (providing a detailed defense of this argument).

53. See ICCPR: *Declarations and Reservations, United States*, *supra* note 31.

54. See *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519 (Can.).

55. See *Minister of Home Affairs v. Nat’l Inst. for Crime Prevention & the Reintegration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) (S. Afr.).

56. *Roach v. Electoral Comm’r* [2007] 233 CLR 162 (Austl.).

57. *Frodl v. Austria*, App. No. 20201/04, 52 Eur. H.R. Rep. 5 (2011); *Hirst v. United Kingdom* (No.2), 2005-IX Eur. Ct. H.R. 187.

58. None of the cited decisions is based primarily on Article 25 of the ICCPR. Nevertheless, the primary rationale for all of these decisions was that the challenged restrictions on voting rights were unreasonable. See generally Ziegler, *supra* note 52; Michael Plaxton & Heather Lardy, *Prisoner Disenfranchisement: Four Judicial Approaches*, 28 BERKELEY J. INT’L L. 101 (2010).

59. Uggen & Manza, *supra* note 44, at 778.

60. Florida, Iowa, Kentucky, and Virginia “deny the right to vote to all persons with felony convictions, even after they have completed their sentences.” THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES I (2011). Alabama, Arizona, Delaware, Mississippi, Nebraska, Nevada, Tennessee, and Wyoming “disenfranchise certain categories of ex-offenders and/or permit application for restoration of rights for specified offenses after a waiting period.” See *id.* at 1, 3 tbl.

been released from prison and are no longer on probation or parole is clearly an “unreasonable restriction” within the meaning of Article 25. Indeed, the National Commission on Federal Election Reform recommended in 2001 that all states restore voting rights to citizens who fully serve their sentences,⁶¹ but that recommendation has not been fully implemented. Hence, the Human Rights Committee correctly concluded “that general deprivation of the right to vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of [A]rticle[] 25” of the ICCPR.⁶²

In contrast to the juvenile LWOP issue, US practice involving felon disenfranchisement has improved somewhat since the mid-1990s. “[S]ince 1997, 23 states have amended felony disenfranchisement policies in an effort to reduce their restrictiveness and expand voter eligibility.”⁶³ Despite these improvements, the laws in many states remain inconsistent with the nation’s treaty obligations under the ICCPR. One could blame US non-compliance on recalcitrant state legislators, but that explanation is not entirely convincing. The federal executive branch could take significant steps to remedy the problem by engaging in more vigorous enforcement of the Voting Rights Act.⁶⁴ Insofar as the president’s current authority may be insufficient, Congress could amend the Voting Rights Act to expand the president’s authority to compel changes in state laws to ensure full compliance with US treaty obligations.⁶⁵

61. See THE NAT’L COMM’N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 45 (2001).

62. Concluding Observations: Human Rights Committee, *supra* note 23, para. 35.

63. Porter, *supra* note 43, at 1.

64. See generally Daniel H. Wolf, *An Extraordinary Facilitator: The Voting Rights Act and U.S. Adherence to International Human Rights Treaty Obligations*, 31 U. PA. J. INT’L L. 1149 (2010).

65. There are two independent constitutional arguments that Congress could invoke as a basis for its authority to enact such legislation. First, Congress could invoke its treaty implementation power under *Missouri v. Holland*, 252 U.S. 416 (1920). In this author’s opinion, Congress’ power to implement treaties should be sufficient to sustain the constitutional validity of legislation that Congress deems necessary to ensure compliance with US treaty obligations. However, the scope of Congress’ treaty implementation power is contested. See *supra* note 42 and accompanying text. Second, Congress could invoke its power under Section 5 of the Fourteenth Amendment, at least insofar as federal legislation is designed to remedy racially discriminatory effects of felon disenfranchisement laws. See *City of Boerne v. Flores*, 521 U.S. 507 (1997); see

C. Prison Overcrowding and Maximum Security Prisons

Article 10(1) of the ICCPR provides: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”⁶⁶ The United States did not adopt a reservation to limit the scope of its obligations under this provision.⁶⁷ Hence, the provision is binding on the United States under international law. There are two reasons why the record of US compliance with Article 10(1) has deteriorated since the United States ratified the ICCPR in 1992. First, any Eighth Amendment violation related to prisoners’ rights is also a violation of Article 10(1). Second, the available evidence suggests that the incidence of prisoners’ rights violations—especially unremedied violations—has increased significantly since 1995.

Consider, first, the relationship between Article 10(1) and the Eighth Amendment. The Eighth Amendment creates only negative obligations: it prohibits “cruel and unusual punishments.”⁶⁸ In contrast, Article 10(1) of the ICCPR creates an affirmative obligation to treat prisoners “with respect for the inherent dignity of the human person.” Thus, a purely textual analysis suggests that international law sets a higher standard than domestic law. However, two factors counterbalance this textual analysis. First, US prisoners are protected by the full panoply of constitutional rights, including the First Amendment, the Fourth Amendment, the Equal Protection Clause and the Due Process Clause, in addition to the Eighth Amendment.⁶⁹ Second, Supreme Court jurisprudence has expanded the reach of the Eighth Amendment well beyond the plain meaning of the text. Under established doctrine, the Eighth Amendment imposes on prison officials an affirmative duty to care for prisoners.⁷⁰ Moreover, the Court has repeatedly

also Wolf, *supra* note 64, at 1173–77 (discussing reliance on Section 5 to promote compliance with human rights treaty obligations).

66. ICCPR, *supra* note 16, art. 10(1).

67. *See ICCPR: Declarations and Reservations, United States, supra* note 31.

68. U.S. CONST. amend. VIII.

69. *See generally* MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* (3d ed. 2003).

70. *See, e.g.,* *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976).

affirmed that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”⁷¹

Even so, there are certain respects in which international human rights law is more protective of prisoners’ rights than US constitutional law. To succeed in an Eighth Amendment claim challenging conditions of confinement, a prisoner must satisfy both an objective and subjective test.⁷² To satisfy the objective component of the test, prisoners must show that they have been deprived “of a single, identifiable human need such as food, warmth, or exercise”⁷³ In contrast, the European Court of Human Rights has set a much lower standard for “degrading treatment” claims, holding that treatment is degrading if it is “such as to arouse in the victims feeling [sic] of fear, anguish and inferiority capable of humiliating and debasing them.”⁷⁴ Moreover, the European Court does not require prisoners to prove any particular mens rea element to establish a claim for degrading treatment.⁷⁵ In contrast, the subjective component of an Eighth Amendment claim requires a showing of “deliberate indifference” to the prisoner’s needs, which the Court has construed as a recklessness standard.⁷⁶ Thus, one may fairly conclude, at a minimum, that any violation of a prisoner’s Eighth Amendment rights is also a violation of ICCPR Article 10(1).

Moreover, the incidence of unremedied Eighth Amendment violations has increased significantly since the United States ratified the ICCPR in 1992. This is due to a confluence of three factors: 1) passage of the Prison Litigation

71. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958))).

72. *See, e.g., Wilson v. Seiter*, 501 U.S. 294, 298–302 (1991).

73. *Id.* at 304.

74. *Van der Ven v. Netherlands*, 38 Eur. Ct. H.R. 46, ¶ 48 (2003). The jurisprudence of the European Court provides persuasive, but not binding, authority for interpreting analogous provisions of the ICCPR. The Human Rights Committee often consults the European Court’s jurisprudence as a guide to construing analogous ICCPR provisions. Moreover, the language in Article 7 of the ICCPR is virtually identical to the language in Article 3 of the European Convention. *Compare* ICCPR, *supra* note 16, art. 7 (prohibiting “cruel, inhuman or degrading treatment or punishment”) with European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 (prohibiting “inhuman or degrading treatment or punishment”).

75. *See Iwanczuk v. Poland*, 38 E.H.R.R. 8, ¶¶ 51–52 (2001).

76. *See Farmer v. Brennan*, 511 U.S. 825, 828, 836–37 (1994).

Reform Act in 1995; 2) the dramatic growth in the US prison population over the past two decades; and 3) increased numbers of prisoners housed in maximum security prisons.

Judicial oversight of prison conditions has declined as a result of the Prison Litigation Reform Act (“PLRA”).⁷⁷ Since passage of the PLRA, “prisoners’ federal filing rates have declined 60 percent, from 26 federal cases per thousand prisoners in 1995 to fewer than 11 cases per thousand prisoners in 2006.”⁷⁸ Proponents of the PLRA hoped that the legislation would reduce the number of frivolous lawsuits without affecting meritorious claims. Unfortunately, the best available empirical analysis suggests that the PLRA has also made it much more difficult for prisoners to bring meritorious claims,⁷⁹ thereby increasing the number of constitutional violations that are left without a remedy.

Second, the number of prisoners detained in state and federal correctional institutions has grown enormously over the past fifteen years. Federal prisons housed about 205,000 inmates in 2009,⁸⁰ more than double the figure of about 82,000 inmates in 1995.⁸¹ State prisons housed about 1.32 million inmates in 2009,⁸² compared to roughly 942,000 inmates in 1995.⁸³ Construction of additional prison capacity has not kept pace with the increasing prison population. Federal prisons were operating at thirty-seven percent over capacity in 2005, compared to twenty-four percent over capacity in 1995. State prisons were operating at twelve percent over capacity in 2005, compared to three percent over capacity in 1995.⁸⁴ The

77. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended at 18 U.S.C. § 3626 (2006)).

78. Margo Schlanger et al., *ABA Criminal Justice Standards on the Treatment of Prisoners*, 25 SUM CRIM. JUST. 14, 19 (2010).

79. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1644-64 (2003).

80. LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 231681, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009, at 1, 7 app. tbl.2 (2010).

81. JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 164266, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 1995, at iv (1997).

82. See GLAZE, *supra* note 80, at 1, 7 app. tbl.2.

83. See STEPHAN, *supra* note 81, at iv.

84. See JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 222182, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005, at 3 (2005); see also STEPHAN, *supra* note 81, at iv.

Supreme Court has acknowledged that overcrowding can be a key factor contributing to the deprivation of prisoners' constitutional rights.⁸⁵

The population of maximum security prisons has also grown steadily over the past two decades.⁸⁶ Although each maximum security prison is different, these prisons, as a group, impose the most severe restrictions on individual liberty, and hence raise the most significant human rights concerns. The Supreme Court described the conditions in one maximum security prison as follows:

Conditions at OSP are more restrictive than any other form of incarceration in Ohio . . . In OSP almost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells. Incarceration at OSP is synonymous with extreme isolation . . . OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.⁸⁷

Such conditions appear to be incompatible with standards for conditions of confinement recently promulgated by the American Bar Association.⁸⁸ Not surprisingly, the Human Rights

85. *See* *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).

86. Federal maximum security prisons housed 21,855 inmates in 2005, compared to 9272 inmates in 1995. State maximum security prisons housed 491,240 inmates in 2005, compared to 354,000 inmates in 1995. *See* STEPHAN, *supra* note 84, app. tbl.11; STEPHAN, *supra* note 81, at 9.

87. *Wilkinson v. Austin*, 545 U.S. 209, 214 (2005).

88. *See* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS ON THE TREATMENT OF PRISONERS 23-3.1-23-3.9 (3d ed. 2010).

Committee concluded “that conditions in some maximum security prisons are incompatible” with US obligations under Article 10(1).⁸⁹

In sum, the dramatic growth in the nation’s prison population since 1995, and especially the increased numbers of prisoners housed in maximum security prisons, has undoubtedly led to an increase in the overall number of prisoners who have legitimate grievances about violations of their constitutional rights. Meanwhile, the PLRA has led to an increase in the percentage of constitutional violations that go unremedied. Since every violation of a prisoner’s constitutional rights is also a violation of US human rights treaty obligations, the gap between treaty requirements and US performance has expanded significantly since the United States ratified the ICCPR in 1992.

II. *WHY SHOULD THE UNITED STATES COMPLY WITH HUMAN RIGHTS TREATY COMMITMENTS?*

Part I showed that the United States is not complying fully with its human rights treaty obligations. But, one might ask, why should the United States comply with its treaty commitments? Part II contends that the United States should comply with its human rights treaty obligations to promote both foreign and domestic policy goals. The nation’s failure to comply with its treaty obligations has a significant negative impact on key foreign policy objectives. Moreover, compliance with international human rights norms would help the United States fulfill the higher moral aspirations of its citizens. The next two Sections consider each set of arguments separately.

A. Foreign Policy Considerations

In 1974, Congress enacted legislation specifying that “a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.”⁹⁰ The legislation added that the goal of promoting “increased respect for human

89. *See* Concluding Observations: Human Rights Committee, *supra* note 23, para. 32.

90. Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 502B, 88 Stat. 1795, 1815 (codified as amended at 22 U.S.C. § 2151 (2006)).

rights and fundamental freedoms” was consistent with US obligations under the UN Charter and “in keeping with the constitutional heritage and traditions of the United States.”⁹¹ Since that time, Congress has enacted numerous statutes—such as the International Religious Freedom Act of 1998⁹² and the Victims of Trafficking and Violence Protection Act of 2000⁹³—designed to promote greater protection for human rights in countries around the world.⁹⁴

One key element of the federal statutory scheme is a requirement for the US Department of State to provide annual reports on human rights practices in foreign countries.⁹⁵ As Professor Sarah Cleveland has noted, the requirement to compile information for the annual reports “provokes constant interactions around human rights norms between US and foreign government personnel and other foreign actors.”⁹⁶ Consequently, international human rights concerns have become an integral part of the day-to-day conduct of US foreign affairs. An official State Department publication released during the Reagan administration asserted: “The cause of human rights forms the core of American foreign policy; it is central to America’s conception of itself.”⁹⁷ Secretary of State Hillary Rodham Clinton recently declared that the cause of advancing “human rights is a daily priority for the men and women of the Department of State, both in Washington and in our embassies overseas.”⁹⁸

When the United States breaches its international treaty commitments it undermines diplomatic efforts to promote respect for human rights in other countries. In a series of amicus briefs submitted to the US Supreme Court over the past decade, former senior diplomats have highlighted the link

91. *Id.*

92. International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787 (codified as amended at 22 U.S.C. § 6401 (2006)).

93. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. § 7101 (2006)).

94. For a brief summary of US legislation on human rights, see LOUIS HENKIN ET AL., *HUMAN RIGHTS* 1025–28, 1037–41 (2d ed. 2009).

95. See 22 U.S.C. § 2151n(d) (2006).

96. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *YALE J. INT’L L.* 1, 90 (2001).

97. U.S. DEP’T OF STATE, *FUNDAMENTALS OF U.S. FOREIGN POLICY* 24 (1988).

98. U.S. DEP’T OF STATE, *2010 HUMAN RIGHTS REPORT: PREFACE* (2011).

between respect for human rights at home and the conduct of US foreign policy abroad. For example, in 2001, former diplomats argued in a case involving capital punishment of mentally retarded individuals that “the current United States practice of executing people suffering from mental retardation is inconsistent with evolving international standards of decency,” and “that North Carolina’s continuation of the practice in this case would strain diplomatic relations with close American allies, increasing America’s diplomatic isolation and impairing other United States foreign policy interests.”⁹⁹ The same group of nine former diplomats—a group that included some of the nation’s most illustrious ambassadors¹⁰⁰—raised similar concerns a few years later in a case involving the death penalty for juvenile offenders.¹⁰¹

A distinct group of former US diplomats filed a series of amicus briefs in support of individuals detained in the War on Terror. For example, in *Rasul v. Bush*,¹⁰² a case involving detention of alleged terrorists at Guantanamo Bay, a distinguished group of former US diplomats asserted:

The courts below denied review of the executive branch’s incarceration of the petitioners, effectively holding that when the executive acts against foreign citizens on foreign soil, it may do so with impunity, free of even minimal judicial review. These rulings undermine what has long been one of our proudest diplomatic advantages—this nation’s constitutional guaranty, enforced by an independent judiciary, against arbitrary government power. The rulings have not gone unnoticed abroad. [Some foreign] [g]overnments . . . have even interpreted the

99. Brief for Diplomats Morton Abramowitz et al. as Amici Curiae Supporting Petitioner, *McCarver v. North Carolina*, 531 U.S. 1205 (2001) (No. 00-8727), 2001 WL 648607, at *2. The Supreme Court ultimately dismissed *McCarver v. North Carolina*, but considered the identical issue in *Atkins v. Virginia*, 536 U.S. 304 (2002).

100. The amici in these cases included four career diplomats who “retired with the rank of Career Ambassador, the highest rank that can be awarded to members of the United States Foreign Service.” See Brief for Former U.S. Diplomats Morton Abramowitz et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636448, at *5.

101. See *id.*

102. 542 U.S. 466 (2004).

rulings as a license to incarcerate their own citizens and others without judicial review.¹⁰³

A similar group of more than twenty former diplomats reiterated these arguments when the Guantanamo litigation returned to the Supreme Court in *Boumediene v. Bush*,¹⁰⁴ contending that “denial of *habeas corpus* to prisoners at Guantanamo undermine[s] one of our country’s most important diplomatic assets—our perceived commitment to the rule of law.”¹⁰⁵

In *Samantar v. Yousuf*,¹⁰⁶ a defendant accused of torture and extrajudicial killing argued that he was entitled to immunity from suit in US courts because plaintiffs’ claims arose from actions allegedly taken in his official capacity when he served as a senior government official in Somalia.¹⁰⁷ In response, a group of twenty-six former US diplomats argued against “a blanket extension of sovereign immunity to former foreign officials in the narrow and discrete context of their being sued in United States courts for alleged torture and extrajudicial executions.”¹⁰⁸ They added: “Plaintiffs allege that a former senior official of a brutal and undemocratic regime was responsible for their torture and for extrajudicial executions of their family members . . . [O]ur fundamental foreign policy commitment to human rights and the rule of law—cornerstones of American foreign policy for decades—may be vindicated by allowing our courts to hear the suit.”¹⁰⁹ In short, domestic judicial application of international human rights norms helps reinforce the

103. Brief for Diego C. Asencio et al. as Amici Curiae Supporting Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2003 WL 22490560, at *4.

104. 553 U.S. 723 (2008).

105. Brief for Former US Diplomats Diego C. Asencio et al. as Amici Curiae Supporting Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2414900, at *1; see Brief for Former US Diplomats J. Brian Atwood et al. as Amici Curiae Supporting Petitioner, *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (No. 08-368), 2009 WL 216168, at *1–2 (contending that “allowing [the lower court decision] to stand will undercut the positive effects on American diplomacy of this Court’s decision in *Boumediene*”).

106. 130 S. Ct. 2278 (2010).

107. See *id.* at 2282–84.

108. Brief for Former US Diplomats Morton I. Abramowitz et al. as Amici Curiae Supporting Respondents, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555), 2010 WL 342036, at *6.

109. *Id.* at *8–9.

nation's foreign policy commitment to human rights and the rule of law.

One final case merits discussion in this context. In July 2011, the United States submitted an amicus brief to the Supreme Court supporting a stay of execution for Humberto Leal Garcia, a Mexican national on death row in Texas.¹¹⁰ The Obama administration argued that the "case implicates United States foreign-policy interests of the highest order" because petitioner's execution would place "the United States in irreparable breach of its international" treaty obligations.¹¹¹ The government added that such a breach of treaty obligations "would have serious repercussions for United States foreign relations."¹¹² Reportedly, "former president George W. Bush also appealed for Leal's execution to be halted on the grounds it could jeopardise . . . US diplomatic interests."¹¹³ Thus, Presidents George W. Bush and Obama apparently agree with former US diplomats that the United States' failure to comply with its treaty commitments has serious negative foreign policy consequences.

In sum, for the past several decades there has been strong bipartisan support in both Congress and the executive branch for treating international human rights as a core element of US foreign policy. Senior government officials responsible for the nation's international diplomacy agree that the US failure to honor its human rights treaty commitments at home has significant negative repercussions for the conduct of US foreign affairs.

110. See Brief for the United States as Amicus Curiae Supporting Applications for a Stay, *Leal Garcia v. Texas*, 131 S. Ct. 2866 (2011), (Nos. 11A1, 11A2), 2011 WL 2630156.

111. *Id.* at *11–12. Granted, this case involves US obligations under the United Nations Charter and the Vienna Convention on Consular Relations, neither of which is a human rights treaty. Nevertheless, in specific cases raising human rights concerns, the negative foreign policy consequences of treaty violations are similar, regardless of whether the treaty at issue is technically classified as a human rights treaty.

112. *Id.* at *12.

113. Chris McGreal, *Humberto Leal Garcia Executed in Texas Despite White House Appeal*, *GUARDIAN* (London), July 7, 2011, at 2. Texas executed him despite these interventions. See *id.*

B. *Domestic Policy Considerations*

International human rights law is rooted in a commitment to the values of human dignity, equality, and individual autonomy. In the Preamble to the United Nations Charter, the drafters affirmed their “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.”¹¹⁴ Shortly after adopting the UN Charter, the member states of the United Nations endorsed the Universal Declaration of Human Rights,¹¹⁵ the foundational document of modern international human rights law. Article 1 of the Universal Declaration declares: “All human beings are born free and equal in dignity and rights.”¹¹⁶ Article 2 adds: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹¹⁷

The principles embodied in the Universal Declaration are not “foreign” or “alien” concepts. They are fundamental American values,¹¹⁸ codified in the US Constitution, and then restated in the Universal Declaration and other international human rights instruments. Although the specific language included in international human rights treaties is slightly different from the language of the US Constitution, the underlying values are the same.¹¹⁹ Indeed, public opinion data shows that US citizens strongly endorse the core principles of international human rights law.¹²⁰ For example, seventy-seven percent of those surveyed agreed that the “government should ‘protect’ human rights for everyone.”¹²¹ Thus, the United States should comply with international human right norms because

114. U.N. Charter pmb. l.

115. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

116. *Id.* art. 1.

117. *Id.* art. 2.

118. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

119. See LOUIS HENKIN, *THE AGE OF RIGHTS* 143–56 (1990).

120. See Alan Jenkins & Kevin Shawn Hsu, *American Ideals & Human Rights: Findings from New Public Opinion Research by the Opportunity Agenda*, 77 *FORDHAM L. REV.* 439 (2008).

121. See *id.* at 445.

compliance promotes values cherished by the vast majority of US citizens.

Unfortunately, over the past few decades state and federal officials in the United States have adopted a series of laws and policies that are at odds with core American values. Politics in the United States has been dominated by fear. We fear “career criminals,” so state legislators enact laws authorizing life imprisonment for petty offenses.¹²² We fear “terrorists,” so the federal executive branch adopts policies authorizing indefinite detention of accused terrorists without providing them a meaningful opportunity to challenge the factual allegations that ostensibly support the decision to detain them.¹²³ We fear “aliens,” so Congress enacts laws to remove aliens from the United States without affording them the procedural safeguards necessary to ensure that they will not be persecuted in the destination country.¹²⁴

122. *See, e.g.*, CAL. PENAL CODE § 667(e)(2)(A) (West 2011) (requiring life imprisonment for a so-called “third strike”); *see also* *Ewing v. California*, 538 U.S. 11 (2003) (rejecting a constitutional challenge to California’s three strikes law and upholding a life sentence for a man convicted of stealing three golf clubs).

123. Congress has authorized the use of military commissions to conduct criminal trials of alleged terrorists. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. § 948a (2006)); Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (codified as amended at 10 U.S.C. § 948a (2006 & Supp. 2010)). However, both the Bush and Obama administrations have conceded that there are a significant number of detainees whom the government intends to detain indefinitely, without ever subjecting them to criminal trials. *See* Exec. Order No. 13,567, 3 C.F.R. 13567 (2011); Presidential Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001), *reprinted in* 10 U.S.C. § 801 (2006). Congress has never enacted legislation that explicitly authorizes such indefinite detention. Pursuant to the Supreme Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), individuals subject to indefinite detention have a right to file habeas corpus petitions to challenge the legality of their detention. However, recent decisions by the D.C. Circuit, which is the only appellate court other than the Supreme Court with authority to review such petitions, raise doubts as to whether the current system provides a meaningful opportunity for alleged terrorists to challenge the factual assertions invoked by the government as a basis for their continued detention. *See* Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011) (reviewing the D.C. Circuit’s development of evolving federal common law standards for judicial review of executive detention policies).

124. In 1996, Congress enacted legislation providing for “expedited removal” of certain aliens seeking admission to the United States. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 18 U.S.C. § 422 (2006)), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as

Policies based on these types of fears yield results that are fundamentally at odds with the higher moral aspirations of most Americans. Virtually all Americans agree that torture is morally repugnant, but fear of alleged “terrorists” produces policies that make US government officials complicit in acts of torture.¹²⁵ Americans value individual freedom, but the United States imprisons a higher percentage of its population than any other country in the world,¹²⁶ because fear of crime prompts legislators to adopt harsh penal policies that are inconsistent with the nation’s moral commitment to individual freedom. The United States needs international human rights law to help us realize our own higher moral aspirations. We need international human rights law as an antidote to the politics of fear that has infected the American body politic over the past few decades.

Some will object that protection of human rights in the United States should be based on domestic law, not foreign law.¹²⁷ This objection is unpersuasive because international human rights law is not “foreign law.” The United States played a very influential role in creating international human rights law, and the diplomats who represented our nation in treaty negotiations achieved great success in incorporating American values into the text of international human rights treaties.¹²⁸ The

amended at 18 U.S.C. § 302(a) (2006)); see STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 506–07 (5th ed. 2009). Aliens subject to expedited removal, including those who express a fear of persecution, are entitled to minimal procedural safeguards to protect them against deportation to a country where they risk persecution. See LEGOMSKY & RODRÍGUEZ, *supra*, at 1052–56. Hence, critics allege that the expedited removal process, as a practical matter, results in deportation of refugees to countries where they will likely be persecuted, contrary to US treaty obligations under the 1967 Protocol on the Status of Refugees. See, e.g., Michele R. Pistone & John J. Hoeffner, *Rules are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 167–72 (2006).

125. See, e.g., *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009); see also Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14, 2005, at 106.

126. The United States incarcerates 743 prisoners per 100,000 population. The next highest incarceration rate is in Rwanda (595 per 100,000), followed by Russia (550 per 100,000), Georgia (547 per 100,000), and the Virgin Islands (539 per 100,000). Iran ranks 38th at 291 per 100,000. China ranks 117th, at 122 per 100,000. See *World Prison Brief*, INT’L CENTRE FOR PRISON STUD., <http://www.prisonstudies.org/info/worldbrief/> (last visited Jan. 6, 2012).

127. See, e.g., Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004).

128. See GLENDON, *supra* note 118, at 236.

US Senate voted in favor of US ratification of the ICCPR, the Race Convention, and the Torture Convention.¹²⁹ Under the Constitution, ratified treaties are the “supreme Law of the Land.”¹³⁰ Thus, ratified human rights treaties are part of the corpus of supreme federal law.¹³¹

Moreover, this Article does not advocate delegation of authority to an international tribunal to pass judgment on US compliance with its human rights treaty obligations. To the contrary, the proposed legislation in the Appendix would give domestic judges, not foreign judges, the power to decide in individual cases whether the conduct of domestic government officials is consistent with US treaty obligations.¹³² Moreover, the proposed legislation specifies that decisions of foreign and international tribunals construing international human rights instruments shall be treated merely as persuasive authority, not binding authority.¹³³ Thus, the proposal does not raise any legitimate concern about ceding sovereignty to foreigners because federal and state judges appointed pursuant to standard procedures for domestic judicial appointments would retain final authority to adjudicate the merits of individual claims and defenses.

Others may object that *judicial* application of human rights norms, as opposed to *legislative* application of such norms, is inconsistent with principles of democratic self-governance.¹³⁴ To state the point more bluntly, they do not want unelected judges

129. The official Senate record does not record the number of Senators voting in favor of ratification, but the Senate approved all three treaties by at least a two-thirds majority vote. See 140 CONG. REC. S7634-02 (daily ed. June 24, 1994) (Race Convention); 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992) (ICCPR); 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (Torture Convention).

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

131. Some may argue that the treaties are not part of supreme federal law because the United States adopted non-self-executing declarations for all three treaties. The proper interpretation of those non-self-executing declarations is contested. See David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 35–44 (2002) (summarizing different possible interpretations of non-self-executing declarations). However, under any plausible interpretation, the treaties are part of the corpus of supreme federal law. See *id.*

132. See Appendix.

133. See Appendix, § 7.

134. See, e.g., John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1747–55 (2009).

making decisions about US compliance with its treaty obligations.

This objection stands the truth on its head. The relevant comparison is *not* between judicial and legislative application of human rights norms. The relevant comparison is between judicial application of *constitutional* norms and judicial application of *treaty* norms. Under current US practice, state and federal courts rely primarily on constitutional norms to vindicate human rights claims. When US courts apply constitutional law, they are applying judge-made law that is not subject to any sort of democratic check, because Congress cannot overrule the Supreme Court's interpretation of the Constitution. In contrast, if US courts applied human rights treaties to resolve fundamental rights claims, and Congress disapproved of the courts' application of the relevant treaty provisions, Congress could enact legislation to overrule the courts.¹³⁵ Thus, those who favor greater legislative control over fundamental rights claims should endorse a proposal for legislation to encourage greater judicial reliance on international human rights treaties as an alternative to excessive judicial reliance on the Constitution. In short, domestic judicial application of international human rights treaties—as an alternative to constitutional adjudication—would enhance democratic self-governance.¹³⁶

III. THE LIKELY SOURCE OF REFORM: CONGRESS OR THE JUDICIARY?

Part I showed that the United States has failed to comply with certain binding human rights treaty obligations. Part II explained why there are sound policy reasons for the United

135. It is well-established that a later-enacted statute takes precedence over a prior conflicting treaty as a matter of US domestic law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987). Therefore, if Congress objects to an interpretation of a specific human rights treaty provision adopted by the courts, Congress could enact a statute to override that provision for the purpose of domestic law. Such a statute would not alter the United States' international legal obligations, but it would determine the scope of domestic legal protection for the right at issue, as a matter of federal law, unless the courts construed the Constitution to be more rights-protective than the statute.

136. For a more extended presentation of the argument presented in this paragraph, see David Sloss, *Using International Law to Enhance Democracy*, 47 VA. J. INT'L L. 1 (2006).

States to improve its human rights performance. Hence, the question arises: which branch of government is most likely to nudge US policies and practices toward improved compliance with the nation's human rights treaty obligations?

Some scholars have argued that human rights activists should look to state and local governments to lead the way in promoting domestic implementation of international human rights norms.¹³⁷ Clearly, much useful work can and has been done at the state and local level to incorporate international norms into domestic government policies.¹³⁸ However, action at the state and local level, without more, is not a viable prescription for national compliance with human rights treaty obligations; actions by state and local governments are too isolated and sporadic to have a significant impact on the United States' overall record of compliance with its treaty commitments.¹³⁹ Hence, national compliance requires unified action at the federal level.

The federal executive has taken some steps to improve domestic implementation of international human rights norms. For example, President Clinton adopted an executive order to enhance domestic implementation of international human rights treaty obligations.¹⁴⁰ However, unilateral executive action is unlikely to have a significant impact on US compliance with its treaty obligations. Human rights treaties regulate the conduct of state and local government officers in thousands of daily interactions with private persons. The federal executive branch lacks the resources to monitor all of those daily interactions. In contrast, private individuals are well-situated to monitor state and local government compliance with human rights treaties because they are directly affected by treaty violations and they have an incentive to correct those violations. Private monitoring

137. See, e.g., Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

138. See Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 474-79 (2008).

139. To the best of my knowledge, scholars who have urged greater reliance on state and local governments do not seriously dispute this proposition. See Powell, *supra* note 137; Resnik, *supra* note 137.

140. See Exec. Order No. 13,107, 3 C.F.R. 13107 (1998).

will not have a significant impact on treaty compliance, though, unless private individuals have access to a court that is empowered to adjudicate human rights claims.¹⁴¹

The president cannot empower courts to adjudicate claims based on human rights treaties because the United States ratified the ICCPR, the Race Convention, and the Torture Convention subject to declarations specifying that all three treaties are non-self-executing.¹⁴² The precise meaning of those declarations is disputed.¹⁴³ At a minimum, though, the non-self-executing declarations mean that individuals cannot file suit to enforce human rights treaties unless Congress enacts legislation to authorize judicial enforcement. Per the Supreme Court decision in *Medellin v. Texas*, the president lacks the constitutional authority to convert a non-self-executing treaty into a self-executing treaty.¹⁴⁴ Therefore, unilateral presidential action is not a viable solution to the problem of US noncompliance with its treaty obligations.

Given the shortcomings of both the federal executive branch and state and local governments, it is necessary to consider both Congress and the federal judiciary as potential agents of change. I contend that Congress is the branch most likely to initiate progressive human rights reforms within the next decade. This claim may seem surprising to many readers. For the past half-century, legal discourse has been shaped by a dominant image that portrays the federal courts as the primary guarantor of fundamental human rights. That image was certainly accurate during the Warren Court and into the

141. In theory, the federal government could create a new federal administrative agency to adjudicate human rights claims against state and local government officers. However, for the reasons explained below, creation of a new federal administrative agency is neither realistic nor desirable. See *infra* text after note 167. If the government wants to empower individuals to bring claims based on human rights treaties, the best approach is to empower individuals to bring those claims in the same courts where they are already litigating statutory and constitutional “human rights” claims.

142. See *ICCPR: Declarations and Reservations, United States*, *supra* note 31; *Race Convention: Declarations and Reservations, United States*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited Jan. 6, 2012); *Torture Convention: Declarations and Reservations, United States*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#12 (last visited Jan. 6, 2012); see also Sloss, *supra* note 19, at 131.

143. See Sloss, *supra* note 19, at 144–71.

144. 552 U.S. 491, 525 (2008).

1970s.¹⁴⁵ But there is nothing inherent in our separation-of-powers system that makes the judiciary the guardian of human rights, or Congress the enemy of human rights. Indeed, from the 1890s until the 1930s, the Supreme Court was dominated by conservative Justices who routinely thwarted progressive legislation designed to enhance protection for human rights.¹⁴⁶ During that era, Progressives placed their faith in Congress to promote broader protection for human rights and conservatives placed their faith in the federal judiciary to protect the interests of corporate America.¹⁴⁷ The point is that the ideological alignment of the judicial and legislative branches is historically contingent. During some historical periods, the judiciary has been the leading champion of human rights, but in other historical eras Congress has been more receptive to a human rights agenda.

A. *The Federal Judiciary as an Agent of Human Rights Reform*

To appreciate the role of the federal judiciary as a potential agent of human rights reform, it is helpful to distinguish three possible mechanisms that, in theory, federal judges could use to promote compliance with human rights treaty obligations: “silent” judicial application, “indirect” judicial application, and “direct” judicial application. Federal courts often promote compliance with international norms by applying domestic constitutional or statutory provisions without mentioning analogous treaty provisions. This is “silent” judicial application. For example, Article 19 of the ICCPR protects freedom of expression,¹⁴⁸ but the First Amendment provides equal or greater protection for freedom of expression than is available under Article 19.¹⁴⁹ Thus, US courts promote compliance with treaty obligations under Article 19 by applying the First Amendment, even if they do not mention Article 19 or related

145. See, e.g., Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055 (2002).

146. See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 19–26 (2000).

147. See *id.* at 11–33.

148. See ICCPR, *supra* note 16, art. 19.

149. See HENKIN ET AL., *supra* note 94, at 1233–52 (comparing protection for freedom of expression in US constitutional law and international human rights law).

international norms in their judicial opinions. When the United States ratified the ICCPR, the Torture Convention, and the Race Convention, the Bush and Clinton administrations assured the Senate that this type of “silent” judicial application would help ensure compliance with US treaty obligations.¹⁵⁰ Since that time, silent judicial application has been the primary mechanism the federal judiciary has employed to help promote US compliance with its human rights treaty obligations.

Courts apply international human rights treaties “indirectly” when they apply a domestic constitutional or statutory provision as a rule of decision, and they invoke a treaty provision to help interpret that domestic constitutional or statutory norm. For example, US courts routinely invoke the Torture Convention when they consider claims for “withholding of removal” under 8 C.F.R. § 208.16.¹⁵¹ That regulation was designed, in part, to implement Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”),¹⁵² a statute Congress enacted to implement US obligations under Article 3 of the Torture Convention. Colloquially, people refer to these types of claims as “Torture Convention claims.” Technically, though, the courts are not applying the Torture Convention directly when they adjudicate such claims. Rather, courts are directly applying the relevant statute and regulations, and they are invoking the treaty indirectly as an aid to interpreting the governing statute and regulations.¹⁵³

Courts apply treaties “directly” when they apply a treaty provision as a rule of decision to resolve a disputed issue in a case. US courts often apply treaties directly in this way. For example, US courts have decided hundreds of cases involving

150. See Sloss, *supra* note 19, at 183–88.

151. 8 C.F.R. § 208.16 (2011).

152. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-761, 2681-822 (codified as amended at 22 U.S.C. § 6501 (2006)).

153. It is important to distinguish in this respect between the Foreign Affairs Reform and Restructuring Act (“FARRA”) and the draft legislation included in the Appendix. FARRA did not authorize courts to apply Article 3 of the Torture Convention directly as a rule of decision. Instead, FARRA authorized federal agencies to enact regulations to implement US treaty obligations. See *id.* In contrast, the draft legislation in the Appendix would authorize state and federal courts to apply relevant provisions of the ICCPR, the Torture Convention, and the Race Convention directly as rules of decision. See Appendix.

direct application of the Warsaw Convention¹⁵⁴ to resolve controversies related to international air carriage.¹⁵⁵ However, US courts almost never apply international human rights treaties directly. When the United States ratified the ICCPR, the Torture Convention, and the Race Convention, it attached declarations stipulating that the treaties are “not self-executing.”¹⁵⁶ Those declarations have effectively barred direct judicial application of human rights treaties. Congress could enact legislation to authorize direct application;¹⁵⁷ until Congress does so, however, courts will continue to cite the non-self-executing declarations as a bar to direct application of human rights treaties.

In theory, the United States could achieve excellent compliance with its human rights treaty obligations—even without direct application of human rights treaties—if US courts made aggressive use of their power to apply human rights treaties indirectly as an aid to construing analogous statutory and constitutional provisions, or if courts adopted liberal interpretations of those provisions and applied the treaties “silently.” However, the analysis in Part I demonstrates that the combined effect of silent and indirect application has failed to achieve a satisfactory record of US compliance with its human rights treaty obligations. Moreover, it is very unlikely, at least for the next decade, that the federal judiciary will utilize its acknowledged power to engage in “indirect” and “silent” treaty application to promote greater compliance with the nation’s human rights treaty obligations. There are two reasons why this

154. Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

155. See David Sloss, *United States*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* (David Sloss ed., 2009).

156. See *supra* note 142 and accompanying text.

157. There are two aspects to the claim that Congress has the constitutional authority to enact such legislation. First, Congress has the authority to reverse the effect of the non-self-executing declarations by empowering courts to apply human rights treaties directly as rules of decision. This proposition is not controversial. Second, Congress has the power to regulate matters that would otherwise be regulated exclusively by state and local governments. This proposition is controversial. The controversy hinges primarily on the continued vitality of *Missouri v. Holland*, 252 U.S. 416 (1920). See *supra* notes 39–42 and accompanying text. As noted above, I believe that Congress’ treaty implementation power under *Missouri* is sufficient to sustain the constitutional validity of legislation that Congress deems necessary to ensure compliance with US treaty obligations. See *supra* note 65.

is so. First, the federal judiciary is quite conservative. And second, the composition of the federal judiciary changes very slowly.

In 1968, President Johnson nominated Associate Justice Abe Fortas to replace Earl Warren as Chief Justice. Senate deliberations proceeded in the midst of the politically charged 1968 presidential campaign. The Republican presidential nominee, Richard Nixon, worked behind the scenes with Senate Republicans to defeat Fortas' nomination.¹⁵⁸ Nixon took office in January 1969, determined to alter the ideological composition of the federal judiciary. Over the next three years, he appointed a new Chief Justice (Warren Burger) and three new Associate Justices.¹⁵⁹ These appointments initiated a dramatic shift to the right: in the two decades from 1970 to 1991, Republican presidents appointed one Chief Justice (Rehnquist) and nine Associate Justices.¹⁶⁰ The only Democratic president during this period, Jimmy Carter, did not appoint a single Supreme Court Justice. Since the 1968 presidential campaign, every Republican president has made a campaign pledge to appoint conservative judges. With limited exceptions, they have delivered on their pledges. At present, about sixty percent of federal appellate judges are Republican appointees, and only forty percent are Democratic appointees.¹⁶¹ Sophisticated empirical studies show that the median federal

158. See JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 2–4 (2001).

159. See RICHARD HODDER-WILLIAMS, *THE POLITICS OF THE US SUPREME COURT* 36–45 (1980).

160. See *Members of the Supreme Court of the United States*, SUP. CT. OF THE U.S. OF AM., <http://www.supremecourt.gov/about/members.aspx> (last visited Jan. 6, 2012).

161. As of September 2011, there were 159 US Court of Appeals judges (including senior judges) appointed by Republican Presidents, and 108 US Court of Appeals judges (including senior judges) appointed by Democratic Presidents. See *Number of US Court of Appeals Judges Appointed by Republican/Democratic Presidents*, U.S. CTS., <http://www.uscourts.gov> (follow “Judge and Judgeships” hyperlink; then follow “Biographical Directory of Judges” hyperlink; then follow “Select research categories” hyperlink; then select “Court type”, “Party of Nominating President”, and “Limit Query to Sitting Judges”, then search “U.S. Court of Appeals” for “Court type”, “Republican” or “Democrat” for “Party of Nominating President” and “All Sitting Judges” for “Limit Query to Sitting Judges”; then follow “Search” hyperlink) (last visited Jan. 6, 2012).

appellate judge is moderately conservative,¹⁶² and conservative judges outnumber liberal judges by a factor of about 1.8 to 1.¹⁶³ Thus, the current federal judiciary, as a group, is not ideologically inclined to adopt the “silent” or “indirect” treaty application strategies that would enhance compliance with US human rights treaty obligations.

Moreover, the composition of the federal judiciary changes slowly. There are currently 179 authorized judgeships for US Court of Appeals judges, and 677 authorized judgeships for US District Court judges.¹⁶⁴ On average, in a four-year presidential term, a president appoints about thirty-nine US Court of Appeals judges and about 152 US District Court judges.¹⁶⁵ In light of these figures, it is likely that conservative judges will still outnumber liberal judges at the end of President Obama’s first term. If Obama serves a full eight years, there might well be a significant ideological shift in the federal judiciary by the end of his second term. However, given the force of *stare decisis*, there would still be a lag time before that ideological change had a significant impact on overall trends in judicial decision-making—especially if the Supreme Court retains its conservative majority during this period.

In sum, absent new congressional legislation, the federal judiciary is unlikely to be a significant agent of human rights reform in the next decade. The non-self-executing declarations stand as a bar to direct application of human rights treaties. Courts could employ strategies of silent or indirect treaty application to promote compliance with human rights treaties, but most judges are not ideologically predisposed to employ those types of strategies. Finally, the ideological composition of

162. See Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1173 (2010).

163. See *id.* at 1203–05 (providing judicial ideology scores for 143 federal appellate judges, including ninety-two who received conservative ratings and fifty who received liberal ratings).

164. See *Federal Judgeships*, U.S. CTS., <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Jan. 6, 2012).

165. These figures are based on the number of judicial appointments by Presidents Carter, Reagan, Bush, Clinton, and Bush between 1977 and 2008. See *Judgeship Appointments by President*, U.S. CTS., <http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/apptsbypres.pdf> (last visited Jan. 6, 2012).

the federal courts changes slowly. Therefore, those who favor progressive human rights reforms should consider pressing Congress for legislative solutions.

B. *Congress as an Agent of Human Rights Reform*

The preceding analysis suggests that state and local governments, the federal executive, and the federal judiciary—acting separately or in combination—are unlikely to adopt the measures needed to achieve satisfactory compliance with the nation’s human rights treaty obligations. Therefore, to ensure fulfillment of US treaty commitments, new federal legislation is necessary to empower individuals to raise claims and defenses based on human rights treaties, and to empower courts to apply those treaties on behalf of individuals. Draft legislation along these lines is included in the Appendix. The proposed legislation raises three distinct sets of questions: 1) why does the draft legislation focus on direct judicial enforcement of human rights treaties, rather than some other mechanism for promoting compliance?; 2) is it realistic to expect Congress to enact legislation along these lines?; and 3) if enacted, would the proposed legislation actually have the intended effect? This Section briefly addresses these three questions.

To begin, it is noteworthy that the United States, as a party to the ICCPR, has a treaty obligation:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative . . . authorities, or by any other competent authority provided for by the legal system of the State . . . ;
[and]
- c) To ensure that the competent authorities shall enforce such remedies when granted.¹⁶⁶

166. ICCPR, *supra* note 16, art. 2, para. 3.

In short, the ICCPR obligates states to ensure that individuals have access to a competent tribunal with authority to decide the merits of individual claims, and to grant remedies to individuals who are victims of human rights treaty violations.

The ICCPR does not require direct application of human rights treaties. In theory, the United States could fulfill its treaty obligations without direct application if US courts applied human rights treaties indirectly and/or silently. However, for the reasons discussed above, the combination of silent and indirect application is unlikely to yield satisfactory compliance in the near future.¹⁶⁷

The treaty does not specifically require judicial enforcement. In theory, a state could effectuate its obligation to provide individual remedies by creating a sophisticated administrative enforcement mechanism. However, in the United States, state and federal courts already have tremendous experience adjudicating “human rights” claims against federal, state, and local government officers. US courts tend to rely on constitutional and statutory law, rather than treaty law, to resolve these types of claims, but they clearly have the expertise to handle claims of this nature. In contrast, there is no existing administrative tribunal with jurisdiction sufficiently broad to adjudicate the range of claims that could conceivably be raised under human rights treaties. Thus, if the United States chooses to provide a forum for direct application of human rights treaties, it is much more efficient to channel these claims into existing judicial institutions, rather than creating a new administrative tribunal for this purpose. In short, the proposed legislation focuses on direct judicial enforcement because that is the most efficient way to fulfill the US treaty obligation to ensure that individuals have access to a competent tribunal with authority to decide the merits of individual claims.

Given that the current House of Representatives is heavily influenced by “Tea Party” Republicans, it is unrealistic to think that the current Congress would support anything like the draft legislation in the Appendix. However, legislative majorities change quickly. Democrats gained fifty-five seats in the House of Representatives and thirteen seats in the Senate between the

167. *See supra* notes 157–165 and accompanying text.

109th and the 111th Congresses.¹⁶⁸ Republicans gained sixty-three House seats and six Senate seats between the 111th and 112th Congresses.¹⁶⁹ It is impossible to predict how long the Republican Party will maintain its current majority in the House of Representatives, but that majority will not last forever. Given the slow rate of change in the composition of the federal judiciary,¹⁷⁰ Congress is more likely than the courts to make a significant ideological move in a liberal direction over the next decade.

Moreover, solid bipartisan majorities have supported previous “human rights” legislation. When Congress enacted the Civil Rights Act of 1964,¹⁷¹ a sizeable majority of both Democrats and Republicans in both the House and the Senate voted in favor of the legislation.¹⁷² Similarly, a significant majority from both parties in both Houses of Congress supported the Voting Rights Act of 1965,¹⁷³ and the Americans with Disabilities Act of 1990.¹⁷⁴ Thus, one should not assume

168. During the 109th Congress, Democrats held 202 House seats and 44 Senate seats. In the 111th Congress, Democrats held 257 House seats and 57 Senate seats. *See Party Divisions of the House of Representatives (1789 to Present)*, OFF. OF THE CLERK, U.S. HOUSE OF REPS., http://artandhistory.house.gov/house_history/partyDiv.aspx (last visited Jan. 6, 2012) [hereinafter *House Party Divisions*]; *Party Division in the Senate, 1789–Present*, U.S. SENATE, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Jan. 6, 2012) [hereinafter *Senate Party Divisions*].

169. During the 111th Congress, Republicans held 178 House seats and 41 Senate seats. In the 112th Congress, Republicans hold 242 House seats and 47 Senate seats. *See House Party Divisions, supra* note 168; *Senate Party Divisions, supra* note 168.

170. *See supra* notes 164–165 and accompanying text.

171. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a (2006)).

172. House Democrats voted 152 to 96 in favor of the legislation. House Republicans voted 138 to 34 in favor. Senate Democrats voted 46 to 21 in favor. Senate Republicans voted 27 to 6 in favor. *See* [88th Cong.] Cong. Index (CCH) 8,065 (Feb. 10, 1964) (providing the House of Representatives voting record); [88th Cong.] Cong. Index 8,129 (June 19, 1964) (providing the Senate voting record).

173. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971 (2006)). House Democrats voted 217 to 54 in favor of the legislation. House Republicans voted 111 to 20 in favor. Senate Democrats voted 49 to 17 in favor. Senate Republicans voted 30 to 1 in favor. *See* [89th Cong.] Cong. Index (CCH) 9,146 (Aug. 3, 1965) (providing the House of Representatives voting record); [89th Cong.] Cong. Index (CCH) 9,147–48 (Aug. 4, 1965) (providing the Senate voting record).

174. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 (2006)). House Democrats voted 248 to 3 in favor of the legislation. House Republicans voted 155 to 17 in favor. Senate Democrats

that Republicans would uniformly oppose legislation designed to promote judicial enforcement of human rights treaties.

Finally, assuming that Congress did enact legislation similar to the draft statute in the Appendix, one might wonder whether “conservative” judges would thwart the purpose of the legislation by adopting narrow interpretations of human rights treaty provisions. This outcome seems unlikely. To understand why, it is helpful to divide so-called “conservative” judges into two groups. A minority of conservative judges may be ideologically opposed to vigorous judicial application of norms protecting human dignity, liberty, and equality. However, I believe that the majority of conservative judges would enthusiastically support judicial application of such norms, provided that Congress signals its support for judicial enforcement by enacting appropriate legislation. In other words, the conservative ideology of many judges is not a manifestation of ideological opposition to human rights. Rather, their conservative orientation reflects an ideological commitment to a democratic process, wherein Congress takes the lead in determining the content of the rights to be enforced by the judiciary. If this assessment is correct, then the fear that conservative judges would thwart the purpose of the proposed legislation is unwarranted.¹⁷⁵

CONCLUSION

Throughout history, great powers have subordinated law to power in their conduct of international relations. The United States claims to be a different kind of great power. As a nation founded on the rule of law ideal, we claim to be committed to the rule of law not only in domestic affairs, but also in international affairs. It is time for the United States to back up this claim with concrete action. To demonstrate its commitment to the rule of law in international affairs, the United States

voted 44 to 0 in favor. Senate Republicans voted 32 to 8 in favor. *See* [101st Cong.] Cong. Index (CCH) 37,131 (May 22, 1990) (providing the House of Representatives voting record); [101st Cong.] Cong. Index (CCH) 23,021 (Sept. 7, 1989) (providing the Senate voting record).

¹⁷⁵ In addition, the treaty interpretation provisions in § 7 of the draft legislation, as well as the findings in § 1 and the statement of purpose in § 2, help minimize the risk that judges would thwart the purpose of the legislation.

should enact federal legislation to facilitate domestic judicial application of international human rights treaties. Until we are ready for US courts to apply international human rights norms as a constraint on federal, state, and local government action, our ostensible commitment to human rights will be more rhetorical than real. Conversely, by enacting the recommended legislation, the United States could become the first great power in world history that actually subordinates power to law in its conduct of international relations. Moreover, the proposed legislation would enhance the United States' moral authority to speak on behalf of oppressed people everywhere who are struggling to realize the aspirations expressed in the Universal Declaration of Human Rights.

APPENDIX

Human Rights Treaty Implementation Act of 2011 (Draft Legislation)

Sec. 1: Findings

It is in the foreign policy interests of the United States to ensure that other countries view us as a leader in the field of international human rights. Certain actions undertaken by the United States Government in the context of the war on terror have tarnished the United States' reputation in this regard.

Sec. 2: Purpose

(a) This legislation is designed to enhance the United States' reputation as a leader in the field of international human rights, and to enhance U.S. compliance with its treaty obligations under the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

(b) This legislation empowers individuals to raise claims and defenses in state and federal courts under the ICCPR, CERD and CAT, and authorizes courts to provide judicial remedies for individuals whose treaty rights are violated.

(c) This legislation effectively removes the non-self-executing declarations attached to the treaties. However, it does not alter any of the other reservations, understandings or declarations that the United States adopted when it ratified those treaties.

Sec. 3: Defenses

(a) In any case where a federal or state government initiates a criminal proceeding against a person, that person shall be authorized to invoke the ICCPR, the CERD or the CAT as a defense in the criminal prosecution.

(b) A defendant's right to invoke these treaties shall be subject to the same procedural limitations—including procedural default rules—that apply to similar constitutional and statutory defenses.

(c) State and federal courts shall be obligated to rule on the merits of human rights treaty defenses to the same extent that they would address the merits of a similar federal constitutional or statutory defense.

(d) This section shall also apply to any civil action initiated by a state or federal government that involves a threat of civil sanctions.

Sec. 4: Suits Against Federal Agencies and Officers

A federal agency action that infringes rights protected under the ICCPR, the CERD or the CAT shall be deemed a “legal wrong” within the meaning of the Administrative Procedure Act, 5 U.S.C. § 702. An individual harmed by such a legal wrong is authorized to pursue a claim against the relevant government agency or officer in accordance with the terms of the Administrative Procedure Act.

Sec. 5: Suits Against State and Local Officers

(a) The ICCPR, the CERD and the CAT create federal rights that are enforceable under 42 U.S.C. § 1983.

(b) An individual who faces a threat of future harm posed by a prospective or ongoing violation of the ICCPR, the CERD, or the CAT committed by a state or local government officer shall have a right of action for declaratory and injunctive relief in accordance with 42 U.S.C. § 1983.

(c) An individual who has suffered harm as a result of a completed violation of the ICCPR, the CERD, or the CAT shall not have a right of action for money damages under this section.

Sec. 6: Habeas Corpus

(a) The ICCPR, the CERD and the CAT are “treaties of the United States” within the meaning of 28 U.S.C. §§ 2241(c)(3) and 2254(a). The ICCPR, the CERD and the CAT are “laws of the United States” within the meaning of 28 U.S.C. §§ 2255(a) and 2255(f)(2). The ICCPR, the CERD and the CAT constitute “Federal law” within the meaning of 28 U.S.C. § 2254(d)(1). The writ of habeas corpus extends to prisoners who are in custody in violation of those treaties.

(b) 28 U.S.C. § 2244(b)(2)(A) is hereby amended by striking the “or” after the semicolon and adding the

following clause: “or the claim relies on The Human Rights Treaty Implementation Act of 2011 and the prior application was filed before enactment of that Act; or”

(c) 28 U.S.C. § 2255(h)(2) is hereby amended by changing the period to a semicolon and adding the following clause: “or a claim that relies on The Human Rights Treaty Implementation Act of 2011 that could not have been raised in a prior motion under 28 U.S.C. § 2255.”

(d) In states where state law precludes a prisoner from filing more than one habeas petition in state court, but allows a prisoner to file a second petition if the legal basis for his claim was previously unavailable, it shall be understood that this legislation provides a legal basis for claims under the ICCPR, the CERD and the CAT that was not available prior to the enactment of this legislation.

Sec. 7: Treaty Interpretation

(a) In adjudicating cases in which individuals raise claims or defenses under the ICCPR, the CERD or the CAT, courts responsible for interpreting the relevant treaty provisions shall consult documents issued by the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee Against Torture. Such documents shall be treated as persuasive, but not binding, authority for the purpose of interpreting the relevant treaties.

(b) Courts shall also consider decisions of the European Court of Human Rights interpreting analogous provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such decisions shall be treated as persuasive, but not binding, authority for the purpose of interpreting the relevant treaties.

(c) When interpreting the ICCPR, the CERD, and the CAT, courts shall be guided by the canon of liberal interpretation, which holds: “If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal

exposition be adopted?” *Shanks v. Dupont*, 28 U.S. 242, 249 (1830).

(d) In any case in which state or federal courts are called upon to interpret the ICCPR, the CERD or the CAT, the federal government’s views concerning the proper interpretation of the treaty shall be entitled to some deference, except insofar as the government adopted the particular interpretation in the context of litigation in which a federal government agency or officer is a party.

Sec. 8: Enemy Combatants

Nothing in this Act shall be construed to alter the rules governing enemy combatants that have been established pursuant to the Detainee Treatment Act of 2005, the Military Commissions Act of 2006, and the Military Commissions Act of 2009.