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Using International Law to Enhance Democracy

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DAVID SLOSS

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INTRODUCTION

Constitutional theorists have grappled with the countermajoritarian difficulty for several decades.¹ The difficulty arises from the seemingly irreconcilable tension between two competing values, both of which are core values of the American legal and political system. On the one hand, as John Hart Ely said, “[R]ule in accord with the consent of a majority of those governed is the core of the American governmental system.”² On the other hand, we have an equally firm commitment to individual rights, which are protected by an independent judiciary that has the power to invalidate laws enacted by democratically elected legislatures. The exercise of judicial review, which is necessary for the protection of individual rights, is at odds with the principle of majoritarian democracy. Thus, as Ely noted, the core difficulty, “has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule.”³

In Ely’s view, one way to help mitigate the tension between majority rule and individual rights is to ensure that “the channels of political par-

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¹. See Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. REV. 333, 334 (1998) (describing the countermajoritarian difficulty as “the central obsession of modern constitutional scholarship”); Mark V. Tushnet, Anti-Formalism in Recent Constitutional Theory, 83 MICH. L. REV. 1502, 1502 (1985) (stating that most recent work in the field of constitutional theory “takes as its central problem...the ‘countermajoritarian difficulty’ with judicial review”).
². JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 7 (1980).
³. Id. at 8.
ticipation and communication are kept open." If the Supreme Court invalidates a state law on the grounds that the law is unconstitutional, the Court closes the channels of political participation because Congress cannot reverse a constitutional decision of the Supreme Court. Suppose, though, that the Supreme Court invalidated the same state law on the grounds that the law conflicted with the International Covenant on Civil and Political Rights (ICCPR), a human rights treaty to which the United States is a party. This would ensure that the channels of political participation remain open, because Congress would retain the power to enact legislation superseding the treaty as a matter of domestic law if Congress disliked the result of the Supreme Court decision. Thus, if courts based their decisions on the ICCPR instead of the Constitution, they could protect fundamental rights in a manner that is consistent with the principle of majority rule.

There is, however, a significant obstacle to judicial enforcement of the ICCPR. When the United States ratified the ICCPR, it adopted a set of reservations, understandings, and declarations (RUDs) that restrict judicial application of the treaty. Ironically, the Senate adopted the RUDs for the ostensible purpose of preserving Congress' role in making decisions about the domestic application of human rights treaties. In fact, though, the RUDs have had precisely the opposite effect: they have precluded congressional participation in the decision-making process by channeling human rights litigation away from treaty-based claims, and towards constitutional claims.

The Supreme Court's recent decision in Roper v. Simmons illustrates this point. In Simmons, the Supreme Court held that the Eighth Amendment prohibits imposition of capital punishment for crimes committed by a person who was less than eighteen years old when he committed the crime. The Court cited several international human rights treaties in support of its holding. In short, the Court applied interna-

4. Id. at 76.
7. See infra Part III.
9. See id. at 574–78.
tional human rights law *indirectly* in support of a constitutional ruling. By basing its holding on constitutional grounds, the Court precluded Congress from participating in the decision about the domestic application of the international norm prohibiting the juvenile death penalty. If the United States had ratified the ICCPR without any RUDs, though, the Court could have ruled in *Simmons* that Article 6 of the ICCPR prohibits the execution of juvenile offenders.\(^1\) If the Court had applied the treaty *directly*, it would have maintained open channels of political participation, because Congress would have retained the power to enact legislation superseding the treaty.

This article analyzes the domestic application of international human rights law from the standpoint of Ely's political process theory. The article contends that an Elysian theory favors direct application of international human rights treaties, rather than indirect application of international law as an aid to constitutional interpretation, because direct application keeps the channels of political participation open. Moreover, there are certain areas of substantive law, such as capital punishment, where the Supreme Court functions as the primary lawmaker in the United States. The Supreme Court establishes the primary rules governing capital punishment by exercising its power to interpret the Constitution. State legislatures implement those rules by modifying their statutes to conform to standards established by the Court. Meanwhile, Congress sits on the sidelines. This arrangement is manifestly at odds with principles of majoritarian democracy. Therefore, from an Elysian viewpoint, in areas of law like capital punishment where Congress takes a back seat to judicial lawmaking, direct application of human rights treaties would be democracy enhancing, compared to the current system of constitutional lawmaking by the Supreme Court, because direct application of human rights treaties would increase opportunities for congressional participation in the lawmaking process.\(^1\)

In the past few years, there has been a good deal of scholarly commentary about the Supreme Court's use of international law as a guide to constitutional interpretation. Several commentators who criticize the

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\(^{10}\) See ICCPR, *supra* note 5, art. 6, para. 5 ("Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age.").

\(^{11}\) As others have noted, "democracy" is a contested concept, which means different things to different people. See Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDozo L. REV. 795, 796 (1999). In advancing the claim that direct application of international human rights treaties could be democracy enhancing, this article assumes an Elysian theory of democratic self-governance, without attempting to defend the advantages of that theory, compared to other theories.
Court’s use of international law have emphasized that the practice is countermajoritarian.\(^12\) Those who support the Supreme Court’s use of international law generally defend the practice on other grounds,\(^13\) while attempting to sidestep charges that the practice is anti-democratic.\(^14\) This article is the first to defend the thesis that judicial application of international human rights law can be used to promote the values of majoritarian democracy.\(^15\)

This article proposes legislation to channel capital punishment litiga-

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12. \(\text{See, e.g., Robert H. Bork, Coercing Virtue: The Worldwide Rule of Judges 1–14 (2003) (contending that judicial activism undermines majoritarian democracy, and that the increasing tendency of national courts “to cite foreign constitutional decisions as guides to the interpretation of their own constitutions” is one manifestation of judicial activism); Justice Antonin Scalia, Keynote Address: Foreign Legal Authority in the Federal Courts, 98 Am. Soc’y Int’l L. Proc. 305 (2004) (contending that comparative analysis of foreign legal materials is not relevant to constitutional interpretation, but it is useful “as a source of example and experience that we may use, democratically, to change our laws”); Roger P. Alford, Misusing International Sources to Interpret the Constitution, 98 Am. J. Int’l L. 57, 58–61 (2004) (discussing the “international countermajoritarian difficulty”).}


14. \(\text{But see Harold Hongju Koh, International Law as Part of Our Law, 98 Am. J. Int’l L. 43, 55 (2004) (contending, in response to the charge that judicial application of international law is anti-democratic, that U.S. courts are expected “to apply enduring principles of law to evolving circumstance without regard to the will of shifting democratic majorities.”).}

15. \(\text{Professor Chander has advanced the related claim that “transnational legal process is consistent with democracy” because it does not remove issues “from the majoritarian political process.” Anupam Chander, Globalization and Distrust, 114 Yale L.J. 1193, 1203 (2005). However, his aim is to rebut claims that there is “a democratic deficit at the international level,” id. at 1196, whereas this article attempts to rebut claims that judicial application of international law is countermajoritarian in the domestic sphere. Other scholars have argued that international trade law can enhance democracy in the domestic sphere. See, e.g., John O. McGinnis & Mark L. Movsesian, The World Trade Constitution, 114 Harv. L. Rev. 511, 514 (2000) (“If its powers remain properly limited, the WTO will promote the power of national democratic majorities by constraining the influence of protectionist interest groups.”). However, their argument focuses exclusively on international trade law, whereas this article focuses on international human rights law.} \)
tion away from constitutional adjudication, and to encourage direct application of the ICCPR by U.S. courts as a substitute for constitutional decision-making. The proposed legislation would authorize state and federal courts to apply Article 6 of the ICCPR directly in cases where capital defendants actually do raise, or potentially could raise, treaty-based defenses to capital punishment. Additionally, the legislation would require courts to address the treaty-based defense first, and to avoid constitutional decisions in cases where defendants could obtain relief on the basis of the treaty.

The proposed legislation would not transfer power from the states to the federal government because the federal courts already function as the primary lawmakers with respect to capital punishment.\(^6\) Thus, as a practical matter, the proposed legislation would transfer lawmaking power from the courts to Congress, thereby increasing opportunities for congressional participation in decisions about the domestic legal protection to be accorded to individual human rights. Although the proposed legislation focuses exclusively on capital punishment, the basic approach could be extended to other areas of substantive law as well. A similar approach could be used to enhance the democratic nature of the lawmaking process in any area of substantive law within the scope of the ICCPR where two criteria are satisfied: international law is more rights-protective than current domestic law; and the courts, rather than Congress, currently function as the primary lawmaking institution in the United States.

At first blush, the proposed legislation appears to run directly counter to other recent legislative proposals designed to preclude the domestic application of international human rights norms. In March 2004, the House Subcommittee on the Constitution approved House Resolution 568, which expresses the view “that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions.”\(^17\) A similar bill introduced in February 2005, House Resolution 97, attracted sixty-five cosponsors.\(^18\) During hearings on House Resolution 97, the Subcommittee Chairman cited Simmons as an example of the Supreme Court’s misplaced reliance on international and for-

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16. Some commentators will undoubtedly object to the proposed legislation on federalism grounds. For a response to this objection, see infra notes 213–26 and accompanying text.


eign authorities.\textsuperscript{19} The proponents of House Resolution 568 and House Resolution 97 criticize the Supreme Court’s use of international law on the grounds that it is contrary to principles of majoritarian democracy.\textsuperscript{20} Even so, there are grounds to suspect that legislators may be using the rhetoric of democratic process to conceal a base form of xenophobic nationalism, which may be the true motivation for the proposed legislation. Legislators who are motivated primarily by xenophobic nationalism will undoubtedly oppose the proposed legislation, because it would increase the use of international law in U.S. courts. Legislators whose primary motivation is to make the decision-making process more democratic, though, should welcome the proposed legislation, because it would restrict the scope of judicial lawmaking, and strengthen the role of Congress in establishing the human rights standards to be applied in U.S. courts.

This article is divided into five parts. Part I draws upon John Hart Ely’s political process theory to analyze the Supreme Court’s indirect application of international human rights law as an aid to constitutional interpretation. Part II then applies Elysian theory to analyze the direct application of international human rights treaties as an alternative to constitutional adjudication. Parts I and II, together, demonstrate that direct application is preferable to indirect application from the standpoint of Elysian theory, because direct application maintains open channels for political participation. Part III demonstrates that the RUDs attached to the U.S. instrument of ratification for the ICCPR have had the perverse effect of channeling human rights litigation away from direct application of human rights treaties toward indirect application in the context of constitutional adjudication.

Whereas Parts I through III present a diagnosis, Part IV prescribes a cure. Specifically, Part IV recommends legislation that would remove the U.S. death penalty reservation, authorize direct judicial application of Article 6 of the ICCPR in death penalty cases, and require courts to avoid constitutional decisions, whenever possible, by deciding capital


\textsuperscript{20} See id. (prepared statement of Nicholas Quinn Rosenkranz) (stating that the Supreme Court’s reliance on international and foreign law as a guide to constitutional interpretation “raises fundamental issues of democratic self-governance”).
punishment cases on the basis of the ICCPR. By encouraging direct application of treaties as a substitute for constitutional decision-making, the legislation would enhance Congress' role in the decision-making process, because Congress would retain the power to change the law if it was dissatisfied with the results of judicial decisions. Although the proposed legislation focuses exclusively on capital punishment, it provides a model for legislation in other areas of substantive law within the scope of the ICCPR where the courts, rather than Congress, currently function as the primary lawmaking institution in the United States.

Part V addresses various constitutional objections to the proposed legislation. The article concludes that the proposed legislation is constitutionally sound and offers significant policy benefits. Even so, Congress is unlikely to adopt the proposed legislation because Congress as a whole prefers to duck responsibility by letting the courts make the rules governing capital punishment. Additionally, many Congressmen, influenced by xenophobic nationalism, are staunchly opposed to the domestic application of international human rights law in any form, even if the suggested mechanism would augment congressional control over decisions involving the domestic application of international human rights norms.

I. INTERNATIONAL HUMAN RIGHTS LAW IN CONSTITUTIONAL ADJUDICATION

In both Lawrence v. Texas\(^2\) and Roper v. Simmons,\(^2\) the Supreme Court used international law indirectly as an aid to constitutional interpretation. Part I analyzes the Court’s use of international law in these two cases. The first section shows that international law had a greater influence on the Court’s decision in Simmons than in Lawrence. The second section briefly analyzes the two decisions from the standpoint of John Hart Ely’s political process theory.

A. Indirect Application of International Law in Lawrence and Simmons

I. Lawrence v. Texas

In Lawrence, the issue presented was “[w]hether Petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate

\(^{21}\) 539 U.S. 558 (2003).

\(^{22}\) 543 U.S. 551 (2005).
their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment. In 1986, in Bowers v. Hardwick, the Court upheld the validity of a Georgia law criminalizing private, consensual homosexual conduct. Lawrence expressly overruled Bowers, invalidating Texas' deviate sexual intercourse statute on the grounds that it violated the Fourteenth Amendment's Due Process Clause.

The majority's analysis in Lawrence can be divided into two sections. In the first portion of its opinion, the majority argued that Bowers was wrong at the time it was decided. In this context, the opinion discussed pre-Bowers case law protecting the right to privacy, analyzed the history of laws directed at homosexual conduct, and cited evidence of an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." The majority concluded this portion of its opinion with a paragraph discussing Dudgeon v. United Kingdom, a case challenging a Northern Ireland law that criminalized private, consensual homosexual conduct. In Dudgeon, decided five years before Bowers, the European Court of Human Rights held that the law at issue violated Article 8 of the European Convention on Human Rights. In Lawrence, the majority noted that the European Court's decision in Dudgeon "is at odds with the premise in Bowers that the claim put forward was insubstantial in

25. Lawrence, 539 U.S. at 578.
26. Id. at 564–66.
27. Id. at 567–71.
28. Id. at 572.

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society...for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id. at art. 8.
our Western civilization.”

The second portion of the majority’s analysis in Lawrence contended that the Court’s prior holding in Bowers had been undermined by subsequent developments. In this context, the majority summarized changes in state legislation, discussed key Supreme Court decisions after Bowers that “cast its holding into even more doubt,” and noted “criticism from other sources.” The majority devoted an additional paragraph to analyzing the development of international law and practice since Bowers. It cited three more decisions of the European Court, noted that other nations “have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct,” and concluded that “[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”

International law featured prominently in the Court’s opinion in Lawrence. The Court devoted two full paragraphs to a discussion of international law and practice, citing four different decisions of the European Court of Human Rights. Although the Court also cited many of its own decisions, none of those decisions specifically addressed the right of homosexuals to engage in private, consensual sexual activity, except for Bowers v. Hardwick, which reached the opposite result. Thus, the decisions of the European Court were the only judicial precedents cited by the Court that directly supported its holding in Lawrence.

Even so, if there was no international law on point, the majority could have written essentially the same opinion, deleting only two paragraphs. It is likely that the majority would have found the arguments presented in the remainder of the opinion sufficiently compelling to support its conclusion that the Texas statute violated the Due Process Clause. Thus, international law did not drive the outcome in Lawrence; it merely supported an outcome that the Court would probably have reached in any case. In Simmons, though, international law arguably did drive the outcome.

31. Lawrence, 539 U.S. at 573.
32. Id. at 573.
33. Id. at 573–74.
34. Id. at 576.
35. Id. at 576–77.
2. Roper v. Simmons

In Simmons, the issue presented was whether it is permissible under the Eighth Amendment "to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime."37 In 1988, the Court decided in Thompson v. Oklahoma that the Constitution prohibits capital punishment for a person who was less than sixteen years old when he committed a crime.38 One year later, the Court decided in Stanford v. Kentucky that the Constitution does not preclude execution of a juvenile offender who was 16 or 17 at the time of the crime.39 Simmons overruled Stanford, holding that the Eighth Amendment bars capital punishment for anyone who was less than eighteen years old when he committed a crime.40

The majority’s analysis in Simmons can be divided into four parts. First, the Court analyzed the activity of state legislatures, concluding on that basis that there was a national consensus against the death penalty for juvenile offenders.41 Next, the Court summarized social science evidence about the differences between juveniles and adults to show that juveniles have less culpability than adults.42 Third, in light of the diminished culpability of juveniles, the majority argued, "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders."43 Fourth, the majority surveyed international law and practice, concluding that the views of the world community provided confirmation for the Court’s judgment that capital punishment is a disproportionate penalty for juvenile offenders.44

The Court’s opinion in Simmons relied more heavily on international law and practice than the majority opinion in Lawrence. Whereas Lawrence devoted only two paragraphs to its discussion of international law, an entire section of the Simmons opinion focused on international law and practice. Moreover, Lawrence focused on the European Court and “Western civilization,”45 largely ignoring the rest of the world.46 In con-

40. Simmons, 543 U.S. 551.
41. Id. at 564–67. In fact, the evidence of a “national consensus” was quite weak. See infra note 55.
42. Id. at 569–72.
43. Id. at 572.
44. Id. at 575–78.
46. The Court in Lawrence cited an amicus brief in support of the proposition that “other nations,” presumably outside of Europe, “have taken action consistent with an affirmation of the
trast, Simmons systematically reviewed state practice and treaty commitments on a global basis to support its conclusion "that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."\textsuperscript{47}

The majority in Simmons stated explicitly that international law did not control the outcome.\textsuperscript{48} Even so, there are grounds to question the accuracy of that statement. In Simmons, the Court cited four different treaties that prohibit capital punishment for anyone under eighteen at the time of the criminal offense.\textsuperscript{49} Suppose, hypothetically, that those treaties established an age limit of sixteen, rather than eighteen. If that were the case, it is unlikely that the Court would have revisited its prior decisions in Thompson and Stanford. The actions of state legislatures do not support a limit of eighteen, vice sixteen, because states that retain the death penalty are roughly evenly divided between those that have an age limit of sixteen and those that have an age limit of eighteen.\textsuperscript{50} Moreover, the majority's analysis of social science evidence and the diminished culpability of juveniles could easily be utilized to support an argument in favor of setting the limit at sixteen, rather than eighteen.\textsuperscript{51} Indeed, the international law portion of the Court's opinion is the only portion that offers a coherent justification for setting the age limit at eighteen, rather than sixteen. Thus, despite the majority's assertion that international law protected right of homosexual adults to engage in intimate, consensual conduct." Id. at 576. However, the Court did not even attempt to show that the legal principle it adopted in Lawrence is also endorsed by a majority of the nations in the world.

47. Simmons, 543 U.S. at 575. As the Court noted, every country in the world except for the United States and Somalia has ratified the Convention on the Rights of the Child, which prohibits the juvenile death penalty. Id. at 576. No state party has entered a reservation to preserve its right to execute juvenile offenders. Id. With respect to state practice, "only seven countries other than the United States have executed juvenile offenders since 1990.... Since then, each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice." Id. Since the Supreme Court published its decision in Simmons, Iran has apparently executed one additional juvenile offender. See Nazila Fathi, Rights Advocates Condemn Iran for Executing 2 Young Men, N.Y. TIMES, July 29, 2005, at A3.

48. See Simmons, 543 U.S. at 578 ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.")

49. Id. at 576 (citing the Convention on the Rights of the Child, the ICCPR, the American Convention on Human Rights, and the African Charter on the Rights and Welfare of the Child).

50. See id., Appendix A to Opinion of the Court, at 579–80. The appendix shows that there are eighteen states that have an age limit of eighteen, three states that have an age limit of seventeen, and seventeen states that have an express or implied limit of sixteen. Where the statute has no express minimum age, the limit of sixteen is implied by virtue of the Supreme Court's decision in Thompson v. Oklahoma, 487 U.S. 815 (1988).

51. Indeed, this portion of the analysis in Simmons is strikingly similar to the corresponding portion of the Court's analysis in Thompson, where the Court set an age limit of sixteen. Compare Simmons, 543 U.S. at 569–75 with Thompson, 487 U.S. at 833–38.
was not controlling, Justice Scalia was surely correct to note that "the views of other countries and the so-called international community take center stage" in the Court’s opinion in Simmons.\(^5\)

**B. Lawrence, Simmons, and Majoritarian Democracy**

As a citizen, I applaud the results of the Supreme Court’s decisions in *Lawrence* and *Simmons*. I believe it is morally objectionable to impose capital punishment on juvenile offenders. And I believe that the government has no business criminalizing private sexual conduct between consenting adults. However, as a legal theorist, I am troubled by the process that led to the results in *Lawrence* and *Simmons*. Two aspects of that process are troubling.

First, in *Simmons*, and to a lesser extent in *Lawrence*, the Court used its power of constitutional interpretation to incorporate international human rights norms into the corpus of domestic law.\(^3\) Separation of powers precepts dictate that it is more appropriate for the political branches, not the courts, to make decisions about the domestic incorporation of international norms.\(^4\) Therefore, insofar as the decisions in *Lawrence* and *Simmons* reflect policy judgments about the desirability of applying international norms domestically, it would have been preferable for the political branches to make those policy judgments.

Second, in both *Lawrence* and *Simmons* the Court used international law to support countermajoritarian decisions.\(^5\) In both cases, the Court invalidated laws enacted by democratically elected legislatures. More-

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52. *Simmons*, 543 U.S. at 622 (Scalia, J., dissenting).

53. *Simmons* can fairly be described as a case in which the Supreme Court decided to incorporate an international norm into the U.S. Constitution, because the international norm was clearly established, and the Court’s opinion relied heavily on international law. In *Lawrence*, the international norm was not so clearly established, and the Court gave less weight to international law. Even so, the Court made a policy judgment about the desirability of conforming U.S. law to the international norm, and that policy judgment did influence the Court’s decision to some extent.


55. In *Simmons*, as in other death penalty cases, the Supreme Court claimed to be applying a majoritarian model, in that the Court’s decision was based in part on evidence of a "national consensus against the death penalty for juveniles." See *Simmons*, 543 U.S. at 564–67. The evidence of such a consensus was quite weak, though. Only eighteen out of fifty states set an age limit at eighteen years old. Twelve states ban capital punishment altogether. The other twenty states set an age limit at sixteen or seventeen years old. See id., Appendix A to Opinion of the Court, at 579–80. This is not very compelling evidence of a national consensus in favor of setting an age limit at eighteen years old.
over, by basing its decisions on the Constitution, the Court effectively precluded Congress from participating in decisions on the merits of the juvenile death penalty and the right of homosexuals to engage in private, consensual sexual activity. Of course, these points apply to any decision in which the Court invalidates a state law on constitutional grounds. The fact that the Court invoked international law in support of its constitutional rulings in *Lawrence* and *Simmons* does not alter this analysis.

John Hart Ely contends that countermajoritarian constitutional decisions are justifiable in cases where majorities abuse their power by enacting laws "infected by prejudice against" disfavored minorities who are not adequately represented in the political process. Application of Ely's theory to *Lawrence* and *Simmons* would likely lead to different results in the two cases. It is difficult to justify *Simmons* on the basis of Ely's theory because juvenile offenders are not the target of prejudicial laws, and they are represented in the political process through their parents. *Lawrence*, on the other hand, can be defended on the grounds that the Texas law at issue in that case was motivated by prejudice against homosexuals, who were not adequately represented in the political process. However, Ely would probably have been more comfortable with Justice O'Connor's concurring opinion in *Lawrence*, which rested on the Equal Protection Clause, than with Justice Kennedy's majority opinion, which relied on the Due Process Clause. Moreover, assuming that Ely would have approved the Court's decision in *Lawrence*, it is less clear whether he would have approved the Court's reliance on international law.

56. There are only two possible ways to reverse a Supreme Court ruling on a question of constitutional law. One possibility is for the Supreme Court to reverse itself; Congress is obviously excluded from that process. A second possibility is to amend the Constitution. Congress does play a significant role in the process of constitutional amendment. See U.S. Const. art. V. However, given the supermajoritarian requirements for constitutional amendments, there is no realistic possibility of utilizing the amendment process to reverse the outcome in either *Lawrence* or *Simmons*. Therefore, as a practical matter, Congress is excluded from the decision-making process.

57. Ely, supra note 2, at 76.

58. Individuals who commit crimes as juveniles are undoubtedly a disfavored minority. However, insofar as there are special laws dealing with juvenile offenders, those laws grant them preferential treatment, as compared to individuals who commit crimes as adults. Therefore, under Ely's theory, the Court should not issue countermajoritarian constitutional decisions to protect juvenile offenders because they are not victims of prejudice.


60. See Roger P. Alford, *In Search of A Theory of Constitutional Comparativism*, 52
From the standpoint of Ely’s theory, though, one thing is clear. Assuming that homosexuals and juvenile offenders both merit legal protection, it is preferable, whenever possible, to utilize majoritarian mechanisms to provide that legal protection, rather than relying on the countermajoritarian mechanism of constitutional adjudication. This article contends that it is possible to develop a different approach to the domestic application of international human rights law: one that emphasizes direct application of international human rights treaties, rather than indirect application of international law as an aid to constitutional interpretation. This approach would mitigate the traditional countermajoritarian difficulty by increasing opportunities for congressional participation in the decision-making process.

II. DIRECT APPLICATION OF HUMAN RIGHTS TREATIES

Part II shows that there are significant advantages to applying international human rights treaties directly, rather than applying international law indirectly as a guide to constitutional interpretation. The analysis is divided into two sections. The first section analyzes Lawrence and Simmons as treaty cases; it considers how the defendants in these two cases would have fared if they had based their claims directly on the ICCPR, rather than invoking international law as a guide to constitutional interpretation. The second section analyzes the theoretical benefits associated with direct application of the ICCPR.

A. Direct Application in Lawrence and Simmons

When the United States ratified the ICCPR, it adopted a reservation expressly reserving the right to impose capital punishment on individuals less than eighteen years old (the “death penalty reservation”). The United States also adopted a declaration stating that the substantive provisions of the treaty are “not self-executing” (the “NSE declaration”). These two conditions impose significant obstacles to direct application of the ICCPR. However, Congress has the power to remove these obstacles by lifting both the death penalty reservation and the NSE declaration. This section analyzes Simmons and Lawrence as treaty cases
based on the (counter-factual) assumption that the United States ratified the ICCPR without these conditions. The analysis demonstrates that, without these conditions, the defendants in these cases would have had viable treaty-based defenses.

1. Simmons as a Treaty Case

Assume that the United States ratified the ICCPR without any RUDs. Assume, further, that Christopher Simmons argued that the Missouri Supreme Court was required to reverse his death sentence because the ICCPR barred imposition of capital punishment in his case. The ICCPR states expressly: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age."\(^{64}\) Christopher Simmons was seventeen years old when he murdered Shirley Crook.\(^{65}\) Thus, the treaty imposes a primary duty on the United States not to execute Simmons, and creates a primary right for Simmons not to be executed.\(^{66}\) If the United States had ratified the ICCPR without the juvenile death penalty reservation, and Missouri had executed Simmons, it would have been a violation of the U.S. treaty obligation and of Simmons’ right not to be executed.\(^{67}\)

The Supremacy Clause provides that treaties are "the supreme Law of the Land," and that "Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."\(^{68}\) The text of the Supremacy Clause provides a simple conflict of laws rule: in the event of a conflict between a treaty and state law, judges are instructed to apply the treaty, not state law.\(^{69}\) Here, there is a direct conflict between Missouri law, which authorizes Simmons’ execution, and the ICCPR, which prohibits that execution. Under the Supremacy Clause, courts are required to apply the treaty. Therefore, Simmons is entitled to a court order barring his execution. Given the unambiguous treaty text, and the unambiguous text of the Supremacy

\(^{64}\) ICCPR, supra note 5, art. 6, para. 5.


\(^{66}\) A primary duty "is an authoritatively recognized obligation...not to do something, or to do it, or to do it if at all only in a prescribed way." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 130 (1994). A primary right "is a position which a person has because someone else has a duty in the performance of which the right-holder is in some way interested." \textit{id.} at 134.

\(^{67}\) Simmons committed the murder in 1993. State ex rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003) (en banc). The United States ratified the ICCPR in 1992. Therefore, there is no retroactivity issue, because the Covenant was in force at the time of the crime.

\(^{68}\) U.S. Const. art. VI, cl. 2.

Clause, in the absence of RUDs, *Simmons* is truly an easy case. 70

2. Lawrence as a Treaty Case

Assume that the United States ratified the ICCPR without any RUDs. Assume, further, that John Lawrence argued that the Texas Court of Appeals was required to reverse his conviction because the ICCPR barred imposition of criminal punishment for private conduct protected under Article 17 of the treaty. 71 Article 17 provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." 72 The treaty clearly grants Lawrence a primary right to be free from arbitrary interference with his privacy. It is less clear, though, whether that right was violated.

Recall the facts in *Lawrence*. John Geddes Lawrence was “engaging in a sexual act” with Tyrone Garner in the privacy of his own apartment when police officers entered the apartment. 73 The officers' entry into the apartment was lawful. When the officers saw the two men having sex, the officers arrested both men and charged them with “deviate sexual

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70. Two possible objections to this argument are as follows. First, one might argue that the ICCPR would be non-self-executing, even without the NSE declaration. See *International Human Rights Treaties: Hearings Before the S. Comm. On Foreign Relations, 96th Cong. 315 (1979)* [hereinafter *Carter Hearings*] (stating that “the substantive provisions of the four human rights treaties submitted to the Senate in February 1978 are in and of themselves non-self-executing,” even without the NSE declarations). For a response to this argument, see Sloss, *supra* note 6, at 153–57.


71. The petitioners in *Lawrence* appealed to the Texas Court of Appeals after they were convicted in the Harris County Criminal Court. See *Lawrence v. Texas*, 539 U.S. 558, 563 (2003).

72. ICCPR, *supra* note 5, art. 17.

intercourse." Lawrence and Garner were convicted before a justice of the peace. In terms of the ICCPR, there is no doubt that the arrest and conviction constituted "interference" with the men's privacy. That interference was not "unlawful" under Texas law. Therefore, if Lawrence raised an ICCPR defense, the key question for the Court would be whether the interference with his privacy was "arbitrary."

How should a Texas court determine whether the interference with Lawrence's privacy was arbitrary? According to the U.S. Supreme Court: "The clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." In this case, though, the treaty text itself cannot answer the question whether the police officers' interference with Lawrence's privacy was "arbitrary," and so the Court would need to look beyond the text to answer the question.

In cases where individuals claim violations of their treaty-based rights, the Supreme Court has often employed the canon of "liberal interpretation." Under this canon, "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." According to one commentator, the Supreme Court applied this canon "in nearly a dozen opinions in the first half of the twentieth century." The canon of liberal interpretation would clearly support a ruling reversing Lawrence's conviction on the grounds that the Texas statute, as applied, interfered arbitrarily with his right to privacy under the ICCPR.

Another principle of treaty interpretation that the Supreme Court has endorsed is that the "judgments of our sister signatories" are entitled to "considerable weight." The rationale for this principle is straightforward.

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74. Id. at 563.
76. In the actual Lawrence decision, the Supreme Court apparently believed that the interference with petitioners' rights was arbitrary, although the Court did not use that word. The Court stated: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." Lawrence, 539 U.S. at 578. One of the dictionary definitions for "arbitrary" is "capricious, unreasonable, unsupported." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 107 (2d ed. 1987) (unabridged). The Court's conclusion that the statute furthers no legitimate state interest is equivalent to a finding that the statute is "arbitrary," in this sense.
ward. If U.S. courts do not give considerable weight to the judgments adopted by other states parties, “the whole object of the treaty, which is to establish a single, agreed upon regime governing the actions of all the signatories, will be frustrated.” This rationale applies with equal force to decisions rendered by international tribunals that are responsible for overseeing treaty implementation. The ICCPR created an international body called the Human Rights Committee that is charged with overseeing treaty implementation. Although the Supreme Court has not passed on this question, lower courts have held that the decisions of the Human Rights Committee constitute persuasive authority for interpreting provisions of the ICCPR.

There do not appear to be any decisions by national courts applying Article 17 of the ICCPR in circumstances that are factually similar to Lawrence. However, the Human Rights Committee has applied Article 17 in one case that is factually similar to Lawrence. Nicholas Toonen, a homosexual Australian citizen, challenged Tasmania’s criminal sodomy statute on the grounds that it violated his right to privacy under Article 17. The Committee ruled that there was a violation of Article 17, stating that Mr. Toonen was “entitled to a remedy,” and concluding that “an effective remedy would be the repeal of sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code.” Australia ultimately repealed these laws to conform to the Committee’s interpretation of Article 17. As


80. Scalia, supra note 12, at 305.

81. See ICCPR, supra note 5, arts. 28–42 (creating Human Rights Committee and defining its responsibilities).

82. See, e.g., United States v. Duarte–Acero, 208 F.3d 1282, 1288 (11th Cir. 2000) (stating that the Human Rights Committee’s “decisions in individual cases are recognized as a major source for interpretation of the ICCPR”); Maria v. McElroy, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999) (same).


84. Id. ¶¶ 9–10.

noted above, the European Court of Human Rights has also held that the European Convention on Human Rights protects the right of adult homosexuals to engage in private, consensual sexual activities. Thus, international case law supports Lawrence's argument that the Texas statute, as applied, violates his right to privacy under the ICCPR.

Notwithstanding the aforementioned considerations, Lawrence does not have a "slam dunk" argument under the ICCPR. If his case had been litigated as a treaty case, the outcome may well have hinged on the position, if any, adopted by the federal executive branch. Even so, in the absence of RUDs, Lawrence could have made a fairly persuasive argument for reversal of his conviction on the grounds that the Texas statute, as applied, violated his right to privacy under the ICCPR.

B. Theoretical Benefits of Direct Application

Assume that, in the absence of RUDs, the defendants in Lawrence and Simmons could have prevailed on the basis of treaty-based defenses. The question arises: what are the benefits of adjudicating cases like Lawrence and Simmons as treaty cases, rather than constitutional cases? What, in other words, are the benefits of direct application, versus indirect application, of international law?

There are two significant benefits associated with adjudicating Lawrence and Simmons as treaty cases, rather than constitutional cases. First, if the Court ruled in favor of the defendants on the basis of the ICCPR, instead of the Constitution, Congress would retain the power to overrule the Court by enacting legislation superseding the treaty for purposes of domestic law. As John Hart Ely has argued, one of the judiciary's central missions is "to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open." In both Lawrence and

pealed these sodomy laws" in response to the Human Rights Committee’s decision in the Toonen case).

86. See supra notes 29–35 and accompanying text.

87. One scholar has noted "that judicial deference to the Executive's position on treaty interpretation is the single best predictor of interpretive outcomes in American treaty cases." See David J. Bederman, Deference or Deception: Treaty Rights as Political Questions, 70 U. COLO. L. REV. 1439, 1464–65 (1999).


89. ELY, supra note 2, at 76.
Simmons, the Court closed the channels of political participation by deciding the cases on constitutional grounds. In contrast, if the Court had applied the ICCPR directly, it could have maintained open channels of political participation, thereby giving Congress an opportunity to participate in the decision-making process. Participation of the political branches is especially important in cases—such as Lawrence and Simmons—where one of the issues at stake is whether it is desirable to apply international norms domestically.

Second, the treaty provisions on the right to privacy and the juvenile death penalty, respectively, are much more specific than the constitutional text that the Court applied in Lawrence and Simmons. One of the main criticisms of the Court’s decisions in Lawrence and Simmons is that the Justices were “legislating from the bench.” Even if one believes that this charge is unwarranted, there is no doubt that the courts are less vulnerable to this type of criticism if they can identify specific language in authoritative texts to support their conclusions. If the U.S. had ratified the ICCPR without RUDs, and the Court ruled that the juvenile death penalty violated the treaty, the Court could not plausibly be accused of “legislating from the bench” because the treaty itself sets an age limit of eighteen. Similarly, although the text of the ICCPR does not explicitly address homosexual conduct, the ICCPR does explicitly protect the right of privacy. In contrast, the Due Process Clause, which the Court relied on in Lawrence, does not mention a right to privacy. Thus, if the Court had based its decision in Lawrence on the ICCPR, it would have been less vulnerable to the charge that it was “making” law, instead of “applying” the law.

The main objection to direct application of the ICCPR is that it is not “made in America.” A central tenet of democratic theory is that “We the People” govern ourselves through laws of our own making. When courts decide cases on the basis of the U.S. Constitution, they are applying law that has an unassailable democratic pedigree because “We the People” ratified the Constitution. The ICCPR, in contrast, is the product

90. See supra notes 55–56 and accompanying text.
91. See 151 CONG. REC. H1405-05 (Mar. 14, 2005) (statement of Congresswoman Foxx) (“Foreign laws and the beliefs of foreign governments should have no bearing whatsoever when it comes to interpreting American laws. Judges who take these outside opinions into account are legislating from the bench and abandoning their duty to interpret the U.S. Constitution.”).
92. See ICCPR, supra note 5, art. 6, para. 5 (“Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age.”). In contrast, the Eighth Amendment merely prohibits “cruel and unusual punishments.” U.S. CONST. amend. VIII.
93. See ICCPR, supra note 5, art. 17, para. 1 (“No one shall be subjected to arbitrary or unlawful interference with his privacy.”).
of international negotiations that are disconnected from any local exercise of popular sovereignty. Moreover, when judges are called upon to interpret the ICCPR they are required to consult foreign sources, rather than American sources.

There are several responses to this objection. First, the Framers of the U.S. Constitution chose to make treaties the "Law of the Land." But they did not give the President unfettered discretion to make treaties on behalf of the United States. Before the President can ratify a treaty, he must obtain a two-thirds majority vote in the Senate in support of ratification. On April 2, 1992, the Senate voted in favor of ratification of the ICCPR. The President subsequently deposited the U.S. instrument of ratification with the United Nations. Thus, the ICCPR was incorporated into the corpus of supreme federal law by means of a democratic process within our domestic legal system. Therefore, when courts apply the ICCPR they are not applying foreign or international law: they are applying U.S. federal law.

Second, the ICCPR itself is largely the result of a successful diplomatic effort to export American constitutional values to the rest of the world. According to the Senate Foreign Relations Committee, the ICCPR "is rooted in western legal and ethical values. The rights guaranteed by the Covenant are similar to those guaranteed by the American Constitution." Therefore, when courts apply the ICCPR they are applying U.S. federal law.

94. Professor Rubenfeld has made a similar argument. See Jed Rubenfeld, Unilateralism and Constitutionalism, 79 N.Y.U. L. REV. 1971, 1991–99 (2004) (contrasting "international constitutionalism" with "democratic constitutionalism," and concluding that, for democratic constitutionalism, "it is critical for constitutional law to be made and interpreted not by international experts, but by national political actors and judges").

95. U.S. CONST. art. II, § 2, cl. 2 (granting the President the "Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur").


97. Some scholars contend that the treaty making process is not truly democratic because the House of Representatives is excluded from the process. See, e.g., Rubenfeld, supra note 94, at 2009. There is no doubt, though, that treaty lawmaking is more democratic than judicial lawmaking, because judicial lawmaking excludes the political branches entirely. Moreover, although there is no bright line that separates creation of law from interpretation of law, much of what passes for constitutional interpretation could accurately be described as judicial lawmaking.

98. If Congress enacted legislation to remove the RUDs (in whole or in part) and to authorize judicial application of the ICCPR, there would be no dispute that the courts were applying federal law when they applied the ICCPR. Even if Congress does not remove the RUDs, the ICCPR is still U.S. federal law because the Supremacy Clause says so. See U.S. CONST. art. VI, cl. 2 (specifying that treaties are "the supreme Law of the Land"). See also David Sloss, Non-Self-Executing Treaties: Exposing a Constitutional Fallacy, 36 U.C. DAVIS L. REV. 1, 37–38 (2002) (explaining that the NSE declaration does not alter the fact that the ICCPR is supreme federal law under the Supremacy Clause).

tution and the Bill of Rights." Therefore, direct application of the ICCPR would not require U.S. courts to import foreign values. Rather, direct application of the ICCPR is properly understood as a re-importation of American ideals that have been exported and filtered through the lens of international law.

Third, judges are already consulting foreign sources to interpret the Constitution. In the past five terms, there have been at least six Supreme Court decisions in which one or more Justices has invoked international or foreign authorities as an aid to constitutional interpretation. Although the use of international law in domestic adjudication is controversial, Justices on both sides of the debate agree that the practice will continue. For example, Justice O'Connor, who supports this trend, has stated: "I suspect that with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues." Similarly, Justice Scalia, who opposes the trend, agrees: "I expect—or rather, I fear—that the Court's use of foreign law in the interpretation of the Constitution will continue at an accelerating pace.

Direct application of the ICCPR would redirect the "comparative urge" away from constitutional interpretation, where the relevance of foreign materials is sharply contested, towards interpretation of a multilateral treaty, where the relevance of foreign sources is undisputed.

Finally, when the courts apply international or foreign law indirectly by means of constitutional interpretation, they incorporate foreign or international norms into domestic law without giving Congress an oppor-

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101. See Roper v. Simmons, 543 U.S. 551, 575–78 (2005); Lawrence v. Texas, 539 U.S. 558, 572–73, 576 (2003); Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing the International Covenant on the Elimination of All Forms of Racial Discrimination in support of decision upholding the constitutionality of law school’s affirmative action program); Foster v. Florida, 537 U.S. 990, 992–93 (2002) (Breyer, J., dissenting from denial of certiorari) (citing foreign judicial decisions in support of the view that the "death row phenomenon" is unconstitutional); Patterson v. Texas, 536 U.S. 984, 984 (2002) (Stevens, J., dissenting from denial of stay of execution) (referring to international consensus opposing the juvenile death penalty); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (majority opinion) (noting that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved").
103. Scalia, supra note 12, at 308.
tunity to express its views about the desirability of applying those norms domestically. In contrast, if the courts applied the ICCPR directly, Congress would have the opportunity to block the domestication of international norms if it objected to the domestic application of a particular rule. Therefore, if U.S. courts applied the ICCPR to resolve domestic disputes, there is no danger that we would be ceding our sovereignty to foreigners because judicial decisions would be subject to a legislative check. Moreover, direct application of the ICCPR would enhance democracy by facilitating congressional participation in decisions about the domestic application of international human rights norms.

III. THE PERVERSE EFFECTS OF RUDs

Part III shows that the actual effect of the RUDs has been almost precisely the opposite of the intended effect. The first section demonstrates that one of the treaty makers’ main objectives in adopting treaty reservations was to ensure that decisions related to the domestic application of international human rights norms would be made through a bicameral legislative process. The second section shows that the actual effect was precisely the opposite: the RUDs have channeled decision-making into constitutional adjudication, thereby excluding congressional participation.

A. The Intended Effect of RUDs

President Carter first transmitted the ICCPR to the Senate in 1978, along with four other treaties. The letter of submittal proposed several reservations. One reservation concerned freedom of speech. The Carter Administration noted that Article 20 of the ICCPR, which prohibits certain categories of speech, “conflicts with the Constitution.” In contrast, the other proposed reservations, including a proposed death penalty reservation, were not designed to avoid conflicts with the Constitution, because there are no other provisions of the ICCPR that prohibit constitutionally protected speech or conduct. Rather, the other proposed reservations were designed “to harmonize the treaties with existing statutes and common law.”

The State Department Legal Adviser stated that the free speech reser-
vation was "absolutely essential in order to avoid conflicts with our own Constitution." However, he said: "As to the other reservations, if the Senate should decide that they are not necessary, I think the administration would be willing to dispense with them." The administration was willing to dispense with the other reservations, including the death penalty reservation, because they were not intended to express substantive disagreement with the terms of the Covenant. Rather, the purpose of the other reservations was to ensure that "further changes in our [domestic] laws will be brought about only through the normal legislative process."

After conducting hearings on the ICCPR and other human rights treaties in 1979, the Senate took no further action on the ICCPR until 1991. In August 1991, President Bush urged the Senate to renew its consideration of the ICCPR. The Bush Administration also recommended several reservations, including a juvenile death penalty reservation, but it did not express opposition to increasing the minimum age to eighteen. To the contrary, the Administration stated that the reservation would "leave open the possibility that Congress might adopt legislation, in connection with ratification of the Covenant or subsequently, prohibiting the imposition of the death penalty for crimes committed by those below 18." In testimony before the Senate Foreign Relations Committee, Bush Administration representatives emphasized that the proposed reservations, other than the free speech reservation, were not intended to convey substantive opposition to the norms embodied in the ICCPR. Rather, the proposed reservations reflected the belief that, in terms of democratic process, it would be better to make changes in domestic law by means of legislation approved by both Houses of Congress.

108. Id. at 42 (statement of Roberts B. Owen, in response to question from Senator Pell).
109. Id.
110. Id. at 29 (prepared statement of Roberts B. Owen).
111. See ICCPR REPORT, supra note 100, at 2.
112. See id. at 6-10 (summarizing five reservations, five understandings and four declarations proposed by the Bush Administration).
113. Id. at 11 (reprinting document transmitted from executive branch to the Senate, entitled "Explanation of Proposed Reservations, Understandings and Declarations").
114. See International Covenant on Civil and Political Rights: Hearing Before the S. Comm. on Foreign Relations, 102d Cong. 15 (1992) [hereinafter ICCPR Hearings] (statement of Richard Schifter) ("[I]f the Congress desires to change existing domestic laws, it will undoubtedly want to do so by statute, in the customary, legislative process."). See also id. at 80 (written response to question from Senator Helms).
The Senate Foreign Relations Committee voted unanimously to report the ICCPR to the full Senate with a resolution of ratification containing the RUDs proposed by the Bush Administration. Like the executive branch, the Committee made clear in its report to the Senate that it was not opposed to making changes in domestic law to conform to the requirements of the ICCPR. However, the Committee agreed that any change in domestic law should be endorsed by the full Congress.

The Committee recognizes the importance of adhering to internationally recognized standards of human rights. Although the U.S. record of adherence has been good, there are some areas in which U.S. law differs from the international standard. For example, the Covenant prohibits the imposition of the death penalty for crimes committed by persons below the age of eighteen, but U.S. law allows it for juveniles between the ages of 16 and 18. In areas such as these, it may be appropriate and necessary to question whether changes in U.S. law should be made to bring the United States into full compliance at the international level. However, the Committee anticipates that changes in U.S. law in these areas will occur through the normal legislative process.

In sum, throughout the process that led to U.S. ratification of the ICCPR, executive and Senate officials agreed on the desirability of the various reservations. However, with the exception of the free speech reservation, the other reservations were not intended to express U.S. opposition to domestic application of the international standard. Rather, the reservations expressed a preference for using a bicameral legislative process, and including the House of Representatives in any decision to modify domestic legal standards to conform to international norms.

115. See ICCPR REPORT, supra note 100, at 3.
116. Id. at 4.
117. It is possible, of course, that the Senate and executive branch did not want to express openly the "actual motivation" for the RUDs, which, according to some critics, was simply hostility to international human rights law. Whatever the actual motivation may have been, the preceding analysis accepts at face value statements made by the Senate and the executive branch. Those statements are consistent with the view that the political branches were not opposed to domestic application of the ICCPR per se, but they favored the use of a bicameral legislative process for making changes in domestic law.
B. The Actual Effect of the RUDs

Part II demonstrated that, in the absence of RUDs, the defendants in Lawrence would have had a viable treaty-based defense to the Texas criminal sodomy statute. Even so, it appears that they never attempted to raise such a defense.\textsuperscript{118} Their failure to raise a treaty-based defense may be partially attributable to the fact that lawyers in the United States are generally unfamiliar with the ICCPR. However, even lawyers familiar with the ICCPR might reasonably have calculated that it was not worthwhile to raise an ICCPR defense because the NSE declaration would have defeated that defense. There are sound arguments supporting the view that the NSE declaration was not intended to preclude defendants in state criminal trials from raising treaty-based defenses.\textsuperscript{119} There are also plausible arguments that the NSE declaration is invalid.\textsuperscript{120} Regardless, faced with a choice between raising a constitutional defense, which required the Court to overrule Bowers v. Hardwick,\textsuperscript{121} and raising an ICCPR defense, which would have required the Court to

\textsuperscript{118} In their appeal to the Texas Court of Appeals, the defendants in Lawrence raised four arguments: a federal Equal Protection argument, an equal protection argument based on the Texas Constitution, a federal Due Process argument, and a right-to-privacy argument based on the state Constitution. See Lawrence v. State, 41 S.W.3d 349 (Tex.App. 2001). The cert petition to the U.S. Supreme Court raised three issues: whether petitioners' criminal convictions violated the Equal Protection Clause; whether their criminal convictions violated the Due Process Clause; and whether Bowers v. Hardwick should be overruled. See Petition for Writ of Certiorari, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2002 WL 32101039.

\textsuperscript{119} See Sloss, supra note 6 (reviewing Senate record associated with ratification of human rights treaties and concluding that NSE declarations were intended to preclude plaintiffs from invoking the treaties as a basis for a private right of action, but were not intended to preclude defendants from invoking treaties defensively).


\textsuperscript{121} See supra notes 23–25 and accompanying text.
tackle various interpretive and constitutional issues associated with the NSE declaration, even lawyers well versed in the complex issues surrounding the NSE declaration might reasonably have decided that the safest course was to focus on the constitutional claim. Thus, by creating an obstacle to the viability of a treaty-based defense, the NSE declaration had the effect of channeling litigation into constitutional adjudication.

Part II also demonstrated that, in the absence of RUDs, Simmons would have had a very strong treaty-based defense to the Missouri death penalty statute. Even so, Simmons' attorneys never raised an ICCPR defense. As with Lawrence, the failure of Simmons' lawyers to raise a treaty-based defense may be partially attributable to their lack of familiarity with the ICCPR. However, even if they were international human rights experts, they might reasonably have concluded that an ICCPR defense was not viable, because they would have had to overcome both the NSE declaration and the juvenile death penalty reservation. There are plausible arguments that the juvenile death penalty reservation is invalid. U.S. courts that have addressed the issue, though, have uniformly rejected these arguments. Thus, faced with a choice between raising a constitutional defense, which required the Court to overrule Stanford, and raising an ICCPR defense, which would have required

122. The Missouri Supreme Court held that Simmons' execution was "prohibited by the Eighth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment." State ex rel. Simmons v. Roper, 112 S.W.3d 397, 413 (Mo. 2003) (en banc). The Court added in a footnote that it was unnecessary to reach the alternative argument that his execution was barred by the Missouri Constitution. Id. at 413 n.20. The Missouri Supreme Court's opinion provides no indication that any other argument was presented.

The petitioner's brief to the U.S. Supreme Court identified two questions for review:
1. Once this Court holds that a particular punishment is not "cruel and unusual," and thus not barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards? 2. Is the imposition of the death penalty on a person who commits a murder at age seventeen 'cruel and unusual,' and thus barred by the Eighth and Fourteenth Amendments?


125. See supra notes 37–40 and accompanying text.
the Court to invalidate the juvenile death penalty reservation, a well-informed lawyer might reasonably have concluded that the ICCPR defense was simply not worth the effort. Thus, by creating a significant obstacle to the successful litigation of an ICCPR defense, the juvenile death penalty reservation had the effect of channeling litigation into constitutional adjudication.

This result is strangely ironic. One of the primary justifications for the RUDs was that the RUDs would help ensure that the full Congress, including the House of Representatives, would participate in decisions about the domestic application of international human rights norms. In fact, though, as exemplified by Lawrence and Simmons, the RUDs have actually channeled decision-making into constitutional adjudication, thereby excluding Congress from the decision-making process. Absent the RUDs, both Lawrence and Simmons could have been litigated as treaty cases. If the Supreme Court had ruled in favor of the defendants on the basis of the ICCPR, Congress could have reversed the outcome by enacting legislation to supersede the treaty. Thus, the actual effect of the RUDs was almost precisely the opposite of the intended effect: they channeled decision-making into constitutional adjudication, thereby excluding Congress from the decision-making process.

IV. A LEGISLATIVE PROPOSAL

Parts I to III diagnosed a malady afflicting American democracy. The problem, in brief, is that federal courts have been invoking international human rights norms in support of constitutional rulings, thereby preventing Congress from participating in decisions about the domestic application of those norms. Part IV prescribes a legislative remedy for this problem. The central objective of the proposed legislation is to enhance the democratic process. This article assumes that the democratic process is enhanced when Congress exercises greater authority, and the courts exercise correspondingly less authority, over decisions about the scope and content of legal protection afforded for fundamental human rights. To augment congressional authority relative to the courts, the legislation

126. Even without the RUDs, litigants might have preferred to litigate Lawrence and Simmons as constitutional cases, and courts might have preferred to decide the cases on constitutional grounds, because U.S. lawyers and judges are generally more familiar with constitutional law than international law. Therefore, the evidence does not establish “but for” causation: one cannot say that “but for” the RUDs the courts would have avoided constitutional decision-making. However, the evidence does support the conclusion that the RUDs are a key factor that pushes courts and litigants away from treaty litigation and into constitutional litigation.
would channel human rights litigation away from constitutional adjudication towards direct application of the ICCPR. Direct application of the ICCPR would augment congressional authority because Congress could enact legislation to supersede specific treaty provisions if it disliked the results of judicial decisions applying the treaty.

Direct application of the ICCPR would not be democracy enhancing in all cases, however. Legislation authorizing direct application of the ICCPR is likely to be democracy enhancing only if two conditions are satisfied. First, the legislation must deal with an area of substantive law where the federal courts currently function as the primary lawmaking institution in the United States. Second, the legislation must deal with an area of substantive law where international law is, at least in some respects, more rights-protective than current domestic law. Consider each of these points separately.

First, there is a crucial distinction between areas of substantive law where Congress has historically framed the primary rules governing the conduct of actors within the domestic legal system, and areas of substantive law where Congress has been a minor player. The ICCPR touches upon areas of substantive law in both categories. For example, there are several provisions of the ICCPR that protect the rights of Native Americans.\(^{127}\) This is an area where Congress has played a dominant role, and the courts have largely deferred to Congress.\(^{128}\) Direct application of the ICCPR provisions related to Native Americans would not augment congressional authority relative to the courts, because Congress is already the dominant player in this area. In contrast, the ICCPR also contains provisions that relate to capital punishment.\(^{129}\) This is an area where, for the past several decades, the Supreme Court has used its power of constitutional interpretation to craft primary rules governing the implementation of capital punishment, and Congress has taken a

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127. See, e.g., ICCPR, supra note 5, art. 1, para. 1 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); id., art. 26 (prohibiting discrimination on the basis of "national or social origin"); id., art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.").


129. See, e.g., ICCPR, supra note 5, art. 6, para. 1 (prohibiting arbitrary deprivation of life); id., art. 6, para. 2 (restricting the death penalty to “the most serious crimes”).
back seat to judicial lawmaking. Direct application of the ICCPR provisions related to capital punishment would enhance congressional authority relative to the courts because judicial decisions applying the ICCPR would be subject to a legislative check, whereas judicial interpretations of the Constitution preclude further democratic process.  

Second, there is an important distinction between areas of substantive law where international human rights law is more rights-protective than domestic law, and areas of substantive law where domestic law provides greater protection for individual rights. For example, the First Amendment generally provides greater protection for freedom of speech than do the corresponding provisions of the ICCPR. It seems likely that heightened speech protections under the First Amendment conform to the policy preferences of a majority of U.S. citizens. In any case, the courts cannot utilize the ICCPR to restrict the scope of First Amendment rights because the Constitution takes precedence over treaties. Neither can the courts use the ICCPR to expand the scope of First Amendment rights because the First Amendment is already more rights-protective than the ICCPR. Thus, if Congress enacted legislation encouraging courts to decide freedom of speech cases on the basis of the ICCPR, instead of the First Amendment, the legislation would not have any practical impact, because courts could not utilize the ICCPR either to expand or to restrict the scope of First Amendment rights. More broadly, in areas of substantive law where U.S. constitutional law is more rights-protective than the ICCPR, it is neither desirable nor feasible for Congress to enact legislation that would redirect litigation away from constitutional adjudication towards direct application of the ICCPR.  

In contrast, compare freedom of speech to prisoners' rights. The ICCPR contains two key provisions that protect the rights of prisoners. These provisions provide greater protection for prisoners' rights,

130. See infra notes 137-57 and accompanying text (discussing respective roles of Congress and the federal courts in shaping the rules governing the death penalty).

131. Article 19 of the ICCPR protects freedom of expression. Article 20, however, obligates states to restrict some speech that is protected by the First Amendment. For example, Article 20 obligates states to prohibit "advocacy of national, racial or religious hatred." ICCPR, supra note 5, art. 20, para. 2. In contrast, the First Amendment, subject to a few narrow exceptions, forbids the government from banning the dissemination of obnoxious ideas. See R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (holding that a St. Paul bias-motivated crime ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses").


133. See ICCPR, supra note 5, art. 7 ("No one shall be subjected to torture or to cruel, inhu-
in certain respects, than does the Eighth Amendment under current Supreme Court jurisprudence. Thus, in the absence of any legislation on the subject, judges who are otherwise inclined to expand the scope of constitutional protections for prisoners' rights might well cite international and comparative materials to support their expansive interpretation of U.S. constitutional rights. Therefore, if Congress wants to participate in decisions about the scope and content of prisoners' rights, Congress could secure its role in the decision-making process by enacting legislation to channel litigation away from constitutional adjudication towards direct application of the ICCPR. More broadly, such legislation makes sense in areas of substantive law where the ICCPR is more rights-protective than domestic law, because those are the areas of law where judges are most likely to invoke international human rights law in support of expansive interpretations of constitutional rights.

In light of the above, Part IV presents a concrete legislative proposal that would channel capital punishment litigation away from constitutional adjudication and encourage direct application of the ICCPR. The first section shows that capital punishment is a good candidate for such legislation because it satisfies the two criteria identified above: the courts have functioned as the primary lawmakers, and international law is more rights-protective than domestic law. The second section sketches the outlines of the legislative proposal. The final section analyzes the likely effects of the proposed legislation. Although the pro-

134. For example, to succeed in an Eighth Amendment claim challenging conditions of confinement, a prisoner must show that he has been deprived "of a single, identifiable human need such as food, warmth, or exercise...." Wilson v. Seiter, 501 U.S. 294, 304 (1991). In contrast, the European Convention on Human Rights, like Article 7 of the ICCPR, prohibits "degrading treatment." See European Convention, supra note 30, art. 3. The European Court of Human Rights has held that treatment is "degrading if it is such as to arouse in its victims feeling of fear, anguish and inferiority capable of humiliating and debasing them." Iwanczuk v. Poland, 38 E.H.R.R. 8, ¶ 51 (2001). "Moreover, it is sufficient if the victim is humiliated in his or her own eyes." Id.

posed legislation focuses exclusively on capital punishment, a similar approach could be applied to any area of substantive law where international human rights law is more rights-protective than domestic law, and where Congress has historically taken a back seat to judicial lawmaking.\footnote{36. Prisoners' rights is another area of substantive law that satisfies these two criteria. Over a period of about two decades, from the mid-1960s to the mid-1980s, "federal courts ended up promulgating a comprehensive code for prison management, covering such diverse matters as residence facilities, sanitation, food, clothing, medical care, discipline, staff hiring, libraries, work, and education." Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons 41 (1998). In contrast, Congress played a very minor role in the movement to reform America's prisons. See id. at 45. As noted above, international human rights law is more protective of prisoners' rights, in certain respects, than current domestic law. See supra notes 133-34 and accompanying text.}

A. Capital Punishment, Judicial Lawmaking, and International Law

1. The Supreme Court as lawmaker

In \textit{Furman v. Georgia},\footnote{137. 408 U.S. 238 (1972).} the Supreme Court held that the Georgia and Texas death penalty statutes violated the Eighth Amendment. The Court produced a deeply fractured decision, without a majority opinion,\footnote{138. In fact, the Court produced nine separate opinions in \textit{Furman}, with each Justice writing separately. See id.} but the practical effect was to invalidate the death penalty nationally, and force state legislatures to redraft their statutes.\footnote{139. See Raymond Paternoster, \textit{Capital Punishment in America} 18-19 (1991).} Thirty-five states enacted new capital punishment statutes over the next few years.\footnote{140. See \textit{id}. at 19-20.} As a formal matter, the state legislatures in these thirty-five states were the "lawmakers" who established the new rules for capital punishment. As a practical matter, though, the Supreme Court was the real lawmaker, because the legislatures drafted statutes in the shadow of \textit{Furman}, trying to deduce from the individual opinions of the various Justices the constitutional rules that would determine whether the death penalty could survive constitutional scrutiny.

The first major constitutional test of the new death penalty statutes came in 1976 in \textit{Gregg v. Georgia}.\footnote{141. 428 U.S. 153 (1976) (plurality opinion).} In \textit{Gregg}, the Court upheld the constitutionality of the revised Georgia statute because the new statute guided the exercise of the jury's discretion by providing "clear and ob-
jective standards so as to produce non-discriminatory application."\textsuperscript{142} The Court's rationale emphasized several features of the Georgia statute: the statute split the trial into a guilt phase and a separate sentencing phase;\textsuperscript{143} during the sentencing phase, the defendant had an opportunity to present evidence of mitigating circumstances;\textsuperscript{144} the prosecution was required to prove at least one aggravating circumstance beyond a reasonable doubt;\textsuperscript{145} and the statute provided for "automatic appeal of all death sentences to the State's Supreme Court."\textsuperscript{146} Although the Court did not hold in Gregg that state statutes must include all of these features to survive constitutional scrutiny, virtually all contemporary death penalty statutes incorporate these features, because state legislatures know that they cannot implement their death penalty statutes without Supreme Court approval. Thus, in effect, the Court in Gregg mandated the basic contours of state death penalty statutes, and state legislatures were left to implement the rules created by the Supreme Court.\textsuperscript{147}

Since Gregg, the Court has handed down several other decisions that further restrict the discretion of state legislatures in crafting death penalty statutes. Statutes must give defendants broad leeway to present mitigating evidence and plea for mercy.\textsuperscript{148} States are not permitted to execute individuals who are insane,\textsuperscript{149} or mentally retarded.\textsuperscript{150} Individuals who were less than sixteen years old at the time of the crime are not eligible for capital punishment.\textsuperscript{151} A state cannot impose capital punishment for the rape of an adult woman.\textsuperscript{152} An individual cannot be sentenced to death "solely for participation in a robbery in which another

\begin{footnotesize}
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\item \textsuperscript{142} Id. at 198.
\item \textsuperscript{143} Id. at 190–91.
\item \textsuperscript{144} Id. at 197.
\item \textsuperscript{145} Id. at 196–97.
\item \textsuperscript{146} Id. at 198.
\item \textsuperscript{147} The Court decided four companion cases on the same day as Gregg. In two cases, the Court upheld the constitutionality of state statutes that were broadly similar to the Georgia statute at issue in Gregg, although they differed in particulars. See Jurek v. Texas, 428 U.S. 262 (1976) (upholding constitutionality of Texas statute); Proffitt v. Florida, 428 U.S. 242 (1976) (upholding constitutionality of Florida statute). In the other two cases, the Court held unconstitutional two statutes that made the death penalty mandatory in certain circumstances. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Together, these cases established the basic constitutional parameters for all the states.
\item \textsuperscript{148} Lockett v. Ohio, 438 U.S. 586 (1978).
\item \textsuperscript{149} Ford v. Wainwright, 477 U.S. 399 (1986).
\item \textsuperscript{150} Atkins v. Virginia, 536 U.S. 304 (2002).
\item \textsuperscript{151} Thompson v. Oklahoma, 487 U.S. 815 (1988). As discussed above, the Supreme Court later raised the age limit to eighteen. Roper v. Simmons, 543 U.S. 551 (2005).
\item \textsuperscript{152} Coker v. Georgia, 433 U.S. 584 (1977).
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\end{footnotesize}
robber takes life."\textsuperscript{153} Aggravating circumstances "must genuinely narrow the class of persons eligible for the death penalty."\textsuperscript{154} The determination of aggravating factors must be made by a jury, not a judge.\textsuperscript{155} These are the primary rules regulating the implementation of capital punishment in the United States today. The Supreme Court created every one of these rules by exercising its power to interpret the Constitution. Thus, the Supreme Court functions as the primary lawmaker in the area of capital punishment. State legislatures have very little discretion because the laws they create must conform to Supreme Court jurisprudence, which defines the basic parameters of what is permitted and what is prohibited.

Congress has influenced the rules governing administration of capital punishment in two ways. First, the Federal Death Penalty Act of 1994 sets forth the capital sentencing procedures that apply in federal criminal trials.\textsuperscript{156} Like state legislatures, Congress has fairly narrow discretion in framing these procedures because it must conform to the constitutional rules established by the Supreme Court. Moreover, these procedures apply only in a small number of cases, because the vast majority of capital cases are tried in state courts, and the Federal Death Penalty Act does not apply to state criminal trials. Second, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA).\textsuperscript{157} AEDPA made substantial changes to the rules governing federal habeas review of state court capital convictions, thereby making it more difficult for federal habeas petitioners to win reversals of their capital sentences. However, AEDPA does not affect the primary rules governing which defendants are death-eligible, which crimes are death-eligible, or what procedures the states may utilize to conduct capital trials. Thus, the primary laws governing administration of the death penalty in the United States are framed by the Supreme Court, not by Congress.

2. A Comparison of Domestic and International Standards

When the United States ratified the ICCPR, it adopted a reservation stating: "That the United States reserves the right, subject to its Consti-

\textsuperscript{155} Ring v. Arizona, 536 U.S. 584 (2002).
Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."\(^{158}\) By adopting this reservation, the U.S. tacitly acknowledged that the international rules embodied in the ICCPR imposed greater restrictions on capital punishment than pre-existing domestic laws. The most obvious example is that the ICCPR explicitly sets a minimum age of eighteen,\(^{159}\) whereas U.S. law at the time of ratification set a minimum age of sixteen.\(^{160}\) Although the Supreme Court decision in *Simmons* removed this discrepancy, there are two other ICCPR provisions that appear to impose stricter constraints on capital punishment than current U.S. domestic law.

First, Article 6(2) states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes."\(^{161}\) U.S. constitutional jurisprudence also restricts capital punishment to the most serious crimes.\(^{162}\) However, the international standard for "most serious crimes" is more restrictive in certain respects than the U.S. standard. For example, in *Tison v. Arizona*,\(^{163}\) the Supreme Court held that the Eighth Amendment permits capital punishment in cases where the defendant neither killed nor intended to kill the victim, but the defendant was a major participant in the criminal enterprise and manifested a reckless indifference to the value of human life. In contrast, there is substantial authority for the proposition that the phrase "most serious crimes" in Article 6(2) restricts the application of capital punishment to intentional crimes. Thus, the Eighth Amendment permits the death penalty for some defendants who neither killed nor intended to kill, whereas the ICCPR arguably prohibits capital punishment for anyone who did not kill intentionally.\(^{164}\)

Second, Article 6(1) provides: "No one shall be arbitrarily deprived of his life."\(^{165}\) As above, this principle is firmly rooted in U.S. constitutional jurisprudence.\(^{166}\) However, there is a plausible argument that the

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159. ICCPR, *supra* note 5, art. 6, para. 5.
161. ICCPR, *supra* note 5, art. 6, para. 2.
162. *See*, e.g., Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty is a disproportionate punishment for the crime of raping an adult woman).
164. *See infra* notes 185–92 and accompanying text (elaborating on this point).
165. ICCPR, *supra* note 5, art. 6, para. 1.
166. *See*, e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238
international standard is more restrictive, in certain respects, than the domestic constitutional standard. International authorities have suggested that significant geographical disparities in the implementation of capital punishment would be contrary to the international rule prohibiting arbitrary deprivation of life. Several studies in recent years have documented significant geographical disparities in the implementation of capital punishment in the United States—both across states, and across counties within a particular state. For example, one statistical study has shown that, within New York state, “murderers outside New York City and its suburbs are ten times more likely to face the death penalty than those inside the New York City region.” In light of the Supreme Court’s decision in McCleskey v. Kemp, though, it is doubtful whether this type of statistical evidence could be used to support a successful constitutional challenge to the New York death penalty statute. In contrast, this type of statistical evidence might well support a claim that the New York statute, as applied, violates the ICCPR rule prohibiting the arbitrary deprivation of life.

(1972).


169. See, e.g., Report of the [Illinois] Governor’s Commission on Capital Punishment, at 196 (April 2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html (“There was a sharp difference in the rate at which defendants were sentenced to death in different regions of the state, even after controlling for factors in aggravation. Among cases with a first degree murder conviction, 8.4% of those from rural counties, 3.4% of those from urban counties, 3.3% of those from collar counties and 1.5% of those from Cook County resulted in a death sentence. These regional differences were statistically significant.”).


171. 481 U.S. 279, 292 (1987) (discounting statistical evidence of racial discrimination because defendant failed to “prove that the decision makers in his case acted with discriminatory purpose”) (emphasis in original).
The preceding analysis shows that international human rights law provides greater protection for capital defendants, in certain respects, than the corresponding provisions of domestic law. Moreover, the federal courts have been the primary lawmakers in this area, while Congress has taken a back seat to judicial lawmaking. Given these two facts, if Congress does nothing, it is likely that courts will continue to invoke international human rights norms in support of decisions that expand the constitutional rights of capital defendants, and Congress will be excluded from participating in decisions about the domestic application of international human rights norms. However, Congress has the power to legislate a role for itself in the decision-making process. The next section sketches the outlines of such legislation.

B. Proposed Legislation

If Congress wants to participate in decisions about the domestic application of international norms restricting the application of capital punishment, it has the power to enact legislation to augment its role in the decision-making process. Such legislation would have three basic elements: 1) direct the President to remove the death penalty reservation attached to the ICCPR; 2) authorize capital defendants to invoke Article 6 of the ICCPR as a defense to capital charges (including on federal habeas review); and 3) in cases where capital defendants raise either a constitutional defense or a treaty-based defense, require courts to address the treaty-based defense first, and to avoid constitutional decisions in cases where defendants could obtain relief on the basis of the treaty. Consider each of these points separately.

In light of the Supreme Court's decision in _Simmons_, one might think that it is unnecessary to remove the death penalty reservation to the ICCPR because the purpose of the reservation was to preserve the U.S. right to impose capital punishment on juvenile offenders. The text of the reservation, though, is actually broader. It states "[t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person...duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."\textsuperscript{172} Thus, the reservation appears to limit the scope of U.S. obligations under Article 6(2), which restricts the death penalty to "the most serious crimes," and under Article 6(1), which prohibits arbitrary

\textsuperscript{172}. Multilateral Treaties, \textit{supra} note 6, at 184.
deprivation of life. The reservation thus inhibits defendants from raising treaty-based defenses and channels litigation into constitutional adjudication, thereby excluding Congress from the decision-making process. Accordingly, if Congress wants to augment its role in the process, the legislation should direct the President to remove the reservation.\(^\text{173}\)

The second element of the legislation would authorize capital defendants to raise defenses based on Article 6 of the ICCPR. By explicitly authorizing such defenses, Congress would effectively remove the NSE declaration with respect to Article 6. This would greatly simplify litigation, because courts would not be required to resolve the difficult interpretive and constitutional issues surrounding the NSE declaration.\(^\text{174}\) The proposed Article 6 defense should apply in both state and federal court, because both state and federal criminal defendants have the opportunity to raise constitutional defenses to capital charges. The legislation should also authorize federal habeas review of state court decisions applying Article 6. This may require minor amendments to the current habeas statute,\(^\text{175}\) but most of the key rules governing federal habeas review of state criminal convictions would be unaffected.\(^\text{176}\)

Legislation to remove the death penalty reservation and authorize direct application of Article 6, without more, would not channel litigation away from constitutional claims. Capital defendants could still raise both constitutional defenses and treaty-based defenses. Since courts are generally more familiar with constitutional law than with international human rights law, many courts would be inclined to decide cases on constitutional grounds, not treaty grounds, if given a choice between the

\(^\text{173}\) Technically, Congress cannot remove the reservation itself, because withdrawal of the reservation requires official communication with the treaty depositary, and that is a Presidential function.

\(^\text{174}\) See supra notes 119–20 and accompanying text. For analysis of the proper interpretation of the NSE declaration, see Sloss, supra note 6. For analysis of the constitutional issues, see Sloss, supra note 98, at 35–44.

\(^\text{175}\) The habeas statute already provides that habeas corpus is a potential remedy for individuals who are “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a) (emphasis added). See also 28 U.S.C. § 2241(c)(3) (same). However, other portions of the habeas statute preclude relief unless the petition alleges a constitutional violation. See, e.g., 28 U.S.C. § 2244(b)(2)(A) (barring a second or successive habeas petition unless “the applicant shows that the claim relies on a new rule of constitutional law”) (emphasis added); 28 U.S.C. § 2253(c)(2) (barring the issuance of a certificate of appealability unless “the applicant has made a substantial showing of the denial of a constitutional right”) (emphasis added). Congress would have to consider whether and how to modify these provisions to encompass claims based on the ICCPR.

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Therefore, to encourage courts to apply the treaty, the proposed legislation would also mandate constitutional avoidance. In a famous concurring opinion in *Ashwander v. Tennessee Valley Authority*,177 Justice Brandeis declared that ""[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.""178 In the seventy years since *Ashwander*, the Supreme Court and lower courts have invoked this doctrine of constitutional avoidance in numerous cases to justify their refusal to address constitutional issues presented for decision.179 The legislation would require both state and federal courts to apply the *Ashwander* avoidance principle in cases where capital defendants raised defenses on the basis of the ICCPR. Specifically, the legislation would direct both state and federal courts to consider treaty-based defenses before considering constitutional defenses, and to avoid ruling on the constitutional issues if relief could be granted on the basis of the ICCPR.180 The courts would remain free to address constitutional questions presented if the case could not be resolved through application of the treaty.

In capital punishment cases where defendants raised only constitutional defenses, and not treaty-based defenses, the legislation would require courts to raise the ICCPR *sua sponte*, and to address any treaty-based defenses before passing on the constitutional defenses. Legislation of this type would help maintain a legislative check on the judiciary by forcing courts, whenever possible, to decide cases on grounds that leave the door ajar for subsequent legislative action. The legislation should provide one exception to the rule mandating constitutional avoidance. In cases where there is a Supreme Court decision directly on

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177. 297 U.S. 338 (1936).
178. Id. at 347 (Brandeis, J., concurring).
179. See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 73–74 (1995) ("[T]he Court still routinely interprets statutes in order to immunize them from constitutional objection, and in so doing diminishes the number of decisions on overtly constitutional grounds that it and the lower federal courts must make."). Prof. Schauer's analysis focuses on a slightly different interpretive principle, also articulated by Justice Brandeis in *Ashwander*: “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Ashwander*, 297 U.S. at 348. As Prof. Schauer notes, the two principles are "very closely related" because, under both principles, "constitutional adjudication is to be treated as a last resort." Schauer, *supra*, at 72.
180. One might legitimately question whether such legislation is constitutional. For analysis of this issue, see infra notes 239–46 and accompanying text.
point that prohibits capital punishment, but the application of Article 6 is uncertain, courts should not be required to apply the treaty. On the other hand, if there is a Supreme Court decision directly on point that authorizes capital punishment, courts should still be required to decide whether Article 6 prohibits capital punishment. Thus, for example, if the proposed legislation had taken effect before the Missouri Supreme Court decided Simmons, the Missouri Supreme Court could have decided Simmons on the basis of Article 6, thereby avoiding the awkward task of predicting that the U.S. Supreme Court, if given the opportunity, would overrule its own constitutional precedent.

The proposed legislation would not prevent courts from creating new rules of constitutional law in areas of substantive law within the scope of the ICCPR. Nor would the legislation prevent courts from citing international or foreign sources in their constitutional decisions. Such legislation, though, would be plainly unconstitutional, because Congress does not have the power to tell the federal courts how to interpret the Constitution, nor does it have the power to prohibit citations of disfavored sources.

C. Likely Effects of the Proposed Legislation

To analyze the likely effects of the proposed legislation, it is helpful

181. For example, U.S. constitutional law clearly prohibits capital punishment for the crime of raping an adult woman. Coker v. Georgia, 433 U.S. 584 (1977). In contrast, there is no authoritative international rule directly on point.

182. In Simmons, the Missouri Supreme Court concluded “that the Supreme Court of the United States would hold that the execution of persons for crimes committed when they were under 18 years of age is prohibited by the Eighth Amendment.” State ex rel. Simmons v. Roper, 112 S.W.3d 397, 413 (Mo. 2003) (en banc). The Court reached this conclusion despite the fact that the U.S. Supreme Court had previously held that the Eighth Amendment did not prohibit execution of criminals who were sixteen or seventeen when they committed their crimes. Stanford v. Kentucky, 492 U.S. 361 (1989). The Missouri Supreme Court’s decision that Stanford, in effect, was no longer good law, drew sharp criticism from Justice Scalia. See Simmons, 543 U.S. at 628–29 (Scalia, J., dissenting).

183. See, e.g., Martin H. Redish, Same-Sex Marriage, The Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For, 9 LEWIS & CLARK L. REV. 363, 378 (2005) (“Congress has no power either to resolve the substantive merits of the constitutional claims itself, or dictate to the courts—state or federal—how to decide the constitutional claims.”).

to consider a specific issue: whether an individual who was convicted of felony murder, but who neither killed nor intended to kill, may be sentenced to death. In *Enmund v. Florida*, the Supreme Court held that the Eighth Amendment precludes the death penalty for an individual "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." In *Tison v. Arizona*, though, the Court revised the *Enmund* rule, holding that it is constitutionally permissible to impose the death penalty on a "defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life."  

Article 6(2) of the ICCPR arguably imposes a stricter standard: it restricts capital punishment to the "most serious crimes." Under international law, the phrase "most serious crimes" is generally understood to encompass only intentional crimes. For example, the Statute of the International Criminal Court is designed to ensure "that the most serious crimes of concern to the international community as a whole must not go unpunished." Under the statute, individuals are generally not criminally liable unless the crime is "committed with intent and knowledge." The U.N. Commission on Human Rights has adopted numerous resolutions construing the phrase "most serious crimes" so as to restrict capital punishment to intentional crimes. The U.N. Economic

185. 458 U.S. 782, 797 (1982).
187. See ICCPR, supra note 5, art. 6, para. 2 ("In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes.").
189. Id., art. 30, para. 1 ("Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.").
and Social Council has also endorsed the principle that the death penalty is reserved only for intentional crimes.\(^{191}\) Thus, if the U.S. removed its reservation to Article 6 and Congress authorized direct application of the ICCPR in U.S. courts, a capital defendant who neither killed nor intended to kill, but who was death-eligible under \textit{Tison}, would have a strong treaty-based defense to capital punishment.\(^{192}\)

In light of this disparity between domestic and international law, this section shows that the proposed legislation would have three likely effects. It would augment the role of Congress in establishing substantive rules governing the use of capital punishment, produce additional constraints on implementation of the death penalty, and lead to greater use of international law in U.S. courts.

\textit{1. Greater Role for Congress}

The central goal of the proposed legislation is to shift decision-making responsibility from the judicial branch to the legislative branch, thereby enhancing democratic accountability for decisions about the substantive rules governing implementation of capital punishment. Assume that Congress enacted the proposed legislation, and a state court applied the ICCPR to invalidate the death sentence of a defendant who neither killed nor intended to kill, but who satisfied the \textit{Tison} culpability requirements. If Congress disagreed with the decision, Congress could enact legislation authorizing states to impose capital punishment in cases that satisfied the \textit{Tison} standard.\(^{193}\) Thus, by encouraging courts to decide capital punishment cases on the basis of the ICCPR, the legislation would provide an opportunity for Congress to participate in decisions about the substantive limits to be imposed on the implementation of the death penalty.

If courts construed the ICCPR to preclude capital punishment for defendants who neither killed nor intended to kill, it is unlikely that Congress would enact legislation to authorize capital punishment for such

\(^{191}\) \textit{See} United Nations Economic and Social Council, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50, ¶ 1, U.N. Doc. E/RES/1984/50 (1984) ("In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes.").

\(^{192}\) Indeed, given international law authorities that restrict capital punishment to intentional crimes, a person who actually killed a victim, but did so recklessly, not intentionally, would arguably be exempt from capital punishment under Article 6(2).

\(^{193}\) Some may object that such legislation is not within the scope of Congress' enumerated powers. For a response to that objection, see infra notes 227–38 and accompanying text.
defendants. Even so, the very fact that Congress has an opportunity to act would be a boon to participatory democracy. Lobbyists on both sides of the issue could express their views to Congress. Individual Congressmen and Senators could introduce legislation. Congressional committees could hold hearings on the issue. In short, the policy debate would move from the courtroom to the Capitol.\textsuperscript{194} From the standpoint of Elysian theory, that would be a healthy development for American democracy.

Suppose, though, that Congress did enact legislation to authorize capital punishment for defendants who neither killed nor intended to kill. The Supreme Court could still invalidate the legislation on constitutional grounds. Therefore, critics may argue, the proposed legislation does not really transfer decision-making authority from the courts to Congress, because the Supreme Court gets the last word.\textsuperscript{195} Granted, no legislation can deprive the Supreme Court of its power over constitutional interpretation. Even so, the Court would be very reluctant to impose a constitutional restriction on capital punishment after Congress had enacted legislation for the express purpose of removing that restriction. In its recent death penalty jurisprudence, the Court has repeatedly emphasized the need to present objective evidence of a national consensus to support a constitutional ruling that a particular punishment violates the Eighth Amendment.\textsuperscript{196} If Congress enacted legislation to authorize capital punishment for defendants who neither killed nor intended to kill, it would be anomalous for the Court to hold that there was a national consensus against the death penalty for such defendants. Therefore, although the Supreme Court would retain the theoretical power to invalidate congressional legislation, the Court would be

\textsuperscript{194} Federalists may object that these issues are best decided at the state level, not the national level. For a response to this objection, see infra notes 213–26 and accompanying text.

\textsuperscript{195} Indeed, a hardened skeptic might argue that the Supreme Court’s primary objective is to maximize its own power. If that is true, the Court could promote that objective by construing the ICCPR narrowly to provide only minimal protection for individual rights, while construing the Constitution broadly to provide maximum protection for individual rights. By adopting this strategy, the Court could exclude Congress from the decision-making process. Not being a hardened skeptic, though, this author doubts that the Court would adopt an interpretive strategy designed to minimize legislative power and to maximize judicial power.

\textsuperscript{196} See, e.g., Roper v. Simmons, 543 U.S. 551, 564 (2005) (noting that Eighth Amendment analysis begins with “a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question”); Atkins v. Virginia, 536 U.S. 304, 312 (2002) (stating that Eighth Amendment analysis “should be informed by objective factors to the maximum extent possible,” and that the “most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures”) (citations omitted).
unlikely to exercise that power.\textsuperscript{197}

Others may object that the goal of transferring decision-making authority from the courts to Congress is a misguided objective, because constitutional lawmaking by the courts is needed to protect individual rights. This objection has force if applied to areas of substantive law where the ICCPR offers less protection for individual rights than current constitutional law. In those areas, continued constitutional lawmaking by the courts is necessary to protect individual rights.\textsuperscript{198} The proposed legislation, however, focuses on areas of substantive law, such as capital punishment, where the ICCPR is more rights-protective than current constitutional law. In those areas, it is possible to utilize the ICCPR to protect individual rights without sacrificing the principles of majoritarian democracy. In fact, as the next section demonstrates, the proposed legislation is likely to yield greater protections for capital defendants, while still preserving open channels for political participation.

2. More Restrictions on Capital Punishment

In recent years, the Supreme Court has created several new constitutional rules that restrict the flexibility of state governments in implementing capital punishment.\textsuperscript{199} The proposed legislation would likely lead to additional constraints, but the new constraints would be based on the ICCPR, not the Constitution. Once again, the issue of capital punishment for defendants who neither killed nor intended to kill illustrates this point. Absent the proposed legislation, there are two significant obstacles to overruling \textit{Tison v. Arizona}. First, the force of \textit{stare decisis} supports continued adherence to the \textit{Tison} rule, absent compelling rea-
sons for overruling that decision. Second, in evaluating the question whether to overrule *Tison*, the Court would review state legislation to determine whether there is evidence of a national consensus that capital punishment is disproportionate punishment for a defendant who neither killed nor intended to kill.\(^{200}\) At present, only 16 of the 38 states that authorize capital punishment prohibit the death penalty for accomplices who did not intend to kill, whereas 22 states permit the death penalty in such circumstances.\(^{201}\) Thus, there does not appear to be a national consensus against capital punishment for accomplices who did not intend to kill. Absent stronger evidence of such a national consensus, it is unlikely that the Court would overrule *Tison* on constitutional grounds.\(^{202}\)

On the other hand, if Congress did enact the proposed legislation, and a capital defendant raised a treaty-based challenge to a state law that permitted capital punishment for defendants who neither killed nor intended to kill, a court could invalidate the state law on the grounds that it conflicts with the ICCPR, without having to overrule *Tison*.\(^{203}\) Moreover, in assessing the question whether an unintentional homicide qualifies as a "most serious crime" within the meaning of Article 6 of the ICCPR, the Court would not need to review state legislation in search of a national consensus, because such evidence is not relevant to ascertain-

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200. See supra note 196.
202. There is a plausible argument to the contrary. First, with respect to *stare decisis*, the Supreme Court has rendered two decisions in the past few years overruling its own constitutional precedents related to capital punishment. See *Roper v. Simmons*, 543 U.S. 551 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Atkins v. Virginia*, 536 U.S. 304 (2002) (overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)). The *Tison* decision is from the same era as other cases that were recently overruled. The Court decided *Tison* in 1987. It decided both *Stanford* and *Penry* in 1989. Five Justices who were in the majority in *Simmons* and *Atkins* are still on the Court. Thus, *stare decisis* is arguably not a large hurdle.

Second, under established Eighth Amendment jurisprudence, the Court also considers, in addition to evidence of a national consensus, whether capital punishment serves the goals of retribution and deterrence. See *Simmons*, 543 U.S. at 568–75; *Atkins*, 536 U.S. at 317–21. There is no plausible argument that the threat of capital punishment deters accomplices who neither killed nor intended to kill. Indeed, the majority in *Tison* made no such claim. See *Tison*, 481 U.S. 137. Instead, the *Tison* majority argued that accomplices who act with reckless indifference to human life are sufficiently culpable to deserve capital punishment. It is possible that a majority of the Court could be persuaded otherwise by evidence of an international consensus supporting the view that individuals who neither killed nor intended to kill are not sufficiently culpable to deserve capital punishment.

203. See supra notes 185–92 and accompanying text.
ing the correct interpretation of the treaty. Thus, adoption of the proposed legislation would increase the likelihood that U.S. courts would invalidate state laws that permit capital punishment for accomplices who did not intend to kill. More broadly, since international law tends to favor greater constraints on capital punishment than current domestic law, legislation authorizing direct application of the ICCPR in capital punishment cases would likely lead to increased restrictions on the use of the death penalty.

It does not necessarily follow, though, that those who support capital punishment would oppose the legislation. Most capital punishment supporters want to ensure that the system operates fairly and impartially, to the extent that is humanly possible. Researchers have completed several studies in recent years indicating that implementation of the death penalty is neither fair nor impartial. By authorizing direct application of the ICCPR, the legislation would provide courts another tool they could utilize to help ensure that the system operates fairly and impartially. Courts are justifiably hesitant to use the Constitution as such a tool, because no system of criminal law is perfect, and it is a very delicate task to draw a line separating constitutionally permissible flaws from constitutionally impermissible flaws. If courts attempted to draw such a line on the basis of the ICCPR, though, the task would be less problematic because judicial line-drawing would be subject to congressional revision. Thus, some capital punishment supporters might reasonably conclude that the trade-off inherent in the proposed legislation is a good one. They would accept greater restrictions on capital punishment—designed to make the system less arbitrary—in exchange for an enhanced legislative role in the process that enables Congress to override judicial decisions that impose excessive constraints on the implementation of capital punishment.

206. The ICCPR prohibits arbitrary deprivation of life. See ICCPR, supra note 5, art. 6, para. 1. Thus, the treaty requires states that maintain the death penalty to ensure that the procedures utilized to decide which defendants live, and which defendants die, are not arbitrary. Although the studies cited in the preceding footnote do not specifically address U.S. compliance with the ICCPR, they do present empirical data suggesting that the United States may be violating the ICCPR’s prohibition on arbitrary deprivation of life.
3. Increased Reliance on International Law

Even if Congress does not adopt the proposed legislation, U.S. courts are likely to continue citing international and foreign law in decisions about the scope and content of constitutional rights. When courts decide cases on constitutional grounds, the primary factors shaping judicial decisions are constitutional text, structure, precedent, and evidence of original intent. International law and foreign law remain secondary, or perhaps even tertiary factors.

In contrast, if Congress adopted the proposed legislation, courts would apply the ICCPR directly to resolve some disputes. When applying the ICCPR directly, the treaty text would be the primary factor governing treaty interpretation, supplemented by extrinsic sources that shed light on the intentions of the treaty drafters. Courts would also be guided by decisions of the Human Rights Committee applying the ICCPR, and by decisions of other international tribunals applying analogous provisions of other human rights treaties. In short, adoption of the proposed legislation would invariably lead to increased judicial reliance on international and foreign authorities.

It does not necessarily follow, though, that "internationalists" would favor the proposed legislation, or that "sovereigntists" would oppose it. In recent years, U.S. courts have tended to adopt very narrow interpretations of rights protected under international human rights and humanitarian law treaties. Therefore, internationalists may fear that U.S.

207. See supra notes 101–04 and accompanying text.

208. See Vienna Convention on the Law of Treaties, supra note 204, arts. 31–32. The basic rule of treaty interpretation is: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Id., art. 31, para. 1. The remainder of Articles 31 and 32 elaborate on this rule.

209. See, e.g., United States v. Duarte-Acero, 208 F.3d 1282, 1288 (11th Cir. 2000) (stating that the Human Rights Committee's "decisions in individual cases are recognized as a major source for interpretation of the ICCPR"); Maria v. McElroy, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999) (same).

210. The various international human rights tribunals, such as the European Court of Human Rights (ECHR), the Inter-American Commission on Human Rights (IACHR), and the Human Rights Committee, routinely cite each other's decisions as persuasive authority for interpreting similar provisions of the different treaties for which they are primarily responsible. Therefore, it is reasonable to assume that, under the proposed legislation, U.S. courts would consult decisions of the ECHR and the IACHR as persuasive authority for interpreting analogous provisions of the ICCPR. If the legislation addressed only capital punishment, ECHR decisions would have limited applicability because all the parties to the European Convention on Human Rights have abolished capital punishment.


212. See, e.g., Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (adopting narrow interpre-
courts would construe ICCPR rights narrowly. Thus, internationalists might oppose the legislation on the grounds that direct application of the ICCPR by U.S. courts would set dangerous precedents weakening international legal protection for individual human rights.

Some sovereigntists would undoubtedly oppose the legislation on the grounds that they are philosophically opposed to any judicial reliance on international or foreign authorities. Many sovereigntists, though, have a genuine commitment to using majoritarian procedures that provide democratic accountability. Since the proposed legislation provides a legislative check on judicial lawmaking, some sovereigntists would likely endorse the legislation for that reason, despite the fact that it would lead to increased judicial reliance on foreign and international law.

V. CONSTITUTIONAL OBJECTIONS

There are three potential constitutional objections to the proposed legislation. The first objection, which I will call the "federalist" objection, is that the ICCPR itself is unconstitutional, and any federal legislation implementing the ICCPR would be unconstitutional, insofar as it purports to regulate matters that are reserved to the States under the Tenth Amendment. The second objection, which I will call the "internationalist" objection, assumes that the ICCPR is valid and binding on the states, but holds that Congress lacks the power to enact legislation superseding the ICCPR, except insofar as that legislation falls within the scope of some other enumerated congressional power. The third objection is that Congress lacks the power to mandate judicial application of the Ashwander avoidance principle. Part V contends that these objections are without merit, and that the proposed legislation is constitutionally valid.

A. The Federalist Objection

The federalist objection begins with the premise that the ICCPR addresses matters beyond the scope of Congress' Article I powers. For example, the federalist might argue, nothing in Article I authorizes Congress to enact legislation prohibiting the juvenile death penalty. Since Congress lacks the power to legislate in this area, it follows that a treaty prohibiting the juvenile death penalty—even if binding on the United

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States internationally—cannot bind the States domestically, because the power to set an age limit for capital punishment is a power "reserved to the States" under the Tenth Amendment.\textsuperscript{213} Thus, insofar as the ICCPR purports to regulate matters that are beyond the scope of Congress' legislative powers, the treaty is not binding on the states, and Congress lacks the power to make it binding on the states. Therefore, Congress cannot enact legislation authorizing direct application of the ICCPR, at least not in suits where individuals allege human rights violations by state or local governments or officers.

In \textit{Missouri v. Holland},\textsuperscript{214} the Supreme Court held that the treaty makers have the power to conclude treaties regulating matters beyond the scope of Congress' enumerated powers, that such treaties empower Congress to enact legislation that would otherwise be beyond the scope of its Article I powers,\textsuperscript{215} and that matters properly within the scope of the treaty power are not reserved to the States under the Tenth Amendment.\textsuperscript{216} Federalist scholars acknowledge that, if \textit{Missouri} is still good law, then the federalist objection fails. Nevertheless, federalist scholars urge the Court to overrule \textit{Missouri}, contending that the case was wrongly decided.\textsuperscript{217}

This article will not attempt to provide a detailed defense of the Court's holding in \textit{Missouri}; other very able scholars have already done so.\textsuperscript{218} Nevertheless, three points merit brief discussion. First, until the Supreme Court says otherwise, \textit{Missouri} is still good law. Given the continued vitality of \textit{Missouri}, it follows that ratification of the ICCPR

\begin{itemize}
\item \textsuperscript{213} See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
\item \textsuperscript{214} 252 U.S. 416 (1920)
\item \textsuperscript{215} The State of Missouri argued that there are federalism limits on the treaty power, "and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." \textit{Id.} at 432. The Supreme Court expressly rejected this argument, holding "that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could." \textit{Id.} at 433.
\item \textsuperscript{216} \textit{Id.} at 432 ("To answer this question it is not enough to refer to the Tenth Amendment, reserving powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly.")
\end{itemize}
is a valid exercise of the treaty power, and that the ICCPR, at least in the absence of RUDs, is binding on the states under the Supremacy Clause. This does not mean that there are no federalism limits on the treaty power. It does mean, though, that Congress has the power to enact legislation providing for direct judicial application of the ICCPR in cases where individuals allege treaty violations by state or local governments or officers.

Second, even if the Court overruled Missouri, Congress might still have the power to enact legislation providing for direct application of the ICCPR. Professor Stephens has argued that Congress has the power under the Define and Punish Clause to regulate a broad range of conduct addressed in modern human rights treaties, beyond what it could regulate under the Commerce Clause or the Fourteenth Amendment. If she is correct, then a decision to overrule Missouri would not impose significant constraints on the government's ability to use the treaty power to impose international human rights norms on the states.

On the other hand, if the Supreme Court rejected Professor Stephens' argument, and it overruled Missouri, then the federal government could not utilize the treaty power to impose international human rights norms on the states. Even so, the Supreme Court could still use its power of constitutional interpretation to impose international human rights norms

219. U.S. CONST. art. VI, cl. 2. In the absence of RUDs, there is one provision of the ICCPR that might not be a valid exercise of the treaty power. Article 20 arguably obligates the United States to restrict speech that is constitutionally protected under the First Amendment. The United States adopted a reservation to limit the scope of its obligations under Article 20 and eliminate conflicts between its treaty obligations and constitutional requirements. See Multilateral Treaties, supra note 6, at 184. Without that reservation, Article 20 would arguably have been an invalid treaty provision, because any conflict between a treaty and the Constitution must be resolved in favor of the Constitution. Reid v. Covert, 354 U.S. 1 (1957).

220. For example, Professor Vazquez has argued that the treaty power cannot be used to abrogate state sovereign immunity associated with the Eleventh Amendment. See Carlos Manuel Vazquez, Treaties and the Eleventh Amendment, 42 VA. J. INT'L L. 713 (2002). Although that conclusion is subject to criticism on other grounds—see Susan Bandes, Treaties, Sovereign Immunity, and “The Plan of the Convention,” 42 VA. J. INT'L L. 743 (2002)—it is not inconsistent with the Supreme Court's holding in Missouri.

221. U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power “[t]o define and punish...Offences against the Law of Nations”).


223. Some aspects of international human rights law overlap with valid federal civil rights statutes, and are therefore within the scope of Congress’ enumerated powers under the Commerce Clause and the Fourteenth Amendment. However, it is generally agreed that other aspects of international human rights law address matters beyond the scope of Congress’ Commerce Clause and Fourteenth Amendment powers.
on the states. This is effectively what happened in *Simmons*. Thus, as a practical matter, a decision to overrule *Missouri* would not increase the power of the States relative to the federal government. Rather, it would increase the power of the federal courts relative to the political branches, because the federal courts would retain the power to make international human rights norms binding on the States by means of constitutional interpretation, but the federal political branches would lack the power to make international human rights norms binding on the States.

From the standpoint of Elysian theory, therefore, a decision to invalidate the proposed legislation on Tenth Amendment grounds would be wrongheaded on two counts. First, it would be contrary to principles of majoritarian democracy, because it would enhance judicial power and diminish congressional power. Second, insofar as the ICCPR provides legal protection for disadvantaged minorities, a decision to invalidate the proposed legislation would weaken legal protections for those minorities. In short, whereas the proposed legislation mitigates the countermajoritarian difficulty by reinforcing protections for individual rights in a manner that is consistent with principles of majoritarian democracy, a decision that the legislation violates the Tenth Amendment would exacerbate the countermajoritarian difficulty by weakening protection for individual rights and diminishing congressional power.

### B. The Internationalist Objection

The internationalist objection begins with the premise that *Missouri* is good law. Given this premise, it follows that Congress has the power under the Necessary and Proper Clause to provide for direct judicial application of the ICCPR. However, *Missouri* held only that Congress has the power to enact legislation that is "a necessary and proper means to execute the powers of the Government."

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224. See *supra* notes 53–54 and accompanying text.

225. See Ely, *supra* note 2, at 87 (contending that the Constitution leaves substantive values "almost entirely to the political process and instead the document is overwhelmingly concerned... with ensuring broad participation in the processes and distributions of government").

226. See id. at 76 (suggesting that the Court should "concern itself with what majorities do to minorities, particularly... laws 'directed at' religious, national, and racial minorities and those infected by prejudice against them").

227. See *Missouri*, 252 U.S. at 432 ("If the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.").
government's powers. Legislation to supersede a treaty, though, is not a necessary and proper means to execute the Treaty Power. Therefore, the internationalist might argue, Congress lacks the power to enact legislation to supersede the ICCPR, except insofar as Congress acts pursuant to some other enumerated power.

Consider a concrete example. Assume that Congress authorized direct application of Article 17 of the ICCPR, and the Supreme Court held in *Lawrence* that the Texas sodomy statute was invalid because it conflicted with the ICCPR. This article contends that one of the key benefits of direct application is that Congress could, in this hypothetical case, enact legislation authorizing States to violate Article 17 if Congress disliked the results of the Court's decision. The internationalist objection is that the Necessary and Proper Clause does not empower Congress to enact such legislation because legislation authorizing States to violate a treaty is not a necessary and proper means to execute the Treaty Power. Moreover, the internationalist continues, although the later-in-time rule authorizes Congress to enact legislation to supersede a treaty, that rule applies only insofar as Congress is acting within the scope of some Article I power. Neither the Commerce Clause nor the Fourteenth Amendment empowers Congress to regulate private consensual sodomy. Therefore, if the Court struck down Texas' sodomy law on the grounds that it violated the ICCPR, Congress would be powerless to intervene. Consequently, the ostensible benefits of direct application are more theoretical than real, because much of the substantive content of the ICCPR concerns matters that are beyond the scope of Congress' Article I powers.

In assessing this objection, it is worthwhile to recall Justice Holmes' statement in *Missouri*: "[I]t is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." Judicial decisions establishing the later-in-time rule suggest that the power

228. *See supra* notes 71–87 and accompanying text.
to violate a treaty is a power that must belong to every national government. For example, Justice Curtis defended the later-in-time rule as follows:

To refuse to execute a treaty, for reasons which approve themselves to the conscientious judgment of the nation, is a matter of the utmost gravity and delicacy; but the power to do so, is prerogative, of which no nation can be deprived, without deeply affecting its independence. That the people of the United States have deprived their government of this power in any case, I do not believe. That it must reside somewhere, and be applicable to all cases, I am convinced. I feel no doubt that it belongs to Congress.232

Although Justice Curtis wrote these words in his capacity as a circuit justice, the Supreme Court subsequently endorsed the later-in-time rule, largely on the strength of Justice Curtis' analysis.233 Thus, under the later-in-time rule, Congress' power to enact legislation to supersede a treaty for purposes of domestic law is "applicable to all cases,"234 including cases where the treaty regulates matters that, prior to ratification, would have been beyond the scope of Congress' Article I powers.

This construction of the later-in-time rule is consistent with the text of the Necessary and Proper Clause. That Clause grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution...all...Powers vested by this Constitution in the Government of the United States."235 The later-in-time rule, as articulated by Justice Curtis, presupposes that the power to "refuse to execute a treaty"236 is a power vested in the federal government. That power is not vested in the federal government explicitly by the text of the Constitution. Nevertheless, it is vested implicitly because the power to violate

233. The earliest Supreme Court decisions endorsing the later-in-time rule all cite Justice Curtis' opinion in Taylor v. Morton as authority for the rule. See Chae Chan Ping v. United States, 130 U.S. 581, 602 (1889) (stating that the issue of conflicts between treaties and statutes "was fully considered by Mr. Justice Curtis, while sitting at the circuit, in Taylor v. Morton"); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (stating that the "subject was very elaborately considered at the circuit by Mr. Justice Curtis"); Edye v. Robertson, 112 U.S. 580, 597–98 (1884) (stating that Justice Curtis "in a very learned opinion exhausted the sources of argument on the subject" of conflicts between statutes and treaties); The Cherokee Tobacco, 78 U.S. 616, 621 (1871) (citing Taylor v. Morton as authority for the proposition that "an act of Congress may supersede a prior treaty").
234. Taylor, 23 F. Cas. at 786.
236. Taylor, 23 F. Cas. at 786.
a treaty is an inherent attribute of national sovereignty, and under the Constitution the federal government possesses all those powers that are inherent in national sovereignty. Thus, Congress has the power to enact legislation authorizing states to violate treaties because such legislation is necessary and proper for carrying into execution the federal government's power to refuse to execute a treaty.

The view that Congress has the power to supersede all treaties, including those regulating matters that would otherwise be beyond the scope of Article I, is consistent with Elysian theory. Ely's theory favors constitutional interpretations that maintain open channels of political participation. If the Supreme Court endorsed the internationalist objection, it would close the channels of political participation because Congress would be powerless to reverse even unintended consequences of certain treaty ratification decisions. Moreover, if the Senate knew that Congress lacked that power, the Senate would be less likely to approve treaty ratification in the first place. Therefore, Elysian theory provides an additional rationale for rejecting the internationalist objection.

C. Mandating Constitutional Avoidance

There are three possible constitutional objections to the proposed rule mandating constitutional avoidance. The first objection is that the proposed rule, as applied to federal criminal trials, would preclude federal courts from exercising jurisdiction over federal constitutional defenses. The question whether Congress has the power to "strip" federal courts of jurisdiction over constitutional claims has been hotly debated for decades. Assuming, arguendo, that the Constitution limits Congress’

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237. The argument presented here is somewhat different from the position endorsed by Justice Sutherland in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–20 (1936). I agree with Justice Sutherland that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." Id. at 318. However, his claim that "[t]he President is the sole organ of the nation in its external relations," id. at 319 (quoting John Marshall's statement in the House of Representatives), is difficult to reconcile with the later-in-time rule, which vests Congress with substantial authority to derogate from the United States' international obligations. Moreover, there are sound structural and functional reasons for vesting the power to violate treaties in Congress, rather than the President. See Derek Jinks & David Sloss, Is the President Bound by the Geneva Conventions?, 90 CORNELL L. REV. 97, 160–64 (2004).

238. See Ely, supra note 2, at 76 ("It is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open.").

239. The literature on court-stripping legislation is quite extensive. Classic articles include Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 STAN. L. REV. 895 (1984); Henry M. Hart, Jr., The Power of
authority to enact so-called "court-stripping" legislation, the legislation proposed herein does not run afoul of those constitutional limits because it does not deprive courts of jurisdiction over any constitutional claim or defense. The proposed legislation would require federal courts to consider treaty-based defenses before considering constitutional defenses, and to avoid ruling on constitutional issues if relief could be granted on the basis of the ICCPR. The courts, however, would retain the power to decide constitutional questions if the case could not be resolved through application of the treaty. In short, the proposed rule mandating constitutional avoidance is a procedural rule, not a jurisdictional rule. Therefore, the proposed rule does not contravene constitutional limits on Congress' power to manipulate federal jurisdiction, whatever those limits may be.

A second potential objection is that Congress cannot order state courts to refrain from applying federal law, because the Supremacy Clause obligates state courts to enforce federal law. As above, this objection misconceives the nature of the proposed avoidance rule. The proposed rule would not prevent state courts from deciding the merits of federal constitutional defenses, except in cases where capital defendants could obtain relief on the basis of the ICCPR. In cases where defendants could not obtain relief on the basis of the ICCPR, state courts would be obligated to address the merits of federal constitutional defenses, except insofar as procedural default rules barred consideration of a particular defense. Moreover, in cases where defendants could obtain relief on the basis of the ICCPR, state courts would still be applying supreme federal law, in accordance with the mandate of the Supremacy Clause, because the ICCPR is itself supreme federal law. In cases where a defendant raises multiple defenses, there is nothing in the Supremacy Clause, or elsewhere in the Constitution, that requires courts to decide the merits of every defense raised if the case can be resolved on the basis of a single

Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953). For a recent debate addressing these issues as they pertain to draft legislation that would have stripped federal courts of jurisdiction over claims related to the Defense of Marriage Act, see Michael J. Gerhart, The Constitutional Limits to Court-Stripping, 9 Lewis & Clark L. Rev. 347 (2005), and Martin H. Redish, Same-Sex Marriage. The Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For, 9 Lewis & Clark L. Rev. 363 (2005).

240. See supra notes 177–82 and accompanying text.

241. U.S. Const. art. VI, cl. 2 (stipulating that the Constitution, statutes and treaties are "the supreme Law of the Land," and that "the Judges in every State shall be bound thereby"); see also Testa v. Katt, 330 U.S. 386 (1947) (holding that state courts are obligated to apply federal law).

242. See supra notes 96–98 and accompanying text.
The third objection is that Congress does not have the power to prescribe procedural rules for state courts. In addressing this objection, I assume that Article I does not grant Congress the power, for example, to prescribe an entire code of procedural rules for state courts.\(^\text{243}\) Even so, the Supreme Court has held that state courts are obligated to apply federal procedural rules in at least some cases where federal rights are at stake.\(^\text{244}\) Moreover, although scholars dispute the scope of Congress' power to regulate procedures in state courts,\(^\text{245}\) there appears to be a scholarly consensus that Congress has a limited power to mandate state court application of federal procedural rules in specific categories of cases where federal rights are at stake, at least insofar as application of federal rules would have only minimal impact on the ordinary operation of state court procedural rules.\(^\text{246}\) The proposed constitutional avoidance rule fits easily within the bounds of this scholarly consensus, because the rule is an integral part of the proposed statutory design, it would apply only in death penalty cases, and it would require state courts to

\(^{243}\) See, e.g., Vicki C. Jackson, *Printz and Testa: The Infrastructure of Federal Supremacy*, 32 Ind. L. Rev. 111, 129 (1998) (questioning whether Congress has a broad "power to supplant state procedural law in any federal question case").

\(^{244}\) See, e.g., Felder v. Casey, 487 U.S. 131, 138 (1988) (holding that federal law preempted state procedural rule because state rule "conflicts in both its purpose and effects with the remedial objective" of section 1983); Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 361-63 (1952) (holding that state court was required to submit factual issues to jury, even though state rules would allow judge to decide those issues); Brown v. Western Ry. of Ala., 338 U.S. 294, 298-99 (1949) ("Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.").


\(^{246}\) See Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 Yale L.J. 947, 951 (2001) ("It is well established that state courts must...enforce federal procedural rules that are part and parcel of an adjudicated federal claim."); Collins, supra note 245, at 184 (conceding that federal law trumps state procedural rules if there is "a clear congressional statement to that effect"); Jackson, supra note 243, at 129 n.78 ("If the underlying substantive law of tort liability for the hazards of tobacco smoking were federalized...Congress would have substantial power to provide for particular procedures 'integral' to or 'bound up with' the statutory scheme...and that these would be enforceable in the state courts."); Redish & Sklaver, supra note 245, at 100-01 ("[A]ssuming that commandeering of state courts falls within congressional power...the implication is all but inescapable that state courts would have to employ federal procedures when expressly mandated by federal statute.").
avoid constitutional decisions only if the case could be resolved through direct application of the ICCPR.

CONCLUSION

Many scholars have argued that the domestic application of international human rights law is inherently anti-democratic. This article offers a more nuanced assessment of the relationship between international human rights law and majoritarian democracy. Indirect application of international law as an aid to constitutional interpretation is anti-democratic in one sense: when courts apply international law indirectly, Congress is excluded from decisions about the domestic application of international norms. Direct application of the ICCPR, however, could be democracy enhancing.

This article has proposed legislation to channel human rights litigation away from constitutional adjudication towards direct application of the ICCPR. If applied to areas of substantive law where Congress has historically taken a back seat to judicial lawmaking, such legislation would enhance democracy by restraining judicial lawmaking and augmenting Congress' role in crafting the substantive human rights norms to be applied in domestic courts. Moreover, if applied in areas of substantive law where international law is more rights-protective than domestic law, the proposed legislation would bolster protection for individual rights. Thus, if Congress selectively authorizes direct application of the ICCPR, domestic application of international human rights law could help mitigate the traditional countermajoritarian dilemma by strengthening protection for individual rights in a manner that is consistent with the principles of majoritarian democracy.

Congress has an institutional interest in restricting the scope of judicial lawmaking, and in asserting its authority to make decisions about the scope and content of substantive rules governing the protection of individual human rights in the United States. Since the proposed legislation would promote Congress' institutional interest in this respect, one might think that individual Senators and Representatives would eagerly endorse the proposed legislation. There are, however, at least two countervailing factors that significantly reduce the likelihood that Congress will enact legislation along the lines proposed in this article: congressional abdication and xenophobic nationalism. Consider each separately.

The term "congressional abdication" refers to a pattern of congressional actions in which Congress voluntarily relinquishes portions of its
constitutional lawmaking authority to other actors in the federal system. The phenomenon of congressional abdication has been the subject of extensive scholarly commentary. 247 Although there is no scholarly consensus about why Congress abdicates its power, the most persuasive explanation emphasizes the divergence between the institutional interests of Congress and the individual interests of its members. 248 Congress has an institutional interest in maintaining, and perhaps even augmenting, its power relative to the President, the courts and administrative agencies. Most members of Congress have an individual interest in securing re-election. Frequently, when members pursue their individual interests in re-election they produce decisions that undermine Congress’ institutional interest in defending its own power. Legislation authorizing direct application of the ICCPR is unlikely to help individual members of Congress secure re-election. Support for such legislation might even harm a member’s re-election prospects in some cases. 249 Therefore, unless legislation authorizing direct application of the ICCPR can be packaged in a way that promotes the members’ individual interests in re-election, or at least that does not harm those interests, such legislation is unlikely to secure the requisite majority in both Houses of Congress.

The problem of congressional abdication is exacerbated, in this case, by xenophobic nationalism. Congress as an institution is suspicious of undue “foreign” influence over “domestic” affairs. The recent controversy involving foreign control of terminal operations at American ports is a case in point. DP World, a company owned by the government of Dubai, agreed to purchase a controlling interest in a British shipping company that operates cargo terminals at some of the largest ports in the


248. See, e.g., Douglas R. Williams, Demonstrating and Explaining Congressional Abdication: Why Does Congress Abdicate Power?, 43 ST. LOUIS UNIV. L.J. 1013, 1040–41 (1999) (suggesting that “legislators find it more ‘profitable’—in terms of getting re-elected—to devote their time and energy to activities that return selective, or “private,” benefits to their constituents than to engage with larger issues of the public good”).

249. This may depend to some extent on the substantive right at issue. Legislation using the ICCPR to enhance protection for freedom of religion is likely to be much more politically popular than legislation using the ICCPR to expand protection for prisoners’ rights.
Despite assurances from the Bush Administration that the planned acquisition did not raise any significant national security concerns, a bipartisan group of Congressmen strenuously opposed the deal. Just one month after reaching agreement, DP World bowed to intense congressional opposition and promised to transfer its operations at U.S. ports to an American company. Although the opponents of the Dubai ports deal used the rhetoric of national security to express their concerns, it seems likely that the national security rhetoric was merely a smokescreen to disguise the anti-Arab prejudice that actually fueled political opposition to the planned acquisition. Similarly, Congressmen who oppose judicial reliance on international and foreign law use the rhetoric of democracy to express their opposition. Even so, there are grounds for suspicion that the rhetoric of democracy is a smokescreen to disguise the xenophobic nationalism motivating measures such as House Resolution 97, which expresses “the sense of the House of Representatives that judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions.”

Congress could dispel that suspicion by enacting legislation along the lines proposed in this article. In contrast to House Resolution 97, which would have no practical effect whatsoever, legislation authorizing direct application of the ICCPR would actually promote the values of majoritarian democracy by curtailing judicial control, and increasing con-


254. Imports of cargo at U.S. ports do raise significant national security concerns, but “America’s port security challenge is not about who is in charge of our waterfront.” Stephen E. Flynn and James M. Loy, A Port in the Storm Over Dubai, N.Y. TIMES, Feb. 28, 2006, at A19. The more significant issue is the fact that the U.S. inspects only a “tiny percentage” of containers entering U.S. ports. Id. The lack of a meaningful inspection regime raises the prospect that terrorists could smuggle weapons of mass destruction into the United States through our ports. But this has nothing to do with the nationality of the company that holds the contract to manage port operations.

255. See supra notes 17–20 and accompanying text.


257. Since House Resolution 97 is merely a “sense of the House” resolution, it has no binding effect on the courts.
gressional control, over the rules governing protection of individual human rights. If Congress continues to pursue measures such as House Resolution 97, and eschews legislation to authorize direct application of the ICCPR, one might reasonably conclude that individual members of Congress are more interested in political grandstanding than in making the difficult policy decisions that constitute the real business of democratic self-governance.