From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies

Tara J. Melish

University at Buffalo School of Law, tmelish@buffalo.edu

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/book_sections

Part of the Human Rights Law Commons

Recommended Citation

This material has been published in The Sword and the Scales: The United States and International Courts and Tribunals edited by Cesare P. R. Romano. This version is free to view and download for personal use only. Not for re-distribution, re-sale or use in derivative works. © Cambridge University Press 2009.

This Book is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Contributions to Books by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*

TARA J. MELISH**

In the battle for democracy and human rights, words matter, but what we do matters much more.

It is frequently said that the United States has a paradoxical human rights policy.1 On the one hand, the United States embraces human rights principles as a founding national ideology2 and has supported the enhancement of human rights and democracy as a core premise of its foreign policy since the end of World War II, when it played a leading role in birthing the international human rights regime.3 Indeed, the promotion of human rights and democracy abroad is a central motivating tenet of U.S. foreign policy,

* The original version of this chapter was published in the Yale Journal of International Law (YJIL), volume 34, pp. 389–462 (2009). It has been adapted and substantively modified for inclusion in this book by permission of YJIL.

** Visiting Professor, University of Notre Dame School of Law, Spring 2009. Associate Professor of Law, University at Buffalo School of Law, SUNY, JD, Yale Law School; BA, Brown University. I extend my gratitude to Robert K. Harris, Steven R. Hill, and Mark P. Lagon of the U.S. Department of State for their helpful conversations on issues discussed in this chapter, as well as to Sean Murphy, Susan Benesch, Rick Wilson, and Cesare Romano for their valuable comments on an earlier draft. All views expressed herein are those of the author alone.


3 See, e.g., U.S. Dep’t of State, Fundamentals of U.S. Foreign Policy (1988), 24 (“The cause of human rights forms the core of American foreign policy [as] it is central to America’s conception of itself.”); Christopher, op. cit. (“America’s identity as a nation derives from our dedication to the proposition ‘that all Men are created equal and endowed by their Creator with certain unalienable rights.’”).

manifested in the nation’s extensive foreign assistance commitments, political and financial support of international human rights bodies, linking of bilateral aid to human rights improvements, and annual reporting on the human rights situation of 194 nations of the world. National public opinion polls, moreover, suggest that roughly eighty percent of Americans believe that human rights inhere in every human being, whether the government formally recognizes those rights or not. Equal numbers express not only their support for U.S. ratification of human rights treaties but also their belief that international supervision over those treaty commitments, by a court or other independent body, is necessary.

Yet despite strong external and internal human rights commitments, the United States has appeared to flinch, even recoil, when it comes to direct domestic application of human rights treaty norms, especially as those norms are interpreted by international supervisory bodies. Whether through the executive, the legislature, or the courts, the nation has insisted that human rights treaties are non-self-executing domestically and has remained ambivalent toward international adjudicatory fora that may judge it on its own human rights treaty commitments. The United States has renounced international bodies that have issued judgments against it on human rights matters, declined to affirmatively accept the contentious jurisdiction of human rights bodies, and even fought the creation of new international bodies with adjudicatory

---


6 See The Opportunity Agenda, “Human Rights in the United States: Findings from a National Survey,” Public Opinion Research on Human Rights in the U.S. (by Belden Russinello & Stewart), Aug. 2007, at 12 (finding that 80 percent of Americans support this proposition, whereas only 18 percent endorse view that “rights are given to an individual by his or her government”).

7 See, e.g., Steven Kull et al., “Americans on International Courts and Their Jurisdiction over the US,” The WorldPublicOpinion.org/Knowledge Networks Poll, May 11, 2006, at 3. The poll finds that 79 percent of Americans believe that there should be an independent international body, such as a court, to judge whether the United States and other states parties are abiding by the international human rights treaties they ratify. Indeed, of all subject matters commonly governed by treaty (i.e., border disputes, fishing rights, environment, human rights, trade, labor, investments, and protection of aliens), human rights treaties received the highest percentage of support for the proposition that independent international tribunal supervision over compliance was necessary. Id.
competence over its citizens. It is this apparent paradox of U.S. human rights policy – outwardly prodigious, inwardly niggardly – and its underlying set of “antinomies”\(^8\) that a growing literature has sought to document and explain, often through the lens of U.S. exceptionalism.\(^9\)

This chapter offers a new narrative based in interest-group management. It does so by taking a closer look at the U.S. human rights paradox from the perspective of U.S. engagement with the international human rights treaty bodies that exercise formal supervisory jurisdiction over it.\(^10\) This engagement, once negligible, has expanded quite significantly over the last decade, a byproduct of the United States’ careful navigation through a diverse set of political pressures. It is thus useful to view the distinct ways and degrees in which this engagement manifests itself, especially with respect to the varied competences that treaty bodies exercise along the supervisory spectrum. Doing so allows us to take a closer look at the actual reasons why the United States may shrink from full engagement with certain international processes, while accepting others fully. Such a frame can, in turn, reveal important insights for predicting what the United States can and will do in the future, why, and under what preconditions or constraining guidelines. Importantly, it also allows us to begin to imagine a set of institutional arrangements and coordinating mechanisms that can help to address the underlying concerns, particularly as they relate to recurrently raised federalism, separation of powers, and countermajoritarian objections.

My central claim is that a closer, more searching look at the nature and scope of U.S. treaty-body engagement policy – especially at the plurality of disaggregated policy interests that determine its evolving and often asymmetric contours – reveals that the U.S. human rights paradox may not in fact be so paradoxical. To the contrary, given U.S. engagement policy’s modern doctrinal anchoring in one of international human rights law’s most foundational principles – the principle of subsidiarity\(^11\) – it may be precisely the foundation

---

\(^8\) Sean D. Murphy, “The United States and the International Court of Justice: Coping with Antinomies,” Chapter 4 in this volume (defining antinomies as “equally rational but conflicting principles” and discussing three that underlie U.S. foreign policy: realism vs. institutionalism, exceptionalism vs. sovereign equality, and autonomous national law vs. internationally embedded domestic law).


\(^10\) Human rights treaty bodies refer to the committees or commissions of independent experts set up under key human rights treaties to supervise, through quasi-adjudicatory and promotional powers, state-party compliance with treaty undertakings.

\(^11\) The principle of subsidiarity, discussed further in this chapter, governs the appropriate relationship among international, national, and subnational levels of supervision in the shared project of ensuring human rights protection for all individuals. Foundational to international human
necessary to build a strong and sustainable domestic human rights policy over the long term. Achieving this, however, will require a fundamental shift in thinking and strategy among many domestic advocates. That shift is one that draws from the insights of an interest mediation perspective to transform the current U.S. engagement emphasis on the negative dimension of the subsidiarity principle from a shield into a sword. That is, the tools of the subsidiarity principle must not be permitted to be used only defensively by U.S. actors to shield domestic legislative and judicial processes from international intervention. They must also be used offensively to routinize, within the bounds of U.S. federalism, an internal process of domestic self-reflection and localized democratic deliberation on how we, in our own local communities, wish to protect internationally recognized human rights to best ensure the dignity of the human person.

The challenge for domestic human rights advocates, I argue, is not to reject the negative dimensions of subsidiarity (as is the tendency today), dimensions that are core to U.S. interest-management techniques, but rather to firmly embrace them, while likewise finding new ways of working flexibly and effectively within the subsidiarity paradigm to institutionalize a framework for respecting the positive half. In this way, advocates may ensure that U.S. engagement policy is directed not only outward, toward an international audience, but, just as critically, inward to our own domestic constituencies at home. It is this vital shift in U.S. human rights policy – from partial subsidiarity (paradox) to genuine subsidiarity – that is the focus of this chapter.

Yet a doctrinally anchored, interest-mediation perspective on U.S. human rights policy does not only help to chart a path toward the future. It also helps to explain the present and past. It offers, in this regard, a fuller, more empirically plausible and realistic account of U.S. human rights policy than can parallel accounts sounding in “U.S. exceptionalism,” whether of a “rights cultural” or “structural” variety. Indeed, a closer look at the actual ways in which the United States engages with human rights treaty bodies – and, specifically, at the varying mediating techniques it employs to ensure its engagement comports

rights law, it has been broadly defined as “the principle that each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself.” Paolo G. Carozza, Subsidiarity as a Structural Principle of International Human Rights Law, 97 Am. J. Int’l L. 58, 38 n.1 (2003) (providing a “simplified working definition”).

12 See Moravcsik, op. cit. (discussing “rights cultural” and “structural” narratives of U.S. exceptionalism, and defending the latter).

13 The term “mediating techniques” is used here in relation to the tactics, methods, and postures employed by the U.S. government in modulating its human rights engagement policy to take into account the countervailing pressures faced from a diversity of interest groups, at both domestic and foreign policy levels, each urging greater or lesser levels of U.S. engagement.
with evolving U.S. domestic and foreign policy interests – suggests that academic prognostications that the United States will resist further engagement with human rights bodies may be short-sighted. Whereas prominent observers of the “U.S. human rights paradox” have suggested that we should not be optimistic about further U.S. engagement in the international human rights regime, given certain structural conditions that set the United States apart from other nations, I argue that this view may be overly static in its portrayal of the predicted behavior of relevant social actors, even under unreservedly correct, “thicker” explanations of U.S. ambivalence to human rights law. Specifically, while correctly focusing on domestic special interest politics and the unique ability of veto players in the United States’ highly decentralized and fragmented political structure to block treaty ratification notwithstanding supportive domestic majorities (especially under Republican Senate majorities), such a view fails to take account of the diverse and dynamic ways that civil society advocates – of both liberal and conservative persuasions – take advantage of changing positions and new strategic openings for advancing their substantive policy preferences.

In particular, by focusing too narrowly on conservative politics, veto players, and formal treaty ratification procedures, the view fails to take account

This usage differs slightly from the term’s primary use in the scholarly literature to describe the justiciability doctrines and other judicial restraint techniques used by courts and tribunals, at both national and international levels, to accommodate separation of powers, federalism, subsidiarity, and sovereignty concerns. See, e.g., Alexander Bickel, The Least Dangerous Branch 112 (Bobbs-Merrill 1962) (discussing domestic judiciary’s “passive virtues” and quoting Justice Brandeis’s assertion that the “mediating techniques of not doing” were the most important thing the U.S. Supreme Court did); Murphy, op. cit. (discussing and citing other scholarly discussions of “mediating techniques” used by international tribunals to promote engagement by States).

14 See Moravcsik, “The Paradox of U.S. Human Rights Policy,” op. cit. Professor Moravcsik identifies four such structural conditions (external power, democratic stability, conservative minorities, and fragmented political institutions), concluding that “[t]he United States is exceptional primarily because it occupies an extreme position in [these] four structural dimensions of human rights politics, from which we would expect extreme behavior on the part of any government.” Id. at 150–51.

15 See id. Professor Moravcsik argues convincingly that a “thicker,” “pluralist” explanation that focuses on the instrumentality of partisan politics and conservative policy agendas in explaining U.S. human rights behavior is more plausible empirically than “thinner” accounts that attribute U.S. ambivalence to a unique American “rights culture,” one predisposing Americans to oppose human rights treaty commitments. He nonetheless reads his analysis as suggesting a “sobering conclusion”: “U.S. ambivalence toward international human rights commitments is not a short-term contingent aspect of specific American policies, but it is woven into the deep structural reality of American political life.” Id. at 197. Consequently, “The institutional odds against any fundamental change in Madison’s republic are high. To reverse current trends would require an epochal constitutional rupture – an Ackermanian ‘constitutional moment’. . . . Short of that, this particular brand of American ambivalence toward the domestic application of international human rights norms is unlikely to change anytime soon.” Id.
of the equally relevant strategies and campaigns of liberal politics, including their regular employ of the many “deblocking” opportunities presented by the fragmented U.S. political structure. Likewise, it insufficiently addresses the ways the U.S. government acts in a mediating role between these countervailing persuasions, including those operating at the foreign policy level: bowing more or less to one or the other, yet always within the bounds of a principled, rule-bound policy position. Under this light, any prediction that the United States will not further engage with human rights treaty bodies may be missing critical domestic movements and changing visions of political agency that suggest the contrary.

This is particularly true as advocates and interest groups adapt their strategies to the hard reality of U.S. ratification of an increasing number of human rights treaties and persistent engagement with international supervisory procedures. The fundamental domestic debate has in many ways thus changed. It is no longer whether the United States will ratify, but rather how domestic advocates will use U.S. ratification and international engagement to achieve their distinct domestic policy agendas at home and what measures or methodologies the U.S. government will adopt to mediate these countervailing pressures.

To address these important issues, this chapter proceeds in six parts. Following this introduction and a brief explanation of the subsidiarity principle, Part A provides an overview of the legal framework that structures current U.S. human rights treaty body engagements at the national and international levels. Part B supplements this review by examining the specific ways the United States in fact engages with the three principal competences exercised by the UN, OAS, and ILO supervisory treaty body systems: periodic reporting, quasi-adjudication, and promotional activities. It concludes that U.S. engagement with these competences is in fact far more robust than popular notions of the “U.S. human rights paradox” would suggest.

Part C seeks then to explain this discrepancy. It suggests that U.S. engagement policy is best viewed not as a static or structural given, but rather as a complex mediation among a variety of pressures exerted on policy makers by powerful actors at both the foreign and domestic policy levels. Disaggregating these pressures, the analysis emphasizes the role of four distinct groups that contribute to the pragmatic calculus undertaken in shaping U.S. human rights policy. These include “realists” and “institutionalists” at the foreign policy level and groups I call “insulationists” and “incorporationists” at the

---

16 Throughout this chapter, “United States” is used to refer to the state agents who express the policy position of the nation before international treaty bodies. Although frequently represented by the U.S. State Department, the position asserted represents that of the “State” and is informed by many complex processes.
domestic policy level, each seeking alternately greater or lesser substantive and procedural engagement with human rights bodies, in accordance with their group-specific policy interests. While scholars in the various camps of international relations theory tend to explain U.S. engagement policy with primary emphasis on one of these four groups, it is the complex interaction and competing interests of each of them, I argue, that determine the precise coordinates at which U.S. policy can most accurately be mapped.

To explain how this complex management process is effectuated, Part D identifies the principal mediating techniques employed by the United States in its current treaty body engagements, each designed to accommodate distinct sets of competing interest-group pressures. While each of these mediating techniques is solidly anchored in foundational international law doctrines of sovereignty and subsidiarity, each nonetheless draws on only the negative dimensions of those doctrines. Corresponding to doctrines of non-interference and deference to domestic political processes, this selective posture allows the United States to effectively manage competing interest group pressures, pursuing an engagement policy that at once permits active U.S. engagement with international procedures, appeases the most vocal critiques of such engagement (at both domestic and foreign-policy levels), and allows the United States to remain in formal compliance with the external procedural obligations it has assumed under international law through treaty ratification.

What it does not do, as currently pursued, is facilitate internal domestic reflection on the nation’s treaty-based human rights commitments. Indeed, responsive to the dominant pressures exerted at present on U.S. policy makers from both within and without government, these mediating techniques draw on only half of subsidiarity’s blueprint. This partial and selective embrace of the tools envisioned by international human rights law’s subsidiarity principle has conduced to a signal, yet predictable, outcome: U.S. engagement policy has to date been pursued principally, if not wholly, as a foreign policy objective, not as a domestic policy one. That is, contrary to the primary purposes of international human rights law, the United States engages with international human rights bodies not with an eye toward better protecting human rights within its own jurisdictional boundaries but rather with a view toward influencing the policies of other sovereign states and the international community generally. Part E

---

17 These camps include those dedicated to realism, institutionalism, liberalism, and constructivism. For a general descriptive overview, see Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 Yale L.J. 1975 (2002). Though neither liberalism nor constructivism refers in name to “insulationists” or “incorporationists,” the emphasis of liberalism on domestic political structures and processes focuses it on the veto-player politics of the former, just as constructivism’s privileging of the role of non-state actors and their persuasive discourses focuses it on the tactics and strategies of the latter.
discusses this conflict, the structural opportunities for addressing it, and the importance of giving the principle of subsidiarity its full and intended meaning in international human rights law. The piece continues by looking at where U.S. policy can be expected to lead in coming years, as U.S. policy makers continue to chart a middle course through difficult and shifting pressures. This middle course is one that does not reject but rather solidly embraces supervisory human rights treaty body processes, albeit under a vision of their jurisdiction as strictly subsidiary to domestic decision-making processes. The challenge for domestic advocates, I argue, is to ensure that this subsidiarity principle is embraced in its full dimensionality, not only in its negative facets. An outline of how this might be institutionally pursued and structured in the United States is discussed in Part E.

* * *

Before turning to these important issues, a brief reflection on the subsidiarity principle in international human rights law is warranted. First off, this principle should not be confused with the narrower, more rigid rule of the same name that has developed since 1993 in the European Union to govern the constitutional relationship between the Union and its member states. Often equated with U.S. federalism, which draws from but does not replicate subsidiarity’s

---

18 For the fullest account of this principle, see Carozza, op. cit.
19 This principle is reflected in Articles 1, 2, and 5 of the (Maastricht) Treaty on European Union, as updated by the Protocol of Amsterdam. Although the broad essence of subsidiarity is reflected in Article 1, which requires that “decisions [be] taken . . . as close as possible to the citizen,” it is the practical operationalization of the principle in article 5 that has been the focus of the EU subsidiarity “rule”: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.”

premises, the rule is directed to dividing legislative competences\footnote{For an argument that subsidiarity should likewise be incorporated into the judicial doctrine of the European Court of Justice, which has so far resisted Maastricht’s governing principle, see Edward T. Swaine, Subsidiarity and Self-Interest: Federalism at the European Court of Justice, 41 Harv. Int’l L. J. 1 (2000); Florian Sander, Subsidiary Infringements before the European Court of Justice: Futile Interference with Politics or a Substantial Step Towards EU Federalism, 12 Colum. J. Eur. L. 517 (2006).} between vertically overlapping sovereignties, with the higher level preempting the lower in its carefully prescribed fields of authority.\footnote{Lower political units, bound by the higher, are thus required to harmonize their laws to conform to the rules and directives of the higher authority, whenever higher action is expressly authorized or, given its scale or effects, sanctioned as “necessary” and proportional to achieve treaty objectives. See Maastricht Treaty, op. cit. art. 5.} The principle of subsidiarity that structurally underlies international human rights law is both broader and less rigid than its modern European namesake.\footnote{See Carozza, op. cit. at 52 (underscoring that “[i]t would truly impoverish our discourse and reduce our capacity for understanding to limit subsidiarity to a technical European rule that does not grow up out of that ground”). Carozza provides the long history to the concept, which dates back to classical Greece, tracing its intellectual history through medieval scholasticism; seventeenth-century securalist theory; the work of eighteenth- and nineteenth-century titans such as Montesquieu, Locke, Tocqueville, Lincoln, and Proudhon; and nineteenth-century Catholic social theory, until finally transposed from social philosophy into positive law by Germany in its post–World War II drive to undo the massive centralization of national socialism and to devolve power to the Länder. It was formally enshrined in the Maastricht Treaty in 1992 (and further proceduralized in the 1996 Protocol of Amsterdam), taking on a particularly European meaning that is nonetheless still quite contested.} This is true even as it is fully consistent with, and complementary to, both the narrower EU subsidiarity rule and American constitutional federalism.

The primary differentiating feature between the two lies in their respective objects of protection. Unlike its narrower rule-based instantiation, the safeguarded object of which is the sovereignty interests of formal political units within a given constitutional structure, the principle of subsidiarity begins and ends with the human person – specifically, with the inherent dignity of the socially situated human being. Society and government are thus viewed as integrated into a protective layering of facilitative support, or subsidium, designed to ensure that such dignity finds genuine expression in meaningful, appropriate, context-specific ways. Such support does not aim to preempt “lower” competences but rather to assist and strengthen them such that they are capable of meeting needs directly where and when they arise, at the level closest (distinguishing “market subsidiarity,” “communal subsidiarity,” “rational legislative subsidiarity,” and “comprehensive subsidiarity”); Giandomenico Majone, “Regulatory Legitimacy in the United States and the European Union,” in The Federal Vision, op. cit. at 252 (noting increased demand in the EU for local control in the nineties led to shift in subsidiarity’s interpretation from “total” harmonization to “optional” and “minimum” harmonization, just as similar demands in the United States in the seventies and eighties led to a shift from “preemptive” to “cooperative federalism”).
to the affected individual. In this way, subsidiarity represents the constitutive scaffolding to what may usefully be visualized as a series of nested circles, with the individual human person sitting at the center, surrounded concentrically by progressively larger social groupings of family, civic solidarity associations, local government, nation-state, and, ultimately, intergovernmental bodies and transnational social networks.

To best ensure the dignity interests of their constituent members, each of these connective layers holds concurrent duties of both non-interference and assistance to their interior or smaller units. On the one hand, larger, more comprehensive organizations have a “negative” duty not to interfere in the freedom of inner groupings to meet their own human dignity needs in ways that accord with their own realities. “It requires that problems be solved where they occur, by those who understand them best, and by those who are most affected by them.”24 It thus mandates that a respectful degree of latitude and discretion be given to smaller communities to interpret and implement human rights in ways that authentically accord with local understandings, mores, and particularized conditions. This follows not only from the fact that local needs are best appreciated by local actors but also from the fact that we live in a plural world in which the value of human dignity can be instantiated in a diversity of ways, each of which may fully accord with the broad purposes to which human rights aim. It is the formalized tools of this negative aspect of subsidiarity that the United States tends to invoke exclusively, often in conjunction with appeals to U.S. federalism, in defending its domestic human rights record and insulating it from outside pressures or influences.

Yet just as the subsidiarity principle does not tolerate preemption of smaller social or political units, neither does it support wholesale devolution to them.25 Accordingly, whenever interior bodies cannot accomplish the good to which human rights aim without assistance, exterior groupings have a “positive” responsibility to intervene – by, for example, “directing, watching, urging, restraining, as occasion requires and necessity demands”26 – to assist them


25 See, e.g., Robert K. Vischer, Subsidiarity as a Principle of Governance: Beyond Devolution, 35 Ind. L. Rev. 103 (2001) (arguing that the “compassionate conservatism” platform of the Republican Party purports to enact the lessons of Catholic teachings on subsidiarity but in so doing advocates wholesale devolution to local authorities, neglecting subsidiarity’s core focus on assistance from higher authorities).

26 Carozza, op. cit. at 41, quoting Pius XI’s 1931 papal encyclical, Quadragesimo Anno: Encyclical Letter on Reconstruction of Social Order.
in fulfilling the objectives of the common good. This requires that comprehensive monitoring mechanisms be set up – separately, at local, national, and international levels – that can track progress and setbacks at lower levels, providing support, an external check, and facilitative assistance whenever locally unremedied abuses or systemic problems are perceived. International human rights law, accordingly, envisions a constitutive framework of monitoring, supervision, and facilitation that allows this subsidiary relationship to play itself out flexibly within a broad variety of institutional structures and mediating procedures.27 This is true not only at the international level but also, just as importantly, at the national and subnational levels.

In short, the subsidiarity principle in human rights law is directed at ensuring that the heavy lifting of human rights interpretation and implementation occurs at the domestic level, as close as possible to affected individuals. International treaty bodies correspondingly see their role as inherently supplemental, designed not to usurp or preempt but to facilitate, assist, and strengthen indigenous and localized implementation efforts. The principle of subsidiarity thus provides an important middle way through the polarizing tensions and cross-talk that currently dominate U.S. discourse on domestic human rights incorporation, particularly in its unhelpful setting of sovereignty and federalism in opposition to internationalism and human rights.28 These dueling

27 Modern international human rights treaty bodies, for example, exercise this subsidiary responsibility through each of their recognized competences. Thus, periodic reporting processes are designed precisely to stimulate and regularize domestic monitoring, enforcement, and self-appraisal processes, with the broad participation of all members of society. See, e.g., Comm. on Economic, Social and Cultural Rights, General Comment 1, Reporting by States Parties (Third session, 1989), U.N. Doc. E/1989/22, annex III at 87 (1989) (identifying objectives of periodic reporting). The issuance of general comments aims to offer advice and guidance, drawn from the comparative experience of other states, for state consideration in implementing, modifying, and enforcing their own policies. Special rapporteurs work to identify best practices and common pitfalls across jurisdictions, stimulating and promoting issue-specific dialogue among a multiplicity of actors working on a common problem. Further, individual complaint processes, activated only when domestic remedies have proved ineffective in addressing a concrete human rights abuse, aim at ensuring, through a variety of tools, that an appropriate remedial scheme is effected by local actors. In fact, to ensure that such interventions are proportional and offered only where necessary, a series of institutional restraint doctrines have been adopted to guide treaty body conduct, particularly where complaints procedures are at issue. These include, among others, the exhaustion of domestic remedies rule, the margin of appreciation doctrine, “reasonableness” and other appropriate interest-balancing and proportionality tests, the fourth instance formula, and friendly settlement and “good offices” conciliation, all of which are important tools of subsidiarity. They also include recognition of the permissibility of reservations, understandings, and declarations and, specifically, respect for the non-self-execution doctrine.

28 This discourse, which extends over an enormous literature, is in many ways succinctly encapsulated in the popular-media exchange between Peter Spiro, Jack Goldsmith, and Curtis Bradley in Foreign Affairs, in which “sovereignty” and “internationalism” are antagonized. See Peter J. Spiro, The New Sovereignists: American Exceptionalism and Its False Prophets, Foreign Affairs,
postures, through their tendency to minimize the important constitutional values and democratic insights offered by the opposing position, tend toward communicative deadlock and heel-digging. Subsidiarity, by contrast, merges the core democratic insights of both positions. It values the procedural facilitation of international bodies and national monitoring, while respecting the primacy of localized process in determining appropriate means toward common ends. That is, it sees as its objective the authentic instantiation of human rights values in locally relevant, contingent, and meaningful ways, by local actors – not as cookie-cutter transplants determined and imposed by international experts, as is frequently claimed by those who resist human rights treaty incorporation on sovereignty, federalism, or majoritarian grounds.

Subsidiarity, in this way, rejects the notion that respect for universal human rights is synonymous with singular or absolutist outcomes or interpretations, which only an international body is competent to define. To the contrary, it understands that, given the plurality of human communities, the broad


The constitutive relationship among democracy, subsidiarity, and human rights has been initially explored in Dinah Shelton, op. cit.

See generally Curtis A. Bradley and Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. Pa. L. Rev. 599, 468 (2000) (noting that “the exaggeration and impatience that characterize the opposition to RUDs [reservations, understandings, and declarations] threaten to make U.S. officials less inclined, not more inclined, to continue their involvement with international institutions”).

This is equally true for quasi-adjudicatory treaty bodies, such as the UN treaty body committees, and for supranational “courts,” such as the European Court of Human Rights and the Inter-American Court of Human Rights. Although court rulings and remedial orders are binding on the parties to the litigation, they tend to be drafted in sufficiently broad terms to permit significant latitude to states in determining the contours of appropriate implementation at the domestic level. The remedial orders of the Inter-American Court, for example, increasingly require the participation of victims in the determination of the specific concrete measures that will give effect to the broad principles laid down by the Court. See Tara J. Melish, “Inter-American Court of Human Rights: Beyond Progressivity,” in Malcolm Langford, ed., Social Rights Jurisprudence: Emerging Trends in Comparative and International Law (New York: Cambridge University Press 2008).
purposes of human dignity that human rights norms encapsulate must be given concrete form in locally relevant ways and that these instantiations will take a wide diversity of forms across the culturally rich tapestry of human society. As such, international processes are designed first and foremost to require that processes are established and routinized at the domestic level to resolve human rights complaints locally and to ensure that these are operating effectively and reliably. International bodies will intervene only when domestic institutions prove ineffective in resolving human rights issues, and then with the primary objective of strengthening local processes through constantly innovating forms of facilitative assistance, or subsidium.

Whether human rights treaty law becomes a more permanent fixture in U.S. law and policy making in the coming years will depend in large measure on the extent to which this positive dimension of the subsidiarity principle is constructively embraced by U.S. policy makers and, most importantly, by domestic interest groups – actively employed to formalize and institutionalize domestic supervisory and monitoring processes, at local, state, and federal levels, as a national project (rather than an international one). Such internally reflective processes – supported by a national institutional framework – must aim to continually assess and reassess national and local progress and setbacks in human rights achievement, debate the normative content of those rights, listen to citizen views on where deficiencies arise and how potential solutions might be crafted, and chart locally and nationally relevant paths toward fuller domestic human rights achievement. The promotion of such internal deliberative processes around the normative meaning of rights is in fact precisely the object to which international human rights law is directed.33

It is important to underscore, in this respect, that the United States’ historic ambivalence to human rights treaty body engagements does not relate to either human rights or international supervisory regimes per se; both are fully consistent with and complementary to U.S. democracy, federalism, and rights culture. Rather, U.S. ambivalence is responsive to a particular static and absolutist way of conceiving human rights and international supervision that has been propagated and popularized over the past half-century by partisan U.S. interest groups. Although this rights absolutism is key to the rhetoric and group-mobilization strategies of many domestic advocates (of both liberal and conservative persuasion), it fails to acknowledge two of the principal underlying tenets of international human rights treaty law and supervision: First, its subsidiary nature vis-à-vis domestic protection efforts and, second, its

33 It has been observed, for example, that “from a Liberal perspective, a – if not the – primary function of public international law is . . . to influence and improve the functioning of domestic institutions” and that, accordingly, “human rights law is the core of international law.” Anne-Marie Slaughter, A Liberal Theory of International Law, 94 ASIL Proc. 240, 246 (2000) (emphasis in original).
focus on domestic process and progressivity, not universalized or standardized, top-to-bottom policy prescriptions or outcomes. A renewed focus on these tenets would reveal that the U.S. human rights paradox, at least in its modern manifestation and as applied within the U.S. territorial jurisdiction, is not in fact so paradoxical. To the contrary, once given an institutional framework to express itself domestically, it may be precisely the foundation for ensuring a sustainable domestic U.S. human rights policy over the long term.34

A. LEGAL CONTEXT: THE HUMAN RIGHTS FRAMEWORK APPLICABLE TO THE UNITED STATES

It is frequently contended that the United States ratifies few international human rights treaties. Although this may be true in relative terms, it does not accurately reflect the scope of commitments the United States has in fact undertaken under international human rights law, particularly over the past two decades. Under growing pressure from domestic and international constituents and with strong bipartisan support, the United States has ratified an increasingly broad spectrum of human rights treaties, under Republican and Democratic administrations alike. Thus, under the administrations of George H. W. Bush, William J. Clinton, and George W. Bush, the United States has ratified the International Covenant on Civil and Political Rights (ICCPR),35 the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),36 the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),37 the Genocide Convention,38 a series of ILO treaties on labor rights,39 and the two Optional Protocols to the Convention on the Rights of the Child in the areas

34 It may also provide important insights for a more sustainable U.S. policy toward other international tribunal engagements, such as with the International Court of Justice.
of children in armed conflict and the sale of children, child prostitution, and child pornography. 40 The United States has also ratified human rights treaties relating to slavery, 41 refugees 42 and the political rights of women, 43 among others, 44 and has ratified the OAS Charter, which subjects it to the promotional and quasi-adjudicatory jurisdiction of the Inter-American Commission on Human Rights with respect to the full scope of internationally recognized rights enshrined in the American Declaration on the Rights and Duties of Man.

Taken together, these treaties cover a vast spectrum of rights – of a civil, cultural, economic, political, and social nature – and extend horizontally under three distinct supranational supervisory systems, each with its own set of promotional and quasi-adjudicatory powers. In this sense, although critical attention is often focused on the U.S. failure to ratify certain internationally popular treaties, including the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the American Convention on Human Rights, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), it must be recognized that the scope of international commitments implicated by these treaties has already, in large measure, been undertaken by the United States pursuant to the treaties that it has ratified. 45 This reality complicates


44 The United States has ratified all four Geneva Conventions. As it recognizes, it has also “entered into many bilateral treaties (including consular treaties and treaties of friendship, commerce, and navigation) that contain provisions guaranteeing various rights and protections to nationals of foreign countries on a reciprocal basis,” some of which may be invoked directly in U.S. courts. See Office of the U.N. High Comm’r for Human Rights, “Core Document Forming Part of the Reports of States Parties: United States,” ¶ 151, U.N. Doc. HRI/CORE/USA/2005, Jan. 16, 2006.

45 There is indeed wide overlap in the rights protected in distinct human rights treaties. This is apparent in the substantial substantive overlap (both direct and indirect) in the rights enshrined in the ICCPR and ICESCR, as well as by the express inclusion of varying numbers of both sets of rights in virtually all other human rights treaties, including the European Convention,
the utility to partisan actors of wholesale opposition to currently nonratified treaties. It also undermines claims that the United States fails to ratify human rights treaties out of a cultural commitment to “negative” or libertarian conceptions of rights or, relatedly, a cultural aversion to economic, social, and cultural rights, two frequently raised but factually uncompelling explanations.

American Convention, African Charter, CERD, CEDAW, and CRC. Although it is therefore undoubtedly correct that the oft-purported “cultural aversion to socioeconomic (‘positive’) rights in the strong sense of welfare entitlements or labor rights,” is not a credible reason for U.S. ambivalence to human rights (see Moravcsik, “The Paradox of U.S. Human Rights Policy,” op. cit. at 163), the proffered reasons for reaching that conclusion are misdirected. Id. (concluding that because “the international human rights system strictly separates civil and political rights from socioeconomic ones,” the “United States could, therefore, at any time simply ignore socioeconomic documents, while ratifying and implementing civil and political ones”).

Indeed, CEDAW, CRC, and ICESCR subject matters are regularly taken up through ICCPR, CERD, CAT, and ILO convention supervisory procedures.

U.S. law, at local, state, and federal levels, provides significant and far-reaching protections for economic and social rights, including the rights to housing, health, education, work, social security, unionization, and other basic labor guarantees. National opinion polls, moreover, reflect that the majority of Americans identify many of these guarantees not as mere “privileges” but as personally held, individual rights, secured as part of the American heritage and in fact constitutive of the rights enshrined in the U.S. Constitution. See, e.g., Cass R. Sunstein, The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More than Ever (Basic Books 2004) (noting that the majority of Americans would be surprised to learn that the rights to social security and education were not constitutionally protected), 62–63 (noting, too, a 1991 survey of U.S. citizens in which strong majorities identified adequate housing, a reasonable amount of leisure time, adequate provision for retirement years, an adequate standard of living, and adequate medical care as “a right to which he is entitled as a citizen” and not as “a privilege that a person should have to earn.”).

A 2007 national survey similarly found that strong majorities of Americans not only believe but “strongly believe” that a core set of social rights are human rights. These include equal access to quality public education (82%), access to health care (72%), living in a clean environment (68%), fair pay for workers to meet the basic needs for food and housing (68%), freedom from extreme poverty (52%), and adequate housing (51%). Only slim majorities believe these are not human rights. The Opportunity Agenda, “Human Rights in the United States: Findings from a National Survey,” op. cit. at 3–4.


At the same time, traditional distinctions between “negative” and “positive” rights, particularly as reified in classic “sets” of rights, have never been tenable as a factual matter, all rights possessing both negative and positive dimensions in the sense of duties to act reasonably and duties not to act arbitrarily. See, e.g., Stephen Holmes and Cass R. Sunstein, The Cost of Rights: Why Liberty Depends on Taxes (W.W. Norton 1999); Tara J. Melish, Rethinking the “Less as More” Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas, 39 NYU J. Int’l L. & Pol. 171 (2006).
These are pretexts for other interests at play. Indeed, in its interactions with international treaty bodies the United States regularly addresses the “positive” dimensions of its human rights obligations as well as a wide spectrum of economic, social, and cultural rights, as it does in its own domestic legislation.

In this regard, it is also useful to note that although the United States has been slow to ratify many treaties – primarily because of the blocking opportunities presented by the fragmentation of the U.S. political structure – virtually all core human rights treaties have, since the late 1970s, been signed by the U.S. executive, indicating at least a political commitment to the rights and obligations enshrined therein and a present, if revocable, intent to be bound in the future. President Carter signed the ICESCR, ICCPR, CERD, and the American Convention in 1977 and CEDAW in 1980. President Reagan signed the Genocide Convention in 1986, and President Clinton signed the CRC and its two Optional Protocols in 1995 and 2000, respectively.


---

46 This is not to say that those who perpetuate them as part of a cultural myth of America are using them as pretext but rather that their underlying motivations rest on political-ideological foundations of a more partisan nature. For discussion, see Part C.2 infra.

49 This is particularly true in U.S. reporting under the ICCPR and CERD, in which the United States regularly addresses the positive measures it has taken to respect and ensure the rights to nondiscrimination, equal protection, due process, and judicial protection with respect to health, housing, education, and employment. See, e.g., U.S. State Department, “Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, April 2007,” at http://www.state.gov/g/drl/hr/race/cedr_report/ (visited Apr. 25, 2007) [hereinafter “U.S. CERD Report 2007”], ¶¶ 219–78 (addressing the right to work; the right to form and join trade unions; the right to housing; the right to public health, medical care, social security, and social services; the right to education and training; and the right to equal participation in cultural activities). The United States also addresses these dimensions of economic and social rights with respect to contentious cases lodged against it with the Inter-American Commission on Human Rights, which has jurisdiction over all of the rights in the American Declaration on the Rights and Duties of Man, including the rights to health, education, unionization, housing, and social security.


51 See, e.g., Christopher, op. cit. at 1. There is wide recognition that Senate consent failed because of the Republican takeover of Congress in 1994.
over the ratification of the two Optional Protocols to the CRC in 2002 but, after
an initial decision to step back from the negotiation process, reinitiated active
engagement in the final stages of the substantive drafting of the newly adopted
UN Convention on the Rights of Persons with Disabilities (CRPD).\(^{52}\) It did
so under active pressure from both domestic constituencies\(^{53}\) and members
of the U.S. House of Representatives.\(^{54}\) CEDAW, for its part, has consistently
garnered strong, even bipartisan, support in Congress, with Senate Demo-
cratic leaders committing in 2008 to bring it to a full Senate vote as soon as
politically opportune. Although likely to face intense targeted opposition from
antiabortion lobbies, which by continuing to politicize it in absolutist terms
may succeed in blocking it still, CEDAW is expected to receive supermajority
support.

This treaty-related behavior, from Republican and Democratic administra-
tions alike, suggests two important conclusions. First, it suggests that, despite
popular rhetoric to the contrary, the United States does not in principle
perceive inherent contradictions between such regimes and U.S. domestic
law, policy, or interests. If it did, such treaties would neither be signed by
the President nor ratified by Senate supermajorities. Second, given the estab-
ished track-record of speedy human rights treaty ratification with Democratic
control of the Senate and Executive, it can be concluded that the nation’s

---

A/RES/61/106 (Dec. 6, 2006) [hereinafter CRPD]. The CRPD received eighty-four signatures
on the opening day, more than any human rights treaty in history. Although the United States
formally participated in all eight sessions of the UN Ad Hoc Committee charged with drafting
the CRPD, it announced its intention not to ratify at the second session in June 2003. See State-
ment of Ralph F. Boyd, U.S. assistant attorney general for civil rights, to the UN General Assem-
bly Ad Hoc Committee on a Comprehensive and Integral International Convention on the
Protection and Promotion of the Rights and Dignity of Persons with Disabilities, June 18, 2003,
USUN Press Release #89 (c5), at http://www.usunnewyork.usmission.gov/c3print_c89.htm (vis-
ited Apr. 20, 2007) [hereinafter Boyd Statement]. The U.S. delegation thereafter ceased to
make substantive proposals, reinitiating its active engagement in the drafting process only at
the seventh session in January 2006.

\(^{53}\) See discussion in Part C.2.III infra.

\(^{54}\) See House Concurrent Resolution 134 (expressing the sense of Congress that the United States
should support a UN convention on disability rights and thereby urging “(1) the United States
to play a leading role in the drafting of a United Nations convention and to work toward its
adoption . . . and (2) urge[] the President to instruct the Secretary of State to send to the
UN Ad Hoc Committee meetings a U.S. delegation that includes individuals with disabilities
who are recognized leaders in the U.S. disability rights movement.”) (emphasis added). The
resolution was unanimously adopted by the House International Relations Committee in 2004
but failed to be scheduled for a vote on the House floor by majority leader Tom Delay (R-TX).
Members of the House committee, together with the Congressional Human Rights Caucus,
met directly with members of the U.S. State Department to express their sense of urgency that
the United States reinitiate a leadership role in the CRPD drafting process, given the United
States’ historic protagonism in advancing disability rights.
political branches reasonably anticipate being subject to human rights treaty regimes as an inevitable outcome of swings in the political process.\textsuperscript{55} Within this context, any view that says the United States institutionally or “culturally” resists human rights commitments appears incomplete.

The better explanation, as advanced by Professor Moravcsik, rests in the distinct ways that conservative minority special interest groups exert their influence over veto players in the ratification process, particularly within the U.S. Senate.\textsuperscript{56} Through rhetorical resort to stereotypes and “rights absolutism”\textsuperscript{57} that portray international procedures as undemocratic, authoritarian, communist, and hence “anti-American,” these interest groups have historically succeeded in turning the rhetorical debate into one related to American rights culture and states’ rights, rather than simply as a rough-and-tumble domestic wrestling match over the shape of distinct social policy outcomes, within the methodological framework of human rights commitments and supervisory monitoring procedures. This “thicker” explanation should not, however, lead to dire predictions that the status quo will persist\textsuperscript{58} but rather to a more searching look at what special interest groups are doing and how their interests intersect or fail to intersect with the promotion of international human rights law.

Special interest groups traditionally at the forefront of the fight against U.S. adherence to international human rights treaties over the past two decades appear in fact to have begun to reassess their positions and modify their strategies, finding ways that recurrence to such treaties may in fact advance their domestic and international agendas. They have increasingly demanded greater U.S. participation in drafting the terms of international human rights

\textsuperscript{55} Strong Democratic control of the Senate has historically been an important facilitating condition for the ratification of human rights treaties. Moravcsik calls it a “necessary condition” based on a review of a set of core treaties ratified from 1945 to 2000. See Moravcsik, op. cit., at 184 (“[T]he Senate has never ratified an international human rights treaty (even with reservations) when Democrats held fewer than 55 seats.”). It is important to recall, however, that ILO Convention 182 as well as the two CRC optional protocols were ratified under Republican Senate majorities in 1999 and 2002, respectively.

\textsuperscript{56} Id. at 186–87 (noting that “[a]ll other things being equal, the greater the number of ‘veto players,’ as political scientists refer to those who can impede or block a particular government action, the more difficult it is for a national government to accept international obligations” and highlighting three characteristics of the U.S. political system that engender veto players: “super-majoritarian voting rules and the committee structure of the Senate, federalism, and the salient role of the judiciary in adjudicating questions of human rights”).

\textsuperscript{57} Rights absolutism can be defined as an unwillingness to recognize that human rights law permits reasonable restrictions on all individual rights and that states are granted a (variable, but generally quite wide) margin of discretion in determining their nature and scope in distinct contextual settings.

\textsuperscript{58} Moravcsik, op. cit., at 197 (predicting no change absent some unexpected “epochal constitutional rupture – an Ackermanian ‘constitutional moment’”).
agreements and even sought U.S. ratification of certain human rights treaties.\textsuperscript{59} This activity, taken together with the renewed mobilization of groups traditionally in favor of human rights treaty compliance – particularly through the coordination of the U.S. Human Rights Network\textsuperscript{60} – is leading to a distinctly new situation for U.S. engagement with international human rights supervisory bodies and will lead to growing opportunities and challenges for all parties involved.

Increased civil society engagement (from both sides of the political spectrum) is being met, moreover, by growing institutionalization of human rights coordination within the U.S. government, particularly from the U.S. State Department, which is increasingly broadening its oversight from an exclusive focus on the human rights situation in other countries to domestic human rights achievement. In this regard, it is useful to recall that it was not in fact until 1976 – the year the ICCPR and ICESCR entered into force – that the U.S. government began to systematically monitor human rights achievement at all, in any country. In that year, Congress amended the Foreign Assistance Act to require the Secretary of State to transmit to it “a full and complete report” every year concerning “respect for internationally recognized human rights in each country proposed as a recipient of U.S. assistance.”\textsuperscript{61} The next year, the first forebear to the current position of Assistant Secretary of State for Democracy, Human Rights, and Labor was appointed,\textsuperscript{62} and an Interagency Working Group on Human Rights and Foreign Assistance was established.\textsuperscript{63} Yet these focal points were mandated exclusively to report on the human rights situation

\textsuperscript{59} See discussion \textit{infra} Part C.2.

\textsuperscript{60} Founded in 2003, the U.S. Human Rights Network is a loosely coordinated community of more than 250 human rights organizations and 1,000 individuals committed to ensuring that U.S. human rights treaty commitments have effect for domestic communities. See http://www.ushrn.org/ (visited Apr. 20, 2007).


\textsuperscript{62} It was at the time called coordinator (and then assistant secretary) for human rights and humanitarian affairs. The latter named bureau was renamed the Bureau for Democracy, Human Rights, and Labor under the Clinton administration.

of other countries, particularly those receiving U.S. foreign assistance. They had no mandate to report on the human rights situation within the United States itself. It was not until two decades later – on the fiftieth anniversary of the Universal Declaration of Human Rights – that an interagency group was specifically mandated to coordinate executive agency response to domestic human rights concerns.

Although that body, the Interagency Working Group on Human Rights Treaties (IAWG), functioned in that form for only two brief years, it represented a fundamental turning point for the orientation of U.S. human rights policy. Created by Executive Order 13107, issued by President Clinton on December 10, 1998, it was mandated to promote coordination among U.S. executive agencies in ensuring compliance with the human rights treaties the United States has ratified and supporting the work of international human rights mechanisms, including the UN, ILO, and OAS. The order states that “[i]t shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.”

Critically, it further charges all executive departments and agencies to “maintain a current awareness of United States international human rights obligations” relevant to their functions and to ensure that such functions are performed “so as to respect and implement those obligations fully.” This duty includes “responding to inquiries, requests for information and complaints about violations of human rights obligations that fall within [each agency’s] areas of responsibility.”

The IAWG, for its part, was given a series of concrete coordination and oversight functions. These included coordinating the preparation of both treaty compliance reports to the UN, OAS, and other international organizations and responses to contentious complaints lodged therewith, as well as overseeing a review of all proposed legislation to ensure its conformity with international human rights obligations. It was also mandated to ensure that plans for public outreach and education on human rights provisions in treaty-based and domestic law were broadly undertaken and to ensure that an annual review of U.S.

---

66 Id. §1.
67 Id. §1(a) (emphasis added).
68 Id. §2.
69 Id. §§2–3.
reservations, declarations, and understandings to human rights treaties takes place. Finally, and notably, the Working Group was charged with ensuring that all nontrivial complaints or allegations of inconsistency with or breach of international human rights obligations be reviewed to determine whether any modifications to U.S. practice or laws are in order.\textsuperscript{70}

The change of administrations in January 2001 meant that the work of the IAWG was never fully institutionalized. On February 13, 2001, it was superseded – in form, if not function – by President George W. Bush’s National Security Presidential Directive, which reorganized the National Security Council system.\textsuperscript{71} Specifically, the Bush Directive transferred the duties of the Human Rights Treaties IAWG established under Executive Order 13107 to a newly established Policy Coordination Committee (PCC) on Democracy, Human Rights, and International Operations, to be directed by the Assistant to the President for National Security Affairs.\textsuperscript{72} With the national security structure thrown into disarray by the September 11 attacks later that year, the PCC was not, however, formally constituted. It was not until 2003 that the staffs of the State Department and National Security Council, aware of a growing number of overdue periodic reports, began to work again on an ad hoc basis in preparing the relevant reports.\textsuperscript{73}

Since then, U.S. responses to international human rights treaty bodies have been coordinated by the Office of the Legal Adviser of the U.S. State Department, with the assistance, when necessary, of legal consultants with expertise in the area and of other executive agencies and departments, particularly the National Security Council and the Departments of Justice, Homeland Security, the Interior, Defense, Health and Human Services, and Labor. This is true both for the preparation of U.S. periodic reports on domestic compliance with human rights treaties and of U.S. responses to individual complaints and precautionary measures.\textsuperscript{74} Although this work is done on an ad hoc basis, without dedicated staff and resources, the framework for a more structured response is at least technically in place. This framework requires formal reconstitution and the infusion of resources and staff that ideally, at least with respect to periodic reporting functions, are functionally independent of the Office of

\textsuperscript{70} Id. § 4.


\textsuperscript{72} See id.

\textsuperscript{73} Interview with Mark P. Lagon, Deputy Assistant Sec’y of State, Bureau of Int’l Affairs, U.S. Dep’t of State, & Robert K. Harris, Assistant Legal Adviser, U.S. Dep’t of State (Feb. 1, 2007) [hereinafter Lagon-Harris Interview].

\textsuperscript{74} For their part, responses to ILO complaints and periodic reports are prepared principally by the U.S. Department of Labor.
the Legal Adviser – more like the current structure for preparing the State Department’s country reports on the human rights situation in other nations. This movement within the executive branch is being matched by movements within the legislative and judicial branches. The judicial branch is increasingly, if slowly and cautiously – and in the face of certain powerful resistance – referring to comparative human rights jurisprudence in resolving domestic disputes and interpreting domestic statutory and constitutional law.

---

75 The State Department has a sizable staff of attorneys working exclusively on preparing Annual Country Human Rights Reports, a permanent staff that is assisted by the staffs of U.S. embassies and consulates around the world. A similar mechanism could be set up through which a permanent staff of attorneys within the State Department or other federal agency or entity, preferably with an autonomous monitoring mandate, is assisted by the staffs of federal offices in the fifty states, together with the voluntary inputs of state officials.


77 Although President Obama has taken no action yet on a proposed Executive Order to revitalize and strengthen the Clinton-era IAWG, he issued an Executive Order on March 11, 2009 establishing a more limited-mandate White House Council on Women and Girls that would function under a similar interagency structure. See Executive Order No. 13506, 74 Fed. Reg. 11,271 (Mar. 16, 2009).

78 Justice Antonin Scalia has been the most vocal judicial opponent of referring to foreign law in domestic jurisprudence. See, e.g., Atkins v. Virginia, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting). A minority of representatives within the U.S. House of Representatives has likewise resisted this trend, introducing two House resolutions in 2004 and 2005, respectively, that sought to legislatively preclude domestic courts from referring to “judgments, laws, or pronouncements of foreign institutions” in determining the meaning of U.S. laws. See H.R. Res. 568, 108th Cong. (2004); H.R. Res. 97, 109th Cong. (2005). Although voted out of committee, the two proposals, which garnered seventy-four and eighty-four House cosponsors, respectively, were never brought to a vote in the full House. A similar bill was introduced to the U.S. Senate in 2005 but did not make it out of committee. It is important to note that Supreme Court justices, including Justice Scalia, have indicated constitutional objections to such legislative initiatives on separation of powers grounds. See Tony Mauro, “Scalia Tells Congress to Stay Out of High Court Business,” Legal Times, May 10, 2006.

79 For recent Supreme Court examples, see, e.g., Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558 (2003); Grutter v. Bollinger, 539 U.S. 344 (2003); Atkins v. Virginia, 536 U.S. 304 (2002). Of course, the Court has long referred to international law in general, either as federal common law or in interpreting domestic statutes to not conflict with international treaty commitments. See, e.g., Murray v. The Charming Betsy, 2 Cranch 64 (1804); The Paquete Habana, 175 U.S. 677 (1900); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 312 (1964). For reviews and discussion of this jurisprudence, both as a contemporary and historical matter, see, for example, Vicki Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement, 110 Harv. L. Rev. 109 (2005); Steven G. Calabresi and Stephani Dotson Zimdahl, The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, 47 Wm. & Mary L. Rev. 743 (2005); Sarah H. Cleveland, Our International Constitution, 31 Yale J. Int’l L. 1 (2006).
The Senate Judiciary Committee, for its part, created a new Sub-Committee on Human Rights and the Law in 2007, reauthorizing it in 2009. Such Senate bodies, together with the bipartisan Congressional Human Rights Caucus, could play a critical role in coordinating with a new National Human Rights Commission, National Human Rights Office, and reconstituted IAWG or PCC, particularly if the latter entities were given a specific legislative reporting mandate, to ensure that all branches of government are adhering to their treaty-based human rights obligations. At a minimum, the playing field for domestic advocates in pushing their respective policy agendas has been materially altered in recent years, changing the opportunity structure for using human rights language to achieve distinct policy ends. Opponents and proponents have taken note, adjusting their strategies accordingly.

B. SUPERVISORY TREATY BODY SYSTEM AND THE SCOPE OF U.S. ENGAGEMENT

Although scarcely covered by the U.S. media establishment and hence not well known outside narrow advocacy circles, the United States has remained actively engaged in the work of supranational human rights treaty bodies, consistent with its international treaty commitments. “Human rights treaty bodies” refer to the committees or commissions of independent experts set up under key human rights treaties to supervise, through quasi-adjudicatory and promotional powers, state party compliance with treaty undertakings. There are currently eight United Nations (UN) human rights treaty bodies operating under the auspices of the UN Office of the High Commissioner on Human Rights, four of which exercise direct supervisory jurisdiction over the United States. These include the Human Rights Committee, the

81 See Part E infra (proposing these new entities).
82 Such a reporting mandate might be similar to the one given to the State Department under the Foreign Assistance Act. The benefit of a legislative mandate is that it cannot be abolished through executive order with periodic changes in the White House.
84 Such experts are nominated and elected by the States parties to the treaty but serve in their personal capacities, generally for renewable four-year terms. Most treaties require them to be persons of high moral authority and recognized competence in the field of international human rights law; in practice, they have various skill sets and backgrounds.
85 The United States is not subject to the jurisdiction of the other four: the UN Committee on Economic, Social and Cultural Rights, the UN Committee on the Elimination of All Forms of Discrimination Against Women, the UN Committee on the Rights of Persons with Disabilities, and the UN Committee on Migrant Workers and their Families.
Against Torture, the Committee on the Elimination of All Forms of Racial Discrimination, and the Committee on the Rights of the Child.\textsuperscript{86} The United States is also subject to the supervisory jurisdiction of the Inter-American Commission on Human Rights, one of the two principal human rights organs of the Organization of American States (OAS),\textsuperscript{87} as well as the International Labour Organization’s (ILO) Committee of Experts and Committee on Freedom of Association.\textsuperscript{88}

Although not courts in the sense of having competence to issue legally binding rulings on the matters and parties before them, these treaty bodies often exercise quasi-adjudicatory functions that closely approximate that role.\textsuperscript{89} Most are empowered to receive petitions of alleged human rights violations from either individual or collective complainants,\textsuperscript{90} review evidentiary or informational submissions, find facts, interpret legal rules, and issue nonbinding decisions or recommendations. Such recommendations are increasingly accompanied by follow-up and compliance reporting requirements, designed to ensure that appropriate measures are taken by states to give domestic legal effect to treaty body pronouncements. These quasi-judicial functions, exercised under jurisdictional rules and procedures highly similar to those of international judicial bodies,\textsuperscript{91} are supplemented by functions of a more overtly

\textsuperscript{86} Although the United States has not yet ratified the Convention on the Rights of the Child, it has ratified the two optional protocols thereto, each of which entails a periodic reporting obligation to the Committee on the Rights of the Child.

\textsuperscript{87} The other is the Inter-American Court of Human Rights, the contentious jurisdiction of which the United States has not recognized. For more on the Court, see Elizabeth A. H. Abi-Mershed, “The United States and the Inter-American Court of Human Rights,” Chapter 7 in this volume; see also Melish, “Inter-American Court of Human Rights,” op. cit.

\textsuperscript{88} The former has mandatory supervisory jurisdiction over the ILO’s core labor standards, two of which the United States has ratified: No. 105 on the Abolition of Forced Labor and No. 182 on the Elimination of the Worst Forms of Child Labor. The latter exercises contentious jurisdiction over collective complaints involving freedom of association regardless of whether the member state has ratified ILO treaties; as of 2008, it has considered forty-nine complaints against the United States. See Steve Charnovitz, The ILO Convention on Freedom of Association and Its Future in the United States, 102 Am. J. Int’l L. 90, 92 (2008).

\textsuperscript{89} See UN Human Rights Comm., General Comment 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 11, U.N. Doc. CCPR/C/GC/53 (Nov. 5, 2008) (“While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.”).

\textsuperscript{90} The UN and OAS mechanisms have individual standing rules, whereas the ILO has jurisdiction over collective complaints lodged by, and on behalf of, workers’ or employers’ organizations.

\textsuperscript{91} Compare, for example, the jurisdictional rules for receiving contentious complaints of the Inter-American Commission on Human Rights (a quasi-judicial body) and the Inter-American
promotional nature, such as periodic reporting procedures and their accompanying committee conclusions and recommendations, the issuance of general comments or observations, onsite visits, and general reports on distinct human rights matters or issues.

U.S. engagement with these bodies extends over the full range of treaty body activities, including each of the three principal types of supervisory mechanisms: periodic reporting processes, individual and collective complaints procedures, and special mandate or promotional mechanisms. Because the scope of engagement with each of these mechanisms speaks so powerfully to the parameters of U.S. human rights policy, each merits slightly closer attention here.

1. Periodic Reporting Process

The quintessential function of human rights treaty bodies is a periodic reporting process. The periodic reporting reflects the subsidiary nature of human rights law vis-à-vis domestic law and is designed to assist states in their central obligation under human rights treaty law: to ensure that protected rights have domestic legal effect through the adoption of “appropriate” or “necessary” measures, determined in context. States parties are thus required to submit reports on the appropriate measures they have adopted to give effect to the rights recognized in the treaty and on the progress and setbacks made in the enjoyment of those rights.

Court of Human Rights (a judicial body). Both bodies – like the UN committees and the European Court of Human Rights – require the exhaustion of domestic remedies, proof of concrete personal harm to identified individuals, imputation of conduct-based causal responsibility to the state for that harm, and similar ratione temporis and ratione loci requirements. The principal difference between the two is that the case-based conclusions of judicial bodies, like the Court, are formally binding on the parties to the dispute, whereas those of quasi-adjudicatory bodies, like the Commission and UN treaty bodies, are recommendatory in nature. An expectation exists nonetheless that such recommendations will be given effect in the domestic jurisdiction, with treaty bodies increasingly requesting follow-up reports on the measures taken toward this end.

An exception is the Inter-American Commission on Human Rights, which, despite an explicit competence to supervise a periodic reporting process (see American Convention on Human Rights art. 42, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, at 1 (1969)), has declined to formally pursue it over the years. A periodic reporting function has been set up under the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights and guidelines have recently been drawn up by the Inter-American Commission for the preparation of reports by States parties. See, e.g., OAS General Assembly Resolution 2074 (XXXV-O/25).

To do so, they are expected to undertake a thorough and comprehensive review of national legislation, administrative rules and procedures, and practices to assess conformity with treaty commitments, to determine whether new policy making is required by identifying areas of strength and weakness, and to continually monitor the actual situation with respect to each treaty-recognized right for progress and setbacks in levels of enjoyment and protection.
Each of the core UN human rights treaties envisions a mandatory periodic reporting process under the supervision of the relevant treaty body committee. An initial report must generally be provided within one year, followed by a periodic report every two to five years or as the Committee so requests.94 The United States has undertaken periodic reporting requirements under the CERD, the CAT, the ICCPR, the two Optional Protocols to the CRC, and certain ILO conventions it has ratified. Although the United States—not unlike most other nations—has frequently been late in submitting its reports,95 it has actively engaged with the supervisory treaty bodies in the periodic reporting process, particularly as nongovernmental organizations (NGOs) have become increasingly savvy in using international procedures and pressure points to ensure timely, substantive, and participatory reporting.

In this regard, the United States submitted its first report under the ICCPR to the Human Rights Committee in Geneva in 1994, defending it in 1995. This was followed by its first CAT report in 1999 and its first CERD report in 2000.96 These reports were defended before the UN Committee on Torture and the UN Committee on the Elimination of Racial Discrimination, respectively, in 2000 and 2001. In 2005, the United States submitted its combined second and third CAT reports and its combined second and third ICCPR reports,97 defending each in Geneva in 2005 and 2006, respectively. It presented its combined fourth, fifth, and sixth report to the CERD Committee in 2007, which it defended in 2008. It has regularly submitted reports as well—on a two-year periodic basis—to the ILO Committee of Experts.98

The supervisory procedures associated with periodic reporting tend formally to be characterized as a process of “constructive dialogue” between treaty bodies and states parties.99 After a state party submits its written report,

94 Most human rights treaties require periodic reports to be submitted every four to five years. CERD, by contrast, requires reports to be submitted every two years. This has led to serious backlogs in the Committee’s ability to review states’ periodic reports and the Committee’s increasing request for states to prepare and submit combined reports on a four-year schedule.

95 This delay owes to several mostly institutional factors. First, until early 1999 the United States lacked any dedicated body with explicit competence to prepare and supervise such reports, causing many deadlines to be missed. While a coordinating mechanism exists today, it continues to lack dedicated staff and resources, thus constraining its capacity to produce reports on time, especially given the significant institutional coordination and commitment needed for their production. It is for this reason that the institutional mechanisms proposed in Part E, infra, are so crucial.


97 These were submitted one and seven years late, respectively.


the treaty body prepares a list of priority issues that the state party should be prepared to discuss at a scheduled hearing in Geneva. On the basis of the state party’s written report, its oral presentations, and any additional information made available to the committee, the supervising committee prepares a public report in which it identifies areas of progress and areas of concern with respect to the state’s human rights achievement. It then draws conclusions and sets forth recommendations for how the state party might take further measures in areas where deficiencies or weaknesses were identified. Although technically a friendly process, treaty-based reporting has become increasingly adversarial over the years as treaty bodies have gained prominence and international authority. As a result, their recommendations are often interpreted, at least by domestic and international advocacy groups and some international media sources, as a binding “legal decision” requiring immediate domestic execution by national authorities. This view is often reinforced by committee requests that the state party submit additional information if committee questions were not answered fully in oral proceedings, a request sometimes construed by advocates as a requirement to report on follow-up measures.

U.S. participation in this process is marked by five major characteristics, each determinative in appreciating the mediated nature of U.S. engagement policy. First, the United States prepares extensive and detailed reports to the committee. In contrast to many states, which often submit incomplete or insufficiently inclusive reports, the United States closely hews to the committee-issued guidelines in preparing its consistently lengthy and comprehensive submissions. These reports address each substantive rights-based that periodic reporting function is “based on the assumption that a constructive dialogue between the Committee and the state party, in a non-adversarial, cooperative spirit, is the most productive means of prompting the government concerned to take the requisite action.”).

These questions are often based on the information provided to treaty bodies in civil-society-prepared “shadow reports,” prepared to highlight and correct misstatements or generalizations in official state reports; fill in overlooked areas with accurate facts, details, and statistics; and generally present an alternative view for the expert UN committee to consider in assessing state progress and setbacks and in making recommendations for domestic improvements. This growing prominence and global authority have in many ways emboldened treaty bodies to be more confrontational with U.S. delegations. Cf. Murphy, op. cit. (“For the [ICJ], the lesson [of increasing global authority unbound by domestic power] may be not to tread lightly with respect to the United States but, rather, to tread heavily unless doing so would be viewed generally as bias.”).

The UN Human Rights Committee, for example, has regularly lamented the lack of comprehensiveness in state party reports. See, e.g., General Comment No. 2, op. cit., ¶1. As a result, it has issued guidelines to assist states in preparing reports under the respective treaties. “Consolidated guidelines for States reports under the International Covenant on Civil and Political Rights: 26/02/2003,” CCPR/C/66/GUI/Rev.2 (2001).

The U.S. third periodic report to the UN Human Rights Committee, for example, was 120 single-spaced pages, covering U.S. achievements with respect to each of the twenty-seven
provision in the relevant treaty, how U.S. law protects the right, the types of claims that are regularly brought to U.S. courts to protect it, and the outcomes of major court decisions, particularly those of the U.S. Supreme Court. In this respect, the United States tends to be very good at reporting on formal legal protections emanating from the three branches of government, focusing on the outcomes of high-profile judicial decisions and the legislation or policy positions enacted to give formal effect to rights. It is less good at critically describing gaps in coverage and at documenting progress or setbacks in the statistical enjoyment of rights over the population and distinct subgroups within it, particularly at the state level.\textsuperscript{104} It is here that the treaty bodies generally focus their questions and direct their recommendations, relying on NGO submissions to fill in the missing pieces and to ask further probing questions. In response, the United States, keen on improving its performance, is increasingly opening the reporting process to a greater degree of transparency among nongovernmental actors and greater substantive comprehension, explicitly seeking input and data for its reports from U.S. NGOs\textsuperscript{105} and state attorney generals.

Second, the United States participates in Geneva-based meetings – and increasingly in contentious OAS proceedings\textsuperscript{106} – with large, high-level interagency delegations. According to State Department officials, it does so to demonstrate the seriousness with which the United States takes the human rights supervisory process. It thereby seeks to set an example for other states, encouraging them to engage the process with a similar degree of seriousness and material commitment. It is important, in this regard, to highlight that the United States sends not only a high-level official spokesperson to present and defend its report but also a full delegation of high-level officials from each of the major executive agencies and departments to present and answer

\textsuperscript{104} In response to Committee requests for the United States to discuss state-level progress and setbacks, the U.S. has included an annex to its 2007 CERD Report in which it provides examples of civil rights programs in Illinois, New Mexico, Oregon, and South Carolina.

\textsuperscript{105} The State Department and other executive departments and agencies have increasingly been meeting with civil society representatives, at the latter’s request, before and after treaty body hearings in Geneva to take their views into account.

\textsuperscript{106} Although this has not historically been the case, a change has occurred over the last five or six years in which larger interagency delegations are appearing at hearings before the Inter-American Commission on Human Rights.

\footnotesize{substantive rights guaranteed in the ICCPR. See CCPR/C/USA/5 (Nov. 28, 2005). The United States’ 2007 CERD Report is more than 170 pages and includes coverage with respect to each provision of the CERD, as well as separate annexes on examples of state-level civil rights programs, the U.S. legal position on the Western Shoshone case, and new domestic laws adopted since 2000, when the United States submitted its first CERD report. See U.S. CERD Report 2007, \textit{op. cit.}}
committee questions in their respective areas of competence. This level of engagement reflects the high standard requested of governments by the Geneva-based committees to ensure the effectiveness of the process.

Third, the United States consistently affirms, particularly in its oral presentations to treaty bodies, that it recognizes that it is not perfect and has definite gaps to fill. The central message of the treaty-mandated reports is thus that the United States “is trying in good faith to bring its domestic practices into compliance with international standards.” Within this context, it formally welcomes the views of the treaty body as part of a constructive dialogue aimed at assisting it in identifying areas of weakness in its own internal process, affirming that committee suggestions are appropriately taken into consideration. According to U.S. representatives, what grates U.S. officials is not the process

107 At its most recent appearances before the UN Human Rights Committee and Committee Against Torture, for example, the U.S. delegation comprised more than thirty government officials from at least six executive agencies or departments.

108 See, e.g., Human Rights Committee, General Comment 2, “Reporting guidelines” (Thirteenth session, 1981), U.N. Doc. HRI\(GEN\)1\(Rev.1\) at 5 (1994), ¶4: “The Committee wishes to state that, if it is able to perform its functions under article 40 as effectively as possible and if the reporting State is to obtain the maximum benefit from the dialogue, it is desirable that the States representatives should have such status and experience (and preferably be in such number) as to respond to questions put, and the comments made, in the Committee over the whole range of matters covered by the Covenant.”

109 Although the UN treaty bodies tended to acknowledge this effort in its initial reports, they have declined to do so in later reports as the relationship with the United States has grown more contentious on matters relating to the Iraq War and counterterrorism measures. Compare “Concluding Observations of the Human Rights Committee: United States of America, cc/104/95,” CCPR/C/79/Add.50 (1995), ¶¶267–68 (expressing appreciation of high quality of report, “participation of high-level delegation which included a substantial number of experts in various fields relating to the protection of human rights in the country,” and well-structured replies) with “Concluding Observations of the Human Rights Committee: United States of America,” CCPR/C/USA/CO/2/Rev.1 (Dec. 18, 2006) (no mention of high-level delegation or quality of process).

110 See, e.g., Remarks to the U.N. Committee Against Torture by Harold Hongju Koh, U.S. Assistant Secretary of State for Democracy, Human Rights and Labor, Geneva, Switzerland, May 10, 2000 (“Although we are proud of our record in eliminating torture, we acknowledge continuing areas of concern within the United States. Although our commitment is unambiguous, our record is not perfect.”); Remarks to the UN Human Rights Committee by Robert Harris, Legal Adviser, U.S. Department of State, Geneva, Switzerland, July 17, 2006 (noting that the United States recognizes that it has gaps to fill in its human rights record under ICCPR); see also Briefing on the State Department’s 2006 Country Reports on Human Rights Practices by Condoleezza Rice, U.S. Secretary of State, Washington, D.C., Mar. 6, 2007 (“We do not issue these reports because we think ourselves perfect, but rather because we know ourselves to be deeply imperfect, like all human beings and the endeavors that they make. Our democratic system of governance is accountable, but it is not infallible.”).

111 See, e.g., Harris Remarks, op. cit. (noting that the United States welcomes committee’s views and that such views are appropriately taken into consideration by agencies of U.S. government).
itself—which, they affirm, is genuinely appreciated, particularly for the opportunity to orally defend U.S. policy positions on human rights internationally—but when committee members appear unopen to dialogue on debatable issues and insensitive to areas of simple disagreement, particularly as they relate to U.S. jurisdictional concerns on the substantive limits of treaty body competence.\textsuperscript{112}

Fourth, and relatedly, members of official delegations and those who prepare reports tend to recognize the genuine utility of the reporting process for gaining a better understanding of the precise ways in which the United States is and is not in compliance with international standards.\textsuperscript{113} That is, despite prominent unilateralist or realist strains within many departments and agencies of government, the process of engagement has revealed for many the real utility of periodic reporting for gaining a better understanding of the national reality and where the country stands vis-à-vis international human rights law. This realization militates in favor of greater U.S. engagement—both for purposes of pushing other states to engage to a similar degree and for promoting the involvement of an increasing number of federal, state, local, and nongovernmental actors in the reporting process. The U.S. government, for example, is increasingly meeting with civil society organizations to follow up on concerns articulated at treaty body sessions and to discuss the establishment of mechanisms for coordinating information on state and national human rights monitoring and achievement.\textsuperscript{114}

Finally, although the United States manifests a high degree of openness and willingness to answer treaty body questions in virtually all areas of domestic human rights policy, there are certain policy issues that it declines to address other than “as a matter of courtesy.” These predominate in two areas: one, the territorial scope of treaty body competence and, two, the intersection of human rights and humanitarian law.\textsuperscript{115} The United States insists that UN and OAS

\textsuperscript{112} Lagon-Harris Interview, \textit{op. cit.}

\textsuperscript{113} This appreciation, often acknowledged to be unexpected, has been consistently expressed in multiple fora by government officials responsible for preparing treaty reports. This is equally true in public meetings between U.S. departments and agencies, treaty bodies, and domestic advocacy groups and in private interviews or conversations in which this author has taken part. See, e.g., Interviews with Steven Hill, Robert Harris, and Mark Lagon, U.S. Department of State, Feb. 2007.

\textsuperscript{114} U.S. State Department officials, as well as those from Justice, affirm that they are always open to meeting and working with domestic groups on human rights issues. Interagency meetings involving representatives of the Departments of State, Justice, Homeland Security, and Defense have been held on multiple occasions with the U.S. Human Rights Network and other civil society organizations to discuss the periodic reporting process and follow-up measures thereto.

\textsuperscript{115} Statement of Mark P. Lagon, Deputy Assistant Secretary of State for International Organization Affairs, Media Roundtable with Senior Government Officials at presentation of U.S. periodic report under the ICCPR to UN Human Rights Committee, Geneva, July 17, 2006 ("There are
treaty bodies lack jurisdiction to consider U.S. human rights policy as it affects persons outside its territorial boundaries and as it intersects with the law of armed conflict, which, it asserts, prevails as lex specialis at points of intersection and hence falls outside treaty body jurisdiction.\footnote{116} The United States has, in this sense, adopted a highly technical and legalized posture with respect to the scope of treaty body competence, asserting its prerogative to decline to answer questions that exceed that competence as the United States defines it. Although this is an explicit mediating posture adopted by the United States to shield its foreign policy and national security interests within the context of active engagement with human rights treaty bodies,\footnote{117} it has nonetheless put the United States in an increasingly adversarial position \textit{vis-à-vis} the treaty bodies.

2. \textit{Individual and Collective Complaint Procedures and Precautionary Measures}

Just as the United States actively engages in mandatory periodic reporting processes under all relevant treaty regimes, it likewise engages in individual and collective communication procedures wherever they are mandatory. The United States has not, however, \textit{optionally} acceded to any such procedure. Thus, it has not recognized the right of individuals to initiate individual communications or claims procedures under the ICCPR, CAT, or CERD, nor has it recognized the contentious competence of the Inter-American Court of

\footnote{116}{On the former point, see “Third Periodic Reports of States Parties due in 2003: United States of America,” CCPR/C/USA/3 (2005), Annex I (“Territorial Application of the ICCPR”), 109–11. This posture predates but supports the U.S. “war on terror” policy of holding suspected terrorists and “enemy combatants” outside of U.S. territory, such as in Guantanamo Bay, Cuba, or on offshore vessels. Significantly, the extraterritoriality point is pressed as a matter of human rights \textit{treaty law}, even while accepting the Supreme Court’s decision in \textit{Rasul v. Bush}, 542 U.S. 466 (2004), that the U.S. judiciary may exercise jurisdiction over extraterritorial abuses taking place in loci over which the U.S. exercises effective (“exclusive”) authority and control. This constitutional exception to the extraterritoriality principle is effectively identical to that recognized in international human rights law generally. See, e.g., \textit{Coard et al. v. United States}, Case 10.951, Report No. 109/99, Sept. 29, 1999, Inter-Am.Comm.H.R, para. 37 (“In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person \textit{subject to its authority and control}.”) (emphasis added).}

\footnote{117}{See discussion \textit{infra} Part D.1.}
Human Rights, the properly judicial (as opposed to quasi-judicial) organ of the regional human rights system. Each of these nonmandatory procedures requires the deposit of an independent instrument of jurisdictional recognition for operativity.

The exception, of course, is the Inter-American Court of Human Rights, the findings of which are “final” and “binding” on all OAS Member States that have accepted its jurisdiction. See American Convention on Human Rights, op. cit., arts. 67–68.

The formal competence of treaty bodies to issue these measures is generally established in their respective rules of procedure. See, e.g., Rules of Procedure of the Inter-American Commission on Human Rights, art. 25, OEA/Ser.I/NI.4 rev. 12 (2007) at 171 (“In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.”). For information on the CERD’s urgent action or early-warning procedure, see Office of the U.N. High Comm’r for Human Rights, Comm. on the Elimination of Racial Discrimination: Monitoring Racial Equality and Non-Discrimination, http://www2.ohchr.org/english/bodies/cerd (last visited Apr. 4, 2009).

These will not be substantively addressed here. For an assessment, see Charnovitz, op. cit. The full range of cases and complaints against the United States can be accessed at International Labour Organization, International Labour Standards, http://www.ilo.org/iloex/english/caseframeE.htm (follow “United States” hyperlink) (last visited Apr. 4, 2009).
Rights. Formally established in 1959, the Commission is mandated under the OAS Charter to “promote the observance and protection of human rights and to serve as a consultative organ of the [OAS] in these matters.” In this regard, the Commission has both quasi-adjudicative and promotional functions.

Persons within the jurisdictional boundaries of the United States at the time of an alleged violation can therefore bring human rights complaints through this supranational mechanism for violation, to their detriment, of any of the rights recognized in the American Declaration on the Rights and Duties of Man, including the rights to health, education, property, life, due process, judicial protection, and nondiscrimination. To date, the majority of cases lodged against the United States have involved persons on death row claiming due process denials with respect to the rights to life and to judicial protection, including through failure to provide consular notification to nonnationals. This U.S. case pattern owes primarily to limited public awareness in the United States about the regional human rights system and its adjudicatory competence over concrete instances of domestic human rights abuse.

Nevertheless, the Commission has considered a growing number of U.S. cases beyond the death penalty context, increasingly so in recent years. These have involved the rights of indigenous persons to ancestral territory, voting


rights in the nation’s capital, summary deportations, abortion, abuses committed during U.S. military action abroad where effective authority or control was maintained over the alleged victims, capital punishment of minors, and the rights of interdicted refugees and detainees held in Immigration and Naturalization Service detention facilities and at Guantanamo Bay. They have likewise involved freedom from extraordinary rendition, the right not to be deported where HIV treatment is not available in the return country, border controls, the right to reparation for civil rights abuses, welfare reform, and the right to police enforcement of domestic violence restraining orders, among others.

Although U.S. responsibility for rights violations is frequently found, the majority of cases lodged against the United States with the Commission are found inadmissible, either in pre-admissibility vetting procedures or after admissibility hearings. This is principally because of jurisdictional defects in petitioners’ arguments, including failure to properly exhaust domestic

132 These two cases do not yet have formal admissibility reports.
135 Poor People’s Economic Human Rights Campaign v. United States (1999, dismissed without prejudice for failure to identify individual victims).
137 In this case, no public record of the filing is maintained.
remedies, lack of victim standing, failure to state a prima facie claim, or lack of *ratione temporis, ratione personae, or ratione loci* jurisdiction. These defects most frequently stem from petitioners’ conflation of the case-based and promotional competences of the Commission and an effort to extract strong, absolutist human rights statements from it without framing the controversy as a concrete justiciable case.\(^{158}\) In this respect, the U.S. position often rests on reminding the Commission of the limited nature of its jurisdiction and the importance of not exceeding it or acting as a court of fourth instance in any particular case.

Within this context, the United States participates reliably in individual petitions processes before the Commission, as it has since at least 1977, the year President Carter signed the American Convention on Human Rights.\(^{159}\) As the cases have become more varied and complex, U.S. participation in hearings has likewise become more active, extensive, and substantive, with strong positive effects for the system as a whole. Although the United States has frequently argued that the Declaration, as a nontreaty, creates no binding obligations for it, its submissions nonetheless consistently address both the admissibility and merits of the underlying claim. The United States today substantively briefs and argues all questions posed by alleged victims and their representatives in each stage of case-based proceedings\(^{140}\) at the Commission’s Washington, D.C., headquarters, at times arriving with full interagency delegations of experts in the distinct fields under consideration.\(^{141}\) It increasingly also invites local or state authorities in whose jurisdiction the alleged violation took place.

At the same time, while the United States hastens to emphasize that the final recommendations of the Commission are in fact just that – nonbinding

---


\(^{159}\) Although earlier cases had been lodged against the United States, it was in 1977 that the first case to proceed to a merits decision was submitted. See “Baby Boy” *v.* United States, Case 241, Inter-Am. C.H.R., Res. No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 ¶ 1 (1981). The United States extensively briefed this abortion-related case, using the regional instruments’ *travaux préparatoires* to support its argument that regional norms protecting the right to life did not proscribe abortion absolutely, but rather allowed it to proceed under reasonable state regulation.

\(^{140}\) This includes pre-admissibility, admissibility, merits, and follow-up/compliance stages. With respect to the latter, the United States attended its first follow-up meeting in March 2007 to discuss compliance with the IACHR’s recommendations. See Dann *v.* United States, Case II.140, Report No. 75/02, Inter-Am. C.H.P. OEA/Ser.L/V/II.117, doc. 1 rev. (2002).

\(^{141}\) This is particularly true in cases dealing with national security issues.
recommendations – it likewise takes measures to consider the propriety of those recommendations and, to the extent that state agency behavior is implicated, to give state agents the opportunity to independently consider and give effect to the Commission’s conclusions and recommendations. Similar to the practice of other federal nations, decisions of the regional body are procedurally transmitted to the responsible federal department or agency and/or state attorney generals for follow-up, within the bounds of their responsibilities, competence, and discretion.\textsuperscript{142} In this sense, the U.S. State Department treats the Commission’s recommendations in much the same way it treats ICJ decisions that affect state and local agents: it transmits the recommendations or decision to the competent authority, leaving it to them – in function of federalism considerations – to determine the appropriate response under the circumstances.\textsuperscript{143} Speaking on the issue most recently in \textit{Medellín}, the U.S. Supreme Court has appeared to endorse this approach.\textsuperscript{144}

The United States responds in a similar way to requests for precautionary measures, whether by the Inter-American Commission or UN treaty bodies, such as the CERD.\textsuperscript{145} Precautionary measures are urgent interim measures of protection designed to prevent the occurrence or continuance of alleged human rights abuses that threaten irreparable harm, particularly until the merits of the underlying claim is considered. They are issued based on a prima facie assessment, without prejudgment on the underlying merits, of written communications that suggest abuse may be occurring.\textsuperscript{146} Although the United States regularly contests the competence of treaty bodies to issue

\textsuperscript{142} Interview with Steven R. Hill, Att’y Adviser, Office of the Legal Adviser, U.S. Dep’t of State, in Washington, D.C. (Feb. 8, 2007) [hereinafter Hill Interview].

\textsuperscript{143} For a discussion of the U.S. response to ICJ provisional measures and merits decisions in the Breard, \textit{LaGrand}, and \textit{Avena} cases, see Murphy, \textit{op. cit.} ("The initial fallout from the decisions on the merits in \textit{LaGrand} and \textit{Avena} is a story of the federal government encouraging the several states to take into account the decisions of the ICJ, without actually telling the states that they must do so as a matter of federal law.") (noting that "the United States sought to implement [provisional] measures . . . principally by encouraging the commutation of death sentences of the relevant convicts by governors or parole boards" and by "embark[ing] on an aggressive campaign to educate and train state law enforcement officers regarding U.S. obligations arising under the Vienna Convention, to the point of printing cards that officers were to carry with them and read out when arresting an alien").


\textsuperscript{145} The CERD Committee issued an “urgent action” request under its early-warning procedure to the United States in March 2006 with respect to the Western Shoshone Peoples of the Western Shoshone Nation, giving the United States four months to respond on the measures it has taken in response. The United States has responded both in writing directly to the Committee and in Annex II of its 2007 CERD Report, \textit{op. cit.}, in which it provides background information on the case and U.S. responses to the underlying claim over the years.

\textsuperscript{146} See, e.g., Rules of Procedure of the Inter-American Commission on Human Rights, art. 25, \textit{op. cit.} ("The granting of such measures and their adoption by the State shall not constitute a prejudgment on the merits of a case.").
such measures, the State Department nonetheless follows a policy of formally transmitting requests for precautionary measures as an informational notice to the appropriate attorney general or responsible federal agency. It also engages in associated hearings on the propriety of interim measures and on follow-up thereto, reporting on the measures it has taken to ensure that precautionary measure requests are brought to the attention of the relevant body or bodies and, where compliance follows, on the steps taken by that body in response to the measures. Although far from the norm, federal and state agents have on occasion complied with precautionary measure requests issued by the Inter-American Commission.

In sum, although the United States asserts that these contentious complaints procedures generate nothing more than recommendations for the United States to take under advisement – and participates in associated proceedings expressly on that basis – it nonetheless treats the process as a formal, adjudicatory one. It actively engages in all stages of proceedings, employing the full set of procedural rights available to it to defend U.S. policy interests within the jurisdictional constraints of the Commission’s competence. Where defects are identified, processes are at times initiated to consider whether further measures are necessary to address the underlying concern. This is true of both individual complaints procedures under the jurisdiction of the Inter-American Commission.

147 Hill Interview, op. cit. Such transmittals do not propose or encourage any particular action, but are sent to the relevant authority for that authority to respond to in its discretion.

148 See, e.g., Ramos v. United States, Case 12.430, Inter-Am. C.H.R., Report No. 1/05, OEA/Ser.L/V/II.124, doc. 7 ¶ 89 (2005) (noting U.S. indication that federal district court judge in Texas had postponed setting an execution date in light of the petition before the Commission and request for precautionary measures) (“The Commission observes that this arrangement has given practical effect to the Commission’s precautionary measures by preserving Mr. Moreno Ramos’ life and physical integrity pending the Commission’s consideration of his complaint, and the Commission commends the efforts taken within the Texas judicial system to preserve Mr. Moreno Ramos’ right of effective access to the inter-American human rights system.”).

149 Notably, following submission of the Baby Boy case to the IACHR in 1977, four members of the U.S. House of Representatives sent a letter to the IACHR in 1979, “in a spirit of cooperation and with the intent of furthering the work of the Commission,” requesting an opinion on “whether, if the United States loses, it would be subject to trade and diplomatic sanctions similar to those imposed upon Cuba by the O.A.S. following, and partially on account of, the human rights violations of the Castro regime?” It also requested suggestions on “how legislation might be shaped in order to eliminate any doubts as to U.S. compliance with IACHR standards in this regard.” “Baby Boy” v. United States, Case 2141, Inter-Am. C.H.R., Res. No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), ¶19.

150 In other instances, the United States will indicate that it is taking measures to address the issue even while asserting that the Commission lacks competence to consider it. See, e.g., Medina v. United States, Case 12.431, Inter-Am. C.H.R., Report No. 31/05, ¶ 43 (2005) (asserting Commission’s lack of competence over Vienna Convention on Consular Relations, but submitting nevertheless that the United States takes its obligations thereunder “very seriously and has since 1998 undertaken an intensive, on-going and now permanently institutionalized effort to improve compliance by federal, state and local government officials . . . including . . . “
Commission and the collective complaints mechanism of the ILO, in which U.S. participation is equally extensive.\textsuperscript{153}

3. Other Promotional Mechanisms

The United States also actively engages with UN, OAS, and ILO treaty bodies in other noncontentious ways aimed at facilitating more robust human rights promotion at the domestic level. This may include coordinating with civil society on treaty-based requirements to prepare national programs of action to give treaty commitments domestic effect\textsuperscript{152} or issuing invitations to UN and OAS special rapporteurs and independent experts to come to the United States to undertake onsite visits or otherwise discuss issues under their special mandates. The United States has, for example, authorized and cooperated with the Inter-American Commission on Human Rights as it has undertaken onsite visits to Florida, Puerto Rico, New York, California, Kansas, Pennsylvania, Louisiana, and Texas to look into alleged abuses in the areas of state and federal detention facilities and with respect to migrant laborers and their families.\textsuperscript{153} U.S. cooperation is also expected should the Commission take up pending proposals to investigate other alleged abuses in the United States, such as housing discrimination and inappropriate use of electroshock weapons by local police forces.

Similarly, the United States regularly accepts and facilitates country visits by UN special rapporteurs and independent experts who request invitations to visit the United States to engage in constructive dialogue with federal and state officials, NGOs, and civil society more broadly – most recently by the UN Special Rapporteurs on the subjects of protecting human rights while countering terrorism,\textsuperscript{154} human rights of migrants,\textsuperscript{155} and racial discrimination. Such

the publication of a 72-page brochure on Vienna Convention requirements as well as pocket reference cards for arresting officials and a training video”.

\textsuperscript{153} As of January 2008, the ILO Committee on Freedom of Association had decided forty-nine cases involving the United States, cases in which it frequently recognized the nation’s reliable and engaged participation.

\textsuperscript{152} ILO Convention 182, for example, requires ratifying states to develop a National Program of Action on ensuring child labor rights. The U.S. government initiated a process of review with civil society organizations but ultimately concluded that no additional measures were necessary.

\textsuperscript{153} For a list of all IACHR on-site visits, see http://www.iachr.org/visitas.eng.htm.

\textsuperscript{154} Press Release, OHCHR, Special Rapporteur on the Rights of Migrants to Visit United States, UN Doc. HR/07/44 (Apr. 27, 2007) (announcing a U.S. invitation for country visit in May 2007).

\textsuperscript{155} See Eliane Engeler, “U.N. rights expert to probe U.S. treatment of illegal immigrants [sic],” Associated Press, Apr. 27, 2007 (reporting on U.S.-facilitated visit in May 2007, with scheduled stops in California, Arizona, Texas, Florida, Georgia, New York, and Washington, D.C.). The UN expert was, however, denied access to certain facilities in Texas by local authorities.
UN experts are mandated to develop a regular dialogue with relevant governmental and nongovernmental actors, exchange information, make recommendations, and identify and promote best practices on measures to respect and ensure fundamental human rights. Consistent with the U.S. approach to periodic reporting processes, U.S. officials have at times noted that special rapporteurs, through the noncontentious dialogue they engender with an array of domestic governmental and nongovernmental actors, represent one of the most promising ways of promoting change within the United States.  

C. INTEREST MANAGEMENT: THE PUSH-PULL OF DOMESTIC AND FOREIGN POLICY AGENDAS

As the preceding section’s examination reveals, U.S. engagement with international human rights treaty bodies is quite robust. The question of interest, then, is how this level of engagement can be reconciled with popular notions that the United States actively resists the domestic application of human rights norms and thumbs its nose at human rights treaty body regimes? The answer, I argue, lies in interest management. Specifically, it resides at the intersection of domestic and foreign policy pressures, and the mediating postures the United States employs to steer a middle course through them. As with all international tribunals, engagement with human rights bodies involves important push-pull dynamics among a plurality of interest groups, with some urging greater engagement (the “push toward” factor) and others resisting engagement (the “pull away” factor). These push-pull vectors operate simultaneously at the foreign policy level and at the domestic policy level. The U.S. position has modulated within these countervailing tendencies, resting at momentary middle grounds within the four corners of the dynamic as interest politics change and distinct strategic opportunities evolve.

What appears clear, however, is that the United States is moving decisively toward greater engagement with international human rights treaty bodies. This shift is due both to growing pressures to engage at the foreign policy level and to a gradual diffusion of interests in domestic constituencies opposed to engagement. The net effect of the two dynamics, both accelerating since the 1990s, is an ever more robust engagement policy, albeit one that operates within clearly parametered constraints that represent the continuing power of “pull back” interests.

156 Hill Interview, op. cit.
157 Viewed diagrammatically, this dynamic may be seen as operating over a plane with domestic and foreign policy interests along one axis and push-pull tendencies along another. The U.S. policy position locates itself within this four-cornered plane at convergence points along the various and shifting vectors.
Although the motivations for each shift are independent of each other, their effects are mutually reinforcing and equally constitutive of the parameters of U.S. human rights policy. To demonstrate the various levers in this interest-management process, the following two sections look, respectively, at the push-pull dynamic as it plays out, first, at the foreign policy level between “realist” and “institutionalist” persuasions in the foreign policy establishment and, second, at the domestic policy level between groups I call “insulationists” and “incorporationists.”

Because these labels are so important to the analysis, it should be emphasized that the four corresponding groups are neither ideologically based nor exclusive in their membership. Rather, each bundles adherents to one of four distinct instrumental approaches to interest achievement, each directed to fostering a political environment most conducive to a given foreign or domestic policy agenda. Their memberships are thus variable and politically contingent, with adherents straddling or moving into or out of groupings depending on the precise issue at stake and shifting appreciations of policy opportunities.

1. Foreign Policy Interests: Net Push Toward Greater Treaty Body Engagement

A body of scholarship has arisen of late, looking more closely at the foreign policy dimension of U.S. human rights engagement and domestic policy making. In particular, whereas accounts of the U.S. human rights paradox often focus narrowly on domestic politics and the partisan cleavages that historically linked human rights with “anti-Americanism” and thus assured for forty years, through veto-player politics, that the United States would neither ratify newly adopted human rights treaties nor adopt broad-based “human rights” campaigns at home, this new literature turns attention back to the countervailing influence of diplomatic and foreign policy pressures on changing formal U.S. behavior on human rights questions within its own jurisdiction.158

This influence cannot be ignored. Just as it was determinative in influencing the federal response to the U.S. civil rights movement in the 1950s and 1960s, when the international human rights regime was first emerging,159 so, too, is it determinative today, fifty years later, as that regime has matured into a set of legitimacy-bestowing international instruments and institutions. Two intellectual camps have been most determinative in this regard, both heavily


159 See Dudziak, op. cit., chaps. 3–5.
represented in the U.S. foreign policy establishment. They include groups broadly referred to as “realists” and “institutionalists.”

Realists include those who, following either classical or neo-structural versions of international relations’ realism theory, understand State behavior as influenced by one of two realpolitik determinants: the raw power of a more powerful State or an objective expectation of material benefit, such as trade benefits, economic assistance, or debt reduction. Realists in the U.S. foreign policy establishment thus tend to reject the usefulness of international institutions or norms, seeing them as mere window-dressing for real power and interest. They seek instead to preserve the unconstrained prerogative of the United States, as a world superpower, to protect national interests and respond to foreign threats by all available means, including unilateral power whenever necessary.

Institutionalists, on the other hand, see greater instrumental utility in engaging actively with both international institutions and global norms – including human rights norms. While they, too, believe that States act exclusively in accordance with their instrumental interest, they see these interests as being increasingly interwoven with participation in international cooperative, peace-building, and dispute-resolution institutions. U.S. engagement with international institutions thus constitutes for institutionalists an important and instrumental foreign policy tool for promoting and defending U.S. interests abroad, while conferring key reputational benefits, ever more salient in global politics particularly in the international human rights field.

While realists dominated U.S. human rights policy during the Cold War, and remain highly influential in the foreign policy establishment today, institutionalists have gained increasing prominence over the last two decades with the dramatic proliferation of international institutions and rapid expansion of the international human rights field. Within this context, the push-pull dynamic over U.S. human rights policy as a foreign policy objective has shifted

---

160 For a brief overview of “realist” and “institutionalist” positions, see Murphy, op. cit.
161 For influential classical accounts of realism, see, for example, Hans Morgenthau, Politics Among Nations: The Struggle for Power and Peace (New York: Alfred A. Knopf, 1948); and Kenneth Waltz, Theory of International Politics (McGraw-Hill 1979). More recent “neo realist” scholarship has sought to refine these classical understandings by drawing upon concepts in game theory and law and economics. See Jack Goldsmith & Eric Posner, The Limits of International Law (Oxford University Press, 2005).
162 Harold Hongju Koh, Why Do Nations Obey International Law, 106 Yale L.J. 2599, 2649 (1997) (referring to both as “instrumental interest theories”).
165 See generally Hartmann, op. cit.
determinatively toward institutionalists, those favoring active U.S. engagement with supranational human rights treaty regimes. For this group, human rights engagement serves two primary strategic foreign policy goals: first, renewal of U.S. moral leadership in multilateral settings and, second, promotion of human rights and democratic reforms in other countries. Both are directed to furthering national security and global public order objectives, independent of any domestic policy implication.

First, institutionalists appreciate that the international standing of U.S. diplomats and their ability to lead in international processes of global dispute resolution are compromised by the nation’s failure to ratify core human rights instruments and engage in their supervisory procedures. This failure, which has left the nation increasingly in the formal company of rogue or failed states, renders it out of step with its democratic partners and subjects it to charges of hypocrisy by less democratic nations where the United States seeks human rights improvements or security safeguards. On a real and practical level, this impairs the United States’ ability to get its national security and other global security priorities accomplished within multilateral settings, at times making disagreement with the United States a “principled” human rights stand in itself for nations. In this sense, ratification and engagement

166 The United States stands alongside Somalia, a nation lacking a functional government, as the only two nations among 194 UN Member States that have not ratified the Convention on the Rights of the Child. The United States likewise stands among only eight nation-states not to have ratified the CEDAW.

167 See, e.g., Harold Hongju Koh, “Why America Should Ratify the Women’s Rights Treaty (CEDAW),” 34 Case W. Res. J. Int’l L. 263, 269 (2002) [hereinafter Koh, CEDAW] (“[F]rom my direct experience as America’s chief human rights official, I can testify that our continuing failure to ratify CEDAW has reduced our global standing, damaged our diplomatic relations, and hindered our ability to lead in the international human rights community. . . . In particular, our European and Latin American allies regularly question and criticize our isolation from this treaty framework both in public diplomatic settings and private diplomatic meetings.”) (reflecting testimony to Congress); Statement of Patricia Derian, Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs, Department of State, in U.S. Congress, Nov. 1979 (affirming to Senate Foreign Relations Committee that “failure . . . to ratify [ICCPR, ICESCR, CERD, and CAT] has a significant negative impact on the conduct of [U.S.] human rights policy,” undermining its “credibility and effectiveness”) (cited in Moravcsik, op. cit., at 194).

168 The United States has found that it is increasingly on the losing side of votes at the UN. U.S. representatives have, accordingly, recognized that the mere fact that the United States takes a strong stand on an issue may cause a number of states to vote against it, even if they have no independent interest in doing so. A recent illustration occurred in a 2006 vote in a UN treaty drafting committee regarding the inclusion of a politicized reference to "foreign occupation" in the treaty’s preamble. Little support had been expressed in the drafting committee for the phrase outside of one regional block. Nonetheless, upon U.S. insistence on a state-by-state roll-call vote on the issue (in a treaty otherwise agreed to by consensus), the United States could garner the support of only four other nations. An overwhelming 102 states voted affirmatively to
serve as a tool through which the United States can reseat itself within the “international community,” reassert its moral leadership role, and hence better promote its national security agenda in multilateral settings, where most international work gets done. For institutionalists, this has been a particular priority following the widely internationally condemned unilateral actions taken by the United States following the September 11 terrorist attacks.

The second factor, most commonly articulated by the U.S. State Department, involves recognition that full compliance by the United States with international human rights treaty body procedures increases the visibility and legitimacy of the procedures themselves, ratcheting up expectation levels for their regular and concerted use, and thereby prodding other states to take the procedures more seriously. Indeed, U.S. executive agencies recognize that human rights treaty bodies – by providing an international spotlight for gross abuses, giving voice to individuals and civil society groups seeking greater human rights protections and transparency at home, and providing legitimacy to domestic human rights and democracy movements – have initiated important conversations and processes in countries around the world, particularly in transitional states. They also recognize that while the U.S. failure to ratify specific treaties has not likely caused other states to forego ratification, it may embolden some to turn ratification into an empty political act, used as a rhetorical device to claim greater commitment to human rights than the United States without making corresponding changes in their policies and practices at home.

In this sense, although the foreign policy establishment may remain skeptical, or at best agnostic, about the usefulness of engagement for the United States’ domestic human rights record, it nonetheless fully recognizes and values the importance of treaty body engagement for promoting human rights.

\[\text{retain the text, with 8 states abstaining. The dearth of support the United States could muster in an official UN vote of this nature sent an unmistakable message. A similar message was conveyed in the November 2006 General Assembly elections of members of the International Law Commission, the first such election in which the U.S. nominee failed to be elected to the international body. See ILC, 2006 election of the International Law Commission, at http://untreaty.un.org/ilc/2006election.htm (visited Apr. 25, 2007).}\\]


\[\text{170 With respect to the frequency of treaty ratification as an empty political act, see generally Oona Hathaway, Do Human Rights Treaties Make a Difference?, 111 Yale L. J. 1935 (2002).}\]
and democracy in less democratically stable states.\textsuperscript{171} By actively and constructively engaging with these procedures – through high-level government participation, comprehensive reporting, well-prepared and legally argued oral and written interventions, civil society participation, and a high degree of transparency – the United States thus seeks, through its example, to encourage other states to do the same. It is, in this sense, constitutive of the United States’ already heavy human rights investments in its broader national security agenda,\textsuperscript{172} a key strategy for promoting good practices in other states and hence contributing to global security as a whole.\textsuperscript{173}

These two general “push” factors appear to be the dominant influences motivating U.S. engagement policy with international treaty bodies. They are, however, blunted at the margins by certain “pull away” or “realist” tendencies. These, led by foreign-policy-focused national security entities, such as the National Security Council and Department of Defense – with the legal buttress of the U.S. Justice Department\textsuperscript{174} – tend to be little concerned by most of what human rights tribunals do and hence have less interest in determining U.S. engagements with them. They are more concerned with the implications of U.S. engagement with other international courts and tribunals discussed in this volume, such as the International Criminal Court (ICC) or the International Court of Justice (ICJ),\textsuperscript{175} that more directly touch on state-to-state national security and international defense prerogatives. This follows from the fact that human rights tribunals do not tend to deal directly with interstate or transjurisdictional disputes that may involve threats to national security or other interests emanating from abroad\textsuperscript{176} – for which realists seek to maintain

\textsuperscript{171} It serves, in this sense, to help restore a balance between ratifying nations whose formal treaty commitments find analogues in domestic policy and practice and those that do not.

\textsuperscript{172} The United States invests heavily and plays an active role in promoting human rights abroad. This takes shape through its annual country reports on the human rights situation of 194 countries around the world, its substantial bilateral and multilateral aid, support of international human rights treaty bodies, and substantial diplomatic efforts.

\textsuperscript{173} In this respect, although some note that U.S. ratification has little effect on other states’ decision to ratify or not, see Moravcsik, op. cit. (finding little empirical evidence to support common claim), the level and scope of U.S. participation in treaty body processes or lack thereof can be expected to have a notable effect on the scope of other states’ participation, given the ratchet-up effect it has on community expectations.

\textsuperscript{174} The U.S. Department of Justice under the George W. Bush administration has played a central role in crafting legal arguments to resist international engagement and provide justification for “war on terror” policies that often put the United States at loggerheads with the rest of the world. In so doing, it has increasingly been at policy odds with the U.S. Department of State. Cf. Neil Lewis, “Justice Dept. under Obama Is Preparing for Doctrinal Shift in Policies of Bush Years,” New York Times, Feb. 2, 2009, at A14.

\textsuperscript{175} See chapters 6 and 4, respectively.

\textsuperscript{176} Optional interstate complaint mechanisms, though rarely used, are in fact established under most human rights treaties. Notably, the United States has recognized the competence of the
a supple and unconstrained response capability. Rather, they deal exclusively with U.S. conduct vis-à-vis persons subject to its own jurisdiction. As such, the geopolitical calculations of engagement tend to be distinct from, and less sensitive than, those related to most other international tribunals.

Realist tendencies nonetheless recognize that too full an engagement with human rights treaty bodies might function in practice to constrain U.S. war-making or defense functions, especially as exercised abroad. Foreign policy realists thus pull back in areas where this might occur. That is, whereas institutionalists, for the reasons noted earlier, tend to prevail on the question of engagement once treaty ratification has been effected, their realist counterparts play an important role in policing the boundaries of human rights supervision, “pulling back” against the institutionalists’ “push forward” wherever human rights supervision may conceivably circumscribe U.S. national security discretion and war-related undertakings.

The United States has mediated these push-pull concerns by adopting an engagement policy that participates fully in human rights treaty body mechanisms, except to the extent they purport to address extraterritorial concerns or matters that overlap with international humanitarian law or the law of armed conflict. That is, the United States has adopted a foreign policy position that supports active U.S. engagement with human rights treaty bodies in all but these two sensitive areas defined as beyond the jurisdictional competence of international human rights supervision. Although these positions put the United States in an increasingly adversarial posture vis-à-vis human rights treaty bodies, given extraterritorial abuses committed in response to the 9/11 terrorist attacks and the U.S. war against Iraq and Afghanistan, they may be seen as a core mediating technique between U.S. institutionalist and realist positions with respect to achieving its varied foreign policy objectives.

UN Human Rights Committee to examine interstate complaints against it under the ICCPR.


177 The U.S. “pull-back” posture has the express effect of opening a space to which contested practices may be removed without the threat of supervisory censure by human rights treaty bodies. This has created growing international alarm as the United States has increasingly moved “war on terror” abuses off-shore, including the holding of “enemy combatants” in Guantanamo Bay, third-party states, and off-shore vessels, and engaged in the practice of extraordinary rendition. See, e.g., Margaret L. Satterthwaite, Rendered Meaningless: Extraordinary Rendition and the Rule of Law, 75 Geo. Wash. L. Rev. 1333 (2007).

Prior to the U.S. presentation of its second and third periodic report to the UN Human Rights Committee in July 2006, a member of the UN Committee lamented privately to this author the fact that the United States had not submitted its report on time, the report being due before the 9/11 attacks in 2001. Had the report been submitted on time, the Committee would not have had to focus so narrowly on the high-profile abuses in Guantanamo, Abu Graib, and other extraterritorial loci, and could have addressed itself more fully to the more general human rights issues affecting the U.S. population as a whole.
2. Domestic Policy Interests: From Pull to Push – The Evolution of Domestic Social Struggles

The foreign policy considerations just described have dominated in determining current U.S. engagement modalities with human rights treaty bodies over the last decade. The prior question of whether the United States will in fact ratify a given treaty, and thus open itself to treaty body engagement, remains a decision in which domestic politics are distinctly paramount. The push-pull dynamic on U.S. decision makers at this level functions not between foreign policy institutionalists and realists but between domestic groups we may term “insulationists” and “incorporationists.” The former seek to insulate domestic law from the influence of international human rights constructions, finding a domestic environment free from human rights methodologies and migrations more amenable to achieving their substantive political policy preferences. They oppose U.S. ratification of human rights treaties and vigorously object to the use of human rights norms by domestic courts. Incorporationists, by contrast, find the mediating influence of international human rights law on domestic politics helpful to their domestic policy agenda, which generally favors broader individual rights interpretations, with fewer permissible restrictions. They thus seek to incorporate international human rights norms and human rights methodologies into domestic law and decision-making processes, through treaty ratification, local monitoring and interpretation initiatives, treaty body engagement, grassroots mobilization, judicial oversight, and direct implementing legislation at local, state, and federal levels.

This push-pull dynamic has played out in virtually every domestic social struggle since the international human rights regime first emerged sixty years ago. Thus, the civil rights era demands of incorporationists in the fifties and sixties for the federal government to ensure respect for internationally protected human rights guarantees of racial equality were quickly countered by insulationists’ initiatives to launch “states’ rights” movements, red-baiting campaigns against rights advocates (and internationalism generally), and the fateful Bricker Amendment, a concerted attempt to constitutionally insulate domestic law from all treaty-related modifications. These insulation initiatives, intersecting with Cold War politics, led to a series of actions and political

---

178 These movements, which included the founding of a “states’ rights” political party, sought to insulate local segregationist and abusive policies from the illumination of federal constitutional, statutory, and treaty law.

179 For an animating description of the process through which the proposed constitutional amendment (and a watered-down version of it) failed, see Anderson, op. cit. Had it passed it still of course would have required approval in three-quarters of U.S. states to take effect. U.S. Const., art. V.
compromises that ensured that human rights remained off the domestic policy-making agenda for the next quarter century. Since the 1970s, this dynamic has played out with similar intensity over “family values,” abortion, parental rights, and personal lifestyle-choice debates, with incorporationists seeking broad human rights statements from international treaty bodies to incorporate into domestic advocacy and litigation strategies and insulationists seeking to foreclose all reference by domestic legislatures and courts to international decisions or comparative rights jurisprudence.\textsuperscript{180}

In this politicized struggle over the control of legal rights meaning, domestic policy insulationists – fewer in number but better in organization, funding, and insider/beltway political contacts – have historically been dominant.\textsuperscript{181} The reasons for this, at least from the perspective of treaty ratification, are reviewed by Professor Moravcsik in his discussion of the “U.S. human rights paradox.”\textsuperscript{182} They center on two factors: first, the extreme decentralization and fragmentation of U.S. political institutions, which make them uniquely amenable to veto-group politics, and, second, a strong conservative minority that has consistently utilized veto players, most notably in the U.S. Senate, to achieve its insulationist agenda. Indeed, employing a culturally resonant rhetoric sounding in constitutional democracy, this minority has historically been successful in rallying partisan affiliates and mobilizing veto players to block ratification of human rights treaties, either by bottlenecks them in the Senate Foreign Relations Committee or by foreclosing the ability to achieve super-majority advice and consent in the full Senate.

The powerful political and financial lobby of these interest groups and their unique control over veto players in the political process – particularly over Republican majorities in the Senate – explain the U.S. historic failure to ratify human rights treaties apace with similarly minded nations, those equally committed to domestic human rights guarantees.\textsuperscript{183} It nonetheless fails as a reliable explanatory framework for predicting U.S. human rights engagements in the twenty-first century. Such an explanation would have to

\textsuperscript{180} See, e.g., H.R. Res. 568, 108th Cong. (2004); H.R. Res. 97, 109th Cong. (2005) (seeking to preclude domestic courts from referring to “judgments, laws, or pronouncements of foreign institutions” in determining the meaning of U.S. laws).

\textsuperscript{181} Liberal advocacy and community-based groups readily recognize that they have been insufficiently successful in organizationally linking their grassroots campaigns and local support with beltway politics, and hence have had a much less effective influence in Washington than their numbers should indicate.

\textsuperscript{182} See Moravcsik, op. cit.

\textsuperscript{183} It also helps to explain why the United States, after ratifying the ICCPR, CERD, and CAT in 1992 and 1994, did not ratify the CRC and CEDAW from 1994 to 2006, when Republicans held majorities in the Senate and “family values” groups were actively lobbying beltway veto players against ratification.
account for three closely related facts: one, U.S. ratification of an increasingly broad spectrum of human rights treaties in the 1990s that failed, over time, to generate or sustain strong issue-specific oppositional lobbies (including the ICCPR, CERD, CAT, and child-protective labor rights treaties); two, active U.S. engagement in the international supervisory regimes corresponding to these treaties, including in areas of substantive overlap with nonratified treaties, such as the CRC, CEDAW, and ICESCR; and, three, the altered opportunity structure both of the above factors create for domestic advocates – that is, those pushing for greater engagement, and those pulling away from it – as they perpetually recreate and evolve their strategies to better achieve distinct substantive policy preferences in changing political environments.

That is, a fully explanatory description of U.S. human rights politics must account not only for the structural potential for mobilized political lobbies to block treaty ratification.\(^{154}\) It must account as well for the shifting incentive structure for them to do so over time and the relative receptivity of the population (and hence potential veto players) to traditional insulationist arguments. As these environmental factors change, so too does the importance of “extreme decentralization” as a structural condition favoring – rather than disfavoring – insulation. At the same time, incorporationism, like incorporationism, has always been an instrumental strategy for its proponents, supported to create a domestic political environment most conducive to particular policy agendas. As soon as it ceases to bring comparative advantage, it will be discarded and replaced by a new set of strategies and supporting ideologies. This is precisely what we are beginning to see today.

The United States is thus faced in the twenty-first century with a new set of domestic pressures in its human rights engagement policy. It is no longer exclusively a push-pull dynamic between “liberal” and “conservative” interest groups, with the latter consistently prevailing – as they did from the 1950s to 1980s – through their unique ability to block ratification of human rights treaties, and hence, together with a particular brand of politically-resonant rights absolutism, preempt human rights conversations from deepening domestically. Rather, with U.S. ratification of core human rights treaties in the 1990s, it is increasingly becoming a push-push dynamic in the twenty-first century. That is, liberal interest groups, true to their incorporationist heritage, continue to push for greater U.S. engagement with human rights treaties and treaty bodies as a means of bringing domestic law, policies, and practice more fully into line with internationally recognized human rights norms, norms

\(^{154}\) The mere existence of a vocal conservative minority and institutional amenability to veto politics as a treaty-blocking option does not, in itself, speak to the utility of incorporationist strategies to the conservative political agenda.
they have spent decades constructing.\textsuperscript{185} Conservative interest groups, for their part, faced with a growing incorporationist reality, have increasingly realized that insulationism alone may not be helpful to their agendas, particularly as they relate to lifestyle, personal choice, and “family values” issues. Many such groups are thus urging the United States not to disengage with international human rights bodies but rather to engage more fully – albeit with a distinct agenda. That is, they do not seek the domestication of presently recognized international norms, as do liberals, but rather – in a strategic reversal of process – the internationalization of socially conservative rights constructions more amenable to their domestic policy agenda, which may then be subject to incorporation at some later date. Where opportunities emerge, traditional insulationists are increasingly using partisan political connections to press the U.S. diplomatic (and legislative) corps to undertake this agenda on their behalf.\textsuperscript{186}

Because this transition is so important for understanding current U.S. human rights politics, it is useful to highlight the constitutive processes that led to it. The techniques the United States adopts to mediate between these dueling push-push pressures will be taken up more fully in Part D.

\textbf{I. Diminishing U.S. Receptivity to Insulationism}

Historically, insulationism has been employed by socially and politically conservative interest groups as a way to bypass the mobilizing influence of human rights law on those wishing to effect equality or dignity-based change in the U.S. social structure. Because such change is rhetorically consistent with the promise of the U.S. Constitution – indeed, with the country’s national narrative\textsuperscript{187} – it has been necessary to create an ideational structure that pits international human rights law against U.S. constitutional democracy, framing the former as undemocratic and even anti-American. This is possible through a rhetorical manipulation of international human rights law that equates it with absolutist, externally defined policy outcomes, intrinsically and automatically superior to domestic determinations. In fact, both sides of the political spectrum have tended to rely on \textit{rights-absolutist} constructions to appeal to their respective constituencies, one side affirming that international treaty law

\textsuperscript{185} Notably, they have often helped construct these norms in the mold of strong U.S. constitutional rights protections.

\textsuperscript{186} See, for example, discussion in Part C.2.III \textit{infra}.

\textsuperscript{187} SeeJack M. Balkin, “\textit{Brown} as Icon,” in Balkin ed., \textit{What \textit{Brown} v. \textit{Board of Education} Should Have Said} 5 (NYU Press, 2001) (describing as the “Great Progressive Narrative” that “widely held and often repeated story of deep resonance in American culture, which sees America’s basic ideals of liberty and equality as promises for the future to be achieved eventually through historical struggle”).
requires the immediate modification of domestic law to conform strictly to international treaty body views and policy preferences, the other that international law constructions conflict with deliberative democracy at home.

It is in fact precisely this rights absolutism that is responsible for the contentiousness of human rights treaty law engagements in U.S. domestic politics and, specifically, the historic ability of veto politics to successfully block human rights treaty ratifications. That is, opponents have mobilized influential veto players by representing human rights law as a doctrine of foreign-determined meaning imposed on nonconsenting domestic populations. Nationalistic urgency is then tied to ratification-blocking campaigns by asserting that ratification will force the United States to adopt a set of externally defined policies that are morally or socially objectionable to a large segment of the population. Although this once took the form of imagining UN bodies as communist-inspired institutions that would force communities to desegregate their schools, eateries, pools, and public accommodations and lead to widespread miscegenation188 – issues that could mobilize powerful domestic constituencies against ratification – it now asserts that adhesion to currently unratified human rights treaties, such as the CRC and CEDAW, will require immediate mandatory legalization of same-sex marriage, provision of abortion and contraception on demand, decriminalization of prostitution, the turning over of child rearing to the state, and other measures that could not currently be achieved through national-level democratic processes alone.189

It is this caricatured vision of human rights treaty law – one permitting of no national discretion in the crafting of “appropriate” policies – that gives rise and animating force to “national sovereignty,” “states’ rights,” and other “rights-cultural” objections.190 These objections, although plainly instrumental given

188 See, for example, William Fleming, Danger to America: The Draft Covenant on Human Rights, 37 A.B.A. Journal 739, 794-99 (1951) (claiming that the Draft Covenant on Human Rights is the “perfect embodiment of . . . unmitigated socialism”); Frank E. Holman, International Proposals Affecting So-Called Human Rights, 14 Law & Contemp. Probs. 479, 483 (1949) (claiming that the Universal Declaration of Human Rights will force the United States to allow interracial marriages).

189 The same strategy has been used with the Equal Rights Amendment to the U.S. Constitution, with opponents arguing in the 1970s that it would lead to women being drafted by the military and to public unisex bathrooms. Today it is warned that its passage would compel courts to approve same-sex marriage and deny Social Security benefits for housewives and widows. See Juliet Eilperin, “New Drive Afoot to Pass Equal Rights Amendment,” Washington Post, Mar. 25, 2007, A1, A4 (citing arguments of Eagle Forum President Phyllis Schlafly and other conservative opponents); see also Phyllis Schlafly, Time to Unsign CEDAW (Feb. 14, 2007) at http://www.eagleforum.org/column/2007/feb07/07-02-14.html (visited Apr. 20, 2007).

the subsidiary structure of human rights law, have high political traction in the U.S. popular mind-set and hence are effective mobilizing tools for capturing key veto players to block ratification when perceived as politically advantageous.

This blocking process reliably works, however, only to the extent a politically influential minority can be convinced, or can convince core constituencies, of two critical factors with respect to any given human rights treaty: one, that ratification will compel the immediate adoption of laws and policies determined by external (not domestic) decision makers; and, two, that such policies are socially or morally repugnant or otherwise contrary to group interests. Both propositions have become increasingly difficult to sustain over the past decade, as the U.S. ratification record reveals.

First, the idea that human rights treaty ratification will compel the United States blindly to adopt externally defined policies is today unsupportable. As a legal matter, the United States has removed all basis for doubt over the issue by adopting the consistent practice of attaching non-self-execution clauses to human rights treaties upon ratification.101 Such clauses stipulate that any change to domestic law required by international treaty commitments must be implemented through the ordinary legislative process, in which federal, state, and local voices may all be heard, not through direct judicial constructions unmediated by “deliberative democracy.”102 This policy, directly responsive to rights-absolutist constructions that sustain “states’ rights” and “national sovereignty” rhetoric, effectively removes the key mobilizing rationale behind policy-driven opposition to ratification initiatives.103 At the same time, it has become increasingly clear, as a factual matter, that U.S. ratification of the ICCPR, CERD, CAT, ILO Convention 182, and the two CRC optional protocols – and submission to the jurisdiction of their supervisory treaty bodies – has not forced the United States to adopt extremist policies that were not fully vetted by domestic political processes. There is no reason to believe that this

101 In providing its advice and consent to the ICCPR in 1992, for example, the Senate declared that “the provisions of Article 1 through 27 of the Covenant are not self-executing.” 128 Cong. Rec. S4781, at S4784 (1992). The Senate stated that the declaration was meant “to clarify that the Covenant will not create a private cause of action in U.S. Courts.” S. Rep. No. 102-23, at 15 (1992).

102 In its decision in Medellín v. Texas, 128 S. Ct. 1546 (2008) the Supreme Court appeared to adopt a different, more expansive interpretation of non-self-execution that does not conform to the Senate’s stated intent in attaching such clauses to human rights treaties. Medellín, 128 S. Ct. at n.2.

will not likewise be true with U.S. ratification of additional treaties, such as the CRC, CEDAW, CRPD, and the ICESCR.

Second, given broad social, cultural, and attitudinal changes in the United States over the last two decades, domestic policy changes claimed to be required by human rights treaty ratification simply are not sufficiently unpalatable to U.S. interest groups in the twenty-first century to sustain veto politics for all but a small number of content-specific treaties. Such treaties are generally those associated with women and children’s role in the family and their access to contraception, abortion, and “integral health services.” These issues – like those on sexual orientation, marriage, prayer, and Israel – are those on which socially conservative minority groups continue to hold powerful domestic sway.\textsuperscript{194} This narrowing environment in which veto politics can effectively function follows from the changing interest politics and shifting political alliances that social struggle and norm internalization have brought with time. Indeed, as the principal social struggles turned in the past half-century from race and Cold War divisions to “moral values” and “lifestyle choice” issues, old social alliances broke down and the treaty-opposition agenda narrowed, becoming more issue specific and less capable of mobilizing influential players across broad social sectors.\textsuperscript{195} At the same time, many politically and financially influential domestic groups – such as the U.S. business and legal communities – that once reliably opposed incorporation have today become, for a diversity of self-interested and non-self-interested motivations, active proponents of U.S. ratification of human rights treaties.\textsuperscript{196} The U.S. business community, for example, has taken energetic part in ILO treaty drafting processes (particularly where child labor protections are at issue), actively lobbying the Senate Foreign Relations Committee for speedy ratification and attaining it even under strong Senate Republican majorities.\textsuperscript{197}

\textsuperscript{194} Significantly, this sway was magnified in the eight years of the George W. Bush presidency, given the special access such groups had to the White House and formal positions of power.

\textsuperscript{195} Interestingly, it has necessitated that many conservative groups, long opposed to internationalism, have had to extend their strategic embrace to like-minded allies beyond domestic borders.

\textsuperscript{196} The American Bar Association was a powerful and highly influential opponent of human rights treaties in the late forties and fifties, see, e.g., Fleming, \textit{op. cit.} (citing arguments of the ABA President); it today actively supports ratification of CEDAW, CRC, ICESCR, and the American Convention, albeit with a standard set of reservations, understandings and declarations (RUDs).

\textsuperscript{197} This was true with both ILO Convention 182 and the two optional protocols to the CRC, each ratified under Republican Senate majorities with the support of the U.S. business community. See, e.g., “U.S. Business Community’s Letter to the Senate Foreign Relations Committee: ILO Convention on the Worst Forms of Child Labor”, Sept. 23, 1999, at http://www.uscib.org/index.asp?documentID=1352 (visited Apr. 20, 2007) (providing reasons U.S. business
Given the nature of the U.S. political structure, these shifting alliances have led to a predictable outcome. With broad national support for human rights treaty ratification generally, targeted pro-ratification lobbying by certain influential groups, and veto players mobilizable only with respect to limited “family value” subject matters, the United States proceeded to ratify the ICCPR, CERD, CAT, and a variety of labor and child rights treaties in the 1990s and early 2000s. It will not be long before additional treaties are ratified, particularly where coordinated civil society ratification campaigns intersect with Democratic control of the U.S. Senate, as will be the case in at least 2009 and 2010.

II. Creeping Incorporation, Despite Insulationist Obstruction

At the same time, it has become increasingly clear that strategies focused on insulation alone – most notably, ratification blocking and the inclusion of a standard package of reservations, understandings, declarations with treaty ratification198 – are no longer reliable in insulating the U.S. domestic system from human rights methodologies and migrations. This has resulted from the many innovative and constantly adapting strategies undertaken by incorporationists over the years, designed to circumvent the blocking potential of traditional insulationist tactics. Whereas these traditional tactics have focused on top-down insulation, mobilizing federal veto players through rhetorical appeals to states’ rights and federalism-based safeguards on localized experimentation, the new incorporationist strategies seek in fact to operationalize these appeals: they start at the grassroots and incorporate upward. In this regard, it is important to underscore that while “extreme decentralization” or “political fragmentation” has been identified as a structural factor of the U.S. political system that favors top-down insulation,199 it is – just as critically – a structural factor of the U.S. political system that favors filter-up incorporation.200 The

community, including U.S. Chamber of Commerce and Business Roundtable, supports U.S. ratification). The U.S. business community has also become a strong and influential supporter of universal health insurance in the United States. See, e.g., Jonathan Cohn, “What’s the One Thing Big Business and the Left Have in Common?” New York Times, April 1, 2007.

198 For the package of Reservations, Understandings, and Declarations (RUDs) under the CERD, ICCPR, and CAT, see 140 Cong. Rec. S7634–02 (daily ed., June 24, 1994), 138 Cong. Rec. S4781–01 (daily ed., April 2, 1992), and Cong. Rec. S17486–01 (daily ed., Oct. 27, 1990). Of course, not all RUDs are aimed at insulation; many are required by constitutional constraints and are fully consistent, in both letter and spirit, with international law.


200 In view of this in the judicial field, William Brennan famously called on state courts to continue to expand strong individual rights protections under state constitutions, given federal judicial
ability of the two in our Madisonian democracy to “resist and frustrate the measures of the other”\textsuperscript{201} has been one of the defining characteristics of U.S. human rights politics from the late twentieth to early twenty-first centuries. This can be seen in a wide variety of modern incorporationist tactics.

First, with ratification of certain domestically popular human rights treaties impeded at the federal level by veto politics, incorporationists have gone straight to their local and state governments seeking direct localized incorporation, with growing success rates. With respect to CEDAW and the CRC, for example, governmental bodies in scores of U.S. states, territories, cities, and localities have adopted resolutions or instruments endorsing the conventions or adopting them on behalf of their jurisdictions.\textsuperscript{202} These initiatives have at times been accompanied by innovative community-based supervision and other follow-up procedures to monitor local-level progress in achieving treaty-related commitments and to ensure implementation of locally relevant solutions to the problems identified. Initiatives in San Francisco,\textsuperscript{203} Berkeley,\textsuperscript{204} and New York have been widely copied elsewhere.

\begin{footnotesize}

\textsuperscript{201}“Federalist 46” (James Madison) (discussing U.S. federal structure); cf. Moravcsik, \textit{op. cit.}, at 197 (“The institutional odds against any fundamental change [in U.S. human rights policy] in Madison’s republic are high.”)

\textsuperscript{202}See, e.g., Chicago City Council, Resolution (Feb. 11, 2009) (resolving to “advance policies and practices [that] are in harmony with the principles of the Convention on the Rights of the Child in all city [sic] and organizations that address issues directly affecting the City’s children.”); Koh, CEDAW, \textit{op. cit.}, at 274 and nn. 48–50 (“Far from CEDAW imposing unwanted obligations on local governments, local governments are in fact responding to the demands of their citizens, who have become impatient at the lack of federal action to implement these universal norms into American law.”).


\textsuperscript{204}On February 27, 2007, the Berkeley City Council adopted a resolution requiring the city manager to supervise a periodic reporting process on the city’s progress in eliminating racial discrimination, in accordance with the CERD. See Resolution No. 63,596-N.S. Eliminating Racial Discrimination. The Office of the City Manager thereupon created a template and sent it to every city agency in Berkeley seeking information on racial discrimination. The first Berkeley City report, submitted on June 26, 2007, was likewise to be sent to the UN CERD Committee in anticipation of its February 2008 review of the United States as a whole, as well as the attorney general of California.
\end{footnotesize}
New York City, Pennsylvania, and Massachusetts have been particularly noteworthy, although forms of localized human rights incorporation are apparent at the grassroots throughout the country. City and state governments are, in response, increasingly taking a human-rights-based approach to community problem solving, including with respect to the few treaties that vocal conservative minorities continue to be able to block at the federal level.

Second, even where federal ratification is attained, non-self-execution clauses have posed a prima facie, if often overstated, dilemma for domestic human rights advocates. These jurisdictional clauses bar domestic courts from entertaining private causes of action arising directly under treaty law, requiring instead that independent causes of action be identified under U.S. statutory,  

205 In New York City, a bill was introduced to the city council in late 2004 to turn CEDAW and CERD into statewide principles of governance, to be interpreted and applied by state and city human rights commissions with competence over local disputes, reported on by city government, and periodically reviewed by a city task force. See Bill, Int. 512-A “New York City Human Rights Government Operations Audit Law.” The bill would require that city government departments and programs review their policies and programs to determine their effects on women and racial minorities and report on those impacts for review by a city task force. For information on the New York City Human Rights Initiative, http://www.nychri.org/frame.html (visited Apr. 20, 2007). The bill is up for reintroduction in 2009.

206 In 2002, the Pennsylvania House of Representatives passed a resolution establishing a House committee to “study and investigate the integration of human rights standards in Pennsylvania’s laws and policies.” See House Resolution 473 (2002). In 2003, House Resolution No. 144 reestablished the select committee to continue its work. Public hearings were held throughout the state on the rights to health, housing, employment, transportation, and nutrition, and the House Select Committee’s conclusions and recommendations were issued on November 30, 2004.

207 In Massachusetts, House Bill No. 706 was proposed in 2005 to establish a special commission to review the integration of international human rights standards into the commonwealth’s laws and policies. It would authorize the state legislature to investigate human rights abuses through a series of public hearings, drawing conclusions and making recommendations for changes in state and local policy.

208 In Chicago, for example, a local city council adopted a right-to-housing bill that brought in significant federal dollars. “National truth commissions” or “community hearings” to expose locally identified deficiencies in U.S. policies and practices vis-à-vis core human rights instruments have also been undertaken locally around the country. See, e.g., Poor Peoples’ Economic Human Rights Campaign, National Truth Commission: Shining a Light on Poverty in the USA, at http://www.economichumanrights.org/ntc_report.shtml (visited Apr. 20, 2007). Efforts at local periodic reporting on human rights compliance are also being advanced in Portland, Oregon, and Milwaukee, Wisconsin.

209 This is particularly true with respect to CEDAW and the CRC. The United States has also not ratified the ICESCR and American Convention. The reasons, however, do not appear to be veto politics but simply the lack of any organized domestic constituency pushing strongly for ratification of either. That is, although there is no vocal minority actively obstructing ratification, neither is there yet any strong domestic advocacy movement pushing for ratification.
constitutional, or common law. Incorporationists have responded by increasingly pressing domestic courts to apply human rights treaty law not directly, but rather indirectly – used as a nonbinding interpretive aid or source of persuasive authority in discerning meaning under independent private causes of action. U.S. courts, with their long historical pedigree of reference to international law, foreign practice, and foreign court judgments, have often been willing to adopt this approach, particularly with respect to state and federal constitutional provisions that are direct analogues to treaty-based norms, such as due process and cruel and unusual treatment or punishment. State courts, the principal protagonists in cooperative judicial federalism, may be especially amenable to such human rights migrations in interpreting state constitutional guarantees. This is particularly true where such guarantees have been directly influenced in their drafting by international human rights law or where they include normative protection for rights – such as those to health, education, welfare, or human dignity – that have no direct federal constitutional parallels and thus for which comparative foreign law and human rights sources are particularly useful. Although insulationist resistance to this judicial methodology remains sharp, the movement toward greater U.S. judicial reliance on transjurisdictional human rights dialogues is unmistakable; it represents an area of growing U.S. human rights incorporation of ratified, and even unratified, treaty law.

210 In the U.S. Supreme Court’s 2006 term, all nine justices endorsed the view that treaty interpretations by international tribunals were entitled to “respectful consideration” by U.S. courts. Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2683 (2006); id. at 2700 (Breyer, J., dissenting).


214 This resistance was perhaps most powerfully manifested in two resolutions introduced to the U.S. House of Representatives in 2004 and 2005, respectively, although neither came to a full vote. Each expressed the sense of their cosponsors that “judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the laws of the United States.” H.R. Res. 568, 108th Cong. (2004), at http://thomas.loc.gov/cgi-bin/query/D?c108:1./temp/~mdbsmtQvNi: (visited Apr. 20, 2007); H.R. Res. 97, 109th Cong. (2005), at http://thomas.loc.gov/cgi-bin/query/ D?c109:2./temp/~mdbsmtQvNi: (visited Apr. 20, 2007).

215 The methodology, given the noncontrolling nature of its inputs, allows domestic judges to draw not only on the growing set of international human rights treaty norms that the
Third, as with non-self-execution clauses, incorporationists have not been deterred by declarations or understandings attached to human rights treaties upon ratification that purport to affirm that U.S. laws are fully in compliance with treaty norms and hence require no modification. Rather, incorporationists have persistently used treaty body procedures – particularly periodic reporting and contentious complaints – to draw attention to perceived gaps and deficiencies in U.S. law, policies, and practices and to press government officials to respond to identified problems within a human rights framework. They have done so by working not only to attain strong issue-specific conclusions and recommendations from treaty bodies but, most important, to then ensure that those conclusions and recommendations are effectively addressed through increasingly institutionalized mechanisms and participatory processes at federal, state, and local levels. At the same time, “shadow report” procedures that accompany periodic reporting processes are now regularly used by incorporationists as a teaching and awareness-raising tactic, employed as a means to train local communities in how to use human rights methodologies and understandings to address problems of local concern and to frame dialogues with governmental entities. The grassroots analyses produced from shadow reporting exercises are then used not only for formal reporting purposes in Geneva but, most significantly, for pressing local, state, and federal officials for meaningful, socially relevant reforms in domestic communities.

Finally, the continued success of federal veto politics in blocking certain treaties, such as the CEDAW and CRC, that raise sensitive issues for socially conservative minorities has not stopped domestic advocates from using international treaty body supervision to engage those very same issues, albeit under

United States has ratified – including their case-specific interpretations by treaty bodies and foreign courts in factually-similar cases – but also norms that the United States has not ratified but that are widely seen as legitimate guiding principles for the conduct of nations, such as those in the Universal Declaration of Human Rights (UDHR) or CEDAW. See generally Jackson, “Constitutional Comparisons,” op. cit. at 111 (noting several U.S. Supreme Court opinions between 1949 and 1970 referring to UDHR).

216 “Shadow reports” are parallel reports to the official treaty body reports prepared by the U.S. government. They aim to highlight and correct misstatements or generalizations in official U.S. reports; fill in overlooked areas with accurate facts, details, and statistics; and generally present an alternative view for the expert UN committee to consider in assessing U.S. progress and setbacks in human rights enjoyment under the supervised treaty and in making recommendations for improvements.

217 The U.S. Human Rights Network has played an important role in coordinating the large numbers of domestic advocates who travel to Geneva to participate in the supervisory process, both by consolidating issue-specific and local shadow reports into a single accessible U.S. NGO report and in coordinating advocates in making timely, effective statements to the UN committees and in presenting appropriate information that is easily accessible to Committee experts as they question U.S. representatives.
other treaties. Pressed by civil society advocates, the UN Human Rights Committee, Torture Committee, and Racial Discrimination Committee thus regularly question U.S. representatives – who provide detailed responses – on the measures taken to give legal effect to rights related to women’s reproductive health and safety, gender violence, children’s rights abuses, discrimination in housing, education, health care, indigenous land rights, and employment, as well as to the disparate impacts of a wide range of U.S. policies on grounds of race, ethnicity, age, sex, religion, and sexual-orientation.

There are in fact virtually no substantive issues arising under the CEDAW, CRPD, CRC, or ICESCR that cannot in some way be addressed under the ICCPR, CERD, and CAT supervisory procedures. The same is true of the contentious individual complaints procedure supervised by the Inter-American Commission on Human Rights, which allows complaints to be lodged against the United States with respect to the full spectrum of internationally recognized rights. Incorporationist strategies have thus altered in fundamental ways the incentive structure that has historically justified mobilizing veto players to block certain treaties. Today, that incentive structure has largely been reversed: given U.S. commitments under the ICCPR, CERD, CAT, ILO treaties, and the American Declaration, there is little functional reason to oppose – and growing functional reasons to support – U.S. ratification of the CEDAW, CRPD, CRC, ICESCR, and the American Convention.218

III. Responding to Incorporation’s Advances: Reappropriating Rights

This just-described reality has fundamentally changed the political environment in which traditional opponents of treaty ratification pursue their own domestic policy agenda, complicating their efforts to cordon off the domestic legal system from international interpretations that might differ from their preferred views. Many appear to be realizing that old strategies focused on ratification blocking alone are insufficient and that failure to reassess their strategies may mean missing out on critical agenda-advancing opportunities. Such interest groups have thus appeared increasingly to focus critical energies on ensuring that new international agreements reflect their interests and agendas at the drafting stage.

218 This is particularly true with respect to the American Convention nonratification of which insulates the United States from no new obligations but rather serves only to prevent the United States from nominating and electing U.S. nationals to serve as judges on the Inter-American Court of Human Rights. This follows from the close substantive parallels between the American Declaration and American Convention and the fact that the Court’s jurisdiction is not mandatory upon ratification of the Convention; a separate opt-in instrument must be filed with the OAS. See American Convention, op. cit., art. 62.
The most notable of these shifts involves the increasingly active participation of traditionally insulationist NGOs in international human rights fora. Many such groups now have a regular and active lobby at UN meetings and conferences, especially those related to women, children, health, and family structure. A strong, but single, example has been the drafting negotiations behind the new UN Convention on the Rights of Persons with Disabilities (CRPD), in which the U.S.-based “pro-life” movement maintained a highly visible presence and sustained political lobby over the four-and-a-half years of the treaty’s negotiation. It did so with a core aim of reshaping the international meaning of rights-based terms related to reproduction, family, child rearing, and “life,” using political affinities within the Bush administration to compel the U.S. government to pursue its policy agenda in the negotiation process.

In fact, although the United States announced at the start of the treaty-drafting process in 2003 that it did not intend to participate actively in the negotiating process, under sustained pressure from socially conservative activist groups it changed course at the penultimate session in early 2006. The United States announced the reason for its reentry as a manifestation of its strong interest in shaping the terms of the new human rights treaty – principally out of its long-term interest in ensuring the strength and consistency of international law as a general matter, but also, specifically, to avoid the inclusion of any language that might be substantively objectionable to the United States. The actual textual amendments proposed by the U.S. delegation, however, spoke more forthrightly to its immediate motivations. These included: strengthened language on the role of the family in dependent caregiving; the deletion of references to “health services,” a term understood by antiabortion groups as an international code word for abortion services; and the insertion of “and worth” after each treaty reference to “inherent dignity,” a proposal associated with the embrace of the human fetus within the protective scope of human rights law. It also included the addition of a new draft

219 The United States provided oral testimony essentially declaring no need for an international instrument given the availability of national laws prohibiting discrimination on the basis of disability and declared its intention not to ratify the Convention. See Boyd Statement, op. cit. (“It is the position of the United States today that . . . the most constructive way to proceed is for each Member State, through action and leadership at home, to pursue within its borders the mission of ensuring that real change and real improvement is brought to their citizens with disabilities. Thus we hope to participate in order to share our experiences . . . but given our comprehensive domestic laws protecting those with disabilities, not with the expectation that we will become party to any resulting legal instrument.”).

220 This official change of policy was declared and explained by the U.S. delegation in public-information side meetings at the Seventh Session of the Ad Hoc Committee charged with negotiating the treaty text. This author served as UN representative of a U.S.-based disability organization in the treaty drafting process.
article – the first of its kind in international human rights law – guaranteeing a right not to be denied food or fluids when dependent on life support, a thinly disguised attempt to internationalize the Terri Schiavo case in human rights terms.  

While the United States failed to achieve sufficient support for removal of “health services,” it did succeed in getting substantial textual revisions to the health and family provisions, the addition of “and worth,” as well as inclusion of the essence of its food and hydration provision.

On the basis of these successes, the conservative NGO movement has intimated support for U.S. ratification of the CRPD. At a minimum, it has signaled that the time for wholesale rejection of international human rights law has passed. In speaking of the CRPD, a conservative commentator recently wrote in the Weekly Standard:

Can anything good come out of the United Nations? Actually, yes . . . The positive impact [of conservative NGO participation in the CRPD drafting negotiations] teaches a valuable lesson. Many conservative organizations eschew obtaining NGO status with the United Nations because they loathe internationalism, disdain the U.N., and expect America not to be bound by these agreements.

But such standoffishness is woefully shortsighted. Like it or not, many of the most important social and legal policies of the twenty-first century are going to be materially influenced by international protocols such as this one. These agreements are molded substantially behind the scenes by NGOs – most of which are currently leftist in their political outlooks and relativistic in their social orientation. This makes for a stacked deck. If conservatives hope to influence the moral values of the future, they are going to have to hold their collective noses and get into the game.

We should increasingly expect to see this: a more active engagement by traditionally insulationist NGOs in the construction of normative meaning at the international level – accompanied by more vigorous pressure on

---

221 This author monitored all UN Member State proposals as they were made. Although the U.S. drafting proposals had partisan undertones and derivations, the United States played a positive role overall in mediating diverse international interests within the negotiations. Its renewed participation in the drafting process in 2006 was welcomed by all governments and civil society actors.

222 The much longer draft provision was, in a final compromise deal, significantly condensed and consolidated into a subprovision of the right-to-health article, which reads: “States Parties shall: . . . (f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.”

sympathetic U.S. officials to engage human rights organs in pursuit of this norm-reappropriation agenda.224

Such a policy was in fact almost adopted twenty-five years ago by the U.S. antiabortion movement, which – given a legally and politically unamenable domestic environment – came close to converting to incorporationism. Indeed, whereas states’ rights and other insulationist arguments prevailed in the 1950s and 1960s, when race and poverty were the dominant social struggles and human rights law clearly favored desegregation and racial equality initiatives, the political climate shifted in the 1970s, as the cultural wars transitioned toward Vietnam, women’s rights, and lifestyle choices. Specifically, in the loosened political climate of the seventies, “rights cultural” or “states’ rights” arguments no longer served the substantive policy agenda of opponents of abortion, contraception, and alternative family structures. These groups increasingly found themselves on the losing side of both federal and state legislation and high court decisions.

Consequently, in 1977, sensing a potential opportunity in the U.S. signature that year of the American Convention on Human Rights, the U.S. antiabortion movement turned to international human rights law. Catholics for Christian Political Action and Lawyers for Life filed a contentious complaint, Baby Boy v. United States, with the Inter-American Commission on Human Rights on behalf of an aborted fetus, alleging that domestic abortion law, at state and federal levels alike, violated international human rights law.225 Specifically, they saw strategic potential in the American Convention’s guarantee of the “right to life,” a legal protection that, according to Article 4 of the treaty’s text, begins “in general, from the moment of conception.” Drawing on this favorable provision (sans the introductory qualifier), the U.S. antiabortion petitioners asserted that an absolute prohibition on abortion, permitting of no restrictions, was mandated by the United States’ international law commitments and that

224 As an example of U.S. officials carrying out conservative social movement agendas abroad, two conservative members of the U.S. House of Representatives went so far as to send a letter to the Special Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights in early 2007, in anticipation of the Rapporteur’s scheduled trip to Nicaragua to meet with women’s groups and the government. In it, the Special Rapporteur was instructed not to discuss a legislative bill then before the Nicaraguan Congress that proposed adding life and health exceptions to the country’s comprehensive abortion ban, threatening cuts to U.S. financial support of the Inter-American Commission if he did.

225 Specifically, petitioners alleged that the United States was in violation of “Baby Boy’s” right to life given its failure to respond appropriately to the Massachusetts Supreme Court’s 1977 acquittal of a manslaughter conviction of the treating doctor and, by extension, the U.S. Supreme Court’s 1973 decision in Roe v. Wade and Doe v. Bolton. See “Baby Boy” v. United States, Res. 25/81, Case 2141, Inter-Am. Comm. H.R. (Mar. 6, 1981),
the United States was legally bound to follow this international construction of rights-based meaning. Had the U.S. antiabortion movement won this case, its activists would undoubtedly have demanded that U.S. law submit to the authoritative and final conclusions of international human rights treaty bodies. As it turns out, they lost. The Inter-American Commission, over two dissents, agreed with the U.S. government’s position that the right to life does not mandate an absolute prohibition on abortion but rather allows for reasonable restrictions in line with domestic political choices.\(^{226}\) By the time the 4–2 decision was issued in 1981, however, the political winds had again shifted in the United States and, with Ronald Reagan in the presidency, the domestic political climate had become distinctly amenable to the conservative “family values” policy agenda. Consequently, the mantle of “states’ rights” and “national sovereignty” was again taken up to insulate local decision-making structures – *in which absolutist constructions of the right to life could still effectively be pursued* – from the influence of evolving human rights law and international constructions, which have consistently rejected rights absolutism.

These conservative advocates may today rue that they did not take a more dualist approach twenty-five years ago – pushing for conservative constructions at the international level, while insulating domestically until those constructions were more fully consolidated. This is the process that appears to be being pursued today.\(^{227}\)

D. MEDIATING TECHNIQUES FOR PROMOTING U.S. ENGAGEMENT: ASSERTING CLEAR LINES AND RECURRING (SELECTIVELY) TO SUBSIDIARITY DOCTRINE

What do these instrumental realignments mean for the United States and its future engagement with human rights treaty bodies? The U.S. position is often presented, inaccurately and unhelpfully, as monolithically opposed to human rights treaty body engagement. In fact, it is most useful to view U.S. human rights policy in fluid and responsive terms: as a careful mediation between distinct political pressures – from realist and institutionalist tendencies at the foreign policy level, liberal and conservative and/or incorporationist

\(^{226}\) Alongside Brazil, the U.S. government had expressly opposed an absolutist meaning of the right to life in the drafting of the American Convention in 1969, as well as in the American Declaration on the Rights and Duties of Man. See id.

\(^{227}\) It can be seen in multiple international fora – both in norm-creating conferences and meetings of the United Nations, its specialized agencies, and regional organizations of States and in the increasing involvement of conservative U.S. organizations in policy debates on abortion in countries around the world.
and insulationist persuasions at the domestic policy level, and “political process” versus “legal process” preferences more generally. The United States, in its policy positions, mediates these pressures, bowing more or less to one or the other at distinct political conjunctures and with shifting electoral politics. Yet, importantly, as its engagement practice reveals, it does so always within the parameters of a clearly articulated and jurisdictionally focused set of legal principles that frame and anchor the U.S. policy position.

These principles, drawn from the lettered texts and doctrines of international law, serve as essential mediating tools in the articulation of U.S. human rights policy. Indeed, as presently invoked, they appear to be advanced with a distinct policy aim: to set bright-line rules with respect to the scope of treaty body competence in precisely those areas that make conservative critics, at both domestic and foreign policy levels, most politically exercised. The resulting U.S. posture at once accommodates those concerns, particularly as articulated through federalism, sovereignty, and national security objections – the priority concerns of domestic policy insulationists and foreign policy realists – while opening a viable political space in which active U.S. engagement with human rights treaty bodies may feasibly be pursued, both as an international project (as has been the case to present) and a national one (a challenge still pending).

Significantly, the United States justifies this policy response not through resort to any exceptionalist notion of its power or political culture but rather through formal, repeated, and insistent resort to two of international law’s most foundational building blocks: the doctrine of sovereignty and the principle of subsidiarity. Both doctrines are not only applicable to and regularly recurred to by all nations of the world in their own engagement policies but are foundational to the very rule of law and effective protection of human rights in the global public community. As such, formal U.S. reliance on them as the basis for its treaty body engagement policy lays a sturdy foundation for constructively advancing U.S. human rights policy toward the future, especially as advocates seek to strengthen and build the domestic dimension of the subsidiarity relationship. Their strategic use as a mediating device in U.S. engagement policy nonetheless comes clearly into focus upon considering that the United States currently invokes them before treaty bodies exclusively in their negative components: as doctrines of non-interference and deference in domestic political processes. Largely absent from the discourse is a parallel focus on their more positive aspects of assistance and support in strengthening domestic processes of human rights enforcement.

The current U.S. policy posture with respect to international treaty body engagement has three framework parts: (1) a bright-line, doctrinal statement of the substantive and spatial boundaries of treaty body jurisdiction, with a view to preserving the flexibility of foreign policy responsiveness in times of
war or threats to global public order; (2) a close attention to the technical-jurisdictional boundaries of “contentious” dispute mechanisms versus “promotional” ones, narrowing access to the former and preferring reliance on the latter; and (3) an aggressive insistence on the nonbinding nature of all international treaty body decisions and conclusions, aimed at underscoring the primacy of domestic political process.228 These three positions are advanced in virtually all international treaty body engagements, frequently as a direct preface to legal briefs and oral arguments. The first draws heavily on the negative dimensions of sovereignty doctrine, the latter two on those of subsidiarity.

While domestic advocates often view these three positions as a manifestation of the United States’ stubborn refusal to accede to the binding rules of international law, they are, in many respects, just the opposite: a mediating posture that relies on the formal rules of international law to allow the United States to engage with supervisory human rights bodies on the widest diversity of subject matters feasible at a given political conjuncture. This rule-based, jurisdictional approach serves a number of ends. On the one hand, it creates a rhetorical or juridical comfort zone in which both conservative minorities can be politically appeased and foreign policy objectives pursued within the formal letter of U.S. human rights treaty commitments; this allows the United States to attend to oppositional concerns while simultaneously confuting charges of exceptionalism. On the other hand, and most consequentially from the domestic standpoint, by changing the relevant vocabulary of resistance, it functions to diffuse and transcend the “rights cultural” rhetoric that has historically given rise to exceptionalist demands at home. Indeed, that rhetoric has served as the primary basis for mobilizing domestic resistance to human rights treaty ratification and engagement, used to caricature human rights law in absolutist terms as contrary to and in direct conflict with U.S. constitutionalism, democracy, and sovereignty.229

228 Although the three are frequently in tension, each plays a necessary role in defining the level of U.S. engagement with international treaty bodies at any given time. Advocates seeking a shift in levels or degrees of U.S. engagement would do well to pay close attention to how their strategies affect the equilibria achieved by these mediating techniques with respect to the underlying competing pressures.

The jurisdictional aggressiveness of the U.S. human rights policy may thus most profitably be interpreted as a mediating strategy in itself, designed to transcend this rhetorical and absolutist view of human rights law, and to bring it back in line with the actual foundations of human rights law. Thus, U.S. practice is to insist before human rights treaty bodies that the United States will not accept human rights law on absolutist terms. Rather, the United States underscores, it will accept human rights law and treaty body engagements only under terms that allow it (1) to engage in legitimate self-defense if national security is threatened, (2) to be the primary and final interpreter of how international law commitments will be translated into domestic laws and policies, and (3) to ensure that those laws and policies are determined in the first instance by the political branches rather than the courts. These positions do not contradict but rather are fully consistent with international human rights law, which is based on the principle of subsidiarity and the sovereign decision-making authority of democratic states.\textsuperscript{230} What sets U.S. human rights policy apart from other states, then, is not its insistence on these legal principles – which other states equally expect to be respected in their relationship with treaty bodies – but rather its forthrightness and hyperlegalized defense of them in international contexts.\textsuperscript{231} This jurisdictional aggressiveness is often popularly misconstrued as a rejection of human rights law itself, rather than simply a rejection of absolutist constructions of that law. U.S. exceptionalism in this respect is often more a question of tone and political sensitivity than of content.

It is here, however, that the mediating nature of the U.S. position is clearest. Although the aggressiveness of U.S. insistence on the primacy of domestic law and the limits of treaty body jurisdiction operates, in many ways, as a liability, it is also a goal: a rhetorical tactic to appease domestic opponents of human rights engagements by making clear that, in actively engaging with

\textsuperscript{230} “Sovereignty,” in this sense, refers not to antiquated international law notions of a “sovereign’s sovereignty” – the prerogative to do as the sovereign pleases within the domestic jurisdiction, insulated from international law – but rather to the modern democracy-based notion of “the people’s sovereignty.” W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 Am. J. Int’l L. 866, 869 (1990); see also id. at 872 (“International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.”) (emphasis added) (”[T]he word ‘sovereignty’ can no longer be used to shield the actual suppression of popular sovereignty from external rebuke and remedy.”).

\textsuperscript{231} That is, the United States is not exceptional in accepting treaty commitments only to the point of political feasibility. It is exceptional only in its forthright and aggressive defense of that policy in international and domestic fora, a defensiveness attributable both to the nation’s own hyperlegalized culture and, relatedly, to the fierceness of domestic politics on the underlying issues.
human rights treaty bodies, the United States has not surrendered any of its sovereignty, constitutional commitment to a federal form of government, or ability to engage in national defense. It demonstrates that the United States has staked out a firm legally based position from which it can safely and reliably defend democratic institutions against perceived over-reaching by international treaty bodies. With these assurances in place, opponents may be willing to relinquish their “rights cultural” arguments that human rights law conflicts with American constitutional democracy. It may thus open the door to a more sustainable human rights policy over the long term, especially at the domestic level.

1. Carving Out “No-Go” Zones: The Substantive Parameters of Treaty Body Competence

The first mediating strategy employed by the United States draws on sovereignty doctrine to assuage realist and institutionalist pressures at the foreign policy level. As discussed, whereas institutionalists in the foreign policy establishment push for greater U.S. treaty body engagement, foreign policy realists pull away from it, seeing international human rights supervision as an unnecessary and unwelcome constraint on the United States’ power and prerogative to respond by all means necessary to foreign threats, particularly in times of war and armed conflict. With an eye toward appeasing both interests, the United States has adopted a mediating policy focused on the parameters of its sovereign consent to treaty body jurisdiction. It supports a policy of “full” jurisdictional engagement with international human rights treaty bodies within their ratione materiae and ratione loci competence. The United States then defines these jurisdictional parameters, using positivist international law doctrines, as exclusive of alleged abuses arising, first, in situations of armed conflict, and, second, extraterritorially – both traditional areas of strong foreign policy sensitivities. It resorts to the full set of internationally accepted methods of treaty interpretation, consistent with the Vienna Convention on the Law of Treaties, to support this jurisdictional interpretation, including ordinary meaning, the travaux préparatoires, state practice, the context surrounding the treaty at its conclusion, and the views of eminent public jurists. Professor Murphy refers to a similar tension as the antinomy of exceptionalism versus sovereign equality. Murphy, op. cit.

Although this posture has become the focal point of scholarly and advocacy critique of U.S. human rights policy since 2001 – given deliberate removals of rights-abusive conduct to extraterritorial loci and other recent “war on terror” abuses – it is useful to take a step back and view it in larger perspective, outside of abusive applications, for what it represents at its core: a mediation tactic. Faced with powerful pressures to disengage entirely with international supervisory bodies should competence be exercised over U.S. military interventions or “war on terror” subjects – as the United States has done with other international tribunals, such as the ICC\textsuperscript{234} or ICJ\textsuperscript{235} – the U.S. decision to remain actively engaged in human rights treaty procedures while carving out limited subject matter “no-go” zones may be viewed, more positively, as a compromise strategy to conserve U.S. human rights engagement in all other areas of domestic human rights abuse. This is an enormous field, and U.S. willingness to engage it should not be minimized.\textsuperscript{236}

It is important to note, moreover, that the U.S. position in this regard is not new. It represents a long-term policy on the part of the U.S. government, regularly raised in international fora wherever U.S. conduct in situations of war, war-related recovery, or conflict abroad has been challenged.\textsuperscript{237} Initially advanced in the 1950s as a pragmatic concern in the ICCPR drafting process it is prima facie credible. More important, it is consistently and persistently advanced across international supervisory jurisdictions. This is true before the Committee Against Torture, the Human Rights Committee, the Inter-American Commission on Human Rights, and even special mandate procedures, such as UN Special Rapporteurs and Independent Experts.

\textsuperscript{234} In May 2002, President George W. Bush renounced the United States’ prior signature of the Rome Statute of the International Criminal Court, asserting in a letter to the UN Secretary-General that “the United States has no legal obligations arising from its signature on December 31, 2000.”

\textsuperscript{235} The United States withdrew from the ICJ’s compulsory jurisdiction in 1986, following the Court’s adverse decision against it in Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). On March 7, 2005, following another merits loss, it terminated the Court’s treaty-specific jurisdiction over it with respect to alleged breaches of the Vienna Convention on Consular Relations. See Journal of the United Nations: Programme of Meetings and Agenda, No. 2005/48, at 13 (Mar. 12, 2005) (reporting UN Secretary-General’s receipt of U.S. withdrawal notice to Convention’s Optional Protocol).

\textsuperscript{236} It covers areas such as discrimination, political participation, due process, health, housing, prison conditions, education, labor rights, and access to justice. U.S. opening to international supervision with respect to these domestic areas represents an important advance. This, of course, is not to say that advocates should not continue to challenge the legitimacy of the “no-go” zones, particularly unjustifiable uses of them to commit human rights abuse. It is only to say that U.S. human rights policy should not be judged exclusively on the basis of no-go zones.

\textsuperscript{237} From 1992 to 1999, for example, the United States made these arguments in litigation before the Inter-American Commission on Human Rights involving its responsibility for the incommunicado detention of 17 civilians during the 1985 U.S. invasion of Grenada. See Coard et al. v. United States, Case 10.951, Report No. 109/99, Sept. 29, 1999, Inter-Am.Comm.H.R (1999). Although the United States argued in the alternative that it had not violated the rights of the
with respect to the U.S.-led post–World War II recovery process in Europe and Japan,

it in many ways today reflects the United States’ self-awareness as the world’s sole remaining military superpower in a world in which international law constitutes “an effective but limited structure.” In consequence of that awareness, and consistent with realist pressures, the United States has persistently rejected juridical recognition of treaty body authority in situations of extraterritorial and armed conflict. This posture enables it to maintain maximum flexibility to respond to threats to national security and global public order – including the leeway to engage in what has been termed “operational noncompliance” – without having to justify its conduct before international expert bodies through resort to legitimate or permissible restrictions on rights, such as those required to protect the rights and security of others.

Significantly, in rejecting treaty body supervision in these limited areas, the United States does not claim immunity from the binding rules of international human rights and humanitarian law, nor that human rights or humanitarian abuses do not occur within no-go zones. Rather, its argument is a narrow jurisdictional one: Treaty bodies, as a technical matter, lack jurisdiction over

alleged victims under either the American Declaration or the Geneva Conventions, its principal arguments centered on questions of admissibility – that is, that the Commission lacked jurisdiction over the law of armed conflict, which prevailed as lex specialis, and, secondarily, over the extraterritorial conduct of a State.

The resulting language in art. 2 of the ICCPR (“within its territory and subject to its jurisdiction”) remains at the center of the U.S. policy position on the extraterritorial scope of human rights treaty obligations. See “Third periodic reports of States parties due in 2003: United States of America,” CCPR/C/USA/3 (2005), Annex 1, 109–11.


Jacob Katz Cogan, Noncompliance and the International Rule of Law, 31 Yale J. Int’l L. 189, 191 (2006) (defined as “noncompliance that keeps a partially effective system, such as international law, operational by reconciling formal legal prescriptions with changing community policies or by bridging the enforcement gap created by inadequate community mechanisms of control”).

Human rights law is in fact designed to allow for this sort of practical accommodation. It expressly allows for justified restrictions on the enjoyment of rights, both in the general interest and, specifically, in times of national emergency. Human rights bodies consistently, moreover – whether explicitly or implicitly – provide a higher margin of discretion to states in crafting such justified restrictions in national security situations. See, e.g., Ireland v. United Kingdom, Judgment of 18 Jan. 1978, Eur. Ct. H.R., Series A, no. 25, para. 214. Lawless judgments of 7 April and 1 July 1960, Eur. Ct. H.R., Series A, nos. 2 & 3. Philip Alston, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, has accordingly urged the United States to adopt this human-rights-based approach: rather than argue that human rights law does not apply in situations of armed conflict and thereby resist supervision, the United States might more usefully argue that its actions represent “justified” conduct in times of war or armed conflict within the frame of human rights law. Press Release, Office of the High Comm’r for Human Rights, Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, U.N. Doc. HR/27/51 (Mar. 28, 2007). The United States has decided that it prefers not to take this course, at least not at present or as an exclusive option.
the United States in such areas, given the United States’ historically based and persistently expressed position on the scope of its treaty undertakings. Under this view, human rights complaints in this sensitive foreign policy and rights-balancing area are valid but best reserved to political mechanisms of control: media attention, political pressure, congressional oversight and investigation mechanisms, international censure, and diplomatic pressure. These controls are understood as best capable of advancing the shared community goal of global human rights protection – both in most effectively restoring fundamental rights protections as soon as any national or global threat diminishes242 and by removing a structured disincentive to responsive unilateral action in situations of humanitarian crisis or other threats to global public order to which the international community cannot or will not respond.243

This is, however, the only area in which the United States should be expected to refuse supervision in its engagement policy. It is a bow to the power of foreign policy realists, enabling the United States to continue its otherwise substantively plenary engagement policy and thereby attend to other domestic and foreign policy pressures and agendas.

2. Preferring “Political” to “Judicial” Controls in Human Rights Supervision and Interpretation

The second set of mediating tactics operates to accommodate the tension not between realists and institutionalists but between engagement as a foreign policy objective and domestic-level resistance to that engagement by those who view it as a threat to constitutional democracy. Such domestic resistance, often rooted in simple partisan political preferences, generally manifests itself in two classic arguments. The first involves classic federalism concerns.244 The second departs from the perceived “undemocratic” nature of treaty bodies, in the sense that their members are not elected by nor directly accountable to U.S. citizens and relatedly are called on to interpret treaties that reflect global

242 For a supportive view of this approach in the United States’ domestic jurisdiction in times of war, see William H. Rehnquist, All the Laws but One: Civil Rights in Wartime (Random House, 1998) (discussing suspension of habeas corpus and other civil rights protections in times of war in United States).

243 It may, in this sense, be viewed as part of a global constitutive process that, although open to abuse under certain ideological postures, functions over the long term to build more enduring international institutions and community mechanisms of control.

244 See, e.g., Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390 (1999) (asserting that treaty power is inconsistent with principle that the national government’s powers are limited and enumerated and that states have rights to legislate independently in certain spheres, concluding that government must therefore “make a choice”: human rights treaties or American federalism).
majoritarian mores, not necessarily U.S. ones.\textsuperscript{245} This counter-majoritarian critique, paralleling similar critiques at the domestic level with respect to the role of the U.S. judiciary in interpreting broadly worded constitutional rights, is amplified where international tribunals are concerned, particularly given rhetorical assertions that such courts will compel the United States to adopt foreign rights constructions that conflict with democratically determined domestic understandings. This follows not only from the fact that treaty-based human rights norms tend to be drafted at a high level of generality, open to widely diverse interpretations by different social and cultural mediators,\textsuperscript{246} but also from common objections that international “experts” or “judges” have no necessary connection to the United States and are elected principally by foreign sovereigns that may have interests or agendas averse, or even hostile, to those of the United States.

Significantly, both of these “states’ rights” and “democratic deficit” objections are voiced most vehemently in one area of particular insulationist concern: the possibility of direct judicial enforcement of human rights treaty law. Insulationists object to such enforcement both by U.S. federal courts\textsuperscript{247} and by supranational human rights treaty bodies exercising adjudicatory or quasi-adjudicatory powers.

The United States answers these objections through the regular use of three specific procedural devices drawn from the negative dimension of the principle of subsidiarity. Each is designed to preserve the primacy of political control mechanisms (the preferred decision-making environment of insulationists) by limiting the jurisdictional competence of judicial or quasi-adjudicatory bodies over raw human rights complaints.

\textsuperscript{245} See, e.g., Roger P. Alford, Misusing Sources to Interpret the Constitution, 98 Am. J. Int’l L. 57, 59 (2004) (discussing his view of “international countermajoritarian difficulty”); Curtis A. Bradley, International Delegations, the Structural Constitution, and Non-Self-Execution, 55 Stan. L. Rev. 1557, 1558 (2003) (“By transferring legal authority from U.S. actors to international actors – actors that are physically and culturally more distant from, and not directly responsible to, the U.S. electorate – these delegations may entail a dilution of domestic political accountability.”); cf. John O. McGinnis and Ilya Somin, Should International Law Be Part of Our Law? 59 Stan. L. Rev. 1175 (2007) (limiting critique to “raw international law,” that is, that which has not been endorsed by the domestic political process).

\textsuperscript{246} See, e.g., Goldsmith, op. cit. at 338–39 (“In and among pluralistic democratic societies, there is a reasonable scope for disagreement about what broadly worded human rights norms require. When the human rights community demands that the United States make international human rights treaties a part of domestic law in a way that circumvents political control, it evinces an intolerance for a pluralism of values and conditions, and a disrespect for local democratic processes.”).

\textsuperscript{247} Id. at 332 (“Domestic incorporation of the ICCPR . . . would constitute a massive, largely standardless delegation to federal courts to rethink the content and scope of nearly every aspect of domestic human rights law.”).
The first involves the regular attachment of non-self-execution declarations to human rights treaties upon ratification. Such declarations assert that treaty norms do not create private causes of action for direct enforcement by the domestic judiciary. Rather, to be judicially cognizable they must first be given locally relevant content in domestically enforceable implementing legislation. This tactic bows directly to institutionalists and indirectly to incorporationists, but, in a concession to insulationists, insists that any incorporation be done by domestic legislatures or other political processes, not courts.

The second subsidiarity-based mediating tactic extends the same principle upward, from the domestic judiciary to the international treaty body system. It takes advantage of the fact that international treaty law generally makes judicial or quasi-judicial complaints mechanisms *optional* for States parties. In an effort to mediate competing institutionalist and insulationist pressures, the United States thus affirmatively accepts the jurisdiction of human rights treaty bodies for purposes of active and regular engagement, but only with respect to *non-adjudicatory* functions. Where given a choice, the United States relies to accept the contentious jurisdiction of treaty bodies, voluntarily submitting only to periodic reporting and other promotional functions that focus on “constructive dialogue” with international supervisory bodies, not rights “adjudication.” U.S. compliance with treaty obligations can thereby be discussed and debated in general ways, without an international adjudication that a specific policy or practice has violated the rights of distinct individuals and hence requires a specific remedial response, independent of domestic appreciation of the matter.

Finally, a third set of subsidiarity-based procedural devices is used in the few instances in which the United States is in fact mandatorily subject to international adjudicatory or case-based claims processes as a requirement of membership in a given intergovernmental organization.²⁴⁸ In such circumstances, the United States trains heavily on the subsidiarity-based jurisdictional rules that limit treaty body competence over contentious cases, such as the exhaustion of domestic remedies requirement, the “fourth instance formula,” and strict *ratione materiae, personae, loci, and temporis* limitations. These procedural devices, recognized in all international adjudicatory fora, are designed to give effect to the principle that human rights treaty bodies should never arrogate to themselves functions that can more immediately and effectively be undertaken at more local levels. U.S. engagement practice is correspondingly characterized by an emphasis on the extensive opportunities the litigant is or was afforded to address the issue through domestic legal and political

---

²⁴⁸ The OAS and ILO have such compulsory membership requirements.
processes and the ultra vires nature of international jurisdiction where domestic processes provide full due process of law and effective redress to the alleged victim.

3. Retaining Full Remedial and Policy-Making Discretion

The United States employs a fourth mediating technique likewise derived from subsidiarity’s negative dimension. This technique draws not on procedural devices designed to limit the exercise of adjudicatory competence, as do the former three, but rather on a subsidiarity-based doctrine of substantive deference applicable once competence is in fact asserted. Premised on the understanding that local actors are in the best position to appreciate the complexity of circumstances on the ground and, correspondingly, to understand what measures may be most effective for internalizing human rights values in distinct contexts, that doctrine mandates that a certain margin of discretion be given to competent authorities in the determination of rights abuse and in the crafting of appropriate responsive measures to it.249 This subsidiarity-based deference doctrine is given regular effect in treaty body practice: both through the standard of review used to assess state compliance with treaty undertakings and, more broadly, through the general recognition that treaty body conclusions are recommendatory in nature only, providing states ample leeway to tailor responses appropriately to local conditions and constraints.

This fourth subsidiarity-based mediation tactic is articulated in U.S. engagement practice through regular U.S. assertions that all treaty body conclusions and recommendations, although welcome and appropriately taken into broader political account, are nonbinding and have no independent domestic legal force. Such nonbindingness is asserted with equal degrees of force with respect to the final recommendations issued by treaty bodies under contentious individual complaints procedures and those derivative of constructive dialogue and periodic reporting. By doing so, the United States seeks to underscore its full retention of plenary discretion to adopt its policies the way it chooses, notwithstanding U.S. submission to and engagement with international supervisory procedures.

In making this assertion, the United States does not affirm anything that is new to international law: the nonbinding nature of human rights treaty body supervision is, as a matter of international human rights law, uncontroversial, as is the ability of states parties to adopt measures of their sovereign choosing

---

249 For a discussion of this doctrine as it has developed in the European system, see Howard Charles Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (Utrecht: Martinus Nijhoff, 1996).
in giving effect to treaty obligations. Rather, the United States uses this policy to speak directly to domestic constituencies, underscoring to insulationists that U.S. engagement will not force it to adopt policies that have not been fully mediated through the democratic process. This important mediating tactic nevertheless puts increasing strain on U.S. relationships with international tribunals. It also invites charges of paradox and double standards from domestic and international quarters alike, who often read U.S. assertions of the nonbindingness of the views and recommendations of treaty bodies as an assertion of the nonbindingness of the treaty commitments themselves. The U.S. government labors to clarify this distinction at the international level, consistently affirming its full acceptance of all treaty obligations duly undertaken. Consistent with interest management, it works less hard to make the distinction clear at the domestic level.

* * *

In light of the foregoing analysis, one might expect the United States to adopt the following postures toward treaty body engagements over the coming years. Reflecting a careful management of the underlying interest-group pressures, each reflects the continuing application of the sovereignty and subsidiarity-based mediation techniques just discussed.

- The United States will continue to ratify internationally popular human rights treaties, accelerating the process where coordinated domestic lobbying campaigns converge with Democratic majorities in the Senate. Such treaty ratifications will likely consist of the CRPD and CEDAW, as first priorities; the American Convention on Human Rights and the CRC, as second priorities; and, finally, the ICESCR.

- These treaties will continue to be accompanied by non-self-execution clauses and other declarations and understandings designed to protect

---

250 See, e.g., Certain Attributes of the Inter-American Commission on Human Rights, Advisory Opinion, Inter-Am. Ct. H.R., OC-13/93 (Ser. A) No. 13, ¶ 29 (1993) (authority of Commission to find violation does not confer “authority to rule as to how a legal norm is adopted in the internal order,” which “is the function of the competent organs of the State”). There are, of course, limits to the measures that a state can adopt and still purport to be giving effect to treaty obligations. These limits are generally expressed in the idea of an appropriate “margin of appreciation” to be granted a state, given local actors’ greater appreciation of the facts on the ground, or the “reasonableness” of government conduct in aiming to achieve a given end, taking account of conflicting duties, burdens, and resource constraints.

251 The United States is unlikely to ratify the Migrant Workers Convention, a treaty that – unlike other core UN human rights conventions – has not received a high level of support from the international community.
the primacy of domestic political processes in the determination of the scope and contours of domestic human rights protections.

- The United States will continue to participate actively in periodic reporting processes at the UN level, as well as through other promotional mechanisms envisioned in UN, ILO, and OAS law. In so doing, it will take a leading international role in identifying ways to make the process more efficient and less cumbersome for government actors, especially as its reporting obligations continue to grow with the ratification of new treaties.

- The United States will continue to decline to accept the contentious jurisdiction of UN treaty bodies.

- All individual contentious complaints of human rights abuse against the United States will instead be processed by the Inter-American Commission on Human Rights, in which the United States will continue to actively and constructively engage. This follows largely from the United States’ greater familiarity with the system’s rules and actors and ability to influence its direction and growth.

- The United States will ratify the American Convention with a view to seating a U.S.-nominated judge on the Inter-American Court of Human Rights. This will be undertaken to better influence the direction of inter-American jurisprudence, increasingly important to the United States as more contentious U.S. cases are brought to the Inter-American Commission on Human Rights.

- The United States will not, however, accept the Court’s jurisdiction over U.S. cases. This policy will continue for the foreseeable future, at least until the United States has a greater degree of confidence in the Court’s self-imposed jurisdictional limits and, most decisively, has established a politically based institutional setup for determining the content of effective remedies at the domestic level.252

- The United States will continue to resist international supervisory jurisdiction over extraterritorial abuses and those committed in armed conflict, even as it takes measures to prevent such abuses or to respond to them once they occur.

Notably, U.S. human rights policy should be expected to embrace these engagement postures irrespective of party control of the White House. Indeed, whether the White House occupant is a liberal Democrat or a conservative Republican, she or he will face the same powerful set of competing

---

252 As a political matter, the United States is also unlikely to accept the contentious jurisdiction of the Court while Canada has similarly declined to do so.
interest-group pressures at both the foreign and domestic policy levels, and will need to find a principled yet flexible way to balance and accommodate them in a single policy posture. In this complex interest-management process, the mediating techniques derived from the principles of subsidiarity and sovereignty should be expected to continue to play a dominant role. This is both because of their firm doctrinal (and hence ideologically neutral) basis in international law and because of their inherent flexibility in responding to new sets of evolving pressures and demands.

It is not, then, stasis that should be expected in U.S. human rights engagement policy, but rather continually evolving and responsive interactions among a wide variety of domestic and international actors, each with vastly different, often conflicting interests. The three predictable constants will be an active attention to the foreign policy benefits of engagement, a continuing emphasis on the primacy of domestic-level democratic decision-making processes, and adherence to a core set of doctrinally anchored mediating techniques designed to effectively mediate the two.

E. HONORING SUBSIDIARITY DOCTRINE IN FULL: FROM INTERNATIONAL DEFENSE TO DOMESTIC CHALLENGE

This chapter has aimed thus far to disentangle some of the motivating pressures and interests that are constitutive of today’s U.S. human rights policy. In so doing, it has endeavored to demonstrate that U.S. human rights policy is best viewed not as a static or fixed structural given but rather as a careful mediation among the varied interest groups that successfully exert power and sustained influence on U.S. policy makers. This vantage point serves a number of important ends. Most significantly, it serves as a civic reminder that U.S. policy making is neither structurally predetermined nor undertaken hegemonically in a political vacuum; it is determined by domestic actors with agency, creativity, and constantly adapting political strategies that interact with each other and their environment as part of a constitutive, contested, constantly evolving process. In this respect, it is vital to underscore the deep irony that results in too heavy a focus by scholars and advocates on the fixedness of the “U.S. human rights paradox,” whether attributed to U.S. rights culture, U.S.

253 In an interview given aboard Air Force One, President Obama responded to a question about the release of Guantanamo detainees by asserting that “there is still going to be some balancing that has to be done and some competing interests that are going to have to be addressed.” “Reassurance on the Economy, and Addressing Afghanistan,” New York Times, Mar. 8, 2009, at A1.

254 See generally William M. Reisman, Necessary and Proper: Executive Competence to Interpret Treaties, 15 Yale J. Int’l L. 316, 323–30 (1990) (noting that law is never static; it changes as parties continually shape behavior in accordance with law, in reliance on it, and in the context of multiple factors that shape and limit options).
global hegemony, or “the deep structural reality of American political life.”

That irony lies in the fact that civil society, pressed with the constant assertion that the United States does not or will not engage domestically on human rights matters, may stop seeking engagement. In a political democracy, when any group ceases to persistently pursue constructive policy engagement, its interests cannot be expected to be represented in mediated political outcomes.

This political reality is, in fact, directly reflected in today’s U.S. human rights engagement policy. That policy has been determined at the intersection of pressures from three primary interest groups: foreign policy institutionalists, foreign policy realists, and domestic policy insulatists. Notably absent in the equation are domestic policy incorporationists. Although these vital social protagonists have been vigorously active at the local level, working with grassroots communities and effecting local change through a variety of innovative initiatives aimed at local government, incorporationists are the first to underscore that they have been least effective in mobilizing their broad base of constituents to influence national policy makers and beltway politics, through, for example, coordinated lobbying and nationally directed political action campaigns. The unremarkable consequence is that incorporationist interests are not today meaningfully reflected in U.S. treaty body engagement policy. Rather, reflecting institutionalists’ concerns for international diplomacy, that policy has been pursued principally, if not wholly, as a foreign policy objective. It is directed to demonstrating to other nations the United States’ strong commitment to human rights, to international law, and to participation in international institutions, not to effecting domestic self-reflection, civic discussion, and constructive change within the internal legal order.

Indeed, the most notable aspect of U.S. treaty body engagement policy today is precisely its lack of any explicit goal of strengthening domestic human rights protection. To the contrary, the U.S. position has been that the nation already has strong domestic rights protections and that, beyond certain modifications determined to be necessary before ratification, it does not need to make additional internal changes in its laws and policies. Accordingly, even as the United States recognizes before international bodies that it is not perfect, has gaps to fill, and that human rights fulfillment is evolutionary, there is currently no institutional mechanism in place to systematically gather and process information from domestic actors on how the United States could improve its human rights protections. Likewise, although the United States prepares reports for submission to treaty bodies with a high degree of comprehension and detail, complying strictly with the technical aspects of its

---

255 Moravesik, op. cit. at 197.
256 Core document, op. cit.
reporting requirements, it lacks any formal institutional mechanism to receive systematically the inputs of civil society into that process, to circulate outputs, to debrief the nation on its findings, or to encourage national reflection on how identified deficiencies might be remedied.

From a democracy standpoint, it is here that the central puzzle of U.S. human rights policy is located: how can such overt lack of institutional attention to facilitating domestic deliberative human rights processes be reconciled with the United States’ formal insistence, as part of its treaty body engagement policy, on the secondary role of international treaty bodies and the primacy of domestic processes in the interpretation and protection of international human rights treaty norms? The disconnect lies in the United States’ selective and partial use of the tools of international human rights law’s subsidiarity principle to mediate the conflicting pressures faced from dominant interest groups. That is, in its treaty body engagement policy, the United States carefully invokes only the negative half of subsidiarity’s project: the “non-interference” principle, the notion that discretion should be left to more local units to determine the content of rights without intervention or assistance from “higher” ones. This exclusive fragment of subsidiarity doctrine corresponds directly to the political coordinates at which the policy agendas of U.S. institutionalists and U.S. insulationists intersect – the former favoring treaty body engagement, the latter resisting any domestic effects thereof.

The problem is that the structural integrity of human rights law cannot endure subsidiarity’s expedient fracture into constituent halves; it is constituted irreversibly of both the non-interference principle and that of intervention or assistance, each of which serves as a structural check on the other in the service of human dignity. Indeed, just as subsidiarity’s negative dimension guards against drift into centralized bureaucracy or authoritarianism, so, too, does its positive dimension stand as a bulwark against collapse into simple devolution or pure unchecked discretion. By invoking only subsidiarity’s negative side and, then, only vis-à-vis the U.S. relationship with international treaty bodies – not within the U.S. body politic itself – the United States undermines first principles of international human rights law, reimagining it as a simple exercise in local devolution.

This partial recognition accounts for why supervisory treaty body concern is so often raised in relation to U.S. reliance on certain doctrinal tools emanating from subsidiarity’s negative dimension (such as the non-self-execution doctrine), despite such tools’ solid foundation in international human rights law and broad parallel use by other nations. Indeed, that concern arises not in

---

257 Australia, Canada, India, Kenya, Mexico, and the United Kingdom, among many others, for example, likewise recognize the non-self-execution doctrine.
relation to the tools themselves, which, in conjunction with subsidiarity-based monitoring mechanisms, are fully sanctioned by international law. Rather, it relates to their regular employ in the absence of effectively functioning domestic monitoring and supervisory mechanisms that reflect subsidiarity’s affirmative dimension. Thus, for instance, although both the United States and Canada apply the non-self-execution doctrine in implementing human rights treaties, international concern tends to be expressed with respect to the former only. This is because Canada employs the doctrine not in isolation but in symmetry with an integrated system of national, provincial, and local human rights institutions. These institutions are mandated to serve in a subsidiarity capacity – internalizing and domesticating human rights values in locally relevant, democratically sanctioned, and indigenized ways, as close as possible to the individual yet within a supportive national structure.

A fuller recognition of the comprehensive nature of subsidiarity thus illuminates the central U.S. human rights challenge for the future: How to give substance to the affirmative aspects of subsidiarity in national human rights policy, while continuing to honor and respect the negative aspects. Indeed, this appears to be the path most capable of effectively accommodating all domestic interest groups. This is true both at the foreign policy level and, most directly, at the domestic level in mediating the vital tensions between incorporationists and insulationists – the former seeking greater incorporation of human rights methodologies and monitoring arrangements into the domestic legal and political system, the latter wishing to protect the primacy of domestic legal process and the boundaries of state consent. A focus on subsidiarity principles serves both ends. It does so by allowing the contested struggle over the meaning of rights, and their application to concrete, real-world situations, to take place within domestic control mechanisms, yet aided by the methodological framework and general subsidiuum of monitoring and implementation mechanisms at the local, state, and federal levels.

The central challenge for the future, therefore, lies in figuring out how to implement creative tools and institutionalized mechanisms to advance such processes at the national and subnational levels – that is, to erect the constitutive scaffolding necessary to link the individual, family, civic solidarity associations, and local, state, and national governments in a common subsidiarity-based project that places human dignity at its center. Such tools should be designed to listen to local and national communities as they discuss

and debate the contours of their own rights, to solicit their solutions for how to respond to deficiencies, and then to parlay those notions into concrete legislative, advocacy, and executive proposals at local, state, and federal levels. This project will, moreover, require a rethinking of traditional incorporationist objections to classic subsidiarity tools like the non-self-execution doctrine, shifting perspective to embrace them as democracy-enhancing and deliberation-forcing tools – ones that do not block human rights incorporation but rather actively aid the process of internalizing human rights norms in locally relevant ways.

By doing so, advocates may succeed – through organized pressure, active engagement, and a constructive shift in human rights strategy to accommodate the genuine democracy-based interests of all groups – in compelling the United States to expand its treaty body engagement policy beyond its current status as an exclusively international project, into a genuinely domestic one. That project would be one self-consciously based in the principle of subsidiarity, designed to support and sustain the localized decision-making capacities of U.S. communities to continually self-reflect on where they are, where they want to go, and how to get themselves there, within the methodological frame of international human rights law. In this way, the international treaty body system can serve its true subsidiary purpose.

The question is, how do we structure this? International human rights law, in function of its basis in subsidiarity doctrine, tends to offer an institutional outline, even while recognizing the wide variety of institutional arrangements that states adopt to govern themselves. At the national level, two general levels of institutional supervisory arrangements are called for: one for state implementation, the other for state monitoring. Both should be established in the United States as a matter of priority.

The following two sections consider each of these national-level institutional arrangements as they might profitably be established in the United States. Each of these arrangements is nevertheless fully replicable at “lower” levels of political organization – by states, counties, cities, and towns. Indeed, such institutional layering of supervisory authority is core to subsidiarity’s premise,

---

259 See, e.g., CRPD, op. cit., art. 33, (recognizing need of states parties to establish national implementation mechanisms “in accordance with their system of organization” and national monitoring mechanisms “in accordance with their legal and administrative systems”).

ensuring that decision making and monitoring occur as close as possible to the individual.

1. A National Office on Human Rights Implementation and Inter-Agency Coordination Body

The first national institutional arrangement required by an effective subsidiarity-based regime is an executive branch “focal point” on implementation.260 Ideally in the form of a National Office on Human Rights Implementation, such a focal point would be dedicated to taking care that the nation’s international human rights treaty undertakings are appropriately implemented in the domestic jurisdiction.261 As the national face for human rights implementation efforts, the focal point should be based in the Executive Office of the President and led by a person of recognized competence and expertise in the field of human rights. That individual, through the National Office, would be responsible for overseeing national efforts on human rights matters.

Importantly, as an orchestrating body, its purpose would not be to take over the administrative functions of other agencies, nor to be responsible for implementing programs or policies, outside those on transparency, capacity-building, human rights training, and small grants programs for innovative local human rights initiatives. Rather, consistent with subsidiarity, it would be dedicated to taking care that the nation’s human rights commitments were being appropriately implemented in the domestic jurisdiction, through each of the nation’s many competent departments and agencies. To this end, it would be assisted at the federal level by a coordination mechanism composed of a senior-level representative from each of the major agencies and departments of government.262 Each member would be personally responsible for overseeing, coordinating, and reporting on human rights mainstreaming efforts in her or his department, as well as responding to agency-related complaints of human rights abuse. The National Office on Human Rights would act as a back-stop on these efforts, providing coordination, a mechanism for the sharing of best

260 There is an increasing emphasis in international law and development theory on ensuring government focal points. Such focal points generally take the shape of a dedicated office within government or other policy-coordinating body. See, e.g., CRPD, op. cit., art. 33(1) (“States Parties…shall designate one or more focal points within government for matters relating to the implementation of the present Convention….”).
261 The U.S. Constitution invests the President with the power and duty to “take Care that the Laws be faithfully executed.” U.S. Const. Art. II, § 3. This undertaking includes enforcement of treaties, which form part of the “supreme Law of the Land.” Id. Art. VI.
262 See CRPD, op. cit., art. 33(1) (“States Parties…shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.”).
practices, encouragement, and advice. To ensure this essential orchestrating role, the coordination mechanism should ideally be chaired by the head of the National Office on Human Rights.

While the United States lacks any executive branch focal point for domestic-level human rights treaty implementation, it has formally established a coordination mechanism. Envisioned by President Clinton’s 1998 Executive Order 13107 and reorganized under President Bush’s 2001 National Security Presidential Directive, that mechanism must be revitalized and given life through new infusions of personnel, resources, and specific human rights mainstreaming mandates, with appropriate corresponding tools of transparency and sanction where deficiencies are identified in agency or department conduct.

It is essential, however, that such a revitalized coordination mechanism be accompanied by a National Office on Human Rights Implementation. Without a centralized, permanent, and dedicated focal point to orchestrate the human rights mainstreaming work of agency and department heads, the coordination mechanism alone will not be maximally effective. This has been the experience of the current Policy Coordination Committee (PCC) on Democracy, Human Rights, and International Operations, which has not functioned other than in an ad hoc fashion. This experience owes in large part to the absence of a dedicated executive focal point that has human rights treaty implementation as its exclusive mandate and area of expertise. Rather, the PCC has been headed by the Assistant to the President for National Security Affairs, for whom domestic-level human rights treaty implementation may be neither a priority nor interest.

A National Office on Human Rights Implementation would thus work with a coordination mechanism to ensure that each of the critical functions expressed in Executive Order No. 13107 are carried out by the appropriate authority or authorities, including the following:

- responding to inquiries, requests for information, and complaints about violations of human rights obligations that fall within each authority’s areas of responsibility;
- coordinating the preparation of treaty compliance reports to the UN, OAS, and other international organizations;
- coordinating responses to contentious complaints lodged with the same organizations;
- overseeing a review of all proposed legislation to ensure its conformity with international human rights obligations;
- ensuring that plans for public outreach and education on human rights provisions in treaty-based and domestic law are broadly undertaken;
• ensuring an annual review of U.S. reservations, declarations, and understandings to human rights treaties; and
• ensuring that all nontrivial complaints or allegations of inconsistency with or breach of international human rights obligations are reviewed to determine whether any modifications to U.S. practice or laws are in order.264

In addition to these competences, the National Office on Human Rights Implementation would likewise have the important mandate to report to Congress and to the nation annually on national human rights progress and to make recommendations on new legislation or policies that might periodically be required on the basis of information received. In this way, Congress would be regularly informed of human rights implementation measures taken throughout the nation and could supplement efforts where gaps in coverage were identified or new forms of spending were required.

The National Office would also, however, play an important facilitation role with respect to the human rights implementation initiatives undertaken by state and local authorities. It could collect information, share best practices, provide publicity, shine a national spotlight on abusive situations, and promote the scaling up of the nation’s most successful local experiments with human rights implementation. The Office would act as a centralizing repository for information generated from a variety of programs, agencies, and private sector sources on national human rights achievement, problem areas, and setbacks and could be held to political account for failures to supervise or intervene where systemic or gross abuses were uncovered.

In short, the National Office on Human Rights Implementation would serve as the nation’s focal point for ensuring that federal, state, local, and private entities were adequately supported and incentivized to implement effective and appropriate human rights policies for themselves, as close as possible to affected individuals. In this way, its mandate would be to help obviate the need for individuals to seek human rights protections and enforcement at international or even national levels. Rather, consistent with the positive dimensions of subsidiarity, it would function to ensure those protections were provided effectively at the immediate site of abuse.

2. United States Commission on Human Rights

Yet, an implementation mechanism alone is not enough to ensure an effective national system of subsidiarity-based protection for human rights. An executive

264 Executive Order 13107, op. cit. §§2–4.
focal point must be accompanied by a fully institutionalized national-level monitoring framework to ensure that all individuals have the ability to participate in national-level scrutiny and public oversight of U.S. human rights implementation commitments. Such a body, ideally in the form of a U.S. Commission on Human Rights, would serve as an independent check on implementation failures, providing a forum through which individuals could report abuses and seek political or quasi-judicial address at the domestic level, before needing to recur to international treaty bodies.

To be maximally effective it should be instituted and financed by government, but functionally independent of the political branches, consistent with the Paris Principles. Most countries honor this function by creating a national human rights commission or ombudsperson’s office, bodies that can be further replicated within subnational political units, as close to the individual as necessary.

Many U.S. states and cities in fact have bodies called “human rights commissions” or “human relations commissions.” Few, however, interpret their mandate as extending beyond investigating complaints of discrimination. A U.S. Commission on Human Rights would serve to encourage states and localities to broaden their own mandates to encompass the full field of rights recognized in the Universal Declaration of Human Rights and in the treaties ratified by the United States. A subsidiarity-based relationship would then be engaged in which the national body would serve to support the human rights protection and promotion activities of more local commissions, ensuring that protection efforts are provided throughout the nation’s diverse communities at the level closest to the affected individual.

265 See, e.g., CRPD, op. cit., art. 33.2 (“States Parties shall . . . maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.”).


268 There reportedly are only three states – Alabama, Arkansas, and Mississippi – that do not have any form of a state or local human rights or human relations commission. See Kenneth L. Saunders & Hyo Eun (April) Bang, “A Historical Perspective on U.S. Human Rights Commissions,” Harvard Univ. John F. Kennedy Sch. of Gov’t Executive Session on Human Rights Commissions & Criminal Justice, No. 3 (June 2007), at 11.

269 The U.S. Commission on Civil Rights has a similarly limited mandate.
Within this subsidiarity orientation, the U.S. Human Rights Commission would have a broad promotional and protective mandate. It would be able to issue relevant reports and guidelines on rights-respecting behavior by distinct social actors. These would include nonbinding guidelines or guiding principles on appropriate conduct in prisons, police stations, administrative agencies, and other fora in which human rights abuses frequently occur, as well as the power and responsibility to make regular (nonbinding) recommendations to all relevant stakeholders, including particularly Congress, executive agencies and departments, and the legislatures of the many states. Such recommendations would be offered in a constructive spirit of cooperation, indicating areas of concern and offering assistance in identifying the most effective measures of response in consultation with affected citizens and local or national authorities.

A national human rights commission would also engage in regular human rights education and training programs, as well as receive complaints from individuals about alleged human rights violations, initiate investigations, offer mediation services, arrive at findings, and issue recommendations to the parties and/or to relevant local authorities. It would be competent to hold nationwide thematic hearings on distinct human rights issues, especially where common themes emerged from state and local hearings, and engage in independent monitoring of national human rights conditions through a variety of means, including investigations, inquiries, and surveys. In this respect, it could gather statistics from local and state human rights commissions on the numbers and types of issues and complaints they were addressing, and ensure the broad availability of human rights documents and materials. It would thereby serve as an important conduit for receiving and processing the results of localized discussions, policies, and experiments around the nation, with a view to discussing and sharing them among a national audience.

A U.S. Commission on Human Rights would thus self-consciously be based in the principle of subsidiarity, ensuring that its interventions were aimed at supporting local decision making, participatory engagement, and community-centered implementation processes. Its work would be directed to supporting

---

270 Paris Principles, op. cit., Part A, ¶ 2 (“A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.”).

271 The Paris Principles explicitly affirm that national human rights institutions “shall, inter alia, have the following responsibilities… To assist in the formulation of programs for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles; [and] [t]o publicize human rights and efforts to combat all forms of discrimination… by increasing public awareness, especially through information and education and by making use of all press organs.” Id. ¶¶ 5, 3(f)-3(g) (emphasis added).

272 Cf. id. Part D.
localism, states’ rights, and the vital experimentation they foster, while serving in a capacity to illuminate problematic areas where national policy intervention may be necessary in function of subsidiarity’s positive assistive aspect.

In this way, a U.S. Human Rights Commission would serve as an independent check to ensure that individuals throughout the United States had effective local mechanisms through which their rights could effectively be protected in meaningful and appropriate ways at the immediate site of abuse, without needing to resort to international human rights treaty bodies for additional assistance and support.

F. CONCLUSION: INSTITUTIONALIZING SUBSIDIARITY

In his statement before the 1993 World Conference on Human Rights, U.S. Secretary of State Warren Christopher affirmed that “[i]n the battle for democracy and human rights, words matter, but what we do matters much more.”273 This continues to be the slogan of the U.S. State Department in its engagement policy with international human rights treaty bodies. That is, the United States engages such bodies in a procedurally exacting, substantively responsive, and high-level way, with the aim of setting an example for other states in deepening their own sovereign engagements with human rights treaty body supervision.

Yet what the United States in fact does in its engagement policy constitutes only half of what it seeks to encourage other states to do. The United States does not wish to encourage other states to use treaty ratification primarily as a foreign policy tool, formally preparing and presenting reports, answering questions, and then leaving the process in Geneva, away from the critical reflection of domestic constituencies. Such a process would serve no useful domestic-level purpose, either in terms of strengthening democratic institutions or enhancing human dignity. To the contrary, the United States aims to use its influence to encourage the world’s governments to bring those international processes and commitments home, to discuss them with civil society, to monitor their own internal human rights progress, and to work to correct areas of deficiency through local innovation, transparency, and corrective experimentation. That is, the United States aims to ensure that international supervision truly serves its intended subsidiary purpose: to accompany and impel forward domestic processes of human rights monitoring, supervision, and remediation at national, municipal/state, and local levels.

In this respect, if the United States genuinely wishes to set a positive, constructive example for other states, it must – as Secretary Christopher

273 Christopher, op. cit.
underscored – not only talk the talk, but walk the walk, demonstrating through self-directed action its commitment to domestic human rights processes. This cannot include engagement with the mere formalisms of international treaty obligations, using them to shield domestic processes from the influence of treaty body engagement. Rather, it must include engagement with the substance and spirit of them. This means institutionalizing domestic processes for using treaty body engagement as the impetus for a regular conversation and self-analysis of how well we are in fact standing up to human rights commitments, as we understand them in our complex and diverse communities and in the concrete contexts in which we live. It means monitoring national-level statistics and collecting regular information from the states with respect to each recognized right, regularly listening to citizens about the ways in which they feel their rights are or are not being addressed, actively considering their proposals for effective solutions, and systematically analyzing complaints of abuse and what remedies are in place to address them. Within this process, the inputs of international actors and comparative national experience can be highly instructive, even as they are never determinative for the precise contours of U.S. policy. That is, human rights engagement is not only or even principally about having a conversation at the international level; it is about starting and sustaining a *domestic* conversation, one that begins at the smallest and most local of places and works its way up to town, state, and federal authorities, within a national facilitative structure.

A U.S. treaty body engagement policy structured in this way – with the focus on domestic processes and responsive accountability to local needs – would go a long way toward transforming U.S. human rights policy from a noted example of paradox for the rest of the world to a genuine model of how human rights law and international treaty body engagement can be used, in function of subsidiarity principles, to deepen democratic processes, strengthen civil society participation, and internalize human rights protections in locally relevant, factually responsive, and genuinely meaningful ways.