

STATE COLLABORATION IN UNITED STATES RATIFICATION OF HUMAN RIGHTS TREATIES

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The process in the United States of negotiating and ratifying human rights treaties seldom engages the states, either individually or collectively. This has been a strange turn in the evolution of our federal system that I believe should be of greater interest to human rights advocates and specialists in foreign relations law. Let me suggest why.

As *The Federalist* makes clear, the framers of the Constitution were confident that the Senate, and the Senate alone, would be an ideal instrument for the expression of state interests in the treaty-making process.¹ The Senate was going to be small and its members were to be elected by state legislatures. It could, therefore, transmit the will of the states in working closely with the executive branch to make and ratify treaties. Moreover, it was expected that the Senators would be among the most able, virtuous, and therefore trustworthy citizens of the various states.²

How times have changed over the past two centuries! The role of the Senate Foreign Relations Committee, the powers and paternalism of its Chairman, and a routinely clumsy handling of foreign affairs would have been beyond the imagination of even the remarkably imaginative Founding Fathers. Nor was their intent to vest a determination of state interests exclusively within the discretion of a handful of Senators. The states, themselves, through a plenary Senate, were to decide collectively what, within constitutional limits, was in their interest. In effect, it was the states

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1. THE FEDERALIST No. 63, at 354 (Alexander Hamilton) (Goldwin Smith ed., 1901). See also TREATIES AND OTHER AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE: A STUDY PREPARED FOR THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE XXXII, S. Print 103-53, 103d Cong., 1st Sess. (1993) [hereinafter Treaties Study].

2. As the select assemblies for choosing the President, as well as the state legislatures who appoint the Senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. The Constitution manifests very particular attention to this object.

THE FEDERALIST No. 63, at 354, *supra* note 1.

that were to advise the President on international agreements and consent to their ratification.³

Surely the states have always had fundamental interests in the codification and progressive development of human rights. In the words of *The Federalist*, "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State."⁴ A little later, the Tenth Amendment, in effect, confirmed these powers.⁵ Today, the states, subject to the United States Constitution and civil rights laws, are where much of the action is.⁶ It is to state government, in the words of *The Federalist*, that "the first and most natural attachment of the people will be."⁷

Senator John Bricker knew that. Senator Jesse Helms knows that. Both of those powerful adversaries of human rights treaties have known that to a serious fault. Why don't the states themselves get the message? Why don't they become more involved in the process of ratifying human

3. U.S. CONST. art. II, § 2. ("[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur.")

4. THE FEDERALIST No. 44, at 256 (James Madison), *supra* note 1.

5. U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.")

6. Consider that state, not national, laws govern our most important social relationships. Marriage, divorce, and parenthood are matters of state law. State courts applying state law decide deeply human and moral disputes - - whether a hospital may discontinue life support for a hopelessly ill patient or force treatment for a child over the parent's religious objections, for example, or whether a child should live with a father or with a surrogate mother who has changed her mind about her surrogate status - - issues of personal rights more meaningful to many people than freedom of the press or the Fifth Amendment protections against self-incrimination or double jeopardy. Property ownership, inheritance, and the use of land are governed by state law. So are buying and selling, employment, and other contracts. So is compensation for personal injuries. Workers' compensation laws were enacted by state legislatures, and battles over tort liability and insurance coverage are won and lost there as well. The states, not Congress, decide who may practice law or medicine, be a plumber or a hairdresser, drive a car or buy a drink.

The mass of conventional crimes are defined by state laws, and the overwhelming majority of criminal cases are investigated by local police officers and prosecuted by states' attorneys in state courts. Decentralized police power and the limited functions and small number of federal law enforcement officials are crucial protections of liberty in a federal system. Consider also that, second only to law enforcement, our most important and largest social service, education, is provided by state and local schools and colleges or governed by state laws.

Hans A. Linde, *Citizenship and State Constitutions*, in *ROOTS, RIGHTS AND RESPONSIBILITIES* 386-87 (A.E. Dick Howard ed., 1992).

7. THE FEDERALIST No. 45, at 258 (James Madison), *supra* note 1.

rights treaties? Of course, many human rights advocates might shudder at the suggestion: The last thing we need is the ghost of the Bricker Amendment⁸ come alive. Let's not give the states any more ideas about how they can puncture the Commonweal. What's more, state and local governments claim that they lack resources. They will therefore do anything to avoid new obligations. Worse yet, local police and district attorneys are out to suppress, not expand, human rights. And what about Proposition 187?⁹ After all, that was the people of California speaking directly. The less we hear from the states, the better.

Despite the risks, however, I would argue that fuller and more direct collaboration by the states in the treaty making process would strengthen and perhaps accelerate our national commitment to the conventional regime of human rights. Such collaboration would make it more likely that the states would promote ratification and implement human rights treaties, even if they are not self-executing. The political branches of the federal government need to enter into a more direct, educational dialogue with the states. The Meiklejohn Civil Liberties Institute, in a letter to the United Nations Human Rights Committee concerning Proposition 187,¹⁰ questioned United States implementation of the International Covenant on Civil and Political Rights. Three out of seven questions raised by the Institute in their letter highlighted the need to educate state authorities on their responsibilities under the Covenant.¹¹ Greater collaboration by the State of California in ratifying the Covenant might well have weakened some of the appeal to California political

8. The Bricker Amendment, rooted in a fear of human rights treaties, would have provided, *inter alia*, against self-execution of treaties and international supervision of any matters essentially within the domestic jurisdiction of states. *Hearings on S. R. Res. 1 and S. J. Res. 43, Treaties and Executive Agreements, Before the Senate Comm. on the Judiciary, Subcomm. on Constitutional Amendments*, S. REP. No. 2-3, 83rd Cong., 1st Sess. (1953) [hereinafter Senate Judiciary Committee Hearings]. See Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in The United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309 (1988).

9. Proposition 187, which California voters approved in November 1994, denies access by undocumented aliens to publicly funded social services, nonemergency health care, and education. *Codified at CAL. EDUC. CODE §§ 43215, 66010.8* (West Supp. 1995); *CAL. HEALTH & SAFETY CODE § 130* (West Supp. 1995); *CAL. WELFARE & INST. CODE § 10001.5* (West Supp. 1995) [hereinafter Proposition 187].

10. Proposition 187, *supra* note 9.

11. MEIKLEJOHN CIVIL LIBERTIES INSTITUTE, ISSUE SHEETS: FACTS AND QUESTIONS ON THE FIRST REPORT OF THE UNITED STATES ON ENSURING AND ENFORCING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS IN THE UNITED STATES 56-57 (Feb. 10, 1995), *quoted in* Anne Paxton Wagley, *Newly Ratified International Human Rights Treaties and the Fight Against Proposition 187*, 17 CHICANO LATINO L. REV. 88, 98-99 (1995).

leaders of Proposition 187,¹² for example. And when we look at what, really, we have accomplished in more than a symbolic sense by our heavily qualified ratification of a limited number of human rights treaties during the past fifty years, the probable benefits of more direct state involvement in the treaty-making process would seem to outweigh the costs or risks. It is at least worth a try.

We should not forget that state constitutions and laws are often out in front of corresponding federal provisions. Consider just a few examples from three states with which I am most familiar: Oregon, Washington, and California. One judicial decision has gone beyond Title IX of the Federal Civil Rights Act¹³ in eliminating gender discrimination in sports.¹⁴ Another simply made gender a suspect classification for judicial scrutiny.¹⁵ Still another rejected polygraph tests as a condition for public employment of persons not involved in public safety.¹⁶ Courts have allowed medical patients to terminate life sustaining equipment or treatment,¹⁷ and voters in one of the three states approved of a ballot measure that provided for physician assisted suicide.¹⁸ Even if California's notorious Proposition 187¹⁹ spoils this record, we should note that California's next-door neighbor has prohibited state and local law enforcement officials from assisting the Immigration and Naturalization Service (INS) in rounding up undocumented aliens.²⁰

These actions are just a few examples of state leadership in promoting and protecting human rights. They are, of course, controversial and far from universal actions among the states. The point is, however, that states can be on the vanguard of championing human rights.²¹ Indeed, there has been a trend toward the use of state courts to implement human rights under state laws and constitutions rather than federal constitutional

12. Proposition 187, *supra* note 9.

13. 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.")

14. *Darrin v. Gould*, 540 P.2d 882 (Wash. 1975).

15. *Hewitt v. State Accident Ins. Fund*, 653 P.2d 970 (Or. 1982).

16. *Long Beach City Emp. v. City of Long Beach*, 719 P.2d 660 (Cal. 1986).

17. *In re Guardianship of Grant*, 747 P.3d 445 (Wash. 1987); *Matter of Welfare of Colyer*, 660 P.2d 738 (Wash. 1983).

18. Death With Dignity Act, OR. REV. STAT. § 127.800 (1995).

19. Proposition 187, *supra* note 9.

20. *E.g.*, 38 Or. Op. Att'y Gen. 759 (1977).

21. See generally, Judith Avner, *Some Observations on State Equal Rights Amendments*, 3 YALE L. & POL'Y REV. 144 (1984).

provisions. Moreover, state courts in the three-state region have had the courage and wisdom to cite international instruments in recent decisions.²² That should remind us that customary human rights law is made not “merely by national governmental actors within a federal system.”²³ Whether states are more progressive or retrograde in promoting human rights is not the most important point. What matters most is that, although state and local governments deal with human rights around the clock, they are not playing a direct enough role in advising the federal government on instruments that ultimately rely on implementation by all three levels of government.

I contacted several leading associations of state and local governments to see if this was true. The National Association of Attorneys General reported that they had been involved in the making of only a single treaty, the North American Free Trade Agreement (NAFTA), because of their concern that it might preempt states’ rights. They were not, however, involved in drafting NAFTA’s side agreement on labor rights.²⁴ The National Governors’ Association noted they had been a leading force in support of NAFTA, but that they never “get involved,” in their words, with any human rights treaties.²⁵ Neither the Democratic Governors Association nor the Republican Governors Association assigns staff members to follow treaty developments.²⁶ Perhaps the most striking comment was made to me by the United States Conference of Mayors. They reported that they normally deal only with “urban” as opposed to “national” issues. Because they have classified human rights treaties as national rather than urban, they have chosen not to be involved in the treaty-making process.²⁷

The underlying message of this very limited survey may be that human rights treaties are too arcane, too remote, or too trivial for busy state and local governments. Another message may be that state and local authorities rely, quite reasonably in theory, on their United States Senators

22. HURST HANNUM, MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW 11 (1985), *citing, e.g.*, *Sterling v. Cupp*, 625 P.2d 123 (Or. 1981); *American Nat’l Ins. Co. v. Fair Emp. & Hous. Comm’n*, 651 P.2d 1151 (Cal. 1982).

23. Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT’L & COMP. L. 147, 158 (1995/96).

24. Telephone Interview with Paul Beaulieu, Deputy Director and General Counsel, Nat’l Ass’n of Att’ys Gen. (Oct. 10, 1996).

25. Telephone Interview with Jim Martin, Director, Office of State and Federal Affairs, Nat’l Governors’ Ass’n (Oct. 3, 1996).

26. Taped telephone messages from Democratic and Republican Governors Ass’n (Oct. 5, 1996).

27. Telephone Interview with Chip Brown, U.S. Conf. of Mayors (Oct. 5, 1996).

to do the job.²⁸ Or, perhaps, governments presume that human rights treaties have only symbolic value by confirming the Federal Bill of Rights. Because human rights treaties, therefore, are thought to pose little or no risk to the nation,²⁹ they are not worthy of much attention. To the extent treaty provisions may exceed constitutional protections, the Chairman of the Foreign Relations Committee can be counted on to fend off any unwarranted international intrusion.

The states have therefore been missing in action during the great battles over human rights. On the other hand, a private body, the American Bar Association (ABA), has been able to deploy its forces very effectively. The saga of ABA obstructionism during the first twenty-five or thirty years of the modern human rights era is well known.³⁰ Apparently the ABA feared that the President, conniving with the Senate behind the backs of the states, would accomplish by treaty what the Congress for many years had refused to enact, namely, civil rights legislation. What is more, the long-time Chairman of the ABA Section on International Law, Eberhard Deutsch, adamantly opposed human rights treaties not only as a threat to states' rights but as a device, in his words, to destroy local government.³¹ Perhaps his New Orleans background led him to fear a sort of French-style system of prefects serving only the interests of the nation. Deutsch used this premise to launch a broader attack on the treaty clause of the Constitution.³² He described it as a "Trojan Horse," ready to unload its hidden soldiery into our midst, destroying State laws and constitutions and leaving behind the wreckage of the dream of the Founding Fathers which envisioned maintenance of the established constitutional balance between State and Federal power, and

28. After all, "in an impressive number of instances," both the Senate and the House of Representatives have been involved in the negotiation process leading to conclusion of a treaty. Anne M. Williams, *United States Treaty Law*, in THE AMERICAN SOCIETY OF INTERNATIONAL LAW, U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 40 (Hurst Hannum & Dana D. Fischer eds., 1993).

29. RICHARD B. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT 13 (1981).

30. For a chronicle of the ABA's opposition to human rights treaties, see NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION, *passim* (1990). "States' rights were ardently defended and often presented as the only bulwark against an expansive federal government that would use its powers to impose a host of liberal programs on states and local communities, programs such as the elimination of racial restrictions on property ownership, marriage, and education." *Id.* at 12.

31. *Id.* at 115-16. In Deutsch's words, "[g]ilding of multipartite treaties with such idealistic immediate goals as the prevention of genocide and the promotion of human rights cannot conceal their underlying long-range objective to destroy local government while expanding the sphere of national power." Senate Judiciary Committee Hearings, *supra* note 8, at 145.

32. *Id.*

preservation of the Bill of Rights intact.”³³ The ABA has, of course, changed its mind. Since it began to support human rights treaties in the 1970s, the ABA has played a constructive role in the process of ratifying them. But it is not a role that can ever replace the states.

The *perceived* importance of states’ rights in the treaty-making process is clear from a statistical profile of arguments made against human rights treaties.³⁴ Moreover, the trend is toward greater reliance on the states’ rights argument to oppose human rights treaties.³⁵ It is ironic that precisely because “human rights fall in the domain of states’ rights,”³⁶ the Senate, without bothering to consult the states directly or to solicit their testimony, has an excuse for refusing to ratify a treaty that might serve their interests or for nonaction.³⁷ The question, however, should be about *human* rights and not *states’* rights. It should not be a question of what a few Senators perceive states’ rights to be, as a technique for blocking human rights treaties. Instead, the question should be how to involve the states in a fuller, more open dialogue about the human rights with which they are concerned on a daily basis.

It is high time, therefore, that we reinvigorate the states’ role at the federal level in the ratification process, as the Framers of the Constitution intended. We need to stir up a sluggish process. “[C]urrent opposition to

33. *Id.* at 119.

34. Kaufman & Whiteman, *supra* note 8, at 331.

35. For example, between 1953 and 1979 there was a reported increase of nearly fifty percent in the percentage of total arguments against human rights treaties (16.8% to 23.4%).

36. Kaufman & Whiteman, *supra* note 8, at 313.

37. Of course, the reasons for the poor record of the United States in acceding to human rights treaties extend beyond the issues of states’ rights:

Although the United States has been in the vanguard of observance of human rights, the issue of entering into legally binding human rights treaties has been controversial. While sometimes there is a difference on the nature of human rights to be guaranteed, often the controversy has extended to treaties guaranteeing human rights on which there is wide agreement. Various administration officials and Senators have contended that human rights should remain a matter of domestic jurisdiction and have expressed concern that internationally determined human rights could have an impact on rights of American citizens under the U.S. Constitution. They feared that since in the United States treaties are the law of the land, human rights treaties could supersede national and state laws. Other administration officials and Senators emphasized the value of the conventions in promoting human rights in other countries and believed that the United States should become a party to maintain its leadership in the human rights fields. They contended the United States usually had a higher standard of human rights than called for in the treaties, and in any event no international agreement could supersede rights guaranteed by the Constitution.

TREATIES STUDY, *supra* note 1, at 231.

human rights treaties is a legacy of the 1950's."³⁸ Enlisting greater state collaboration would, of course, impose burdens on the human rights movement. We can expect, for example, that states, individually or collectively, would oppose as well as support ratifications. But that is democracy and the federal system at work. And who knows? Broader collaboration might help convert skeptical state authorities. It might also diminish the significance of federal-state clauses in human rights treaties³⁹ and the appeal of reservations to them on the basis of so-called states' rights. We might then avoid some of the Swiss cheese effect of this country's treaty commitments to the international protection of human rights.

38. KAUFMAN, *supra* note 30, at 2.

39. *Id.* at 171.