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Alice A. Noble

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THE COVENANT ON CIVIL AND POLITICAL RIGHTS
AS THE LAW OF THE LAND.

I. INTRODUCTION

More than three decades ago, at the United Nations San Francisco Conference, President Truman announced that "we have good reason to expect the framing of an international bill of rights acceptable to all nations involved. That bill of rights will be as much a part of international life as our own Bill of Rights is a part of our own Constitution."1 While the expectation of the framing of an international bill of rights has been realized in the International Covenant on Civil and Political Rights2 and the International Covenant on Economic, Social and Cultural Rights,3 the United States has lagged far behind other nations4 in making these Covenants "as much a part of international life as our own Bill of Rights is a part of our own Constitution."5 Although both of these Covenants were opened for signature in 1966 and entered into force in 1976,6 to date, neither Covenant includes the United States as a member party.

In a speech before the United Nations in March, 1977, President Carter stated that he will urge congressional approval of these Covenants.7 Both


4. Among the parties to both the Covenant on Civil and Political Rights, supra note 2, and the Covenant on Economic, Social and Cultural Rights, supra note 3, are the United Kingdom of Great Britain, Northern Ireland, Czechoslovakia, the German Democratic Republic, the Federal Republic of Germany, Mongolia, Ukraina Soviet Socialist Republic, the Union of Soviet Socialist Republics. United Nations, Multilateral Treaties in Respect of Which the Secretary General Performs Depository Functions 95-106 (1977).

5. See note 1 and accompanying text supra.

6. See notes 2 & 3 supra.

7. 76 DEP'T STATE BULL. 329, 332 (1977). The President stated:

The basic thrust of human affairs points toward a more universal demand for fundamental human rights. The United States has a historical birthright to be associated with this process.

... To demonstrate [the commitment of the United States to human rights] I will seek congressional approval and sign the U.N. covenants on economic, social and cultural rights and the covenants on civil and political rights. And I will work closely with our own Congress in seeking to support the ratification not only of these two instruments but the United Nations Genocide Convention and the Treaty for the Elimination of All Forms of Racial Discrimination as well.

Id.
Covenants have been signed by the United States and on February 23, 1978, President Carter delivered them to the Senate for advice and consent to ratification. Doubtless much heated debate will be generated when, and if, they are introduced in the Senate since this has been the case in the senatorial debates during the more recent, largely unsuccessful hearings on other human rights treaties, such as the Genocide Convention. Indeed, in recent years, human rights treaties have generally fared poorly in the Senate despite the fact that Americans have often been key influences in the drafting of these conventions. It seems anomalous that a "world-recognized" leader in causes relating to human rights, a nation born out of a determination to exercise freely the inalienable rights so boldly proclaimed by the Founding Fathers in the Declaration of Independence, should fail to be a party to international promises of human rights protection.

Historically, the United States has not hesitated in becoming a party to treaties concerned with the rights of individuals. For example, one of the first treaties entered into by the United States, the Definitive Treaty of Peace with Great Britain, stated that "no Person shall suffer future Loss or Damage either in his Person, Liberty or Property on account of his participation in the Revolutionary War." This was followed by other treaties

10. In 1963 President Kennedy sent the Supplementary Convention on the Abolition of Slavery, The Slave Trade and Institutions and Practices Similar to Slave Trade, April 30, 1957, 296 U.N.T.S. 3, and the Convention on the Political Rights of Women, March 31, 1953, 193 U.N.T.S. 135, to the Senate with a letter urging the Senate to consent to their ratification. 49 DEP'T STATE BULL. 23 (1963). It was not until 1967 that hearings were held on these documents. See Hearings on Executive J, K, and L, 88th Cong., 1st Sess. (1963); 90th Cong., 1st Sess. (1967); id. Part 2 (1967). Of these conventions only the Supplementary Slavery Convention was approved by the Senate. See 113 CONG. REC. 30788-62, 30902-09 (1967). This was the first United Nations Human Rights Convention approved by the Senate. For a general discussion of congressional action with respect to such treaties, see L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 968-69 (1972).

One Senator made the following comments concerning the failure of the Senate to act on the Convention on the Political Rights of Women:

The Human Rights Convention on the Political Rights was adopted by the General Assembly of the United Nations in December of 1952.
It was opened for signature on March of 1953, 14 years ago. As in the case of every Human Rights Convention, the Senate has failed to ratify the Convention on Political Rights of Women. President Kennedy sent this convention to the Senate 4 full years ago.
Result: no action by this body.

12. Id. art. VI.
which provided for such freedoms as the right to dispose of property upon death,\textsuperscript{13} the right to counsel under the sixth amendment,\textsuperscript{14} and equal protection rights.\textsuperscript{15} In an article on international protection of human rights, Professor Bitker points to these early treaties as demonstrating that "concern for human rights by treaty is traditionally American."\textsuperscript{16} Accordingly, the United States' endorsement of the recent treaties dealing with human rights would be consistent with this tradition. However, despite this tradition and the urgings of Presidents Truman,\textsuperscript{17} Kennedy,\textsuperscript{18} Nixon,\textsuperscript{19} and Carter,\textsuperscript{20} the Senate has shown strong opposition to United States involvement in such multilateral agreements by refusing to consent to United Nations documents,\textsuperscript{21} and by attempting a constitutional amendment of the treaty power through the proposed Bricker Amendment.\textsuperscript{22}

The purpose of this comment is to consider the constitutional arguments which have been raised by critics of American involvement in international human rights treaties, and to weigh the validity of the constitutional caveat to United States ratification. Part I of this comment will deal with the debate over the constitutional implications of treaty-making in general, while Part II will focus upon the constitutionality and merits of various provisions of the Covenant on Civil and Political Rights.

II. HUMAN RIGHTS TREATIES AND THE SCOPE OF THE TREATY POWER

It is submitted that a determination of the scope of the treaty power is essential when debating the wisdom of entrance into human rights agreements. Opponents of such agreements have asserted that the scope of the treaty power is so broad that treaties may interfere with constitutionally pro-

\textsuperscript{14} Treaty of Peace, Friendship, Commerce and Navigation, Dec. 12, 1828, United States-Brazil, art. XII, 8 Stat. 390-98, T.S. No. 34.
\textsuperscript{15} Treaty of Peace, Friendship, Commerce and Navigation, May 13, 1858, United States-Bolivia, art. III, 12 Stat. 1003-22, T.S. No. 32.
\textsuperscript{16} Bitker, The Constitutionality of International Agreements on Human Rights, 12 SANTA CLARA LAW. 279, 280 (1972).
\textsuperscript{17} See note 9 and accompanying text supra.
\textsuperscript{18} See note 10 and accompanying text supra.
\textsuperscript{19} See note 9 and accompanying text supra.
\textsuperscript{20} See note 7 and accompanying text supra.
\textsuperscript{21} See generally L. SOHN & T. BUERGANTHAL, supra note 10, at 913-34.
\textsuperscript{22} See Treaties and Executive Agreements: Hearings on S.J. Res. 1 and 43 Before a Subcomm. of the Senate Comm. on the Judiciary, 83d Cong., 1st Sess. 1-12, 823-27 (1953) [hereinafter cited as Treaties]. The constitutional amendment proposed by Senator Bricker provided, \textit{inter alia}, that a treaty which denied or abridged the constitutional rights of United States citizens should be of no force or effect. \textit{Id.} For a compilation of the various texts of the proposed "Bricker Amendment," see W. BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 110-12 (3d ed. 1971). See also L. SOHN & T. BUERGANTHAL, supra note 10, at 948-61.
Thus, this section will examine the arguments made for and against human rights treaties in terms of the proper reach of the treaty power.

A. Constitutional Analysis

One source of opposition to entrance by the United States into international human rights agreements has been the supremacy clause of the Constitution which provides: "The Constitution and the laws of the United States which shall be made in pursuance thereof, and all Treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land . . . ." 24

This clause has been construed to mean that while laws of the United States must be made in pursuance of the Constitution, the treaty power is not subject to that limitation. 25 For example, concern that the Genocide Convention would interfere with the rights of freedom of speech and of the press, and the rights of the criminal defendant, led the American Bar Association to campaign against its ratification. 27 Moreover, the Bricker Amendment sought to invalidate treaty provisions which deny or abridge any right enumerated in the Constitution. While the proposed amendment failed, hearings regarding it generated considerable debate which evidenced a fear on the part of some senators that treaty provisions may supersede the Constitution. 29 A year prior to the hearings, the future Secretary of State, John Foster Dulles, stated that treaties are "more supreme than ordinary laws, for Congressional laws are invalid if they do not conform to the Constitution . . . [while] treaties can . . . cut across the rights given the people by the Constitution." 30

This proposition that treaties are not subject to other constitutional provisions has been strongly refuted by the commentators. Louis Henkin, for instance, considers such an interpretation of the treaty power to be a "myth." 31 Nevertheless, the belief that the treaty power is not limited by

23. See generally note 22 supra. See also notes 27-30 and accompanying text infra.
24. U.S. Const. art VI.
25. See generally note 22 supra. See also notes 27-30 and accompanying text infra. The fact that one version of the Bricker Amendment failed by only one vote to receive the two-thirds majority of the Senate required for passage is evidence of the pervasiveness of this interpretation of the supremacy clause. See 100 Cong. Rec. 2349-58, 2364-75 (1954).
26. See note 9 and accompanying text supra.
27. See L. Sohn & T. Buergentahl, supra note 10, at 951. Frank Holeman, then President of the American Bar Association, criticized the move toward ratification of the Genocide Convention and other such treaties, claiming that the agreements contradicted the American concept of inalienable rights by purporting to grant, rather than protect, human rights. Holeman, International Proposals Affecting So-Called Human Rights, 14 Law & Contemp. Prob. 479, 482 (1949).
28. See note 22 supra.
29. See Treaties, supra note 22, at 1-12, 823-27.
30. Id. (remarks of Senator Bricker quoting John Foster Dulles).
the Constitution appears to have been a large factor in the failure of the United States to enter into the United Nations treaties. 32

Although there is no United States Supreme Court decision directly holding that the treaty power is limited by the Constitution, there is dicta which recognized such a limitation. In Geofroy v. Riggs, 33 the Court stated: "It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids ... ." 34

Similarly, in Missouri v. Holland, 35 the Supreme Court addressed the extent of the treaty power. In that case the State of Missouri brought suit to enjoin the enforcement of a treaty between the United States and Great Britain which permitted the federal government to regulate activities affecting migratory birds. 36 Missouri claimed that the treaty violated the tenth amendment 37 in that it infringed upon the state's property rights and sovereign powers. 38 Earlier decisions of the district courts had invalidated acts of Congress which attempted to regulate the killing of migratory birds as an improper exercise of power over birds owned by the states in their sovereign capacity. 39 The Holland Court distinguished those decisions, however, on the ground that the statute involved in Holland had been enacted by Congress pursuant to a treaty. 40 The Court stated: "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could ... ." 41 Nevertheless, in upholding the treaty, the Supreme Court was careful to note in dictum that the "treaty in question does not contravene any prohibitory words to be found in the Constitution." 42

The scope of the treaty power was also addressed in United States v. Pink, 43 and in United States v. Belmont, 44 but in the context of a presiden-
tial agreement known as the Litvinov Assignment. In those cases, the Court, in upholding the presidential agreement, assumed that it was subject to the limitations of the fifth amendment. It is questionable, however, whether a presidential agreement has the same constitutional status as a treaty. A treaty is an agreement made by the President with the "advice and consent" of the Senate, requiring a two-thirds vote to be put into effect. In contrast, a presidential agreement is entered into by the President alone. Moreover, there is no mention in the supremacy clause of presidential agreements. Therefore, it may be argued that, although agreements such as those in Pink and Belmont are subject to constitutional limitations, treaties are not. Nonetheless, the Court in Pink broadly stated that "[a] treaty is a 'Law of the Land' under the Supremacy Clause of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity." According to one commentator, the peculiar facts of the decisions dealing with the Litvinov Assignment mitigate the extreme statements of this opinion.

In Reid v. Covert, another case involving a presidential agreement, the Court made what may well be its strongest statement on the treaty power and its constitutional limitations. In Reid, the defendant was tried and convicted of murder by a United States military court in Great Britain.
under a presidential agreement which "permitted United States military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen and their dependents." The constitutional protection provided by the Bill of Rights, including the right to trial by jury, was not applied to the proceedings before the military court. The Supreme Court, in a plurality opinion, affirmed the federal district court's reversal of the conviction, holding that the Constitution in its entirety applied to the trial:

There is nothing in [the supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with provisions of the Constitution . . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions . . . . The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and Senate combined.

Nevertheless, since only four justices clearly held that the prohibitions of the Constitution were designed to apply to all branches of the government, the issue whether treaties are subject to constitutional limitations based on the supremacy clause cannot be definitively resolved on the basis of case law alone.

Outside of the supremacy clause arguments, support for the position that treaties are subject to other provisions of the Constitution can be found in Marbury v. Madison. There the Supreme Court established the overriding importance of the Constitution in holding that this document was ordained by the people as the fundamental law to which all statutes enacted

54. 354 U.S. at 15.
55. Id. at 16-17 (footnotes omitted).
56. In a concurring opinion in Reid, Justice Frankfurter concluded that in capital cases, the exercise of court-martial jurisdiction over civilian dependents in time of peace cannot be justified by the power of Congress under article I to regulate land and naval forces, when considered in light of the constitutional rights of the criminal defendant. 354 U.S. at 49 (Frankfurter, J., concurring). In a separate concurrence, Justice Harlan concluded that with respect to capital offenses, article 2(11) of the Uniform Code of Military Justice, Pub. L. No. 506, art. 2, § 11, 64 Stat. 108 (1950), "cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace." 354 U.S. at 65 (Harlan, J., concurring). It is not known how the two concurring Justices would have held had the offense not been capital, or to what extent the seriousness of the crime and the concomitant potential deprivation of the defendant's liberty influenced their decisions.
57. 5 U.S. (1 Cranch) 137 (1809).
thereunder are to be subordinated. 58 Thus, it is submitted that the requirement of constitutionality should exist for treaties as it does for statutes. Although this position has never been explicitly adopted by the Supreme Court, it seems that treaties should be consistent with constitutional protections considering that the Constitution is the fundamental law from which the treaty power is derived. 59 It would be anomalous to claim that a treaty could override the document from which the power to make it emanates.

Further support for this proposition can be found in United States v. Curtiss-Wright Export Corp., 60 where the Supreme Court stated that the power of the President, as the sole organ of the federal government in the field of international relations, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." 61 Therefore, it is submitted that language in Supreme Court decisions and the structure of the Constitution form the basis for strong arguments that the treaty power is limited by the Constitution.

B. Pragmatic Analysis

Another obstacle to the acceptance of human rights treaties is the belief that the Constitution prohibits treaties from dealing with domestic matters. The treaty power, it has been asserted, only covers international subjects, to the exclusion of domestic matters. 62 Certainly the rights to be accorded citizens are a domestic concern; however, it is submitted that to separate the internal and external affairs of a modern nation is to ignore the necessary concurrence of these interests. 63

The Supreme Court shed some light on the issue of whether the treaty power extends to domestic affairs in Santovincenzo v. Egan, 64 where the Court stated that the treaty power is

broad enough to cover all subjects that properly pertain to our foreign relations, [including] . . . the rights and privileges of citi-

58. Id. at 176-77.
59. See McLaughlin, supra note 50, at 740.
60. 299 U.S. 304 (1936).
61. Id. at 320 (emphasis added).
63. See Restatement (Second) of Foreign Relations Law of the United States § 117, Comment b (1965). Comment b provides: "Matters of international concern are not confined to matters exclusively concerned with foreign relations. Usually, matters of international concern have both international and domestic effects." Id.
64. 284 U.S. 30 (1931). Santovincenzo involved a treaty between the United States and Italy which provided that upon the death of a citizen or subject of either of the countries within the territories of the other, his effects, if the decedent lacked next of kin and died intestate, would be delivered to the nation of which the deceased was a subject or citizen. Id. at 35-36. The Supreme Court held that the United States, under the treaty-making power, may determine the disposition of property of aliens, and that such an agreement would supersede the conflicting law of any state. Id. at 40.
The question remains, however, as to what subjects outside of the three areas delineated by the Santovincenzo Court are properly an international concern. Specifically, do international human rights agreements fit within the reach of the treaty power?

Traditionally, international law regulated individual rights of aliens but did not deal with the rights of citizens in relation to their own state. The Nuremburg Tribunal, however, established that the relation of a government to its own citizens is also amenable to international regulation. This precedent is followed in the Covenant on Civil and Political Rights insofar as it regulates the treatment of all individuals within the borders of member States, both citizens and aliens. By participating in and espousing the views of the Nuremburg Tribunal, it is submitted that the United States has established precedent for joining international agreements that protect the political and civil rights of its citizens. Thus, the scope of the treaty power is arguably broad enough to include certain areas not formerly considered to be of international concern.

It is submitted that this expanded view of the scope of the treaty power is a result of the growing interdependency of the world’s peoples. It is this growing interdependency, it is suggested, that has made such agreements a necessary ingredient of world peace. Professors MacDougal and Leighton state: "It is a commonplace in a world threatened by new war and atomic destruction that all peoples everywhere are today interdependent for securing all their basic demands, that mankind today lives in what is in fact a world community." This wane of isolationism, however, does not...
diminish the importance of individual nation-states. As Professors MacDougal and Leighton maintain: "How power is structured internally in a nation-state, how the individual human being is related to centrally organized coercion, affects very directly how the nation-state seeks to exercise power in the world arena, whether by violence or by peaceful procedures." 74 Thus, in view of the potential for world strife arising from the disregard of individual human rights, international human rights treaties are advocated as a necessary mechanism whereby stability and security may be brought to the world community. 75

Based on this view, commentators have suggested pragmatic tests, outside the language of the Constitution and the courts, for determining the proper scope of the treaty power. To Professors MacDougal and Leighton, the fundamental issue is whether human rights and security are sufficiently at stake to justify the United States' assuming the obligations demanded by the particular treaty in return for other nation-states' assuming reciprocal obligations. 76 Professor Gardner, on the other hand, finds this threshold question unnecessary since, in his view, guarantees of human rights are essential to world order. 77 The current unwillingness of the United States to participate in international covenants is, according to Professor Gardner, a "costly anachronism." 78 Thus, it is submitted that whether applying the analysis of Professors MacDougal and Leighton or that of Professor Gardner, the protection of human rights is no longer a matter of mere altruism; it is a fundamental requisite for peace. The great potential for world peace that exists when nations exchange promises to set and to meet high standards in the treatment of their citizens cannot be denied. In the words of President Kennedy, peace is, "in the last analysis, basically a matter of human rights." 79

C. Immediate Benefits of Entrance into the Covenant

Besides the goal of peace through internationalizing human rights, other more immediate consequences have been cited as likely to flow from United States' ratification of human rights treaties. The United States would be in a better legal and moral position to prevent infringement of the Covenants by

74. MacDougal & Leighton, supra note 71, at 493.
75. The history of Nazi Germany illustrates the potential for international strife which is created when one nation within the world community violates the fundamental rights of individuals. Such a nation has a strong motive to engage in aggression abroad in order to turn the national consciousness away from domestic suffering and toward the aggrandizement and glorification of the state. As Professor Gardner observes: "Dictators typically employ foreign adventure to solidify their domestic power ...." Gardner, supra note 31, at 908.
76. MacDougal & Leighton, supra note 71, at 506.
77. Gardner, supra note 31, at 908.
78. Id. at 907.
other ratifying countries. Ratification will also increase the United States’ influence in the drafting of legal norms in this area. The United States would thus be able to assume its role as world leader in expanding its traditional support of basic human rights in the more direct and relevant forum of the United Nations.

III. THE COVENANT ON CIVIL AND POLITICAL RIGHTS AMIDST THE TREATY POWER AND CURRENT CONSTITUTIONAL LAW

This section will focus on two specific issues pertaining to the Covenant on Civil and Political Rights: 1) whether the provisions of the Covenant conflict with the United States Constitution; and 2) if conflicts do exist, whether they can be cured by a reservation or an understanding. Before discussing the potential constitutional debates, a general explanation of the Covenant on Civil and Political Rights is in order. The Covenant is a statement of the civil and political rights which member states are to ensure their citizens. The notion of “inalienable rights”—paralleling the concept of individual rights in the Declaration of Independence of the United States—pervades the treaty. The preamble to the Covenant states that recognition of the “rights of all members of the human family is the foundation of freedom, justice and peace in the world,” and that “these rights derive from the inherent dignity of the human person.” Although the Covenant provides for suspension of the treaty in time of an officially proclaimed public emergency that threatens the life of the nation, the Covenant prohibits even the temporary denial of certain specified rights. This approach is in keeping with the “inalienable rights” concept espoused by the Covenant.

81. Id.
82. A “reservation” is a stipulation made by a ratifying state indicating that it will not abide by one or more of the provisions of the treaty because of conflicting domestic law. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 124 (1965). Reservations are also appropriate when a state is unwilling to expand or change its present law in order to comply with treaty expectations. A state may not formulate a reservation that is incompatible with the object and purpose of the treaty. See Vienna Convention on the Law of Treaties, art. 19, United Nations Conference on the Law of Treaties (March 26-May 24, 1968; April 19-May 22, 1969) 289, U.N. Doc. A/39-27 (conf.) (1969).
83. If a reservation is not appropriate, an “understanding” may be made. An understanding is a stipulation as to the signatory nation’s interpretation of a specific provision which need not be assented to by other parties, and which is effective as between those parties who agree to that interpretation. See BISHOP, supra note 22, at 98-99.
84. Covenant on Civil and Political Rights, supra note 2, passim.
85. Id., preamble.
86. Id.
87. Id. art. 4, para. 1.
88. Id. art. 4, para. 2. These rights are as follows: the right to life, id. art. 6, paras. 1, 2; freedom from torture, id. art. 7; freedom from retroactive criminal laws, id. art. 15, para. 1; freedom from imprisonment for civil debt, id. art. 11; the right to be recognized as a person before the law, id. art. 16; and the right to freedom of thought, conscience, and religion. Id. art. 18.
The basic assumption of the treaty that human rights are inalienable and must be protected has long been strongly supported by the Constitution and the history of the United States. As to the enumerated rights which member states agree to enforce, Professor McLaughlin contends that "it can be stated with some confidence that the rights enumerated in the Covenant on Civil and Political Rights are not inconsistent with those protected in the United States, with the possible exception of . . . the 'right of self-determination.'" 89 Professor MacChesney claims that although some of the proposed articles differ from comparable provisions in our Bill of Rights, 90 the interests of the United States may be protected by an article in the Covenant which provides that nothing in the document will lower existing standards in any country. 91 It is submitted, however, that the assertions of Professors McLaughlin and MacChesney may not be accurate since several provisions of the Covenant are arguably inconsistent with the Constitution.

A. Equal Rights

The scope of the Covenant's protection of equal rights is, it is suggested, difficult to ascertain. In article 2, the nations which are parties to the treaty undertake to ensure all individuals "the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." 92 There is some question as to whether the words "without distinction" are to be taken literally.

It is submitted that a literal interpretation of the Covenant provision forbidding distinction on the basis of sex would not be in harmony with Supreme Court cases upholding statutes that treat men and women differently. 93 Historically, until the early 1970's, gender-based discrimination was held to be constitutional. 94 For example, Supreme Court decisions let stand 1) a statute limiting the hours women were permitted to work; 95 2) a

90. See notes 92-181 and accompanying text infra.
91. MacChesney, International Protection of Human Rights in The United Nations, 47 NW. U.L. REV. 195, 216 (1952). Professor MacChesney was referring to article 5 of the Covenant which states: "There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant . . . on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." Covenant on Civil and Political Rights, supra note 2, art. 2, para. 20.
92. Covenant on Civil and Political Rights, supra note 2, art. 2, para. 1.
95. Radice v. New York, 264 U.S. 292 (1924). The Radice Court stated:

The two sexes differ in structure of body, in the functions to be performed by each, in the
statute which included on jury lists only women who volunteered, while men were required to serve;96 and 3) a statute prohibiting women from working as barmaids unless a wife or daughter of the owner.97 In each of these cases the Court required only a showing of rational purpose for the statute to meet constitutional standards, and a legislative purpose to protect the role of women as the center of home and family life was considered to be sufficiently rational.98

In this decade, the Court has struck down an increasing number of sexually discriminatory statutes, but no clear pattern has yet emerged. One line of cases, including Reed v. Reed99 and Frontiero v. Richardson,100 has demonstrated a departure by the Court from its previous tolerance of gender-based discrimination by the government. In Reed, the Court overturned a statute that gave preference to men, over equally qualified women, in granting administration over a deceased's estate.101 The statute struck down in Frontiero permitted female members of the armed forces to claim their spouses as dependents only upon a showing that the husbands received over one-half of their support from their wives; male members, on the other hand, were not required to make any such showing in order to claim their spouses as dependents.102 Applying what was purportedly a rationality standard, subsequent decisions have held that social security payments could not be awarded only to widows and not to widowers;103 and that a statute requiring parental support payments to be made for boys up to the age of 21, but for girls only up to the age of 18, is unconstitutional.104

To date, the Court has not consistently applied a "strict scrutiny" test105 to sex-based classifications. Instead, varying levels of rationality have

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amount of physical strength, in the capacity of long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation.

Id. at 295, quoting Muller v. Oregon, 208 U.S. 412, 422 (1908). The Court further stated that "[t]he inequality produced in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary.'" 264 U.S. at 296, quoting Arkansas Natural Gas Co. v. Railroad Comm'n, 261 U.S. 379, 384 (1923).

98. See Hoyt v. Florida, 368 U.S. 57, 61-62 (1961). Justice Harlan, writing for the Court, stated: "Despite the enlightened emancipation of women from the restrictions and protections of bygone years . . . woman is still regarded as the center of home and family life." Id.
101. 404 U.S. at 77.
102. 411 U.S. at 690-91.
105. The strict scrutiny standard is applied by the Supreme Court in reviewing "classifications which touch upon fundamental constitutional values or use a criterion for classification which itself violates a fundamental constitutional value." NOWACK, ROTUNDA & YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 524 (1978). In applying the strict scrutiny test, the justices
been required for the classification scheme to be found constitutional. In *Craig v. Boren*, the Court departed from the mere rationality standard but did not go so far as to apply a strict scrutiny test: "[T]o withstand constitutional challenge, previous cases establish that classifications by gender must be *substantially related to achievement of these objectives.*"

In another line of cases, however, the Supreme Court has clearly upheld statutes treating men and women distinctly. For instance, in *Kahn v. Shevin*, the Court upheld a provision of a Florida statute granting widows, but not widowers, an annual property tax exemption of five hundred dollars. Also sustained, in *Schlesinger v. Ballard*, were a pair of federal statutes which provided that, having twice been passed over for promotion, a male officer would be mandatorily discharged regardless of the length of his service, whereas a woman officer could be discharged under identical circumstances only after she had served a minimum of thirteen years. This line of cases also includes a decision upholding a provision in the Social Security Act that permitted retired women to receive higher benefits than retired men, and a decision permitting a state to bar women from working as guards in contact areas in all-male penitentiaries.

The phrase "without distinction" in article 2 of the Covenant on Civil and Political Rights seems to demand a greater measure of equality than the Supreme Court has been willing to afford. Moreover, article 3 of the Covenant provides that "[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant," while article 26 guarantees equal protection before the law. Thus, it is submitted that the Covenant's provisions relating to sex discrimination appear broad enough

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108. *Id.* at 197 (emphasis added).

109. *See* cases cited note 93 supra; notes 110-27 and accompanying text infra.


111. *Id.* at 355.


114. 419 at 510.


117. Covenant on Civil and Political Rights, supra note 2, art. 3.

118. *Id.* art. 26. Article 26 provides: "All persons are equal before the law and are entitled without any discrimination to equal protection of the law." *Id.*
to prohibit any discrimination on the basis of sex and would, therefore, be inconsistent with the Supreme Court's sex discrimination decisions.\footnote{119}

A second area in which the equal protection provisions of the Covenant on Civil and Political Rights may provide a higher standard of protection than is provided under the Constitution is that of the rights afforded to aliens. Article 2 of the Covenant ensures to all individuals within the territory and subject to the jurisdiction of the member states the rights enumerated in the document "without distinction of any kind, such as . . . national or social origin."\footnote{120}

Historically, state statutes discriminating against aliens were upheld by the Supreme Court on the grounds that the public interest required less favorable treatment of noncitizens in order to protect the welfare of citizens.\footnote{121} Thus, the Court upheld state requirements that contractors engaged in constructing public works employ only United States citizens,\footnote{122} that only citizens may be licensed to operate pool rooms,\footnote{123} and that aliens may not own land for the purpose of farming.\footnote{124} This public interest justification is no longer constitutionally adequate for, in recent years, the Court has invalidated statutes classifying individuals on the basis of alienage.\footnote{125} For example, aliens have successfully challenged statutes denying welfare benefits to noncitizens,\footnote{126} excluding aliens from practicing law,\footnote{127} and permitting only American citizens to hold permanent positions in the competitive class of a state civil service.\footnote{128}

Recent cases, however, make it clear that not all discrimination against aliens violates the fourteenth amendment.\footnote{129} For instance, in 1973, the

\begin{quote}
119. It could be argued that the ratification of the Covenant is tantamount to passage of an equal rights amendment. Professor Tribe suggests that "the Supreme Court's failure to articulate clearer principles in the area of gender discrimination may be explained in part by the Court's reluctance to overstep what it conceives to be the bounds between constitutional interpretation and constitutional amendment." L. Tribe, AMERICAN CONSTITUTIONAL LAW 1074 (1978). However, ratification of the Covenant would render gender-based discrimination legally impermissible, thereby accomplishing by treaty that which is not compelled by the Constitution as interpreted by the Supreme Court.

120. Covenant on Civil and Political Rights, supra note 2, art. 2, para. 1.

121. See, e.g., Clarke v. Deckebach, 274 U.S. 392 (1927); Terrace v. Thompson, 263 U.S. 197 (1923); Heim v. McCall, 239 U.S. 175 (1915). For a discussion of these cases, see notes 122-24 and accompanying text infra.

122. See Heim v. McCall, 239 U.S. 175, 195 (1915).


125. See, e.g., In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971). For a discussion of these cases, see notes 126-30 and accompanying text infra.


\end{quote}
Court stated in dictum that states can constitutionally bar aliens from voting and from holding state elective or important nonelective offices. In the 1976 case of Matthews v. Diaz, the Court held that Congress can condition receipt of medicare benefits on a set period of residency. Even more recently, the Court has upheld citizenship requirements for police officers and school teachers.

In light of these more recent decisions, it is submitted that the equal protection afforded aliens under the Covenant is broader than that provided by the Constitution. It should be noted, however, that the Court's position that aliens may be barred from voting and holding public office is consistent with article 25 of the Covenant which similarly limits these rights.

A third area of conflict between the Covenant's guarantees of equal protection and the provisions of the Constitution is that of the degree of equality afforded illegitimates. In Levy v. Louisiana, the Court held that illegitimates are persons within the meaning of the equal protection clause, and, utilizing a rationality standard, invalidated a state statute permitting only legitimate children to maintain an action for the wrongful death of a parent. However, in a later case, Labine v. Vincent, an intestate succession provision which subordinated the rights of acknowledged illegitimates to the rights of legitimate children and other relatives was up-
A "denial of equal recovery" was subsequently declared unconstitutional in *Weber v. Aetna Casualty & Surety Co.*, where it was held that the claims of dependent unacknowledged illegitimates to death benefits under a state workmen's compensation law could not be subordinated to the claims of legitimate children.

In cases following *Weber*, the Court has required a showing of more than mere rationality to uphold a statute employing legitimacy based distinctions, but it has not submitted such statutes to the strictest scrutiny. In *Matthews v. Lucas*, for instance, the Court upheld a provision of the Social Security Act which distinguished between legitimate children—who were presumed to be entitled to receive funds—and illegitimate children—who were obligated to present individual proof of their parentage. It is constitutionally permissible, however, for a state to require that the paternity of the father of an illegitimate child be judicially declared sometime before the father's death as a precondition to the child's inheriting by intestate succession.

Thus, in the illegitimacy area of equal protection, the Covenant and the Constitution seem to be inconsistent. Although the Supreme Court has stated that the scrutiny to be applied to legitimacy classifications is not "toothless," and that the classification is invalid under the fourteenth amendment if it is not substantially related to permissible state interests, it is submitted that the "without distinctions" language from the Covenant seemingly demands greater protection than the Court presently affords under the Constitution.

It is therefore submitted that ratification of the Covenant will establish a legal basis to afford women, aliens, and illegitimates greater rights than the Constitution is presently interpreted to guarantee. Thus, before Congress can consent to the Covenant, it must determine the advisability of expanding these rights, and ascertain whether the Covenant affords the most advantageous means of accomplishing their expansion.

144. Id. at 539-40.
146. Id. at 175-76. The *Weber* Court distinguished this case and *Levy* from *Labine* on the basis that in *Weber* and in *Levy* an insurmountable barrier was placed in the way of the child's recovery, while in *Labine* the decedent could have overcome the barrier by providing for his illegitimate child in a will. Id. at 170-71.
147. In *Trimble v. Gordon*, 430 U.S. 762 (1977), the Court stated: "The Equal Protection Clause requires more than the mere incantation of proper state purpose." Id. at 769. The *Trimble* Court invalidated a state statute which permitted legitimate children to inherit from both parents, but only permitted illegitimates to inherit from their mother. Id. at 776.
149. Id.
150. Id. at 510.
153. 439 U.S. at 275.
B. Freedom of Expression

The Covenant’s concept of freedom of expression is set forth in article 19, which provides: "Every one shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." 154 This right to free speech appears to be largely consistent with the free speech right recognized by the Constitution. 155 The Covenant further recognizes that freedom of speech carries with it special duties and responsibilities, and may be subject to certain restrictions. 156 Such restrictions are consistent with the Constitution since freedom of speech is not an absolute freedom, as was recognized by the Supreme Court in Schenck v. United States: 157

The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. 158

Thus, both documents admit that freedom of expression may be subject to some restrictions.

A variance between the Covenant and the Constitution may arise, however, when determining how much restriction is permissible. While the Covenant provides for restrictions necessary "for the respect of the rights or reputation of others," 159 recent Supreme Court cases raise some questions as to whether this qualification of the right of free speech for the protection of reputation can be constitutionally tolerated. 160 For instance, in Miami

154. Covenant on Civil and Political Rights, supra note 2, art. 19, para. 2.
156. Article 19 of the Covenant provides:
   The exercise of the [right to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
      (a) For respect of the rights or reputations of others;
      (b) For the protection of national security or of public order (ordre public), or of public health or morals.
Covenant on Civil and Political Rights, supra note 2, art. 19, para. 3.
158. 249 U.S. at 52 (citations omitted).
159. Covenant on Civil and Political Rights, supra note 2, art. 19, para. 3.

http://digitalcommons.law.villanova.edu/vlr/vol25/iss1/7
Herald Publishing Co. v. Tornillo, the Court overturned a Florida statute that granted candidates for political office, who are assailed regarding their character or official record by any newspaper, a right to demand that the newspaper print the candidate's reply to the charges. Thus, according to Tornillo, public figures such as candidates for office are not afforded protection of their personal reputation at the expense of another's freedom of expression. In view of this rationale, it is submitted that the Covenant may limit the freedom of press presently recognized in the United States.

Another restriction that the Covenant imposes on the freedom of expression is that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." It is not clear whether this section was intended to be equivalent to the "clear and present danger" test announced in Schenck, or whether it was intended to include speech that is less than a clear and present danger of a serious substantive evil. In Terminiello v. Chicago, the Supreme Court held that a speech which "vigorously, if not viciously, criticized various political and racial groups" was constitutionally protected. Indeed, one function of speech recognized by the Court is to invite dispute which necessarily creates unrest and dissatisfaction. Therefore, depending upon how the Covenant's phrase "incitement to discrimination" is interpreted, another conflict between the Covenant and the Constitution may arise.

A final, somewhat knotty problem exists with respect to reconciling the free speech provisions of the Covenant and the Constitution. Article 5 of the Covenant provides that no right that is recognized as fundamental by a

162. Id. at 255.
163. In New York Times v. Sullivan, 376 U.S. 254 (1964), the Court further held that a public official is unable to recover damages for a defamatory falsehood relating to his official conduct, unless he shows that the statement was made with knowledge that it was false or with reckless disregard of the truth. Id. at 279-80. However, this stringent barrier to recovery for libel was not extended to private persons. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).
164. Covenant on Civil and Political Rights, supra note 2, art. 20, para. 2.
165. See notes 157-58 and accompanying text supra.
166. 337 U.S. 1 (1949).
167. Id. at 3.
168. Id. at 4.
169. Id.
170. The reasons for the Covenant's vagueness in the free speech area are understandable when one compares this fledgling document to the Constitution which has endured for two centuries and has been interpreted through a highly sophisticated development of case law. Some degree of elasticity is necessary in a document that is not only young but binding on so many nations of differing ideologies. With time, and through the influence of the member states, the vagueness will be ameliorated by specific interpretation. It is submitted that, as a party to the Covenant, the United States would be provided with an invaluable opportunity to influence the development of the Covenant in a direction paralleling American democratic ideals through the process of interpretation and amplification of the document.
member state may be restricted because the Covenant recognizes that right to a lesser extent.\textsuperscript{171} The apparent purpose of this provision is to prevent a nation which protects a certain right to a greater extent than the Covenant requires from using the adoption of the Covenant as an excuse to dilute its own guarantee. The problem arises in that the Covenant appears to prefer the right of reputation over that of free speech,\textsuperscript{172} whereas the preference in the United States is the reverse.\textsuperscript{173} This places the United States, as a potential signatory nation, in the quandary of attempting to accept two mutually exclusive provisions—one preferring reputation over free speech, and one forbidding any limitation of the exalted position free speech presently holds in the United States.

\textbf{C. Rights of the Criminal Defendant}

The Covenant provides the criminal defendant with many of the same protections afforded by the Constitution, such as the right 1) to be presumed innocent until proven guilty;\textsuperscript{174} 2) to the assistance of counsel;\textsuperscript{175} 3) to a speedy trial;\textsuperscript{176} 4) to confrontation of witnesses;\textsuperscript{177} 5) against self-incrimination;\textsuperscript{178} and 6) against double jeopardy.\textsuperscript{179} The Covenant, however, also assures the criminal defendant certain rights which are not provided for in the Constitution, such as the right to have sentences reviewed by a higher tribunal,\textsuperscript{180} and the right to compensation if one's conviction is reversed because it was the result of a miscarriage of justice.\textsuperscript{181} Because the rights afforded the criminal defendant under the Covenant may be greater than those recognized in the United States, a determination must be made as to whether the expansion of rights by way of this document is desirable.

The Covenant provides that "\textsuperscript{(e)}everyone convicted of a crime shall have the right . . . to his sentence being reviewed by a higher tribunal according to the law."\textsuperscript{182} In the majority of jurisdictions in the United States, sentencing power is vested "solely within the discretion of the trial judge, with appellate review available only to correct sentences which do not conform to

\begin{itemize}
\item \textsuperscript{171} Covenant on Civil and Political Rights, \textit{supra} note 2, art. 5.
\item \textsuperscript{172} See note 159 and accompanying text \textit{supra}.
\item \textsuperscript{173} See notes 160-63 and accompanying text \textit{supra}.
\item \textsuperscript{174} Covenant on Civil and Political Rights, \textit{supra} note 2, art. 14, para. 2.
\item \textsuperscript{175} Id. art. 14, para. 3(b), (d).
\item \textsuperscript{176} Id. art. 14, para. 3(c).
\item \textsuperscript{177} Id. art. 14, para. 3(e).
\item \textsuperscript{178} Id. art. 14, para. 3(g).
\item \textsuperscript{179} Id. art. 14, para. 7.
\item \textsuperscript{180} Id. art. 14, para. 5.
\item \textsuperscript{181} Id. art. 14, para. 6.
\item \textsuperscript{182} Id. art. 14, para. 5. This section also deals with the right to appeal a conviction. It should be noted that this is presently a statutory right, rather than a constitutional right, in the United States. \textit{See} Chanosky v. Building Supp. Co., 152 Conn. 449, 451, 208 A.2d 337, 339 (1965).
\end{itemize}
the statutory limits." 183 One commentary cites sentence disparity as a serious problem within the American criminal justice system because of this total reliance upon the judge's discretion. 184 While various programs, such as sentencing councils and institutes, have been set up to curb disparity and improve the quality of sentencing decisions, 185 it is submitted that a more direct solution to the problem of disparity in sentencing would be to adopt the Covenant's approach of permitting appeals of sentences.

Should ratification of the Covenant prove to be impossible, however, due to its current provisions relating to fundamental rights, the impasse could be overcome either by an understanding 186 or by a reservation 187 refusing to agree to a particular provision of the Covenant. But should the United States decide to ratify the treaty, strong policy reasons militate against the use of understandings and reservations. It is submitted that adoption of the Covenant with reservations may appear to the rest of the world as a somewhat "half-hearted" affirmation of human rights, thus weakening American leadership in this area. Such reservations and understandings made on the part of the United States may provide other nations with a precedent to qualify their acceptance of various essential human rights. It is submitted that the benefits which would accrue from an unqualified reciprocal acceptance of the Covenant by all nations party thereto, would greatly outweigh the burden of making the relatively minor changes in American policy which are needed to permit an unconditional American acceptance of the Covenant. 188

IV. CONCLUSION

During the recent decades, the United States has resisted entrance into multilateral human rights treaties. While the reasons for this hesitation are numerous, it is suggested that many are meritless. Whether it be constitutional elitism that inhibits the United States from exchanging promises with developing nations or an exaggerated fear of the treaty power's scope, the real issue—the merits of the Covenant—is being overlooked. Fear that treaties may override the Constitution and the concern that protection of civil rights is a matter beyond the reach of treaties should not, it is submitted, be permitted to cloud the valid areas of concern, such as the policy considerations in establishing world recognition of human rights. The real area of investigation should be the specific provisions of the treaty in ques-

184. Id.
185. Id.
186. See note 83 supra.
187. See note 82 supra.
188. See generally MacDougal & Leighton, supra note 71, at 506.
tion and their consistency with American legal processes and philosophy. It is suggested that through ratification of the Covenant on Civil and Political Rights, the United States can become that much more influential in the framing and enforcement of an international bill of rights. By failing to ratify, advocacy of international human rights becomes a meaningless gesture by a nation unwilling to recognize that national and world security demand that human rights be safeguarded on an international level.

As Louis Henkin points out, now is the time "when all ability, flexibility, [and] wisdom are needed for cooperation for survival by a frightened race, on a diminishing earth." 189 The time is ripe for the United States to discover what it can gain from, as well as give to, the protection of human rights by way of such treaties. The United States Constitution should not, it is submitted, be a barrier, but an impetus to entrance into an agreement such as the Covenant on Civil and Political Rights so that its principles may be adopted worldwide.

Alice A. Noble*

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*J.D., Villanova University School of Law, 1979. Member, Pennsylvania Bar. The author would like to express her gratitude to Professor Joseph W. Dellapenna, Villanova University School of Law, for his assistance in the preparation of this comment.