

**Why the United States Has Failed to Ratify the CEDAW:
A Look at Purported Problems with Ratification**

Courtney Goldsworthy

The Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter Convention) was adopted by the United Nations General Assembly on December 18, 1979 and entered into force on September 3, 1981. The Convention is an international legal instrument that requires respect for an observance of women's rights and represents an international human rights norm of women's equality. The countries that have ratified the Convention have pledged to actively promote the equality of both men and women in all areas of life and have also pledged to end both *de jure* and *de facto* discrimination against women.¹ However, the United States has yet to ratify the Convention.

This paper examines some of the issues surrounding the lack of ratification of the Convention on the part of the United States. It begins by providing an overview of the Convention and examining the general difficulties of the United States in treaty ratification, and also surveys domestic arguments favoring and disfavoring ratification. It examines reservations within a broader framework by analyzing the articles within the Vienna Convention that are directly related to treaty reservations and then comparing this with reservations that are already in place by different signatories to the Convention. The last part of the paper looks at potential reservations, understandings and declarations of the United States, provides a comparison between some laws of the United States and laws of the Convention, and posits that despite the lack of ratification, and due to the Supreme Court trend of relying on international law in their more recent jurisprudence,

¹ Julia Ernst, *U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 3 MICH. J. GENDER & L. 299-367, 2 (1995).

the Convention is most likely to work its way into the American legal system through that means. Thus, it is clear that the only choice that the United States has is to ratify the Convention.

Overview of the Convention

The need to gather and consolidate the bulk of norms reflecting the rights of women in different international resolutions, declarations, and recommendations of international organizations was recognized in the early 1970's.² This effort culminated over five years of negotiations and discussion. Finally in March of 1980, the United Nations General Assembly presented the Convention on the Elimination of All Forms of Discrimination as the most recent instrument of a global character, reflecting a vow to protect women from discrimination. It was the only instrument referring to women's rights that also had a monitoring system for its implementation.³

The Convention has also been dubbed the "Charter of Human Rights of Women,"⁴ and rightfully so, as the aim of the Convention is to eliminate all forms of discrimination against women in the most comprehensive fashion.

The Convention has six parts. Part I is dedicated to general principles and commitments. Part II refers to political and civil rights of women. Part III deals with social areas and pays special attention to women living in rural areas. Part IV is devoted to equality before the law and within the family. Part V contains follow up and surveillance provisions for the implementation of the Convention and establishes the Committee on the Elimination of Discrimination Against Women (hereinafter

² Aída Gonzalez Martinez, *Human Rights of Women*, 5 WASH. U. J. L. & POL'Y 157- 188, 166.

³ *Id.*

⁴ *Id.*

“Committee”). The sixth part focuses on procedural issues, issues of implementation, controversy and dispute resolution, and the presentation of reservations.⁵

The Convention, under Article 1 “forbids any distinction, exclusion, or restriction between the sexes which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms in the political, social, cultural, civil or any other field.”⁶ A unique feature of the Convention is the recognition of discrimination that exists outside of the public sphere, such as domestic violence.⁷

Article 2(a) and (e) of the Convention, respectively, states are required to “embody the principle of the equality of men and women” in their constitutions or appropriate legislation and to “modify or abolish existing laws, regulations, customs, and practices” that discriminate against women.⁸ States are also required to take appropriate measures to eliminate discrimination whether by individuals or organizations, and ensure that national tribunals and other public institutions are competent to afford women protection from any act of discrimination.⁹

Articles IV, V, and VI deal with temporary measures, stereotypes, and sexual violence. Article IV provides an affirmative action policy while guaranteeing that states may adopt, when necessary, special temporary measures to “shorten the inequality gap between men and women.”¹⁰ Article V recognizes cultural traditions and the impact of those on the condition of women, and places the common responsibility of educating

⁵ *Id.* at 167

⁶ Julie A. Minor, *An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women*, 24 GA. J. INT’L & COMP. L., 137-53, 2 (1994).

⁷ *Id.*

⁸ Malvina Halberstam, *The United States Ratification On The Convention On The Elimination Of All Forms Of Discrimination Against Women*, 31(1) GEO. WASH. J. INT’L L. & ECON., 49-96, 2 (1997).

⁹ *Id.*

¹⁰ Martinez, *supra* at 168.

children in the hands of both men and women.¹¹ Article VI refers to sexual abuse of women and the need to eliminate human trafficking and prostitution.¹²

Article II of the Convention requires states that have ratified the Convention to pursue “by all appropriate means” a “policy of eliminating discrimination against women.”¹³ Along with the requirements listed above, the Convention also calls for states to take appropriate measures to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”¹⁴

Article VII requires parties to “ensure to women, on equal terms with men” the right to vote, “to hold public office,” to participate in the formulation of government policy, and to “participate in non-governmental organizations and associations concerned with the public and political life of the country.”¹⁵ Article X requires states to eliminate discrimination against women and to ensure them equal educational rights by providing the same conditions for access to studies at various educational levels. These conditions would include requiring for both sexes the same curricula, the same examinations, the same qualified teaching staff, and the same opportunity to academic benefits such as grants and scholarships, while additionally encouraging coeducation.¹⁶

Article XI focuses on discrimination in the workforce and requires states to “take all appropriate measures to eliminate discrimination against women in the field of

¹¹ *Id.*

¹² *Id.* at 169

¹³ Ann E. Mayer, *Reflections on the United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L. 727-823, 735 (1996).

¹⁴ *Id.*

¹⁵ Halberstam, *supra* at 2.

¹⁶ *Id.*

employment” and to ensure equality to “the same employment opportunities.”¹⁷ Article XII focuses on the equality of rights to health care, including family planning.¹⁸ Article XIII provides for economic and social equality, including family benefits, equal access to credit, and access to all sport and cultural activities.¹⁹ Article XIV applies the Convention to women in rural areas, Article XV deals with equality of women before the law and civil rights, and Article XVI deals with equal legal rights concerning matrimony and family relations.²⁰

A significant feature of the Convention is that it specifies means that are to be pursued to achieve its purpose. Article XVII establishes a monitoring body, the Committee on the Elimination of Discrimination Against Women, that holds the main task of observing parties’ performance and behavior.²¹ The Committee is comprised of 23 “experts of high moral standing and competence in the field of women’s rights who are nominated and elected by the States’ Parties to serve four year terms.”²² The Committee holds the responsibility of annually reviewing reports regarding the status of women’s rights filed by each party to the Convention. These reports must contain information about any legislative, judicial, administrative, or any other kind of measures taken to carry out the provisions of the Convention and must be filed within one year of acceding the Convention. The Convention does not authorize state parties to submit reports about one another, nor may individuals submit reports. The Committee has no power to undertake action against any self-reported violators. The sole remedy for violations is

¹⁷ *Id.*

¹⁸ Martinez, *supra* at 169.

¹⁹ *Id.* at 171

²⁰ *Id.*

²¹ Rebecca J. Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, P. 228-56, 647 (University of Pennsylvania Press, 1994).

²² www.unasa.org

encompassed by an annual report for the United Nations General Assembly based on the reports received by each individual state. Examining this, the enforcement mechanism is based solely on a self-monitoring structure and the extent of enforcement seems limited.²³ The members that make up the Committee are “elected taking into consideration not only traditional equitable geographical distribution, but also the representation of different forms of civilization, as well as the principle legal systems.”²⁴ The Committee is empowered to perform analysis of the different methods of implementation of the Convention in various countries and to debate some of the main issues, including, but not limited to, contents of the reports, reservations of states when ratifying, and the “scope and significance of the Articles and their implementation.”²⁵

United States and the Ratification of the Convention²⁶

The United States is not among the signatories of the Convention. President Carter signed the Convention on July 17, 1980, but the United States has never ratified it. No action has been taken during the current Congressional session, but in 2002, although not voted on by the full Senate, the Convention was approved by the Senate Foreign Relations Committee.

Since President Carter signed the treaty in 1980, ten years passed before the Committee held its first hearing.²⁷ Although the House of Representatives does not have

²³ Corbera, Michael, *Women's Convention and the Equal Protection Clause*, 26 ST. MARY'S L.J., 755-90, 758 (1995).

²⁴ Martinez, *supra* at 173

²⁵ *Id.* at 174

²⁶ The process of ratifying a treaty in the United States is simple. Article II, Section 2 of the United States Constitution empowers the President to make treaties with the advice and consent of the Senate. Once the treaty is signed, the President forwards it to the Senate. The Senate Foreign Relations Committee then holds hearings to consider ratification. A vote of committee members is taken to recommend ratification. From the Committee, it is sent to the Senate floor where a two-thirds majority vote is needed for ratification.

²⁷ www.un.org/womenwatch/daw/cedaw/cedaw/htm.

an official role in treaty ratification, they voiced their support for the Convention in House Resolution 166 in October of 1991.²⁸ In the spring of 1993, 68 Senators signed a letter to President Clinton asking him to take the necessary steps to ratify the convention.²⁹

Nearly ten years later in early 2002, the Convention won the support of the Bush Administration, as it was categorized as “generally desirable and [something that] should be approved.”³⁰ Subsequently, a few hearings on the Convention were scheduled but postponed by the administration, which cited that a new Justice Department review of the Convention was necessary. After a few more delays and finally a hearing, the Convention was approved by the Committee by a vote of 12 to 7.³¹ Since 2002, there have been no efforts made towards the ratification of the Convention.

General Difficulties with Treaty Ratification

There are general difficulties with the United States ratifying the Convention. One of the obstacles to ratification includes the “slow pace at which the Department of State reviews each treaty that has been signed and is under consideration by the United States.”³² The slow pace of ratification has been attributed to historical hostility and Congressional mistrust of international treaties, most notably those involving human rights.³³ It has also been attributed to the State Department’s limited resources and practice of “considering and reviewing each convention dealing with human rights consecutively...[thus placing] all other proposed conventions...on hold until the one

²⁸ *Id.*

²⁹ *Id.*

³⁰ www.unausa.org

³¹ *Id.*

³² Ernst, *supra* at 7.

³³ *Id.*

chosen for immediate action has been completely reviewed and processed through the ratification system.”³⁴

Another obstacle is the “desire of the United States to abide fully by the terms of any treaty to which it is a party.”³⁵ There is the possibility of the United States making reservations to the Convention. However, with the number of possible conflicts with national law, “if the United States government ultimately determines the need to make a substantial number of reservations, the State Department has expressed the possibility of not ratifying the Convention at all.”³⁶

Domestic Arguments Relating to Ratification

There are also many domestic arguments in favor of and against ratification of the Convention. To begin, the proponents of ratification emphasize that the Convention is the most effective way to advance women’s rights on a global level since it provides a universal definition of discrimination against women offering means for reviewing and encouraging compliance with it.³⁷ Therefore, ratification would bolster the effort of the United States to improve the status of women around the world. It would also allow the United States to nominate an expert to sit on the Committee, therefore increasing the level of American international policy making in the area of women’s rights, and thus affirm the role of the United States as a global leader for human rights.³⁸

Opponents of ratification argue that ratification would pose serious threats to the nation’s sovereignty because it would relinquish too much power to the international community as treaty provisions would supersede United States law, and that the

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ www.unausa.org

³⁸ *Id.*

Convention aims to “implement a radical agenda that would undermine traditional moral and social values, including marriage, motherhood, family structure, and even Mother’s Day.”³⁹ However, the Convention is compliant with the Constitution and, as discussed *supra*, the Committee does not have any real enforcement power and there is no disciplinary mechanism in place for failure to comply.⁴⁰

It is important to note that the treaty has been declared non-self executing, as noted *infra*, and therefore does not require any change to current domestic law.⁴¹ The Convention also does not seek to regulate family life and structure, but only adopt public information programs and educational programs to help eliminate current prejudices caused by traditional gender norms that hinder the full operation of the principle of social equality for women.⁴² Related to family structures, the Convention does not seek to interfere with parenting roles, but only calls for recognition of the “common responsibility of men and women in the upbringing and the development of their children” and “to promote what is in the best interests of the child” which is consistent with the law of the United States.⁴³

Related to family structure, parenting, and motherhood, opponents argue that the Convention promotes abortion and also would lead to federally sanctioned same-sex marriages.⁴⁴ However, the Convention does not refer to abortion on an international level and even countries where abortion is illegal, such as Ireland and Rwanda, have ratified it.⁴⁵ The State Department has stated that the Convention is “abortion neutral” and in

³⁹ *Id.*

⁴⁰ www.un.org/womenwatch/daw/cedaw/cedaw/htm.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

1994, the Senate Foreign Relations Committee added an understanding to the Convention, discussed *infra*, that Article XII, dealing with the power of the countries to determine the appropriate health care services offered related to family planning, does not include a right to an abortion.⁴⁶ As for the promotion and sanctioning of same-sex marriages, the Convention's terms are clearly aimed only at sex-based discrimination and not sexual-orientation based discrimination. The Convention would not compel the United States to change any laws or pass any same-sex marriage laws. In addition, much like the issue of abortion, many countries, such that have ratified the Convention, such as those coming from Africa, Asia, Eastern Europe and the Middle East⁴⁷, have laws banning same sex marriages.⁴⁸

Opponents also argue that the Convention is broad in its definition of discrimination which would lead to mass amounts of litigation and frivolous lawsuits.⁴⁹ However, the Convention seemingly only urges a change in the type of judicial standard of review afforded gender discrimination suits, as discussed *infra*, from mid-level scrutiny to strict scrutiny.⁵⁰

There have also been concerns that ratification of the Convention will force women to be sent into armed ground combat.⁵¹ However, the Convention does not

⁴⁶ *Id.*, See *Maier v. Roe*, 432 U.S. 464 (1977) (which held that there was no suspect class involved as an indigent woman desiring an abortion did not come within the limited category of recognized disadvantaged classes, and the fact that the impact of the regulation fell upon those who did not pay did not lead to a different conclusion. The Court further found that the regulation placed no obstacle to obtaining an abortion and did not create the indigency that made it difficult or impossible to obtain an abortion and the funding scheme did not impinge upon a fundamental rights. The Court held that the regulation rationally furthered the state's legitimate interest in encouraging normal childbirth and it was not unreasonable to insist upon a prior showing of medical necessity to insure that state money was being spent only for authorized purposes.)

⁴⁷ <http://en.wikipedia.org>

⁴⁸ www.un.org/womenwatch/daw/cedaw/cedaw/htm.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

require countries to send women into combat. There is no reference in the Convention to women in the military or women in combat. In addition, the 1997 Convention Committee report urging “full participation of women in the military” is not a requirement, but an observation that women’s absence in military decision-making councils hampers diplomacy, negotiations and peacekeeping, and peace-making efforts, and neglects to take note of the effect upon women and families of military decisions in times of conflict.⁵²

Article X has also been a cause for concern among the opponents of ratification, who argue that the Convention is a threat to single sex schools and will be burdensome on public schools because it will require everything to be gender neutral.⁵³ However, the language does not prohibit single-sex schools; it merely refers to the need for equal education facilities, text and other materials for both sexes, whether or not in single-sex or mixed schools.

Opponents lastly argue that the Convention, if ratified, would require the legalization of prostitution.⁵⁴ However, the Committee has called for the decriminalization of prostitution in countries such as China where prostitution and trafficking of women and children are rampant, and not for all countries in general.⁵⁵ Regulation would allow victimized women to come forward without repercussions for treatment to prevent HIV, AIDS, and other STDS, to obtain health care and education, and to halt trafficking and sex-slavery practices.⁵⁶

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ www.unusa.org.

⁵⁶ *Id.*

Although this list is not exhaustive, these conflicting views seem to warrant the assumption that if the United States was to ratify the Convention, it would not do so without making serious reservations.

Reservations and the Implications of the Vienna Convention

One of the most important means of limiting obligations under treaties is through the use of reservations. A reservation to a treaty is defined in the Vienna Convention as a “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.”⁵⁷ Reservations to treaties are typically infrequent with the exception of reservations to international human rights treaties. This factor highlights the “constant tension between encouraging universal participation in a human rights convention and protecting the integrity of the convention.”⁵⁸ Article XXVI of the Vienna Convention on the Law of Treaties states the basic international law principle of *pacta sunt servanda*: “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁵⁹ Article 2(d) defines reservation as a “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.”⁶⁰ A state may enter a reservation when ratifying treaties that restrict or modify the effect of the treaties, subject to conditions that may vary from one treaty to the next. Article 19(a) provides that states can enter a

⁵⁷ *Text of the Vienna Convention*, at <http://untreaty.un.org>.

⁵⁸ Cook, *supra* at 649.

⁵⁹ *Text of the Vienna Convention*, at <http://untreaty.un.org>.

⁶⁰ *Id.*

reservation unless “the reservation is prohibited by the treaty”⁶¹ or, under (b), “the treaty provides that only specified reservations, which do not include the reservation in question, may be made.”⁶² However, according to Article 19(c), the reservation cannot be entered if it “is incompatible with the object and purpose of the treaty.”⁶³

Historically, tolerance of reservations to treaties of this nature has been encouraged for two reasons. One, the certainty of domestic impact of treaties dealing with human rights is less than that of a commercial treaty. Two, the treaty may have a dynamic force and the scope of interpretation may be broad.⁶⁴ Thus, reservations provide states with an assurance that it can protect its interest to the fullest extent possible in the event it cannot comply fully with the terms of the treaty and prevention from humiliation if found in breach.⁶⁵

Article 28(2) of the Convention states: “A reservation incompatible with the object and purpose of the present Convention shall not be permitted,” thus simply reiterating the basic principle outlined in the Vienna Convention. Despite this provision, it is noted that “more reservations with the potential to modify or exclude most of the terms of the Convention have been entered to CEDAW than any other convention.”⁶⁶

There are many difficulties with reconciling the compatibility rule of Article 19(c)(see above) of the Vienna Convention and the acceptance and objections rule of Article 20(4). Article 20(4) states:

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Cook, *supra* at 650.

⁶⁵ *Id.*

⁶⁶ Mayer, *supra* at 737.

“In cases not falling under the preceding paragraphs, and unless the treaty otherwise provides:

- (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States:
- (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State:
- (c) an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.”⁶⁷

The compatibility rule provides that “a state may not formulate a reservation incompatible with the object and purpose of the treaty concerned”⁶⁸ and the objections rule provides that “a reserving state becomes a party to the treaty regarding all other states that expressly accept the reservation, do not object to it or that object without expressing a definite intention to preclude the entry into force of the treaty between the reserving state and itself.”⁶⁹

Three interpretations have evolved out of this conflict between the two articles. According to the first interpretation, which holds that the test of admissibility of a reservation lies within acceptance of it by other states, “the content of the reservation is relevant only to the interpretation of the rights and obligations of the treaty parties.”⁷⁰

⁶⁷ *Text of the Vienna Convention*, at <http://untreaty.un.org>.

⁶⁸ Cook, *supra* at 657.

⁶⁹ *Id.*

⁷⁰ *Id.*

The second interpretation differentiates between the articles by holding that “[a]rticle 19 governs the ‘permissibility’ of a reservation, an incompatible reservation being impermissible and therefore illegal....and [a]rticle 20...concerns the issue of ‘opposability’ of a permissible reservation, and this involves inquiring into the reactions of the [p]arties to that reservation and the effects of such reaction.”⁷¹ The final interpretation views the formulation of an incompatible reservation as “a wrongful act entailing the reserving state’s international responsibility regarding the other states parties.... and not necessarily a breach of the treaty itself, but a breach of the legal norm embodied in the Vienna Convention.”⁷² The three views basically look at the language of the reservation only, the intent of the parties, and whether or not the basic aim of the Vienna Convention was violated.

Reservations to the Convention (CEDAW) Currently in Place

Many problems arise with permitting reservations to international human rights treaties. For instance, the number of reservations, their content, and their scope may undermine effective implementation of the Convention and tend to weaken respect for the obligations of states parties. The CEDAW has been concerned with the issue of reservations to the Convention, not only because of the large number of reservations, but also because of the content of the reservations. When drafting the Convention, the drafters had to make a choice between maximizing participation in the project and maintaining the integrity of the document. It has been argued that the former was the chosen path.⁷³ The large number of reservations, at least twenty-five parties making a

⁷¹ *Id.*

⁷² *Id.*

⁷³ Minor, *supra* at 3.

total of sixty-eight reservations,⁷⁴ makes the Convention among the most heavily reserved of international human rights instruments. The Convention allows reservations, but does not provide clear and objective criteria to determine whether the reservations have been made in accordance with the requirements of the Convention.⁷⁵ To address this issue, the CEDAW adopted a declaration that was submitted to the General Assembly in 1998 that stated “[a]rticle 2 has fundamental importance for the object and purpose of the Convention and that upon ratifying the Convention, the states parties expressed their agreement that all forms of discrimination should be condemned,⁷⁶ and further agreed to put into practice the strategies provided for in items (a) to (g) of Article 2 to eliminate discrimination.” It was further noted that “neither the traditional, religious, or cultural practices nor the national laws and policies, incompatible with the Convention, can justify the violation of the provisions of the convention.”⁷⁷

A common type of reservation to human rights treaties is based on a religious belief or practice. For example, many Islamic countries have entered reservations, both on a general and a specific level, when ratifying human rights treaties. In terms of the Convention, there are many candid examples, including, but not limited to the following:

- The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contrary to the principles of Islamic Sharia upon which the laws and traditions of the Maldives are founded.⁷⁸

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Martinez, *supra* at 175.

⁷⁷ *Id.* at 176.

⁷⁸ DAMROSCH LORI, & HENKIN LOUIS, INTERNATIONAL LAW 489 (West Group 2001).

- The Arab Republic of Egypt is willing to comply with the content of this article (Article 2 of the Convention), provided that such compliance does not run counter to the Islamic Sharia.⁷⁹
- It is clear that the child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe upon the principle of equality since it is customary for a woman to agree that the children shall be of the father's nationality. (Egypt's reservation to Article 9 of the Convention).⁸⁰
- The Hashemite Kingdom of Jordan hereby registers its reservation and does not consider itself bound by the provisions of Article 9, paragraph 2, article 15, paragraph 4 (a woman's residence and her domicile are with her husband).⁸¹
- Iraq has made unexplained reservations to Article 2(f) and (g), which, respectively, require states to take all appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women, and repeal penal laws that discriminate against women.⁸²
- Libya made a general reservation stating that accession to the Convention cannot conflict with Islamic laws on "personal status."⁸³
- In 1984, Bangladesh stated that it did not consider "as binding upon itself the provisions of articles 2.13(a) and 16.1(c) and (f) as they conflict with

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Minor, *supra* at 3.

⁸³ *Id.*

Sharia law based on Holy Koran and Sunna (the example of the Prophet).”⁸⁴

Although these reservations have been accepted, it is clear that they do not promote the objective of gender equality of the Convention, nor do they promote the goal of eliminating discrimination. In actuality, these reservations tend to promote gender discrimination and essentially nullify many principles of the Convention because they provide states parties with essentially “unfettered discretion in determining the extent to which they would be bound by the relevant [Convention] norms.”⁸⁵ It has also been argued that the vagueness of these reservations in general amounts to pronouncements that countries would uphold any “relevant domestic laws that were deemed officially to flow from Islamic requirements at the expense of conflicting CEDAW obligations.”⁸⁶

These Islamic reservations are vastly different from other countries that have entered reservations. The Islamic reservations essentially are substantive reservations, whereas reservations by other states parties tend to be more procedural in nature. Examples illustrate the difference between relatively harmless procedural reservations and reservations that trigger uncertainty about whether the ratifying state has actually accepted the Convention obligations.

France entered several obligations upon ratification, including a reservation concerning the right to choose a family name. Article 16(1)(g) states that a husband and wife would have the same personal rights, “including the right to chose a family name, a profession and an occupation.”⁸⁷ As an issue of symbolic importance, a woman’s right to

⁸⁴ Mayer, *supra* at 738.

⁸⁵ *Id.* at 739.

⁸⁶ *Id.* at 738.

⁸⁷ *Id.* at 739.

pass on her name to her children is seemingly crucial, but lacks an overall substantive effect on the purpose of the Convention, i.e., the preservation and implementation of an “overall equality of Frenchwomen and their ability to function on par with men in French society.”⁸⁸ French acceptance of all other major provisions of the Convention also indicated that France was not “taking a stance opposed to the purpose of the [Convention].”⁸⁹

The 1984 ratification of the Convention by Spain included a short reservation stating “that [Convention] ratification shall not affect the constitutional provisions concerning succession to the Spanish crown.”⁹⁰ Although this reservation on its face appears to be discriminatory against Spanish women, “it is sharply limited in terms of immediate impact...and only a few Spanish bluebloods could ever be affected by this exception.”⁹¹ Much like the French reservation, this reservation lacks any real substantive effect on the overall acceptance and implementation of the Convention.

Reservations, Understandings, and Declarations of the United States

In the event that the United States chooses to ratify the Convention, it has been argued that it would not do so without entering extensive reservations. When the Convention was submitted to the Senate in 1980, the State Department included a memorandum identifying potential conflicts with U.S. law and recommended appropriate reservations, understandings⁹² or declarations⁹³ to that effect.⁹⁴ The underlying premise of

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 739-40.

⁹¹ *Id.* at 740.

⁹² *Text of the Vienna Convention*, at <http://untreaty.un.org>. An understanding, or a memorandum of understanding is an international instrument of a less formal kind. It often sets out operational arrangements under a framework for international agreement. It is also used for the regulation of technical or detailed matters. It is typically in the form of a single instrument and does not require ratification

the State Department memo is that “ratification of the Convention would not change domestic law.”⁹⁵ The State Department memo listed four reservations, three understandings and two declarations.

In addition to the general recommendations above, the State Department concluded that four reservations were necessary to bring the Convention into compliance with United States law. The reservations involve private conduct, women in the military, comparable worth, and maternity leave.⁹⁶ The proposed reservations specifically provide that the United States accepts no obligation under the Convention “(1) to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States⁹⁷; (2) to assign women to all military units and positions which may require engagement in direct combat⁹⁸; (3) to enact legislation establishing the doctrine of comparable worth⁹⁹; and (4) to introduce maternity leave with

⁹³ *Text of the Vienna Convention*, at <http://untreaty.un.org>, (The term “declaration” is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations.)

⁹⁴ Minor, *supra* at 4.

⁹⁵ Halberstam, *supra* at 56.

⁹⁶ *Id.*

⁹⁷ Convention on the Elimination of All Forms of Discrimination Against Women, Appendix 3, (“The Constitution and laws of the United States establish extensive protections against discrimination reaching all forms of governmental activity as well as significant areas of non-governmental activity. However individual privacy and freedom from governmental interference in private conduct are also recognized as among the fundamental values of our free and democratic society. The United States understands that by its terms the Convention requires broad regulation of private conduct, in particular under Articles 2, 3, and 5. The United States does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution of and law of the United States.”)

⁹⁸ Convention on the Elimination of All Forms of Discrimination Against Women, Appendix 3, (“Under current US law and practice, women are permitted to volunteer for military service without restriction and women in fact serve in all US armed services, including combat positions. However, the United States does not accept an obligation under the Convention to assign women to all military units and positions which may require engagement in direct combat.”)

⁹⁹ Convention on the Elimination of All Forms of Discrimination Against Women, Appendix 3, (“US law provides strong protections against gender discrimination in the area of remuneration, including the right to pay for equal work in jobs that are substantially similar. However, the United States does not accept any obligation under this Convention to enact legislation establishing the doctrine of comparable worth as that term is understood in the US.”)

pay or with comparable social benefits without loss of former employment, seniority or social allowances.¹⁰⁰,

As for the understandings, the State Department expressed concern with the interpretation of some articles in a way that limited the freedom of speech. Therefore, it was recommended that the United States would not be obligated to adopt any legislation or measure that would restrict rights under the First Amendment in any way, so long as the rights in question were constitutionally protected.¹⁰¹ For example, since obscenity is not a category of protected speech, any restrictions on such activity or speech would not fall under the protection of the First Amendment and conflict with the Convention, but, political speech, as a protected category, would.

The second understanding proposed was in relation to Article XII of the Convention which permits the states to determine appropriate health care standards in relation to family planning, pregnancy, confinement and post-natal care. The proposed understanding was that this article did not mandate health care free of charge.¹⁰²

The third understanding proposed was that the “United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered (by the Convention), and otherwise by the state and local governments....[t]o the extent that state and local governments exercise jurisdiction over such matter, the Federal Government shall, as necessary, take

¹⁰⁰Convention on the Elimination of All Forms of Discrimination Against Women, Appendix 3, “Current US law contains substantial provisions for maternity leave in many employment situations but does not require paid maternity leave. Therefore the United States does not accept an obligation under Article 11(2)(b) to introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority, or social allowances.”

¹⁰¹ Halberstam, *supra* at 58.

¹⁰² Text of the CEDAW, www.un.org/womenwatch/daw/cedaw/cedaw/htm.

appropriate measures to ensure the fulfillment of this Convention.”¹⁰³ This meant that Congress would not substitute federal legislation for state regulation on matters regulated by state and local governments, but the United States was not limiting the application of the Convention to only those matters which were presently subject to federal regulation.¹⁰⁴

The State Department also proposed two declarations. The first states that “[t]he United States declares that, for purposes of its domestic law, the provisions of the Convention are non-self executing.”¹⁰⁵ This bars the invocation of the Convention in any United States court, thus negating any legal right that could be invoked, i.e., the possibility of asserting the Convention as a defense or a claim.¹⁰⁶

The second declaration, states “[w]ith reference to Article 29(a)(2), the United States declares that it does not consider itself bound by the provisions of Article 29(a)(1). The specific consent of the United States to the jurisdiction of the International Court of Justice concerning disputes over the interpretation or application of this Convention is required on a case-by-case basis.”¹⁰⁷

There are different arguments for and against ratifying the Convention with reservations. Supporters of ratification argue that “it should be ratified because it is basically compatible with U.S. law and would not effectuate any change.”¹⁰⁸ Detractors argue that if the United States were to ratify without reservations, the Convention would be “too broad and would have far-reaching and undesirable effects in the United

¹⁰³ Halberstam, *supra* at 58.

¹⁰⁴ Text of the CEDAW, www.un.org/womenwatch/daw/cedaw/cedaw/htm.

¹⁰⁵ *Id.*

¹⁰⁶ Minor, *supra* at 60.

¹⁰⁷ Text of the CEDAW www.un.org/womenwatch/daw/cedaw/cedaw/htm.

¹⁰⁸ Minor, *supra* at 4.

States.”¹⁰⁹ It is also argued that the practical effect of ratification would be minimal because of “the inherent limitations of a federal system,...[the fact that] [u]nconstitutional treaty provisions are never given any effect as law,...and without a self-executing provision, the courts would probably hold the Convention to be non-self executing.”¹¹⁰

Constitutional Implications of Ratification

Judicial Review

It is argued that the law of the United States, measured by the principles outlined in the Convention is deficient, as it fails to promote the equality of women. For example, in equal protection cases involving gender discrimination, the Supreme Court has only been willing to extend a mid-level review of scrutiny, as opposed to strict scrutiny which is applied in cases of racial discrimination, discrimination based upon national origin, and discrimination based upon alienage, the “suspect classes.” Gender is not considered to be a “suspect class” in American jurisprudence, but rather a “quasi-suspect class.”

The case that enunciated the intermediate standard of scrutiny that is applied to gender was *Craig v. Boren*¹¹¹. *Craig* was a successful challenge to an Oklahoma statute that forbade the sale of “3.2%” beer (supposedly non-intoxicating) to males under the age of 21, and to females under the age of 18. The constitutional claim was that the statute denied equal protection to males aged 18 to 20. The Court articulated the applicable standard as being that “classifications of gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”¹¹² The

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Craig v. Boren*, 429 U.S. 190 (1976).

¹¹² *Id.*

standard applied to racial discrimination is that the classification will be upheld only if it is necessary to promote a compelling governmental interest. Any statute that is subjected to strict scrutiny almost always fails. Intermediate scrutiny, on the other hand, provides more leeway for statutes to pass judicial review and be held valid.

Craig, and the intermediate scrutiny standard applied to gender, is an example of how the Equal Protection Clause falls short of an equality guarantee for women. Women are afforded limited protection, but this standard of scrutiny applied by judges provides more room for the judges to factor in stereotypes to their rulings. Article 2(a) of the Convention calls for constitutions and laws to embody equality and Article 5(a) calls for the eliminations of prejudices based on roles borne out of gender stereotypes.¹¹³ The United States law, especially after a close examination of the status of women under the Equal Protection Clause, is representative of the kinds of problems that the Convention was created to eliminate.

This conflict between the Convention and the Equal Protection Clause is probably one that could not be cured through a simple reservation. Reservations to international treaties are properly used by states parties to limit enforceability and applicability particular provisions. However, the Vienna Convention on the Law of Treaties prohibits reservations that are incompatible with the object and the purpose of the treaty. Thus, if the Convention is unconstitutional on equal protection grounds, it cannot be cured through reservations because it unconstitutionally would be tied to the Convention's very object and purpose.¹¹⁴ The Convention seeks to give women extra protection in order to further the object and aim of eliminating discrimination against them. In *Craig*, the court

¹¹³ Mayer, *supra* at 788.

¹¹⁴ Corbera, *supra* at 780.

expressly stated that it did not matter whether the discrimination operated against men or women. Thus, Equal Protection jurisprudence is clearly at odds with the object and purpose of the Convention.

Implementation and the Duty of Good Faith

Another problem lies with the non-self executing declaration. This declaration raises international law concerns, constitutional concerns, and policy concerns. Under international law, each state is given latitude in determining implementation of its treaty obligations. Some states have provisions that treaties automatically become state law, while others require implementing legislation. Some systems, like the United States, have a hybrid system of self-executing and non self-executing treaties. There is a good faith requirement in international law, meaning, if a state ratifies a treaty, it is required to implement it. Ratifying a treaty and then failing to provide any implementation is a breach of this good faith duty.¹¹⁵

International Law as Support for Validity of Supreme Court Decisions

Despite the fact that the United States has made the declaration that the Convention is not self-executing, which bars the invocation of the Convention in any United States court, thus negating any possibility of asserting the Convention as a defense or a claim,¹¹⁶ this does not mean that it will not appear in our jurisprudence. Recently the Supreme Court has been following a trend of providing citations of international law as an evidentiary tool supporting the validity of their decisions. For example, in *Lawrence v. Texas*¹¹⁷, the recent case overruling a Texas statute barring same sex sodomy, Justice Kennedy, writing for the majority, cites a decision by the European Court of Human

¹¹⁵ *Id.* at 62.

¹¹⁶ *Minor, supra* at 60.

¹¹⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003).

Rights (ECHR) allowing homosexual conduct as evidence of a lack of consensus on such conduct's illegality. Also, in *Atkins v. Virginia*¹¹⁸ the Court struck down laws providing that the mentally retarded could be sentenced to death using foreign authorities. Justice Stevens, writing for the majority opinion found that "it is fair to say that a national consensus has developed against [execution of the mentally retarded]."¹¹⁹ This consensus finding noted that the Court had found support from many different groups, but most notably it cited an amicus brief filed by the European Union and concluded that the brief proved that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."¹²⁰

The most notable example of this is within the context of the juvenile death penalty. In *Roper v. Simmons*¹²¹, the Court held that the Eighth Amendment forbids the imposition of the death penalty on juvenile offenders under eighteen years old. The Court noted that "[t]he overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18....The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom."¹²²

¹¹⁸ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹¹⁹ *Id.* at 316.

¹²⁰ *Id.* at 317 n. 21.

¹²¹ *Roper v. Simmons*, 125 S. Ct. 1183 (2005)

¹²² *Id.*

In *Roper*, the majority cited to international authority to support the validity of its decision. In cases prior to *Roper* dealing with the juvenile death penalty, international law was also cited in the majority and dissenting opinions. In *Thompson v. Oklahoma*¹²³, the court found that the imposition of the death penalty on persons under 16 years of age was prohibited by the Eighth and Fourteenth Amendments. Justice Stevens, writing for the majority, states “[w]e have previously recognized the relevance of the views of the international community in determining whether or not a punishment is cruel and unusual. See *Trop v. Dulles*, *Coker v. Georgia*, *Enmund v. Florida*. (citations omitted).”¹²⁴ Relying on *Thompson*, the dissent in *Stanford v. Kentucky*¹²⁵, held that it was constitutional to impose the death penalty on juveniles over age 16, noted that “indicators of contemporary standards of decency should inform our consideration of the Eighth Amendment are opinions of respected organizations.”¹²⁶ The dissent included as an indicator of this contemporary standard of decency an amicus brief submitted by the International Human Rights Law Group.¹²⁷

Through opinions like *Roper*, *Lawrence*, *Atkins*, *Thompson* and *Stanford*, the Court is clearly acknowledging the importance of the way the United States is perceived in the global context and clearly stating that reliance or utilization of international standards as guidance in rendering opinions is not inconsistent with our system of law. Although the United States has not ratified the Convention, it is safe to surmise that if a case came before the court dealing with the issue of gender equality, the Convention will be quoted as an authoritative amalgam of the world opinion on gender equality issues.

¹²³ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

¹²⁴ *Id.* at 831 n. 31.

¹²⁵ *Stanford v. Kentucky*, 492 U.S. 361 (1989).

¹²⁶ *Id.* at 388-389

¹²⁷ *Id.*

Conclusion

In sum, the Convention provides the most comprehensive international declaration of women's legal rights. Some potential reasons for non-ratification by the United States have included the pace at which the State Department ratifies treaties, the limited amount of resources the State Department has to review treaties, and the overall desire of the United States to want to fully abide by and comply with the terms of a treaty. It is also possible that some of the domestic arguments against ratification have been influential in preventing the United States from going forth with ratifying the Convention.

If the United States did ratify the Convention, it would not do so without making many reservations, which must be compatible with the parameters of reservations laid out in the Vienna Convention. The principle that reservations must not be incompatible with the object and purpose of the treaty, as outlined in Article 19(c) of the Vienna Convention on the Law of Treaties, is an integral part of the Convention, as it is stated verbatim in Article 28(2) of the Convention. Although this is directly stated, there still remain problems with interpreting the provisions of the Vienna Convention that deal with the rules of objection and the rules of compatibility, so this makes it difficult to discern how exactly the rules apply to the Convention.

The Convention is the most heavily reserved human rights treaty as cited by the examples provided supra. Some of the reservations seem very substantive, in that they border on being compatible with the object and purpose of the Convention, and thus may be in violation of the Convention per Article 28(2). Other reservations are more

procedural in nature and do not seem to negatively impact any object or purpose of the treaty.

United States reservations include reservations related to constitutional issues, military issues, maternity leave issues, and finally the reservation to the implementation of the necessary legislation to make the treaty forceful and effective on a domestic level. Supporters of ratification argue that it is possible due to the basic compatibility between United States law and the Convention. However, the apparent tension between our Equal Protection Clause and the Convention make it highly unlikely that ratification without drastic reservations will occur anytime soon. And, if it does occur, the reservations may be substantive in nature and thus go against the object and purpose of the Convention and violate the good faith provision of the Vienna Convention on the Law of Treaties, and Article 28(2) of the Convention itself.

However, the Supreme Court trend of relying on international documents to provide evidentiary support for the validity of their decisions points to the possibility that if a gender equality issue came before the Court, it is highly likely that the Convention would be cited in the opinion because of its representation as the collection of gender norms from around the world. Thus, the United States should ratify the Convention.

