Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America

Catherine Powell
Georgetown University, cp443@law.georgetown.edu

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Catherine Powell*

INTRODUCTION

While we live in an Age of Rights,¹ culture continues to be a major challenge to the human rights project. During the drafting of the Universal Declaration of Human Rights (UDHR)² in the 1940s and during the Cold War era, the periodic disputes that erupted over civil and political rights in contrast to economic, social and cultural rights could be read either explicitly or implicitly as a cultural debate.³ Some scholars and commentators claim that with the collapse of the Cold War and in the aftermath of the September 11 terrorist attacks, the clash today is even more explicitly a cultural one—between Western and other cultures.⁴ Despite attempts by President George W. Bush to reach out to...

* Associate Professor of Law and Co-Faculty Director, Joseph R. Crowley International Human Rights Program, Fordham Law School. Former Founding Executive Director, Columbia Law School, Human Rights Institute. J.D., Yale University; M.P.A., Princeton University; B.A., Yale University. I benefited greatly from presenting drafts of this Article at the Columbia International Law Workshop, Cornell Feminist Theory Workshop, Fordham Faculty Workshop, Georgetown International Legal Theory Workshop, NYU Law Review Workshop, Yale Law School Human Rights Workshop, and at Princeton University and Wellesley College. I am also grateful to Lama Abu-Odeh, Jose Alvarez, Karen Engle, Martha Fineman, Martin Flaherty, James Fleming, Katherine Franke, Abner Greene, Laurence R. Helfer, Louis Henkin, Tracy Higgins, Vicki C. Jackson, Bob Kacorowski, Paul Kahn, Linda McClain, Henry Monaghan, Judith Resnik, Susan Sturm, Edward Swaine, Chantal Thomas, Ian Weinstein, Leti Volpp and Benjamin Zipursky for their support and invaluable comments on earlier drafts of this Article. Thanks are also due to Jay Chien, Tahira Clarke, Geeta Kohli, Seema Saife, Katy Schuman, and Nycole Thompson for their superb research assistance, as well as Cynthia Enciso and Travis Neal of the Hastings Law Journal for their helpful editorial assistance.

4. For discussion of the culture clash theory in the post-Cold War era, see, e.g., Samuel P. Huntington, Clash of Civilizations and the Remaking of World Order (1996); Bernard Lewis, Islam and the West (1993); Susan Moller Okin, Is Multiculturalism Bad for Women?, in Is
Muslims following the September 11 terrorist attacks, statements by U.S. government officials have reinforced the perception of a civilizational divide between the Western world and Muslim world by “characteriz[ing] the war against terrorism as a battle for ‘civilization’—indeed, a ‘crusade.’” Gender has figured prominently in this perceived

MULTICULTURALISM BAD FOR WOMEN? (Joshua Cohen et al. eds., 1999).

For discussion of the culture clash theory following the September 11 attacks, see, e.g., Lisa Schiffren, How the Judges Forced the President’s Hand, N.Y. TIMES, Feb. 29, 2004, § 4, at 13 (describing the debate over gay marriage as “a distraction from the real cultural war, which is being fought in the Middle East against terrorists and anti-democratic fanatics.”). Much of the post-September 11 commentary positing a clash of cultures builds on Samuel Huntington’s earlier work or notes the relevance or popularity of his theory in the wake of the attacks. See, e.g., Stanley Kurtz, The Future of “History”: Francis Fukuyama and Samuel P. Huntington, Post-September 11, Pol’y REV. (Hoover Institution), June & July 2002, available at http://www.policyreview.org/jun02/kurtz.html. Stanley Kurtz says of Huntington’s work:

Read in the wake of September 11, it is more than clear that Huntington’s book is filled, not with impermissible “essentialism,” but with useful generalizations. . . . How did Huntington manage to predict the future so uncannily? . . . He acknowledged and explored what others failed to recognize—that America was already engaged in a war of sorts with the Islamic world, even before September 11. Id.; see also Joel Achenbach, The Clash, WASH. POST, Dec. 16, 2001, at W-17 (“There’s no doubt that Huntington has been in ascendency since September 11. His book, five years after publication, has rocketed onto the best-seller lists.”); Gershom Gorenberg, Clash of Civilizations? No Thanks, JERUSALEM REPORT, Oct. 22, 2001, at 33 (noting that following the September 11 terrorist attacks, Huntington’s Clash of Civilizations rose to twenty-fourth on the sales rankings of Amazon.com); Thomas Meyer, A Fundamental Fallacy, TIMES HIGHER EDUC. SUPPLEMENT, Nov. 9, 2001, at 15 (“Since the September 11 attacks on the United States, there has been a revival in the debate about clash-of-civilizations theory.”); Ahmadzukiman Zain, Send Clear Message to the World, Says Hariri, MALAY. NAT’L NEWS AGENCY, Oct. 14, 2003 (quoting Lebanese Prime Minister Rafiq Hariri as saying, “Certain parties that have a problem with Muslims understood [September 11] as an affirmation of Huntington’s thesis about clash civilizations. But this is not true.”).

In the aftermath of the September 11 terror attacks, Samuel Huntington has apparently backed away from his theory to some extent. See Achenbach, supra (Paraphrasing Huntington, following an interview with him, Achenbach notes that Huntington recognizes that the Islamic world is not a monolith, and that the September 11 “terrorists did not represent Islam—this wasn’t an authentic civilizational clash [although] it might just lead to one.”); Gary Dorsey, Choosing a Clash of Cultures to Blame, BALTIMORE SUN, Oct. 21, 2001, at 1F (“[A]lthough Huntington has rapidly backpedaled since Sept. 11, saying the terrorist attacks cannot exemplify his theory, the Clash of Civilizations idea has been raised repeatedly to explain the supposed enmity within Muslim nations for Western culture and pointed to as the fuel that fires fundamentalist rage.”).

5. Following the attacks, President Bush met with Muslim leaders, took off his shoes before visiting the Islamic Center in Washington, D.C., and stated publicly that Americans must not target people with hate crimes because they belong to specific groups. See Leti Volpp, The Citizen and the Terrorist, 49 UCLA L. REV. 1575, 1581 (2002) (citing Dana Milbank & Emily Wax, Bush Visits Mosque to Forestall Hate Crimes: President Condemns an Increase in Violence Aimed at Arab Americans, WASH. POST, Sept. 18, 2001, at A1).

6. Volpp, The Citizen and the Terrorist, supra note 5, at 1582; see also Peter Ford, Europe Cringes at Bush “Crusade” Against Terrorists, N.Y. TIMES, Sept. 19, 2001, at A1 (describing concerns among political and religious leaders in Europe that Bush was promoting the idea of a “clash of civilizations” by—however unintentionally—invoking the idea of the Christian crusades against Muslims, when Bush warned Americans that “this crusade, this war on terrorism, is going to take awhile”); Michael Hirsch & Roy Gutman, Powell’s New War, NEWSWEEK, Feb. 11, 2002, at 24 (describing George Bush’s use of “axis of evil” and describing the fight as one “the President has
culture clash, for example, with the Bush administration’s use of Afghan women as cultural icons in need of liberation—a claim that helped justify the overthrow of the Taliban government in Afghanistan.7

According to this culture clash notion, the West is governed by rationality and enlightenment, rather than culture.8 By contrast, “[t]he notion that non-Western people are governed by culture suggests they have limited capacity for agency, will, or rational thought.”9 As such, the West is assumed to provide a culturally neutral baseline or measuring rod against which to evaluate the progress of the rest of the world, whose cultural practices are said to clash with what is perceived to be a Western liberal human rights tradition. To be fair, one prominent culture clash scholar, Susan Moller Okin, acknowledges that “Western cultures, of course, still practice many forms of sex discrimination,” but asserts that Western liberal cultures have generally “departed far further from [their patriarchal pasts] than others.”10 In fact, in developing this gendered dimension to the clash, Okin concludes that female members of “a more patriarchal minority culture [may] be much better off if the culture into which they were born were either to become extinct . . . [or if the culture were] encouraged to alter itself so as to reinforce the equality of women . . . .”11


8. For discussion and critique of this notion, see Leti Volpp, Blaming Culture for Bad Behavior, 12 YALE J.L. & HUMAN. 89 (2000). Volpp notes, “According to the West, culture—not the high culture of opera, but the culture of daily activities, quotidian practices and rites—did not rule the lives of the rational thinkers of the West as it did those who were governed by tradition, folk ways, and tribal affiliations.” Id. at 98.

9. Id. at 96.
10. Okin, supra note 4, at 16.
11. Id. at 22–23.
Several scholars have criticized this gendered dimension of the culture clash hypothesis as unnecessarily pitting gender against culture and for its monolithic approach to culture and, relatedly, religion.12 Further, as Leti Volpp points out, this culture clash approach both diverts attention away from sex inequality closer to home and exoticizes third world women in ways that put the spotlight on cultural restrictions while obscuring other restrictions and obstacles these women face.13 While culture clash theorists and other scholars have focused mainly on cultural practices affecting non-Western women (as well as minority and immigrant women in the West), far less attention has been given to the complex ways in which cultural claims are advanced to limit women's human rights more generally in the West, much less in the United States.14 Consider, for example, the fact that the primary cases advanced in the debate over whether human rights are universal or culturally relative—female circumcision, bride burning, honor killings, veiling, polygamy—are largely drawn from non-Western States.15

By contrast, this Article examines cultural arguments made in
opposition to the United States' ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) during hearings in the Senate Foreign Relations Committee in 2002. By offering a home grown illustration reflecting how cultural claims are advanced to limit women’s human rights in the United States, this Article provides a window into the complexity of cultural arguments. Because this Article assumes that there is much we still do not fully understand about how culture operates, its focus on the United States serves as a warning against oversimplifying cultural claims at home or abroad. While cultural claims are often genuine expressions of shared ways of life, such claims cannot necessarily always be taken at face value. In the United States and abroad, cultural claims are sometimes manipulated to advance other interests, including those of male elites, and are, therefore, frequently contested by the very women in whose name these claims are made. In fact, women have often challenged the validity of such cultural claims or have provided alternate interpretations of their local culture or religion.

Although this Article investigates cultural claims made by CEDAW opponents in the U.S. ratification context, the failure of the United States to ratify CEDAW has been conventionally understood as grounded in concerns that the Convention is incompatible with U.S. constitutionalism. A fresh look at the ways constitutional objections in the United States have masked cultural assumptions about women is particularly urgent in light of renewed attention to women's human rights and constitutionalism in the context of new constitutional frameworks in Afghanistan and Iraq. Commentators have expressed concern regarding the role of religion and culture as potential obstacles for Afghan and Iraqi women to achieve constitutional rights, noting, for example, that constitutional provisions in Afghanistan and Iraq envisioning a role for Islam create “tensions in the constitutional

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17. See, e.g., Sunder, Piercing the Veil, supra note 12, at 1399 (describing this in the context of the work of women living under Muslim law).


structure” that may be at odds with securing women’s equality. An important backdrop for these concerns is the fact that the U.S. invasion of Afghanistan was in part justified as a means to save “women of cover” (as President Bush called the Burka-clad Afghan women). This Article draws attention to women’s human rights in the context of U.S. constitutionalism to explore ways in which tensions created by the U.S. constitutional structure have operated as a cover for cultural assumptions about American women in the context of CEDAW ratification.

In rejecting CEDAW, the United States has hidden behind the banner of constitutionalism—particularly notions of federalism and limited government inherent in U.S. constitutionalism. But, as testimony offered during the CEDAW ratification debate reveals, the United States’ failure to ratify CEDAW can be usefully understood as grounded in fear that ratification would disrupt traditional cultural understandings of women’s role in the family and in society. In fact, some of the CEDAW opponents who testified against ratification framed their objections explicitly in terms of culture and traditional gender roles. Rather than adopting this explicit cultural framing of the Convention, however, the United States, in its official position on CEDAW has expressed reservations to the treaty in terms of constitutionalism. By veiling traditional cultural understandings of women behind the lofty claim of constitutionalism, the United States has largely been able to...

20. Feldman, supra note 19 (speculating that in light of the fact that the Afghan draft constitution makes Islam the nation’s official religion, “tensions in the constitutional structure will have to be resolved later by the Supreme Court [such as whether] laws requiring women to dress modestly [will be found] unconstitutional as a violation of women’s rights, or constitutional as in accord with the teachings of Islam); see also Linda C. McClain, Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations, 72 FORDHAM L. REV. 1569, 1590 (2004) [hereinafter McClain, The Place of Associations]. Referring to the Afghan Constitution, McClain asks:

How will the constitution’s guarantees of freedom from discrimination and equal rights and duties before the law reconcile with the provision that “no law can be contrary to the sacred religion of Islam” and that laws protecting the family (especially the child and mother) shall not be contrary to “the sacred religion of Islam”?

Id. (referring to AFG. CONST., arts. 2, 22, 54 (2003), available at http://www.constitution-afg.com/Adopted%20Constitution.htm)). For discussion of similar concerns about potential tensions between Islam and women’s equality raise in the context of the emerging constitutional framework in Iraq, see Wong, supra note 19 (“A working draft of Iraq’s new Constitution could cede a strong role to Islamic law and could sharply curb women’s rights, particularly in personal matters like divorce and family inheritance.”).


23. As discussed in Part I and III, the United States has proposed a set of reservations, understandings and declarations (RUDs) to limit the impact of CEDAW on domestic law. See infra notes 58–59 & 138 and accompanying text. These RUDs are framed in terms of constitutionalism and perceived constitutional constraints. Because family law and other areas of domestic law related to gender have traditionally been regulated by state and local government, the constitutional constraints of federalism and limited government are reflected in the proposed RUDs.
avoid serious international criticism of its failure to ratify CEDAW. By contrast, countries that have more explicitly relied on cultural or religious objections to women's human rights in their reservations to CEDAW have attracted significant international criticism.\(^\text{24}\)

While women's human rights activists in the Muslim world are, in the words of Madhavi Sunder, "piercing the veil"\(^\text{25}\) of religion and culture as justifications to deny these women their rights, this Article suggests that *American* women lift the veil which cloaks cultural assumptions underlying U.S. resistance to ratifying CEDAW. Rather than dwell on the poetics of the veil as a symbol of women's oppression in Afghanistan and other parts of the Muslim world,\(^\text{26}\) this Article argues that American women could benefit from considering that, today, Afghanistan has ratified CEDAW, while the United States has not.\(^\text{27}\) In the analysis offered here, the veil serves as a symbol of how U.S. exceptionalism\(^\text{28}\) has blinded American women from recognizing the potential of the international human rights framework to offer substantive norms concerning women's equality. In fact, our focus on the perceived subordination of women in other cultures (signified in the United States by the veil) has helped to obscure the degree to which the rights of *American* women are limited by aspects of our culture. With the title, "Lifting Our Veil of Ignorance," this Article calls on American women to expose to sunlight, debate and criticism the cultural arguments made in the context of CEDAW ratification. The Article also points to the need for criticism and revision of the international human rights framework to realize process-oriented principles concerning transparency and women's participation in the making, implementation and interpretation of international treaties. This Article, therefore, is part of my broader research agenda criticizing the current structure of international law for its heavy reliance on traditional notions of the nation-state, which

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\(^{24}\) Consider, for example, the fact that the CEDAW Committee recommended that the U.N. review reservations to CEDAW based on Islam. See, e.g., Louis Henkin, Gerald Neuman, Diane Orentlicher and David Leebron, Human Rights 364 (editors' notes).

\(^{25}\) Sunder, *Piercing the Veil*, supra note 12, at 1399; see also Mayer, *Universal Versus Islamic*, supra note 12, at 307 (discussing the political protests of Iranian and Saudi women opposing their governments' attempts to deny recognition of women's human rights).

\(^{26}\) See Abu-Lughod, *supra* note 7, at 785 (critiquing the West's obsession with the veil as a symbol of the oppression of Muslim women).

\(^{27}\) I am not arguing here that Afghanistan guaranties women's human rights more effectively than the United States, or that mere ratification ensures compliance with international human rights law. See Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (noting that since countries with worse human rights ratings often ratify treaties at higher rates than those with better ratings, human rights treaty ratification is often associated with worse ratings than otherwise expected). However, I am suggesting that ratification is one of several variables for measuring compliance with international human rights standards.

\(^{28}\) For discussion of how the Unites States' hostility to participating in international regimes reflects American exceptionalism, see Michael Ignatieff, *American Exceptionalism and Human Rights* (2005).
operate to exclude women and others who lack power in national law making processes.  

Additionally, by titling this Article "Lifting Our Veil of Ignorance," I am alluding to John Rawls's well-known idea of the veil of ignorance.  

Using this metaphor in his 1971 book, A Theory of Justice, Rawls invites us to imagine what principles of justice individuals would choose in forming a social contract in which no one knows his or her place in society.  

As a thought experiment, we might assume that Rawls's notion could include ignorance of one's gender (although in 1971, he did not explicitly list gender as one of the unknowns behind the veil of ignorance).  

A Rawlsian analysis would, thus, posit that in selecting principles of justice behind such a veil of ignorance, men and women would choose principles that would be fair and would lead to greater equality in the sense that in arriving at them, no one is permitted to be partial to themselves. By extension, this Article assumes that behind the veil of ignorance, men and women, each unaware of his or her gender, would be deeply concerned with ensuring women greater equality than is available under the U.S. constitutional scheme (which, of course, women were not able to participate in designing).  

This Article suggests, then, that the principles selected behind a veil of ignorance would be more consistent with CEDAW than the sex equality paradigm that has developed through judicial interpretation of the U.S. Constitution.  

To be sure, the veil of ignorance is a hypothetical construct, and we have no actual veil of ignorance in the real world. While we cannot create a veil of ignorance, identifying ways to broaden participation in law-making can help us mimic its effects. In securing representation from as many different walks of life as possible, we could ensure that the treaty implementation process utilizes principles of process that come as

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30. John Rawls, A Theory Of Justice 11-17 (1971). One may object that Rawls's style of reasoning is itself culturally located, emerging as it does from Western intellectual thought. However, since I am drawing on Rawls as a mode of analyzing women's rights in the United States, I am not proposing imposition of a Western intellectual framework on a non-Western context. I would like to acknowledge Paul Kahn for raising this point as a possible objection.  

31. Id. at 12 ("Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.").  

32. See Susan Moller Okin, Justice and Gender: An Unfinished Debate, 72 Fordham L. Rev. 1537, 1548-49 (2004) (suggesting that were gender to be considered a contingent characteristic in the veil of ignorance—as Rawls later indicated in response to feminist criticism of his work—then "considerable revision of the theory seemed called for.").  

33. Id. at 1549.
close as possible to veil of ignorance-produced principles (i.e., principles that reflect fairness and equality—by including the voices of the previously excluded, rather than merely the biases of the most powerful members of society). In so doing, broader participation would help lift the veil of ignorance that surrounds our understanding of CEDAW and why the United States has yet to ratify it. While Rawls asks us to put on, rather than take off, the veil, paradoxically, this proposal—which calls for greater awareness of international law through increased participation in the treaty process—relies on procedural norms that are actually consistent with Rawls.

To the extent that we appreciate that his principles of justice are principles that require a more fair and equal process as much as they are substantive principles, a Rawlsian analysis leads us to both a more inclusive process and the type of substantive equality envisioned in CEDAW. The primary objective of this Article, however, is to propose a structural (as opposed to substantive) solution, by calling for broad-based participation in treaty making and implementation.

Part I examines the emergence of the West/Rest culture clash view of the world in the human rights field, and warns that this view is both inaccurate and corrosive. Part II of this Article discusses the value of identifying cultural objections to CEDAW in the United States, as a means of moving beyond the West/Rest dichotomy. Part III then examines the United States as a case study of a Western country whose failure to ratify CEDAW reflects particular cultural assumptions about women and their roles in the family and society. By unveiling these cultural assumptions through examination of the CEDAW ratification hearing itself, this Article offers a culturally conscious account of the United States' approach to women's human rights. In developing such an account, this Article suggests that cultural claims that underlie any State's objections to women's human rights must be viewed as potentially contested by and unrepresentative of large numbers of women within a particular society, given that the views of women are typically

34. Widening the range of participants in the debate about treaties such as CEDAW has the added benefit of expanding the scope of cultural narratives that we can draw on, leading to a more complex picture of culture and enriching our understanding of the context in which CEDAW would operate.

35. Admittedly, Rawls is committed to the notion that reason, not revelation, should have priority in establishing a system of justice. In fact, the act of stepping behind his veil of ignorance involves giving up "revelation" as the source of truth. To those who believe that reasoning must start from revelation, Rawls's position may be a nonstarter. However, by proposing that Americans lift our veil of ignorance, this Article contends that reason would be facilitated by revealing to more people more information about "external" international legal norms, the "internal" domestic legal norms, and the relationship between these two. I would like to thank Paul Kahn for noting the tension that exists between reason and revelation.

36. Once a more inclusive process is in place, treaties such as CEDAW must either be adopted or rejected based on their own merits.
underrepresented in the treaty ratification process. Part IV of the Article draws on feminist readings of John Rawls’s work as a heuristic device to examine how new, more participatory modes of deliberation over human rights treaty norms could facilitate the involvement of disenfranchised groups, such as women, in debates over treaty norms.

I. THE EMERGENCE OF THE CULTURE CLASH VIEW OF THE WORLD IN THE HUMAN RIGHTS FIELD

Conceived of during World War II and in its aftermath, the contemporary human rights idea insists that all humans everywhere are inherently entitled to basic rights simply by virtue of our humanity. A parsing of the human rights idea reveals its organizing principle. Human rights are conceived of as “human,” because they are implied in our humanity; they are inalienable. Human rights are also conceptualized as “rights,” not mere aspirations or charity.37 Humans are entitled to these rights equally and in equal measures regardless of location.

According to the idea of rights, individuals have claims (“rights”) upon society, and society has corresponding duties to provide domestic laws and institutions to effectuate these rights.39 The duties that States owe are both negative and affirmative, as they must respect, protect, and ensure rights. While respecting rights can be achieved through government restraint from violating rights, protecting and ensuring rights require more: States must affirmatively provide mechanisms to prevent and punish rights violators, as well as effectuate rights.

Beautiful in its simplicity, the idea of human rights has become universal and international.41 It is international in that by piercing national sovereignty, human rights scrutiny has transformed governments’ treatment of individuals, including its own citizens, into an appropriate subject of international inquiry. The human rights idea is universal, both as an historical and empirical matter.

Historically, the idea of human rights can be most directly traced to

37. These rights cannot be transferred, waived, forfeited, usurped, or lost through failure to exercise or assert them. HENKIN, supra note 1, at 3.
38. Id. at 2.
40. While the distinction between civil and political rights on the one hand and economic, social, and cultural rights on the other is often understood as a re-articulation of the negative/affirmative rights dichotomy, several theorists have critiqued this dichotomy. See, e.g., HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 35-40 (2d ed. 1996). After all, effectuating welfare rights (typically considered an affirmative or economic right) does not necessarily require greater affirmative government outlays than the right to liberty (typically considered a negative or civil right), which requires supporting the cost of a police force, judicial system, and the right to counsel for indigent defendants. Id. I am grateful to Jeremy Waldron for bringing this point to my attention.
41. HENKIN, supra note 1, at 2, 13-29.
John Locke as well as revolutionary moments in the Western experience.\textsuperscript{42} However, these seventeenth- and eighteenth-century Western ideas of individual autonomy combined with twentieth-century predominantly non-Western ideas about decolonization, welfare state, socialism, and group rights.\textsuperscript{43} This broad conception of the human rights idea found full expression in the Universal Declaration of Human Rights (UDHR), which was adopted in 1948. As an empirical matter, virtually all of today’s States have accepted the UDHR.\textsuperscript{44} Even the Asian States that issued the “Bangkok Declaration” (a counter to the official document developed leading up to the 1993 Vienna World Conference on Human Rights) do not seriously take issue with the universality of rights so much as the selectivity with which civil and political rights are prioritized over economic, social, and cultural rights.\textsuperscript{45}

These dimensions of the human rights idea are now widely understood and agreed upon; governments, however, both Western and non-Western, have failed to respect, implement, and enforce the full range of human rights. Among other things, this failure is enabled through selective enforcement, treaty reservations, and the existence of two separate international human rights covenants that divide civil and political rights from economic, social, and cultural rights.

While both Western and non-Western States continue to resist rights compliance, in the context of women’s human rights, scholars and advocates have primarily focused on cultural objections made by non-Western States. This focus has contributed to the culture clash view of the world and has coalesced around questions concerning gender equality.

A. Gender as a Focal Point

While far from being the only area where culture creeps into the human rights field, gender has become an enormous focal point for scholarship, policy debate and popular discourse on culture.\textsuperscript{46} Seyla

\textsuperscript{42} See id. at 1 (providing historical perspective, including how the Universal Declaration of Human Rights (UDHR) tracks the American Declaration and French Declaration for the Rights of Man and of the Citizen).

\textsuperscript{43} Id.

\textsuperscript{44} Henkin, The International Bill of Rights, supra note 39, at 1 (“The universalization of human rights is a political fact. . . . [E]ven those, notably the European Communist states, which had abstained when the Declaration was approved, have now accepted it formally in the Final Act of the Conference on Security and Cooperation (Helsinki, 1975).”); see also Thomas Franck, The Empowered Self: Law and Society in the Age of Individualism 148 (1999). In tracing the history from communitarianism to individualism, Franck notes that advocates from non-Western countries have “taken the lead in insisting that human rights are not a set of imposed western ideas, but are of universal application, speaking to the human condition,” Id. (citing Rosalyn Higgins, Ten Years on the Human Rights Committee, 6 EUR. H. RTS. L. REV. 570, 575 (1996)).

\textsuperscript{45} See Powell, Locating Culture, supra note 14, at 207–08.

\textsuperscript{46} Martha Minow, About Women, About Culture: About Them, About Us, 129 DEDALUS 125
Benhabib posits that "women and their bodies are the symbolic-cultural site upon which human societies inscript their moral order." Women as agents for transferring cultural practices from one generation to the next is hardly inevitable. Yet, the cases advanced in the controversy over whether human rights are universal or vary according to culture center on women's bodies—specifically, non-Western women's bodies. For example, gender segregation enforced by the Taliban leadership in Afghanistan was seen as a paradigmatic example of cultural defiance against a human rights framework assumed to be Western. By contrast, the United States' failure to ratify CEDAW is not seen as cultural, and is therefore normalized and rationalized. Why is this so, and does this help explain why gender equality practices in the United States are rarely scrutinized as international human rights violations?

B. GOOD ACTORS AND BAD ACTORS

The culture clash view of human rights helps to cast Western States as "good" actors and non-Western States as "bad" actors. This West/Rest dichotomy is reinforced by what governments themselves say. On the one hand, non-Western States are more likely to attach conditions—known as reservations, understandings, and declarations (RUDs)—that explicitly rely on cultural and religious grounds, than on constitutional provisions. These States often invoke "sovereignty" as a

49. See supra text accompanying note 14-15.
The Taliban project was tinged with medieval romanticism, in which supposedly traditional practices were exalted over the West of independent women like Monica Lewinsky and Kate Winslet. It was above all, however, a form of countermodernity. It envisaged itself as a pure form of Islam.... As a nativist countermodernity it rejected both major foreign forms of cultural imperialism, Marxism and liberalism. It represented itself as... authentically Afghan.....

Id. at 805. But see Shahin Cole & Juan Cole, Veil of Anxiety Over Women's Rights, L.A. TIMES, Mar. 7, 2004, at M2 (suggesting that the Taliban's exclusion of women from schools may not have been particularly faithful even to Islamic principles, pointing out that “[i]n Afghanistan, the Taliban excluded women from all education, despite the Islamic principle that all believers must seek knowledge, on the ground that the injunction used masculine grammar and applied only to males.”).
51. See supra note 8 and accompanying text.
52. Having surveyed all of the RUDs submitted for CEDAW, I have found that sixteen non-Western governments rely on religion or culture, including: Bangladesh, Egypt, India, Iraq, Kuwait, Lesotho, Libya, Malaysia, Maldives, Mauritania, Morocco, Niger, Pakistan, Saudi Arabia, Singapore,
shield against international criticism of cultural and religious practices. For example, Liu Huaqui, the head of the Chinese Delegation to the Vienna World Conference on Human Rights, warned that the West's human rights priorities were not sufficiently sensitive to Asian values, culture and sovereignty: "To wantonly accuse another country of abuse of human rights and impose the human rights criteria of one's own country or region on other countries or regions are tantamount to infringement upon the sovereignty of other countries and interference in the latter's internal affairs . . . ." In invoking these objections, these States often construct culture as static, fixed, untouchable and unchanging, sometimes for self-serving, patriarchal or nationalistic reasons. These static constructions of culture often developed and were consolidated in the context of anticolonial struggles, in which nationalist discourse relied upon particular images of women. Such images of women have been vital "in marking the identity of the nation" which is often constructed through metaphor. We know also from Benedict Anderson's work that culture and community are imagined, often in response to, in solidarity with, or in opposition to colonialism, trade, immigration, and other transnational projects.

On the other hand, Western States, such as the United States, are more likely to base their RUDs to CEDAW on concepts inherent in constitutionalism, than on culture or religion. While the United States has not yet ratified CEDAW, it has proposed RUDs to the Convention, and Syria. Five of these governments have also invoked constitutional provisions. These include Lesotho, Mauritania, Morocco, Niger and Pakistan. Two non-Western states, Thailand and Tunisia, have relied on constitutional provisions, but not on culture or religion. Article 19 of the Vienna Convention on the Law of Treaties allows parties to make reservations to a treaty only if they do not undermine the "object and purpose" of the treaty. CEDAW has a similar provision, Article 28(2), which permits reservations only insofar as they are consistent with the "object and purpose" of CEDAW. See CEDAW, supra note 16, art. 28(2).

53. Liu Huaqui, Speech at the World Human Rights Conference in Vienna (June 1993), quoted in Michael C. Davis, Human Rights in Asia: China and the Bangkok Declaration, 2 BUFF. J. INT'L L. 215, 226–27 (1996). But see Amartya Sen, Human Rights and Asian Values, NEW REPUBLIC, July 14, 1997, at 34 (criticizing this "clash of civilizations" approach and arguing that it is disingenuous to characterize such a vast and diverse region as Asia as having a monolithic set of values "that separate the Asians as a group from people in the rest of the world").

54. See, e.g., NARAYAN, DISLOCATING CULTURES, supra note 14 (describing the reliance of Indian nationalism on particular images of Indian women in need of rescue from British colonialism).

55. Volpp, Feminism Versus Multiculturalism, supra note 12, at 1198.

56. BENEDICT ANDERSON, IMAGINED COMMUNITIES (Verso 1991).

57. To the extent Western states provide a reason for entering an RUD, the basis is more likely to be grounded in constitutionalism than culture. Three Western countries that have ratified CEDAW refer specifically to constitutional provisions in entering RUDs to the Convention, including Australia, Liechtenstein, and Spain. Israel is the only Western state that explicitly invokes religion as the basis of a reservation (in the context of (1) the appointment of women to serve as judges in religious courts, and (2) personal status laws binding on various religious communities in Israel). However, as discussed in Part III, other RUDs, such as the RUDs proposed by the United States, implicitly reflect cultural and perhaps even religious views.
invoking the related notions of federalism and limited government. For example, by invoking the notion of federalism in a proposed “federalism understanding,” the United States has arguably tried to limit the responsibility of the national government in securing women’s rights in spheres deemed the province of state and local government.\footnote{58} By asserting the notion of limited government, the United States has also tried to limit the national government’s role in securing women’s rights in the marketplace. Proposed reservations to CEDAW’s requirements concerning paid maternity leave and equal remuneration reflect this effort to limit government regulation of the market in wage and benefit arrangements that would enhance equality for women.\footnote{59}

International human rights non-governmental organizations (NGOs) and United Nations agencies fall into a similar trap of dichotomizing Western and non-Western States vis-à-vis women’s human rights. One need only consider proposals at the U.N. to focus on Islamic reservations to CEDAW in contrast to other types of reservations, or the focus by women’s divisions of international human rights NGOs on “cultural practices” in non-Western (but not Western) States that violate women’s

\footnote{58} In a September 6, 2002 report, the Senate Judiciary Committee recommended that the Senate give its advice and consent to ratification, subject to four reservations, five understandings and two declarations. Proposed U.S. Reservations, Understandings and Declarations to CEDAW, cited in S. REP. No. 107-9, at 6 (2002) [hereinafter Proposed U.S. RUDs to CEDAW]. The first understanding, commonly known as a “federalism understanding,” is mirrored in several treaties the United States has ratified. \textit{Id.} The proposed “federalism understanding” for CEDAW states:

\begin{quote}
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 therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.
\end{quote}

\textit{Id.} (emphasis added); cf. Ann Elizabeth Mayer, \textit{Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?}, 23 \textit{HASTINGS CONST. L.Q.} 727 (1996). This “appropriate measures” language could arguably be understood as limiting the federal government’s obligation to ensure fulfillment of the Convention in areas in which state and local governments exercise jurisdiction. For discussion of the “take appropriate measures” language as it is used in CEDAW itself, see \textit{infra} notes 80-86 and accompanying text.

\footnote{59} The proposed reservation to the treaty provision concerning equal remuneration states:

\begin{enumerate}
\item That U.S. law provides strong protections against gender discrimination in the area of remuneration, including the right to equal 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 U.S. practice.
\end{enumerate}

\textit{Proposed U.S. RUDs to CEDAW, supra} note 58, at 6. The proposed reservation to the treaty provision concerning paid maternity leave states:

\begin{quote}
Current U.S. 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 with comparable social benefits without loss of former employment, seniority or social allowances.
\end{quote}

\textit{Id.} For discussion of CEDAW’s requirements concerning paid maternity leave and equal remuneration, see \textit{infra} notes 76–77 and accompanying text.
human rights. Of course, the very terms “Western” and “non-Western” re-inscribe the default assumption that the West is culturally neutral, while the non-Western (the not Western) is residual. I use the terms “Western” and “non-Western” as a kind of placeholder from which to examine and criticize the assumptions that underlie this dichotomy.

The construction of Western States as good actors and non-Western States as bad actors makes it more difficult for the latter to be co-owners and co-equals in the human rights project, fueling a cycle of resentment that is damaging and corrosive for the human rights project. For decades, Edward Said and Gayatri Spivak have discredited the construction of non-Western countries as the culturally primitive “Other,” which has permitted the West to define a contrasting identity as rational and civilized—a device used in the service of colonialism and imperialism. Paradoxically, non-Western governments play along with the construction of the West as a cultural default by charging that selective human rights critiques are Western and a form of cultural imperialism or colonialism. In this sense, non-Western States embrace their inferior


61. See Edward W. Said, Orientalism 3 (Vintage Books 1979) (1978) (explaining how the creation of “the Orient” in European and American literature, discourse, and imagination has supported Western global conquest and domination); Edward W. Said, Culture and Imperialism 108-09 (Vintage Books 1994) (1993); Gayatri C. Spivak, In Other Worlds: Essays in Cultural Politics (1988); see also Leti Volpp, Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism, 96 Colum. L. Rev. 1573, 1602 n.140 (1996) [hereinafter Volpp, Talking Culture] (“Imperialism has been justified by ideology which posits a fundamental distinction between the West and the rest of the world, created through perceived geographical and cultural barriers, as well as by methods used to codify difference among peoples, which chart progress ‘from primitive or subject races,’ and finally to ‘superior or civilized peoples . . . .’”) (citation omitted). Leti Volpp notes:

The idea that nonwhites are more culturally determined can be traced to historical antecedents in colonialist and imperialist discourse. This discourse contrasted tradition and modernity in the service of justifying the conquest and subjugation of the colonized. Colonialism associated tradition with colonized peoples, ancient ritual, despotism, and barbarity, while connecting modernity to Western progress, democracy and enlightenment. Volpp, Blaming Culture for Bad Behavior, supra note 8, at 97-98.

62. See Tracy Higgins, Anti-Essentialism, Relativism, and Human Rights, 19 Harv. Women’s L.J. 89, 113 (1996) (noting that what is perceived to be a Western feminist agenda has been labeled as “cultural imperialism” and has therefore been resisted by Muslim governments in the context of the 1996 Fourth United Nations World Conference on Women (held in Beijing, China) and the 1994 United Nations Population Conference (held in Cairo, Egypt)); Sunder, Piercing the Veil, supra note
status as the supposedly culturally primitive "Other." The result is a delicate dance whereby non-Western States shield their noncompliance behind a veil of culture, which further enables Western States to mask their noncompliance as non-cultural and therefore rational. This puzzling state of affairs represents the central dilemma of this Article.

This dilemma is all the more stark in the context of women's human rights. The view that women are repositories and purveyors of cultural knowledge for future generations prompts passionate calls to stave off what is seen to be the corrupting influence of external scrutiny. Criticism of cultural practices or restrictions concerning women continues to prompt complaints that such scrutiny violates the "sovereignty" of those countries under examination. Therefore, the notion that women's human rights are inherently Western and that cultural and religious objections to these rights are exclusively non-Western creates an especially powerful dichotomy. On the one hand, this dichotomy undermines the work of non-Western feminists, who are seen as mere agents of their Western counterparts, even when the work of non-Western feminists draws on local or indigenous resources. Consequently, this dichotomy also weakens the ability of "outside" Western feminists, human rights groups and governments to legitimately support the work of feminists in non-Western countries. On the other hand, the West/Rest dichotomy shields the cultural roots of gender inequality in Western States, such as the United States, from scrutiny by either advocates or foreign governments.

II. Why Use Culture as a Vehicle for Understanding the Rejection of CEDAW in Post-September 11 America?

Unveiling the way gendered cultural stereotypes have informed the United States' consideration of CEDAW may be a step toward moving
beyond this dichotomy. To move beyond this dilemma, therefore, we need to theorize a “culturally conscious” account of human rights. What does it mean to theorize a culturally conscious account? A culturally conscious account of human rights differs from what Karen Engle has criticized as a culturally tolerant or sensitive approach to human rights in the sense that the former envisions something different than mere tolerance or sensitivity. A culturally conscious account would recognize and remedy the ways in which we see and do not see culture; the ways in which we alternatively essentialize and ignore it; and the ways in which human rights discourse constructs culture as overdetermined in some sites and underdetermined in others. In being more conscious of ways in which the current discourse elides culture, we may be better equipped to clearly analyze forces besides culture that undermine human rights. However, doing so requires an understanding that all cultures (including our own) are patriarchal—“not more or less so, but differently patriarchal.”

On a theoretical and practical level, a culturally conscious account of human rights involves challenging the twin assumptions that (1) “cultural” objections to human rights are an exclusively non-Western phenomenon against a culturally neutral Western baseline, and (2) Western governments are not susceptible to relativist behavior. The logical corollaries to these twin assumptions are that culture and religion sit largely outside of the human rights framework, and that the only relativism that threatens universal human rights (and therefore the only relativism that matters) is cultural relativism, in contrast to other relativisms that are reflected in selective enforcement of human rights by Western and non-Western governments alike. This Article tests these assumptions.

As I have suggested earlier, the cultural clash view of the world

66. Volpp, Feminism Versus Multiculturalism, supra note 12, at 1217 (emphasis added).
67. In fact, in theory, cultural and religious rights are included in various human rights instruments. Jeremy Waldron’s thoughtful criticism, however, notes that in practice, the human rights paradigm may be an impoverished framework for evaluating and accommodating these claims. Jeremy Waldron, How to Argue for a Universalist Claim, 30 COLUM. HUM. RTS. L. REV. 305 (1999) (arguing that culture and religious claims represent universalist views that are not adequately reflected in the human rights framework). This impoverishment further supports my call for a more culturally conscious account of human rights. At the same time, I am not arguing for a totalizing idea of human rights that can do all the work needed to address cultural and religious needs and claims. Rather, human rights provides a framework for mediating what may at times appear to be conflicting claims (i.e., gender equality and religious rights) and for protecting the space separate and apart from the state within which individuals enjoy religious freedom, spirituality and culture. HENKIN, supra note 1, at 193 (“[R]eligion [and] traditional societies ... will find, I believe, that their values and goals ... depend on individual dignity and fulfillment, and in a modern world have to be firmly supported by the idea of human rights.”).
assumes that human rights is a Western construct and that the United States is generally in compliance with international law norms governing women's human rights. Since the September 11 terrorist attacks, U.S. foreign policy reflects this view and has used concerns regarding cultural restrictions on women's human rights in the Muslim World in an instrumental way to advance the U.S. "War on Terrorism." The use of women's human rights as an instrument of U.S. foreign policy is aptly reflected in First Lady Laura Bush's speech regarding the U.S. invasion of Afghanistan, in which she said that "the fight against terrorism is also a fight for the rights and dignity of women." However, less than a year following Mrs. Bush's speech and the September 11 attacks, the U.S. Senate considered but failed to garner votes to ratify what has been called the "International Bill of Rights for Women." Ratification of CEDAW was defeated in the Senate in part due to pressure by a highly mobilized opposition that warned that CEDAW is a form of "cultural colonialism" that would force women into work and children into day care by "eliminat[ing] cultural norms that support the role of the mother at home[.]", "undermin[ing] the dual-parent married family[.]", and "go[ing] far beyond the protections already enshrined in the laws of the United States of America."

While disagreeing that CEDAW would undermine motherhood or the family, I cannot entirely dismiss these criticisms. In fact, CEDAW ratification would obligate the United States to make dramatic changes to ensure women greater equality. Among other things, CEDAW would obligate the United States to "take all appropriate measures" to ensure

68. I use the phrase "War on Terrorism" because the policies undertaken by the Bush administration in the aftermath of the September 11 terrorist attacks are commonly referred to under this rubric. However, as there is no declared war and the term could have infinite elasticity in its usage leading to imprecision, I prefer to place it within quotation marks. While the United States has invoked human rights as a secondary reason to go to war in Afghanistan and Iraq, the "War on Terrorism" has generally been associated with restricting human rights and civil liberties within the United States. Powell, Transnational Norm Entrepreneurs, supra note 29, at 47; see also David Cole, Enemy Aliens, 54 STAN. L. REV. 953 (2002).

69. Abu-Lughod, supra note 7, at 784.

70. Discrimination Against Women: Hearing Before S. Comm. on Foreign Relations, 107th Cong. 7 (2002) (statement of Kathryn O. Balmforth, Former Director, World Family Policy Center, Brigham Young University) [hereinafter Statement of Balmforth].


72. Id. at 1.


74. Indeed, I believe that CEDAW would strengthen both motherhood and families by assisting women reach their full potential.

75. This phrase, which appears throughout CEDAW, has ambiguous meaning. See infra notes 80–86 and accompanying text.
paid maternity leave and may be interpreted as guaranteeing equal pay for work of comparable worth. These guarantees could offer women far greater economic security than is available under U.S. law. CEDAW’s prohibition against discrimination also applies to discriminatory impact as well as discriminatory intent, unlike the Equal Protection Clause of the U.S. Constitution, which only reaches the latter. Moreover, gender-based violence that disproportionately affects women is included within the definition of discrimination in CEDAW, unlike the U.S. constitutional approach. Furthermore, CEDAW requires that States “take all appropriate measures . . . to modify or abolish existing laws, regulations, customs and practices [that] constitute discrimination against women.” This could reach further into the private sphere than U.S. constitutional law in eliminating discriminatory conduct.

One possible limitation built into CEDAW is that by requiring States to “take all appropriate measures,” it may create an incentive for

76. CEDAW, supra note 16, art. 11(1)(b). While the Family and Medical Leave Act prohibits employers from firing or replacing those who take parental leave, it does not require paid leave. See 29 U.S.C. § 2612 (2000).

77. Compare CEDAW, supra note 16, art. 11(1)(d), with Proposed U.S. RUDs to CEDAW, supra note 58, at 6 (“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 U.S. practice”). While U.S. courts have not accepted the comparable worth doctrine—the notion that government should intervene to ensure equal pay for work of comparable value—hundreds of municipalities and companies in the United States have embraced the comparable worth approach. Mayer, supra note 18, at 804.

78. By defining discrimination as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the . . . exercise by women . . . of human rights,” CEDAW, supra note 16, art. 1 (emphasis added), CEDAW would require the United States to provide a broader equality standard than has been articulated by the U.S. Supreme Court in interpreting the Equal Protection Clause. Compare CEDAW, supra note 16, art. 1, with Washington v. Davis, 426 U.S. 229 (1976) (effectively precluding the discriminatory impact standard for equal protection purposes in the race discrimination context), and Pers. Admin. of Mass. v. Feeney, 442 U.S. 256 (1979) (same as regards to gender).


80. CEDAW, supra note 16, art. 2(f).

81. CEDAW applies to the private sphere. CEDAW, supra note 16, art. 2(e) (requiring states parties to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”). In a proposed reservation to CEDAW, the United States has stated that it would “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 and laws of the United States.” 140 CONG. REC. S13927-04 (daily ed. Oct. 3, 1994).
States to use their discretion in determining what is "appropriate" and to circumscribe implementation of the Convention accordingly. The word "appropriate," therefore, may provide a loophole for States to limit the implementation measures they adopt in light of their domestic cultural, constitutional and other constraints. On this view, States could limit their implementation of CEDAW's requirements without actually departing from international law, since the qualifier "appropriate" is built into the text. In one sense, if CEDAW can be diluted in this way, this interpretation of CEDAW undercuts the underlying assumptions of this Article that U.S. ratification of the Convention is important and desirable. In another sense, however, if CEDAW allows for some qualification of its obligations due to considerations of "appropriateness," then my assertion about cultural resistance to CEDAW in the United States is made stronger. With such a loophole, the United States cannot justly argue that it is hindered from ratifying CEDAW by its own constitution, since it need only implement CEDAW in ways that are "appropriate." On this reading, what appears to be a loophole actually leaves the United States with no legal leg to stand on, further exposing the cultural nature of U.S. resistance to ratification (and the pretextual nature of the constitutional objections).

In fact, scholars are split on the meaning of the "appropriateness" language in CEDAW. Some argue it gives States too much discretion. Others contend that the language was intended to strengthen CEDAW by requiring that States take a broad range of measures beyond just legal

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82. I am grateful to Chantal Thomas for raising this point.
83. Indeed, as Malvina Halberstam has observed, the "federalism" understanding proposed by the United States in its package of RUDs reflects an understanding of the term "appropriate" in that context as enabling it to implement CEDAW (were it to ratify it) in ways that comport with (i.e., are appropriate for) the U.S. constitutional framework. Malvina Halberstam, United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, 31 GEO. WASH. J. INT'L L. & ECON. 49, 58 (1997). As discussed above, by submitting the federalism understanding, the United States could conceivably limit the national government's responsibility to secure women's rights in spheres deemed the province of state and local government. See supra note 58 and accompanying text. Interestingly, Halberstam notes, "The State Department explained at [an earlier round of ratification] hearings that although the Convention will not be used to 'federalize' matters that are presently within the regulatory purview of state and local governments, the federal government will 'ensure that the fundamental requirements of the Convention are respected and complied with at all levels of government within the United States.'" Halberstam, supra, at 58-59 (citation omitted). "Presumably," Halberstam continues, "this means that Congress will not substitute federal legislation for state regulation on matters presently regulated by state and local governments, but the United States is not limiting application of the Convention only to those matters that are presently subject to federal regulation." Id. at 59.
84. See, e.g., Kathryn E. Nelson, Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches, 24 Hous. J. INT'L L. 551, 566 (2002) (arguing that "the Women's Convention has been largely ineffective" in the area of trafficking because, among other reasons, the "appropriate measures" language in Article 6 (concerning trafficking) "is not defined and is too vague to be readily enforceable").
measures. Yet other scholars take the middle ground, positing that the "appropriateness" language provides some discretion, albeit limited. Regardless of whether or not CEDAW's text suggests built-in limitations, clearly some of its opponents in the United States claim the Convention would be far-reaching in its impact. As discussed in Part III in greater detail, CEDAW opponents fear that "matters covered by CEDAW [sic] go to the core of culture, family, and religious belief" and would destroy "our culture." Indeed CEDAW is not exclusively of "our culture" (i.e., American culture) nor is it exclusively of any country's local culture. As with other multilateral treaties, CEDAW is a transnational cultural artifact that blends a variety of approaches to law and culture. Understood as an artifact of transnational legality and culture, CEDAW can be seen as a product reflecting aspirations of women around the globe. Even so, CEDAW can certainly be critiqued

85. See, e.g., Jo Lynn Southard, Protection of Women's Human Rights under the Convention on the Elimination of All Forms of Discrimination Against Women, 8 Pace Int'l L. Rev. 1, 65 (1996) ("Effective implementation of CEDAW necessitates an understanding that 'all appropriate measures' be interpreted broadly. It should not allow for slow change because of the difficulty in changing custom, but require intensive education programs to facilitate change, as well as aggressive enforcement of new laws that are enacted to outlaw these customary practices."). See also, Lars Adam Rehof, Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women 52, 57 (Kluwer Academic Publishers 1993) (reflecting the fact that representatives of several states involved in the negotiation process indicated "all appropriate measures" suggested the use of non-legal or broader than just legal measures).

86. See, e.g., Andrew Byrnes & Jane Connors, Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?, 21 Brook. J. Int'l L. 679, 726 (1996) (arguing that while "it may be argued that States Parties have been left with so much discretion to determine the means appropriate to eliminate discrimination ... that it is impracticable for an independent quasi-judicial body to assess ... whether States Parties have complied[,]" nevertheless provisions of the Convention are enforceable and in many instances justiciable); Rebecca J. Cook, State Responsibility for Violations of Women's Human Rights, 7 Harv. Hum. Rts. J. 125, 161-62 (1994) ("The determination of what is 'appropriate' must be sensitive to national legal, political and social environments, but criteria of appropriateness are not within the states' exclusive control.... International human rights tribunals may apply leeway or 'margin of appreciation' in evaluating each state's program of compliance, but nevertheless hold countries to international standards."); Laboni Amena Hoq, The Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights, 32 Colum. Hum. Rts. L. Rev. 677, 715 (2001) ("[W]hile obligations to 'take appropriate measures' may be more difficult to monitor than more precisely circumscribed rights, meaningful scrutiny of a State's performance in implementing its obligations under the Convention is nevertheless possible.").

87. Statement of Balmforth, supra note 70, at 8.

88. I am grateful to Tracy Higgins for raising this point.


90. Perhaps more realistically and accurately, CEDAW can be seen as reflecting the aspirations of treaty negotiators. Treaty makers, like other governmental decision makers, when faced with specialized issues, turn to the expertise of epistemic communities for advice. See Peter M. Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 Int'l Org. 1, 12-16 (1992). Epistemic communities, while not entirely neutral observers, infuse the treaty-making process
in terms of both its substantive and procedural requirements. In analyzing critiques of CEDAW made in the context of the United States' ratification debates, Part III of this Article attempts to separate substantive objections (expressed in terms of culture) from structural objections (expressed in terms of notions of federalism and limited government bound up with U.S. constitutionalism). At the same time, the Article explores how these two types of objections may be interrelated.

In assessing the substantive, cultural objections, this Article relies on a notion of culture as a way of life that is constantly contested and redefined. To use Bonnie Honig's definition, "culture is a way of life, a rich and timeworn grammar of human activity, a set of diverse and often conflicting narratives whereby communal (mis)understanding, roles, and responsibilities are negotiated." In many societies, there is a significant degree of internal contestation of the meaning of "culture" and of the interpretation of religious texts, including readings that support women's human rights. With transnational flows of culture, capital, and labor, local culture is increasingly global and visa versa. The notion that local culture occupies a completely independent, separate sphere from other cultures must be rethought in light of the fact that the parameters of local and global are increasingly intermingled and interdependent.

Despite this complex reality, reservations to CEDAW based on cultural and religious objections are sometimes offered as monolithic and uncontested. In fact, cultural and religious perspectives are likely to be with expertise that may or may not converge with those of government decision makers. But cf. Emanuel Adler, The Emergence of Cooperation: National Epistemic Communities and the International Evolution of the Idea of Nuclear Arms Control, 46 INT'L ORG. 103, 135 (1992) (describing the convergence of different schools of thought on arms control in the epistemic community and thus the development of the doctrine of nuclear deterrence as a "politically viable alternative both to disarmament and to military superiority"). From the standpoint of democratic accountability, the influence that experts from these epistemic communities have over treaty negotiations may be problematic. However, in the arms control context, by having a degree of detachment from the political process, nuclear deterrence experts were able to avoid the type of interest group capture that reflects a breakdown in the democratic process. Id.


92. Bonnie Honig, My Culture Made Me Do It, in IS MULTICULTURALISM BAD FOR WOMEN?, supra note 4, at 35, 39.


contested within a given society, although male elites—including those in leadership roles in religious institutions—may claim to represent the views of others. Moreover, cultural and religious claims supporting women’s human rights can be and have been asserted within the context of the human rights framework. However, scholars have pointed out that the traditional approach to human rights may be too rigid to fully realize cultural and religious claims within its framework. Because the human rights framework provides a floor (not a ceiling) for basic standards of human decency, the challenge is to determine how it can best co-exist with other potentially competing aspirations that cannot be fully expressed through the rights framework, so that each human being can reach his or her fullest potential. Identifying and understanding the contours of these aspirations—such as those reflected in cultural or

95. See Hope Lewis & Isabelle Gunning, Essay: Cleaning Our Own House: “Exotic” and Familial Human Rights Violations, 4 BUFF. HUM. RTS. L. REV. 123, 127 n.12, 128 (1998) (discussing how indigenous African women both support and oppose female circumcision); Sunder, Cultural Dissent, supra note 93, at 500 (While individuals are contesting traditional norms and claiming rights to make new cultural meaning, “law remains steadfastly committed to [an] old-world view of cultural diversity existing across cultures, but not within them.”); Douglas Jehl, Arab Honors Price: A Woman’s Blood, N.Y. TIMES, June 20, 1999, at A1 (citing disagreement within Muslim societies between those who contend Islam permits family members to kill girls and women suspected of infidelity, premarital sex, or other allegations of sexual conduct believed to shame the family, and those who contend that such killings have no basis in the Koran and violate the human rights of women).

96. See Azizah al-Hibri, Islam, Law and Custom: Redefining Muslim Women’s Rights, 12 AM. U. J. INT’L L. & POL’Y 1, 2-6 (1997). Azizah al-Hibri argues that while Islamic legal jurisprudence is primarily created through interpretation of Islamic law by male clerical elites and is often patriarchal by virtue of this interpretation, the author’s own devout Muslim feminist perspective is based on a reading of the Koran which supports women’s equality in many ways; in fact, there is a diversity of views, even among devout Muslims, on questions concerning human rights issues, such as women’s rights. Id.; see also Amartya Sen, Human rights and Asian Values, NEW REPUBLIC, July 14, 1997, at 34 (constructions of “culture” by government elites do not necessarily represent the “vast variations of cultural and historical traditions, despite the fact that the conformism that characterizes [the] political leadership and the official interpretation of Asian values is very powerful”).


98. Cf. Sunder, Piercing the Veil, supra note 12, at 1441-42 (suggesting that “normative, religious and cultural experience may be so important that it requires more substantive rights within these spheres than are recognized by formal [human rights] law.”); Waldron, supra note 67, at 313-14 (The human rights discourse must be enriched to include “the variety of cultural and religious and ethical perspectives that are in the world... [to avoid] consigning human rights discourse to a rather unpleasant, obtuse, and morally impervious relativism of its own.”).

99. As Louis Henkin perceptively notes, “[r]eligion explains and comforts, tradition supports, socialism cares, development builds; human rights idea does none of these.” HENKIN, supra note 1, at 193.
constitutional claims for example—is helpful in determining how or whether the human rights paradigm should accommodate them. In revealing ways in which cultural assumptions operate in a Western country such as the United States (not merely in non-Western countries, as is often assumed), this piece argues that “culture” is often misunderstood as a category for explaining human rights noncompliance.

III. USING A CULTURALLY CONSCIOUS ACCOUNT TO EXPLAIN THE FAILURE OF THE UNITED STATES TO RATIFY CEDAW

A culturally conscious account of the 2002 CEDAW ratification hearings provides a tool for interrogating how traditional cultural stereotypes of women have been used in the United States to defeat a major human rights treaty. On the surface, many of these cultural objections to CEDAW have been framed in terms of principles inherent in U.S. constitutionalism, specifically the notions of federalism and limited government. However, invocation of federalism and limited government obscures the role that cultural stereotypes play in U.S. resistance to women's human rights.

Over 180 countries are States parties to CEDAW. By not ratifying, the United States keeps company with Iran and Sudan. The United Nations adopted CEDAW on December 18, 1979, and the Convention entered into force in September 1981. President Jimmy Carter signed it in 1980, and submitted it to the Senate for its advice and consent regarding ratification. Fourteen years later, following years of inaction, President Bill Clinton made an attempt to secure ratification in 1994. The Senate Foreign Relations Committee voted 13-5 with one abstention to recommend treaty passage by the full Senate. But several senators put a “hold” on it for the duration of the 103rd Congress. Then, in the summer of 2002, the Senate Foreign Relations Committee, under Democratic Senator Joseph Biden’s leadership, held ratification hearings on CEDAW, but there was not sufficient support to carry the required two-
thirds of the Senate.

As alluded to earlier, resistance to CEDAW ratification in the United States has been expressed in two separate, sometimes interrelated, ways. First, much of the resistance has been substantive, often expressed as cultural objections to CEDAW. Second, resistance has also been expressed in structural terms, often articulated as constitutional objections. While opponents of the treaty have been upfront about their substantive objections concerning the ways in which they believe CEDAW would upset traditional culture, gender roles and family relations, the government's official reservations to CEDAW have been framed in terms of structural, constitutional objections. However, these two types of objections can be interrelated. As illustrated by the testimony and other arguments discussed in this Part, federalism as a structural or constitutional objection is not only used as a pretext or distraction from the substantive, cultural arguments. Rather, the notion of federalism itself has cultural roots and is culturally-coded. The invocation of federalism as an anti-civil rights, pro-states' rights platform dates back historically to the days of slavery and, of course, can be traced through the Civil War and the clashes over desegregation during the 1960s and 1970s. Raising federalism as an objection or reservation to CEDAW invokes that history as well as the concessions and compromises made to maintain a balance between federal authority and state and local power. In this sense, foregrounding federalism asserts a particular view about localism (and therefore local culture) as a mode for addressing gender inequality.

The objections made by Republican Senator Jesse Helms against CEDAW reflect how cultural and constitutional concerns are interrelated. On International Women's Day in March 2000, Senator Helms, then chair of the Senate Foreign Relations Committee, explained his opposition to the Women's Convention, saying, "[I]t is a bad treaty; it is a terrible treaty negotiated by radical feminists with the intent of enshrining their radical antifamily agenda into international law." Complaining that CEDAW would promote "global legalization of abortion," "[l]egalization of prostitution," and "abolishment of Mother's Day," Senator Helms concluded:

This treaty is not about opportunities for women. It is about denigrating motherhood and undermining the family. The treaty is designed to impose, by international fiat, a radical definition of "discrimination against women" that goes far beyond the protections already enshrined in the laws of the United States of America.

104. Statement of Sen. Helms, supra note 73.
105. Id. at S1277.
Putting to one side its accuracy, Senator Helms' statement illustrates a culturally-specific conception of motherhood and domesticity as central to women's role in American society. At the same time, in expressing concern that CEDAW's definition of discrimination is broader than U.S. law, Helms alludes to the fact the U.S. Supreme Court's interpretation of the U.S. Constitution offers a more limited approach to gender equality law than that offered under CEDAW. In fact, CEDAW would require greater government intervention in the private sphere and in areas of law traditionally regulated by state and local governments.

Brushing aside these cultural and constitutional objections, Democratic Senator Joseph Biden held ratification hearings on June 13, 2002, when the Democrats briefly regained control of the Senate, and Biden took over the leadership as chair of the Senate Foreign Relations Committee. Echoing Senator Helms' earlier objections, those testifying against CEDAW during the 2002 hearings also made objections on both cultural and constitutional grounds. The objections based on culture,

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106. See Statement of Koh, supra note 102, at 5. Rebutting objections such as the ones made by Senator Helms, Professor Harold Koh, in testimony supporting CEDAW ratification before the Senate Foreign Relations Committee, pointed out that no provision of CEDAW mandates abortion:

To the contrary, on its face, the CEDAW treaty itself is neutral on abortion, allowing policies in this area to be set by signatory States. . . . In fact, several countries in which abortion is illegal—among them Ireland, Rwanda, and Burkina Faso—have ratified CEDAW.

Id. In fact, the aforementioned countries have ratified CEDAW without reservation regarding the "family planning" language or making any effort to retain the right to prohibit abortion, indicating no effort was necessary. Working Group On The Women's Human Rights Treaty, Response to "Concerned Women For America" at 7 (on file with author). The fact that the references to "family planning" in Articles 12 and 14 of CEDAW do not imply access to abortion services is tellingly demonstrated by the fact that the Philippines, another country which prohibits abortion, first suggested the family planning language that was ultimately adopted. The Philippines also has not entered any reservations, understandings or declarations concerning the family planning language. Statement of Koh, supra note 102, at 5.

Of the claim that CEDAW would legalize prostitution, Professor Koh also noted that "CEDAW's Article 6 specifically states that countries that have ratified CEDAW 'shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution in women.'" Id. at 6.

Finally, Senator Helms' claim that CEDAW ratification would lead to the abolition of Mother's Day is also flatly untrue. He had taken out of context a quote from the Committee that oversees CEDAW. In its concluding comments on Belarus' country report to the Committee, the CEDAW Committee stated that it was "concerned by the continuing prevalence of sex-role stereotypes, as exemplified also by the reintroduction of such symbols as a Mothers' Day and a Mothers' Award" as the only response to the crisis facing women in Belarus – a crisis the country itself acknowledged in light of the increasing economic challenge facing women there. Committee on the Elimination of Discrimination Against Women, Concluding Observations: Belarus, U.N. Comm. H.R. 22d Sess., U.N. Doc. A/55/38, paras. 361 (Jan. 17, 2000) available at http://www.un.org/womenwatch/daw/cedaw/reports/a5538.pdf (emphasis added); see also Sarah Albert & Kit Cosby, Working Group On The Women's Human Rights Treaty, Response to Senator Jesse Helms' Statement on CEDAW at 2 (on file with author) [hereinafter Response to Sen. Helms].

107. See supra notes 76–81 and accompanying text.
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however, were even more explicit.

For example, in testimony before the Senate Foreign Relations Committee, Kathryn Balmforth, a treaty opponent, complained that CEDAW, in requiring equality for women in the workplace, will threaten U.S. culture and values (as she conceives of them):

These matters, and other matters covered by CEDAW, go to the core of culture, family, and religious belief. . . . The doctrinaire approach of the CEDAW Committee is nothing less than "cultural colonialism," which attempts to force a radical western agenda which is widely rejected even in the West. It completely ignores the right of women and men, to political, social, and cultural self-determination.

She went on to argue that CEDAW would undermine the traditional role of women as mothers who pass on "culture and values." To support this claim, Balmforth testified that the CEDAW Committee criticized Slovenia because, according to Balmforth, "too many of their tiniest children—from newborns to the age of three—were with their mothers, instead of in day care." A review of the CEDAW Committee's report on Slovenia reveals that Balmforth's characterization is disingenuous, and that, in fact, the Committee expressed concern that children of working mothers lacked formal day care. Clearly, Balmforth was willing to distort the facts to advocate for a culturally conservative approach to gender.

Referring to "our culture" as if U.S. culture were the monolithic, tradition-bound one that she advocates, Balmforth contended that women's progress in the United States has occurred "without an international committee interfering in our domestic governance and telling us which parts of our culture we had to jettison." Claiming that international oversight interferes with domestic
governance, Balmforth invoked the veil of sovereignty (often raised by non-Western States) as a shield against international scrutiny of cultural and religious practices. At the same time, Balmforth's complaints also track the concerns of states' rights proponents who resist interference by a higher level of government in local governance and culture.

Referring to the "U.N.'s countercultural agenda," in a backgrounder for the Heritage Foundation, CEDAW opponent Patrick Fagan also raised explicit cultural objections to CEDAW. In discussing what he views as the U.N.'s attempt "to change cultural values and norms," Fagan warned, "Few Americans are aware that agencies within the United Nations system are involved in a campaign to undermine the foundations of society—the two-parent married family, religions that
espouse the primary importance of marriage and traditional sexual morality, and the legal and social structures that protect these institutions." Recycling many of the same unfounded claims that Helms and Balmforth rely on, Fagan also contended that "U.N. statements denigrate the role of the stay-at-home mother as unfulfilling and damaging to her own welfare and decry national policies that support her. The U.N. reports instruct nations to eliminate, through legislation, cultural norms that support the role of the mother at home." Pointing out that the CEDAW Committee criticized St. Kitts for providing inadequate legal protection to children born out of wedlock, Fagan also argued that the Committee "tell[s] states to normalize out-of-wedlock birth" and that such "recommendations seek[] to change cultural values and norms to weaken the standing of the married family in society." Fagan further described what he views as a "clash of cultures." On one side of the culture clash is what Fagan described as "the benefits of channeling sexuality and reproduction into marriage [which is] a cultural norm [that] ensures... the reduction of violence against women and children... the lowest crime rates, greater social cohesiveness, longer life spans, better health, higher levels of education, and higher levels of income." On the other side of the equation, Fagan claimed: [T]he U.N. actively promotes sex outside of marriage as an acceptable cultural norm, and this agenda is made clear in its policies on abortion, contraception, gender definitions, prostitution, and pornography. The U.N. encourages governments to lend legal and financial support to the effort to change long-held and wise cultural norms.

Noting that the CEDAW Committee recommends that countries combat traditional sex roles and stereotypes through educational campaigns in schools, the workplace and society at large, Fagan asserted, "The U.N. is intent on removing the cultural and legal structures that have shepherded reproduction and the nurturing of children into the married family." Further, Fagan views continuing educational programs, such as those the

117. Id. at 1.
118. For discussion of these claims and why they are unfounded, see supra notes 106-14 and accompanying text.
119. Fagan, supra note 71, at 8.
120. Id. at 9.
121. Id. at 17.
122. Id. at 13. But see Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women: Hearings Before the S. Comm. on Foreign Relations, 107th Cong. (June 13, 2002) (Statement of Jane E. Smith, Chief Executive Officer, Business and Professional Women/USA) ("Almost one-third of the American women murdered each year are killed by their current or former partners, usually a husband.").
123. Fagan, supra note 71.
124. Id. at 16.
CEDAW Committee recommends for the legal profession and judiciary, as "part of the effort to change sexual and social norms to promote unrestricted sexual behaviors."\textsuperscript{125}

Fagan contrasted CEDAW with domestic efforts in the United States to strengthen families through welfare reform, "parents' rights" and "traditional social norms."\textsuperscript{126} By contrast, he concluded that "the United Nations has become the tool of a powerful feminist-socialist alliance that has worked deliberately to promote a radical restructuring of society."\textsuperscript{127}

In considering these cultural objections to CEDAW, it is clear that opponents are uncomfortable with what they view as the treaty's support for government regulation of and interference with the family (traditionally defined) and other areas deemed to be "private." In doing so, these opponents often invoke—either implicitly or explicitly—the principles of federalism and limited government as a framework within which to make cultural objections. For example, Balmforth contended, "CEDAW requires [national] government to intrude in all areas, no matter how private, consensual, or even sacred.... CEDAW requires the exertion of government power against family, religion and even thought. On its face, CEDAW calls for an unprecedentedly intrusive government."\textsuperscript{128}

Like Balmforth, conservative commentator Phyllis Schlafly expresses what are essentially cultural objections (to what she views as CEDAW's radical approach to family and the role of women in society) by invoking the notions of federalism and limited government. Invoking federalism in an article written shortly before the June 2002 CEDAW ratification hearings, Schlafly asserted that CEDAW's Article 16 (concerning family planning) "levels a broadside attack on states' rights. It would obligate the federal government to take over all family law, including marriage, divorce, child custody and property."\textsuperscript{129} Schlafly pointedly wrote, "Private relationships should be none of our government's business, much less the business of the United Nations."\textsuperscript{130} Invoking the principle of limited government, Schlafly also rejected CEDAW's support for government intervention in the market. She

\textsuperscript{125} Id. at 17.
\textsuperscript{126} Id. at 19. While welfare reform in the United States was touted as a way to roll back federal government involvement in providing social safety nets, in fact, by setting national goals (to reduce out-of-wedlock pregnancies, to increase marriage rates, and to move women off public assistance) the federal welfare law "flies in the face of the localism that ostensibly animates it." See Michael Dorf & Charles Sabel, A Constitution of Democratic Experimentalism, 98 COLUM. L. REV. 267, 437 (1998).
\textsuperscript{127} Fagan, supra note 71, at 21.
\textsuperscript{128} Statement of Balmforth, supra note 70, at 2.
\textsuperscript{130} Id.
criticized CEDAW's Article 2, which specifies that the treaty applies to discrimination against women "by any person, organization or enterprise"—a provision that extends the Convention's protection to private actors, including corporations, as well as perpetrators of domestic violence. Schlafly was also critical of CEDAW's Article 11, which ostensibly requires equal pay for work of comparable value (in contrast to the standard in the United States, which requires equal pay only for identical work). She complained that the CEDAW provision requires that "subjective" determinations of equal or comparable value be made (by the government) in lieu of "objective" determinations made (by the market).

In fact, the U.S. Constitution does authorize Congress to regulate the private sphere in limited ways to address gender inequality (for example, through the Commerce Clause). However, by relying on cultural stereotypes of women as mothers rather than as breadwinners, CEDAW opponents have been able to provide traction for their claims that the Convention would undermine U.S. constitutionalism and sovereignty. In the words of Kathryn Balmforth, "there is no way to guarantee that the CEDAW Committee will not at least attempt to meddle in the domestic affairs of the American people, in violation of our Constitution and our sovereignty." As illustrated through the words of CEDAW opponents quoted above, the substantive appeal to culture has fueled the structural, constitutional arguments in support of government deregulation (through federalism) and market deregulation (through limited government).

Perhaps anticipating claims that ratification of CEDAW would threaten American culture and constitutional commitments to federalism and limited government, senators and non-governmental organizations supporting treaty ratification during the 2002 ratification debate packaged it as a foreign policy initiative rather than as an instrument that would have domestic impact. For example, in an Op Ed supporting ratification, Democratic Senators Joseph Biden and Barbara Boxer argued: "Ratification of the treaty would not impose a single new requirement in our laws—because our Constitution and gender discrimination laws already comply with treaty requirements. But U.S. participation could advance the lives of millions of women elsewhere."

131. Id.
132. Schlafly, supra note 129 ("Article 11 would chain us to the feminist goal that wages should be paid based on subjective notions of 'equal value' (i.e., the discredited notion of 'comparable worth') rather than on objective standards of equal work.").
133. See, e.g., Statement of Balmforth, supra note 70, at 11.
134. See, e.g., Joseph R. Biden, Jr. & Barbara Boxer, Senate Needs to Ratify Treaty for the Rights of Women, S.F. CHRON., June 13, 2002, at A29. For critique of the inside-the-beltway treaty ratification strategy that typically, as with CEDAW, downplays the domestic impact of treaties, and in so doing,
Appealing to the interests of President George W. Bush and First Lady Laura Bush in “liberating” the women of Afghanistan, Senator Boxer (whom Senator Biden asked to chair the CEDAW hearings) said, “[T]he U.S. cannot use CEDAW as a diplomatic tool for human rights because we have not ratified it—it is very important to the women of Afghanistan that we do so.”

A New York Times column by Pulitzer Prize winning writer Nicholas Kristoff reflects how effective and complete the campaign to package CEDAW as a foreign policy initiative has been:

[F]rankly, the treaty has almost nothing to do with American women, who already enjoy the rights the treaty supports—opportunities to run for political office, to receive an education, to choose one’s own spouse, to hold jobs. Instead it has everything to do with the half of the globe where to be female is to be persecuted until, often, death.

Referring to critics who “have complained [that] the treaty, in the words of Jesse Helms, was ‘negotiated by radical feminists with the intent of enshrining their radical anti-family agenda into international law’ and is ‘a vehicle for imposing abortion on countries that still protect the rights of the unborn,”’ Kristoff states unequivocally:

That’s absurd. Twenty years of experience with the treaty in the great majority of countries shows that it simply helps third-world women gain their barest human rights.... Do we really want to side with the Taliban mullahs, who, like Mr. Ashcroft, fretted that the treaty imposes sexual equality? Or do we dare side with third-world girls who die because of their gender, more than 2,000 of them today alone?

Objections concerning the domestic impact of CEDAW have prompted the United States to propose particular reservations, understandings, and declarations (RUDs) to limit the domestic impact of CEDAW. While expressed in terms of constitutionalism (in terms of the commitment to federalism and limited government), these RUDs can also be understood in terms of cultural stereotypes and a cultural approach to women as occupiers of roles that should be negotiated and determined solely in the private (as opposed to the public) sphere. For example, in the proposed reservation to CEDAW’s Article 11 requiring

undermines the relevance and democratic legitimacy of these instruments, see Powell, Dialogic Federalism, supra note 29.


137. Id.
equal pay, the United States indicates that it will not accept any obligation requiring comparable worth that would require government intervention in the market.\(^{138}\) It is fairly clear from the debates surrounding ratification of CEDAW that there is deep resistance in the United States to taking on international obligations requiring government intervention in the market.\(^{139}\) However, the government intervenes in the market all the time (i.e., subsidies to farmers, the bailout of savings & loans, etc.).

So why draw the line at women? Is this line-drawing based on cultural attitudes regarding women (i.e., women are not typically breadwinners so why bother paying them living wages)? Or is the market itself a cultural construct? There is a fairly well-developed literature on how culture creates capitalism, which can be traced from Max Weber's *The Protestant Ethic and the Spirit of Capitalism* to more contemporary legal and economic analyses of how culture explains why capitalism is failing in Russia, which may help inform this inquiry.\(^{140}\)

### IV. Theorizing New, More Participatory Modes of Deliberation over Treaty Norms

As I have noted, non-Western States are more likely to explicitly use the veil of culture and the orientalist claim that they represent a culturally primitive "Other," by framing international criticism as a new form of colonialism. The United States, on the other hand, uses constitutionalism as a thinly-veiled attempt to block international scrutiny of the traditional cultural stereotypes of women inherent in U.S. law and policy. This Article tries to address this paradox by lifting the veil to examine how the United States masks traditional cultural assumptions about women that underlie its rejection of the main international treaty protecting women's human rights. By offering a

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138. See Proposed U.S. RUDs to CEDAW, supra note 58; see also Mayer, supra note 18, at 804 (while the reservation rejects the comparable worth doctrine, hundreds of municipalities and companies have embraced it, undermining the claim that it is anathema to a free market system).

139. See supra notes 131–32 for discussion of Phyllis Schlafly’s comments on comparable worth in the context of CEDAW, and her criticism of CEDAW’s Article 2, which applies the Convention’s antidiscrimination protections to private actors. See supra note 128 and accompanying text for Kathryn Balmforth’s criticism of CEDAW’s application to the private sphere.

cultural account of U.S. objections to CEDAW, this Article exposes these cultural stereotypes. These cultural stereotypes—advanced as American culture—reflect political power of particular groups more than they reflect American culture. Because culture is not a static concept, treaty opponents presenting such cultural arguments should not go unchallenged. The fact that these particular “cultural” claims are successfully articulated and heard in the context of national treaty ratification reflects that certain groups are politically organized and wield political influence, more than it reflects that these claims of culture are necessarily authentic or representative of the culture as a whole. Indeed, American culture is so diverse, and cultural attitudes toward women, family and society are in such flux that it is virtually impossible to characterize American culture in a monolithic or static way. Opening up the treaty ratification process could allow these cultural claims to be scrutinized and debated by the broader public.

New, more participatory modes of deliberation over treaty norms must be supported in the United States, as well as in other countries, to ensure that cultural assumptions are scrutinized in broader, more democratic ways, beyond the narrow group of (typically male) elite policymakers involved in the treaty-making process at the national level. Only then can we develop useful ways to evaluate cultural claims and weigh them against gender equality claims. Whether we ultimately choose to characterize U.S. objections to CEDAW as being based on culture or constitutionalism, the influence of a few politically mobilized groups and individuals—not necessarily the constituents whose rights are at stake—will continue to shape treaty debates, unless a broader range of perspectives and experiences are represented.

This Article builds on my earlier work on federalism and human rights, which criticizes the structure of international law for its primary reliance on traditional notions of the nation-state. By relying primarily on national governments to make, implement, and articulate international human rights norms, the international system precludes popular participation in developing and understanding these norms. For the most part, national governments only receive input from treaty “experts” and national organizations. Thus, ratification at the national level relies on claims that are defined and dominated by national elites. Women and others who lack power in national lawmaking are often unable to participate effectively in making, implementing and articulating international law. One problem is that transparency is lacking in both international fora (where international law is made) and in U.S. fora (where treaties are implemented through ratification by the

141. Powell, Dialogic Federalism, supra note 29, at 251–52, 255–62; see also Powell, Transnational Norm Entrepreneurs, supra note 29, at 50.
President with the advice and consent of only the Senate—not both houses of Congress, unlike purely domestic legislation). Thus most American women do not know what CEDAW is, much less have a voice in the political debate concerning its ratification by the United States. Therefore, cultural arguments that paved the way for the defeat of CEDAW were not exposed to great scrutiny. In my previous work, I have argued that more participatory avenues of democratic deliberation are needed in the making, implementation, and articulation of international human rights law. Whether or not international human rights standards are ultimately adopted into law in the United States, Americans should be given an opportunity to debate and consider these standards in the process of norm creation.

Part of my project, then, is to try to understand the role of law—specifically international human rights law—in the process of policy-making and norm creation. While traditional legal process approaches have come under attack, these traditional approaches have given way to newer legal process approaches that regard the law's legitimacy as based on not only process but on its normative content as well. This Article tries to imagine process-oriented norms that facilitate broader-based participation in the creation of substantive norms regarding human rights.

This Part is divided into three sections. First, I draw on feminist readings of John Rawls's veil of ignorance metaphor as a thought experiment to evaluate the substantive norms in CEDAW. Next, I identify the need for procedural norms in the treaty implementation process that would mimic a veil of ignorance-produced rule regarding gender equality. Of course, we have no actual veil of ignorance to shield ourselves from knowledge of our gender and other characteristics. Thus, there is no guarantee that each of us would set aside our self-interests in debating principles of justice. Even so, broader participation in ratification debates could neutralize the most powerful self-interests, and prevent them from dominating the process. The third and final section turns to an analysis of participatory modes of democratic deliberation that could expand women's participation in both the formal political realm as well as in informal sites of political contestation concerning

142. For further criticism on this point, see Powell, Dialogic Federalism, supra note 29, at 251–52.
143. See generally Powell, Dialogic Federalism, supra note 29; Powell, Transnational Norm Entrepreneurs, supra note 29, at 47.
144. See Powell, Dialogic Federalism, supra note 29, (arguing that while human rights principles must live or die on the merits, new modes of democratic deliberation must be developed to give Americans the opportunity to consider these principles, and the freedom to either adopt or reject them).
145. Koh, Transnational Legal Process, supra note 114, at 188 (explaining that this newer school has a somewhat thicker approach to process insofar as its theorists frontload certain substantive values such as free speech rights and equality as preconditions of legitimate process).
treaty implementation. Such modes of deliberation are in fact already emerging in the context of CEDAW at the subnational level.

In its focus on domestic implementation of CEDAW as an artifact of transnational legality, this Article attempts to provide a "careful description of the inner workings of [this] artifact] . . . [as] a means of understanding how the very apprehension of globalization is created and intensified through legal instruments."146 This case study is modest in that it only explores one dimension (i.e., U.S. implementation) of one treaty (i.e., CEDAW). In examining the interplay of CEDAW's transnational norms and the United States' cultural and constitutional norms, this case study recognizes that "[n]either local nor global descriptions of [transnational legal] artifacts will be adequate since their power lies in the way they work at multiple levels of scale at once."147

A. PRINCIPLES OF JUSTICE SELECTED BEHIND THE VEIL OF IGNORANCE WOULD SUPPORT CEDAW'S SUBSTANTIVE NORMS

In A Theory of Justice,148 Rawls asks us to imagine what principles of justice individuals would choose in forming a social contract in an original position of equality, in which no one knows his or her place in society.149 Since behind the veil of ignorance, "[n]o one knows his situation in society nor his natural assets, . . . no one is in a position to tailor principles to his advantage."150 According to Rawls, behind this veil

146. Riles, supra note 89, at 277.
147. Id. at 278.
148. While Rawls's The Law of Peoples is an extension of his domestic theory to the international context, I find it not to be as helpful as the domestic theory offered in A Theory of Justice for my present purposes. See generally John Rawls, The Law of Peoples (1999); Rawls, supra note 30. First, my focus on domestic implementation of CEDAW benefits more from the domestic account offered in A Theory of Justice, which theorizes a process of design for the basic structure of society. Second, in the international account provided in The Law of Peoples, Rawls draws a line between liberal (as well as decent hierarchical, and well-ordered, but not yet liberal) societies deserving of respect on the one hand and the remaining ("outlaw States" or "benevolent absolutisms") not deserving of respect on the other. Rawls, The Law of Peoples, supra, at 4, 63. This line is too sharp for me, and glosses over the heterogeneity I assume exists within societies and the intermingling I assume exists between societies. Cf. Martha Nussbaum, Women and the Law of People, 1 Pol. Phil. & Econ. 283, 287 (2002) (criticizing what she describes as Rawls's "shop-worn conceptual division of the world into 'Western' and 'non-Western' . . . suggesting singleness where in real life there is a complex multiplicity."). Finally, while A Theory of Justice gives weight to the interests of individuals (and collectives or associations only insofar as individuals choose to identify with them), The Law of Peoples gives weight only to the interests of collective peoples (and not to the interests of individual persons). This focus on peoples again dismisses the diversity I presume flourishes within collective groups of peoples. For a more elaborate criticism of asymmetries between the domestic case offered in Rawls's earlier book and the international case offered in the later book, see Thomas W. Pogge, The Incoherence Between Rawls' Theories of Justice, 72 Fordham L. Rev 1739 (2004).
149. Rawls, supra note 30, at 12 ("Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.").
150. Id. at 139.
of ignorance, men and women in a hypothetical original position of equality would choose two principles of justice to ensure fairness: (1) "equality in the assignment of basic rights and duties," and (2) "social and economic inequalities ... are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society." Comparing these principles of justice to CEDAW, it is apparent that the Convention is more consistent with Rawls than is the gender equality paradigm that has evolved under U.S. constitutional law.

As Susan Moller Okin has pointed out, while Rawls's *A Theory of Justice* did not explicitly list gender as one of the contingent characteristics hidden behind the veil of ignorance, in his latter work, he indicated that gender should be regarded as one of the unknowns. Applying this revised condition to Rawls's *A Theory of Justice*, Okin suggests types of gender equality policies that would result mainly from the principle concerning social and economic inequality. One type of policy "would encourage men and women to share the public and the domestic, the paid and the unpaid roles and responsibilities of family life, equally, so that both might participate on an equal footing in their various roles—at work, in civil society, and in politics...." Such policies could include subsidized child care, flexible working hours for both parents, parental leave for both parents, and other family leave.

These policies are more consistent with CEDAW, which, unlike U.S. law, requires paid maternity leave and equal pay for work of equal value.

It is not surprising that CEDAW is more consistent with the types of policies that would predictably result from principles selected behind the

151. *Id.* at 14–15.

152. Okin, *supra* note 32, at 1548 (citing John Rawls, *Fairness to Goodness*, 84 PHIL. REV. 537 (1975)). Nonetheless, Okin takes him to task, because "he gave no indication ... that [adding gender to the list] required substantial revision of major aspects of his theory." *Id.* First, Okin argues that Rawls would have needed to retract or at least explain and justify his assumption that those who select the principles of justice behind the veil of ignorance were (presumably male) "heads of households." *Id.* at 1553. Second, Okin points out that if gender were an unknown in the original position, individuals selecting the principles behind the veil would "surely be deeply concerned about ... sex discrimination ...." *Id.* at 1549. Finally, contrary to Rawls's position that the principles of justice do not apply directly to the family, Okin argues that in including ignorance of gender behind the veil, "families would certainly have to be taken seriously as part of the basic structure of society." *Id.*

153. *Id.* at 1554.

154. *Id.* Okin goes on to explain a second type of policy, which is worth mentioning (though it is less relevant to consideration of CEDAW). The second type of policy would "protect those (perhaps mostly, but not exclusively, women) who choose to undertake the bulk of unpaid family work, from the vulnerabilities they now incur." *Id.* Such policies could include "equal division of the earner's paycheck between the earning and the non-earning spouse," and family law protection following divorce to ensure that the non-earning spouse would have the same standard of living as the earning spouse. *Id.*

155. CEDAW, *supra* note 16, art. 11(2)(b) (paid maternity leave), art. 11 (1)(d) (equal pay).
veil of ignorance, since the assumptions built into the Rawlsian construct ensure a more transnational outcome. Rawls assumes that in selecting principles of justice behind the veil, "the parties do not know the particular circumstances of their own society" such as "its economic or political situation, or the level of civilization and culture it has been able to achieve." Just as no one is in a position, behind the veil, to tailor principles of justice to one's individual advantage, so too no one can conform these principles to one's societal political, economic, cultural or other advantages. Instead, the principles would reflect a transnational sensibility. As an artifact of transnational legality and culture, CEDAW too reflects this hybridity. It is attentive to and blends a variety of cultural approaches to law, including elements from the negative rights paradigm found in the United States as well as from positive rights schemes, such as those found in places as diverse as Western Europe, South Africa and India.

It is important to note here, however, that some of CEDAW's provisions are expressly designed to overcome a past history of subordination of women. Such provisions—which permit or even require affirmative measures to redress a past history of subordination—only make sense in light of and in response to such a history. Because such affirmative measures are developed to fit the history and circumstances of a particular society, they likely would have no place in the principles adopted behind the Rawlsian veil.

B. THE NEED FOR PROCEDURAL NORMS THAT WOULD MIMIC VEIL OF IGNORANCE-PRODUCED PRINCIPLES

Of course, the veil of ignorance is a hypothetical construct. In the real world, we have no way of creating an actual veil of ignorance that would prevent self-dealing in selecting principles of justice. We have no way to shield ourselves from knowledge of our gender, our particular cultural values, or other characteristics that shape our place in society. Moreover, "[f]eminist theory suggests that we can [unselfishly] achieve identity of interest on the real-life side of the veil." By applying feminist methodology, we can identify methods in which “people would not be moved solely by self-interest, but also by feelings of love, intimacy, and care for others.” In this way, we can find other
mechanisms to ensure that the norms selected as guiding principles of justice for society mimic the effect of the veil of ignorance, without actually needing to privilege abstraction and ignorance of one’s circumstances over the experiential knowledge of one’s life circumstances, which feminist theory has celebrated.161

By identifying new modes of democratic deliberation in the treaty implementation process that ensure representation from as many different walks of life as possible, for example, we can come as close as possible to selecting veil of ignorance-produced principles (i.e., principles that reflect fairness and equality, rather than merely the interests of the most powerful members of society). By securing broader input, new treaty implementation mechanisms could permit inclusion of the experience and wisdom of disenfranchised members of the community along with the already included views of more powerful members. While not ridding ourselves of the problem of self-dealing that the Rawlsian model seeks to eliminate, the more inclusive approach envisioned here builds a case for more dialogue and negotiation over what interests, values and norms should be advanced through the treaty ratification process. By being more participatory, such an approach would, thus, be more likely to reflect basic fairness and equality of the sort Rawls envisioned.162

1. The Treaty Reservation Approach

The models that exist within the international system for consideration of cultural difference are flawed in that they fail to permit a wider range of experience to inform the process for articulating and weighing culture, gender and other claims. Currently, we have a system of treaty reservations that provides an escape valve for cultural difference. Using treaty reservations as a way to accommodate cultural differences is an imperfect solution. Because reservations undermine human rights compliance by making noncompliance legal and shutting off individuals from accessing their full spectrum of rights, the hurdle for States to make reservations should be high. While States ostensibly make reservations to certain rights (i.e., sex equality) by asserting other rights (i.e., cultural and religious claims), this approach locates national governments as the site where culture is defined and articulated. This, of course, allows these governments to manipulate how they choose to characterize their culture to meet various political ends, even when they are inconsistent with human rights. Because culture is continuously

161. Id. at 619.

162. Of course, there are reasons to be cautious in claiming that greater participation (and specifically greater inclusion of women) would translate into adoption of legal norms that reflect fairness and equality. One source of skepticism about this claim is explored infra notes 169–72 and accompanying text.
defined and redefined through dynamic processes that occur within and between societies, it is almost impossible for a State to refer to any particular "culture" as if it relates to a pure, unadulterated, or monolithic "tradition" of an imagined past.\textsuperscript{163} The requirement in international law that treaty reservations may not be inconsistent with the "object and purpose" of the treaty fails to account for the plasticity of culture and the incentives that exist for States to manipulate this plasticity.\textsuperscript{164}

2. The European Margin of Appreciation Approach

Another approach is the European margin of appreciation approach. This doctrine assumes that there is a set of universal European norms, from which individual European States can deviate by a particular margin, to allow for some degree of diversity among States in their approaches to human rights. This model for accommodating culture is flawed because it assumes a layer of sameness, upon which a layer of difference is built. As with the treaty reservations approach, the margin of appreciation idea provides an inadequate vehicle for accommodating difference because, again, it locates States as the primary site for negotiating culture and other claims.

Instead, we need more participatory, democratic modes of deliberation over international human rights treaty norms. Encompassing a wider range of participants than are typically involved in the national treaty ratification process, such alternative avenues of deliberation would expose cultural and constitutional objections to human rights to broader scrutiny. How can we reconceive existing avenues of deliberation over treaty norms to develop more participatory, more democratic approaches?

C. Expanding Women's Participation in Both Informal and Formal Sites of Democratic Deliberation

This Article makes two proposals that would support new modes of deliberation over human rights treaties. The first proposal is to broaden the involvement of women in the implementation of treaty norms by expanding the "sites of democratic contestation" beyond the formal political realm.\textsuperscript{165} "[R]ather than locating the source of democratic

\textsuperscript{163} As Benedict Anderson has pointed out, ideas and representations of culture often emerge from an imagined past. Benedict Anderson, \textit{supra} note 56. As Anderson and others suggest, culture is not fixed or static. Rather, "culture [i]s composed of seriously contested codes and representations." James Clifford, \textit{Introduction: Partial Truths}, in \textit{WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY} 1, 2 (James Clifford & George E. Marcus eds., 1986).

\textsuperscript{164} As mentioned earlier, Article 19 of the Vienna Convention on the Law of Treaties, \textit{supra} note 52, allows parties to make reservations to a treaty if they do not undermine the "object and purpose" of the treaty. CEDAW has a similar provision, Article 28(2), which permits reservations if they are consistent with the "object and purpose" of CEDAW. CEDAW, \textit{supra} note 16, art. 28(2).

\textsuperscript{165} Susan Moller Okin, \textit{Multiculturalism and Feminism: No Simple Question, No Simple Answers}, in \textit{MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY} 67, 80 (Avigail Eisenberg & Jeff
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legitimacy strictly in formal political deliberation,” we should recognize that “the scope of democratic activity is much wider than this. . . .”\(^{166}\) After all, “nonformal democratic resistance and reinvention in the private realm also speak to the issue of a [norm’s] legitimacy or illegitimacy.”\(^{167}\) While these informal avenues of political deliberation and expression may operate in opposition to government policy, such modes of deliberation may ultimately strengthen the democratic legitimacy of law by offering greater transparency and participation in the creation and reformation of law. In reinvisioning the traditional process for considering human rights treaties, this proposal calls for an attentiveness to methodologies for community education and decision-making that increase critical engagement by community members with both international norms as well as domestic cultural or constitutional claims opposing these norms.\(^{168}\)

The second proposal is to broaden the involvement of women in formal sites of deliberation by supporting the emergence of state and local CEDAW initiatives. These state and local initiatives provide laboratories of experimentation that further support critical engagement by community members with both international norms and domestic claims opposing these norms. Because the size of the relevant community is smaller at the state and local level than at the national level, community participation in deliberation over these “external” international norms and “internal” domestic claims is more workable.

Why expand women’s participation in deliberations over human rights treaty norms, when the majority of those who testified in the 2002 CEDAW national ratification hearings were women? Indeed, as discussed in Part III of this Article, many of the main opponents who testified or spoke out against CEDAW during the 2002 ratification debate were women, including Phyllis Schlafly and Katherine Balmforth. There is a rich literature emphasizing the importance of crediting the account women offer of their own experiences and entitling women to describe and define these experiences.\(^{169}\) At the same time, despite the important emphasis of these “standpoint epistemologists” on the significance of “women’s stories as understood by women themselves, the problem of untangling the connection between the oppression of

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\(^{166}\) Monique Deveaux, A Deliberative Approach to Conflicts of Culture, 31 POL. THEORY 780, 781 (2003).

\(^{167}\) Id.

\(^{168}\) Cf. Sunder, Piercing the Veil, supra note 12, at 1443–57 (describing similar critical engagement through the work of Women Living Under Muslim Laws).

women and their own definition of their condition persists.”¹⁷⁰ After all, the possibility of “internalized oppression and the process of consciousness-raising [through self-examination and sharing of experiences] both imply that every woman’s report of her own condition may not be fully credited as a reliable guide to her own flourishing.”¹⁷¹ By creating opportunities for inclusive problem solving and bottom-up innovation,¹⁷² broader, more inclusive modes of implementing human rights treaties would permit women to accept or reject CEDAW norms based on a fuller understanding of what the Convention offers, rather than allow cultural objections to defeat the Convention before women across the country even have a chance to learn about CEDAW.

Theorizing from the facts on the ground,¹⁷³ the remainder of this Article looks to emergent modes of deliberation that have led to (1) “the expansion of sites of democratic contestation” outside the formal political realm, and (2) “the inclusion of women in formal decision-making processes.”¹⁷⁴

I. Expansion of Women’s Participation Outside the Formal Political Realm

As Monique Deveaux reminds us in her “deliberative approach” to negotiating intracultural conflicts, “[d]emocratic activity is not exhausted by formal political processes; it is also reflected in acts of cultural dissent, subversion, and reinvention in a range of social settings.”¹⁷⁵ Such “[i]nchoate democratic activity” may be found in “homes, schools,... religious [institutions,]... and in the provision of community and social services...”¹⁷⁶ With an “expanded view of the scope of democratic activity comes an expanded view of the basis for democratic legitimacy.”¹⁷⁷

In considering the value of informal political deliberation over human rights treaty norms, we can usefully consider feminist legal methods here. As Katherine Bartlett notes in her pioneering work on

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¹⁷⁰ Higgins, supra note 62, at 118.
¹⁷¹ Id. at 119 (citing Catharine A. MacKinnon, Toward a Feminist Theory of the State 83-105 (1989) (discussing the role of consciousness-raising in feminist method)).
¹⁷³ This approach draws inspiration from the work of other scholars who are exploring and developing theories of governance in a variety of fields by looking to developments in practice and theorizing based on these real-life developments. See, e.g., the work of Jennifer Gordon, James Lieberman, Charles Sable, William Sage, and Susan Sturm.
¹⁷⁴ Okin, No Simple Question, supra note 165, at 18 (internal citation omitted).
¹⁷⁵ Deveaux, supra note 166, at 782.
¹⁷⁶ Id.
¹⁷⁷ Id.
feminist legal methods, such methodologies "reflect the status of women as 'outsiders,' who need ways of challenging and undermining dominant legal conventions and of developing alternative conventions which take better account of women's experiences and needs."\(^{178}\) One such methodology that would engender community deliberation over human rights norms is consciousness-raising, which Bartlett describes as the process of "seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative..."\(^{179}\) Because conventional understandings of truth disguised as neutral in fact reflect male points of view, consciousness-raising is a critical tool women use to reflect upon and describe their own experiences and truths.\(^{180}\)

Consciousness-raising operates as feminist method not only in small personal growth groups, but also on a more public, institutional level, through "bearing witness to evidence[] of patriarchy as [it] occur[s], through unremitting dialogues... and challenges to the patriarchs, and through the popular media, the arts, politics, lobbying, and even litigation."\(^{181}\)

As discussed in fuller detail below, the benefit of consciousness-raising is that it can involve critical engagement with the "external" norms that international human rights law offers as well as with the "internal" norms of U.S. law, particularly as it is expressed through cultural and constitutional objections to international human rights treaty provisions. However, there are possible drawbacks to consciousness-raising—particularly where differences such as race, class, sexuality, and other vectors of inequality exist. To avoid these drawbacks, "[t]he task of feminist method is to listen openly to those women who are different... especially the most subordinated—to hear their stories as best we can and to check our theories against the interests of those we have listened to."\(^{183}\) Moreover, "we must be slow to generalize, slow to build grand theory—or at least willing to revise our theories continuously in light of new knowledge."\(^{183}\)


\(^{179}\) Id. Bartlett offers two other closely related feminist methodologies: "(1) identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups (asking the "woman question") [and] (2) reasoning from an ideal in which legal resolutions are pragmatic responses to concrete dilemmas rather than static choices between opposing, often mismatched perspectives (feminist practical reasoning)...." Id.

\(^{180}\) Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 Signs 515, 537 (1982); Katharine T. Bartlett, Gender Law, 1 Duke J. Gender L. & Pol'y 1, 6 n.28 (1994).

\(^{181}\) Bartlett, supra note 178, at 864-65 (quoting Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. Legal Educ. 3, 9-10 (1988)).


\(^{183}\) Id.
Nongovernmental organizations (NGOs) play a key role in providing a forum for consciousness-raising as a method of community deliberation. In his work, John Rawls discusses the role of associations in cultivating and sustaining a just society. For my purposes, in focusing on "associations," I am referring to nongovernmental institutions in civil society, which include cultural and religious institutions as well as advocacy organizations and other types of NGOs.\footnote{184 I am borrowing this definition from McClain, The Place of Associations, supra note 20, at 1570.} For Rawls, associations play an important role in sustaining a commitment to the principles of justice once the veil of ignorance is lifted. Rawls recognized that a just society would not be easy to maintain, since once the veil of ignorance is lifted, people may "realize that they could benefit from a less egalitarian social distribution [and abandon] the principles of justice they [chose] in the original position, when their impartiality was assured."\footnote{185 Okin, supra note 32, at 1542; see also Rawls, supra note 30, at Part III.} To increase stability of the just society and to promote moral learning, Rawls posits that members of society “grow up under a framework of reasonable and just political and social institutions.”\footnote{186 Rawls, The Law of Peoples, supra note 148, at 7.} This process of moral learning enables “a sense of justice as they grow up.”\footnote{187 Id. at 44.} This sense of justice acquired by citizens “inclines them not only to accept but to act upon the principles of justice.”\footnote{188 Id. at 45.}

Because we must choose principles of justice and policies that express these principles on the “real-life side of the veil,”\footnote{189 Matsuda, A Feminist Critique of Rawls’ Theory of Justice, supra note 159, at 627.} for my purposes, nongovernmental associations play an important role not only in sustaining these principles and policies, but also in creating them. By providing a variety of avenues for deliberation and advocacy, NGOs broaden and facilitate the involvement of community members from a variety of backgrounds and experiences in communal decision-making over these principles and policies. To the extent these associations play a role in affecting public policy, they help to ensure greater representation and engagement in policy from a broad and diverse range of voices. By increasing the range of perspectives in deliberations over public policy, this broadened participation from community members produces veil of ignorance-like principles and policies that are more fair and representative. Applying this vision of NGOs to the context of domestic implementation of international human rights law, it is clear that these associations hold tremendous potential.\footnote{190 Indeed, NGOs have emerged as norm entrepreneurs that fill gaps where traditional avenues of policy-making have failed. Cf. Powell, Transnational Norm Entrepreneurs, supra note 29 (discussing the role of NGOs in initiating conversation about human rights in the debate over the trade-off...}
raising and other forms of community deliberation, these NGOs create and sustain principles and policies in the context of human rights through three functions: (a) critical learning and engagement, (b) political action and institutional change, and (c) transnational networking.

a. Critical Learning and Engagement

First, NGOs offer opportunities to learn critically about international human rights norms by using popular education training as a form of community deliberation. Rather than merely convey information, such training sessions offer an opportunity for community members to critically engage human rights norms and evaluate them against the backdrop of cultural and constitutional norms claimed on behalf of the community in opposition to human rights. Through this critical engagement, community members remake and translate international human rights law to fit their local circumstances. At the same time, this process also involves re-examination of the cultural and constitutional objections to rights, and may reveal these claimed “truths” to be socially constructed, historically contingent, and biased.

Describing similar critical engagement through the work of the NGO, Women Living under Muslim Laws (WLUML), Madhavi Sunder observes that by “[r]evealing [asserted] truths as partial, women are empowered to reconstruct religious and cultural norms in ways that reflect modern, international human rights principles and women’s own current needs and aspirations.” In her study of WLUMU, Sunder describes how the group encourages its members to deliberate over the meaning and relevance of international human rights standards for women through use of an interactive human rights training manual, Claiming Our Rights: A Manual For Women’s Human Rights Education in Muslim Societies. By using role playing, fact patterns, and exercises in the manual, WLUMU facilitates critical engagement with the religious and cultural traditions of their communities as well as with the

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191. For a discussion of the importance of translation rather than mere transmission of international human rights law from the international to the domestic context, see Karen Knop, Here and There: International Law and Domestic Courts, 32 N.Y.U. J. INT’L L. & POL. 501, 504-05 (2000) (arguing that genuine domestic incorporation of international law involves more than “a conveyor belt that delivers international law to the people”); Koh, Transnational Legal Process, supra note 114, at 184, 186 (describing interactions between the domestic and international as an iterative process that generates new understandings of law); Powell, Dialogic Federalism, supra note 29, at 251 (arguing that the translation metaphor is particularly well-suited to the U.S. context because it describes the foreignness that many Americans associate with international law); Sunder, Piercing the Veil, supra note 12, at 1444 (describing translation as a core empowerment strategy used by feminists in Muslim countries where women are reconceiving human rights in ways that are relevant to their particular local religious and cultural contexts).

192. Sunder, Piercing the Veil, supra note 12, at 1443.

193. Id. at 1443-57.
international human rights norms themselves.\textsuperscript{194}

\textit{b. Political Action and Institutional Change}

A second way in which NGOs create and sustain principles of justice and policies to advance these principles is by providing a vehicle for political action and institutional change. Once the community has engaged in a process of critical engagement, community members are poised to develop strategies to change public policy. As is discussed in further detail below, this could involve advocacy for federal, state and/or local adoption of CEDAW. Linda McClain notes that in shaping the “background culture of civil society,”\textsuperscript{195} nongovernmental associations “contribute[] to liberal democracy by affording oppositional space to ‘enclaves of protected discourse and action’ which allow social actors to seek to correct the injustices of an ongoing democracy by bringing about social change.”\textsuperscript{196} McClain reflects on the fact that several feminist scholars have examined the work of local women’s organizations as “deliberative enclaves of resistance.”\textsuperscript{197} As with Madhavi Sunder’s work described above, the women’s associations examined in this scholarship often assert women’s human rights norms within their religious or cultural contexts, rather than in opposition to them (in contrast to the approach described in the culture clash scholarship).

In addition to examining how local women’s groups can “generate new understandings of the requirements of justice”\textsuperscript{198} by reinterpreting religious texts and cultural norms in ways that support gender equality, these scholars have documented how these associations act upon these new understandings. For example, in her work challenging cultural assumptions of women in India and its diaspora, Uma Narayan underscores the role of associations in realizing the transformative potential of women making political connections to other women.\textsuperscript{199} Narayan makes the distinction between, on the one hand, women’s awareness of their “personal problems” (i.e., gender dynamics within their families) and, on the other, their recognition of these problems “as a systematic part of the ways in which their family, their ‘culture,’ and changing material and social conditions script gender roles and women’s lives, [which] they must contest ... in more formal, public, and political ways.”\textsuperscript{200} Thus, “[i]t takes political connections to other women ... ,

194. Id.


196. Id. at 1586 (quoting Linda C. McClain & James E. Fleming, Some Questions For Civil Society-Revivalist, 75 Chi.-Kent L. Rev. 301, 321–22 (2000)).

197. Id. at 1592 (citation omitted).

198. Id. at 1593 (citation omitted).

199. NARAYAN, DISLOCATING CULTURES, supra note 14, at 11.

200. Id.
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political analyses of women’s problems,” deliberation, and opportunities to strategize and develop solutions “to make women into feminists in any full-blooded sense.”201 Similarly, Celestine Nyamu alludes to the potential of associations as deliberative sites for “Third World” women to participate in shaping community norms and values.202 She insists that women and women’s associations should be consulted when courts and legislators are determining what notion of culture or religion should inform an opinion or statute.203

c. Transnational Networking

A third way in which NGOs create and sustain principles of justice and related policies in the context of human rights is through the formation of transnational networks. These transnational advocacy networks permit domestic NGOs to create alliances with similarly-situated foreign NGOs (as well as foreign governments, scholars and international organizations) to mobilize and place pressure on domestic decision-making bodies.204 In my earlier work, I have explored how NGOs emerged as transnational norm entrepreneurs and have benefited from their involvement in transnational networks in mobilizing opposition to the U.S. policy of incommunicado indefinite detention of terrorism suspects at the U.S. naval base in Guantánamo Bay, Cuba.205 In the context of domestic implementation of human rights within the continental United States, NGOs have also begun to use transnational communication structures and information strategically to challenge human rights violations in the United States on issues such as the juvenile death penalty.206

As Harold Koh has observed, these transnational norm entrepreneurs not only mobilize popular opinion and political support within their host country and abroad, they also play an important role in “‘elevating their objective beyond its identification with the national interests of their government.’”207 Thus, in the context of CEDAW,

201. Id.
203. See id. at 409–17.
206. For example, in striking down the juvenile death penalty, the U.S. Supreme Court cited to an amicus brief filed by a foreign NGO. See Roper v. Simmons, 125 S. Ct. 1183, 1199 (2005) (citing Brief for Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae Supporting Respondents at 13–14).
207. Koh, Frankel Lecture, supra note 205, at 647 (quoting Ethan A. Nadelmann, Global
NGOs, working with overseas allies through transnational networks, could reframe the debate concerning cultural and constitutional objections raised in opposition to the Convention. For example, during the CEDAW ratification debates held in the summer of 2002, NGOs might have secured greater support from feminist organizations in Muslim countries as a way of showing that the traditional cultural stereotypes used to oppose CEDAW in the United States are similar to stereotypes the United States has sought to challenge through its foreign policy and military operations in the Muslim world.

2. Inclusion of Women in Formal Decision-Making Through State and Local CEDAW Initiatives

In the United States, thirty-eight cities, sixteen counties, fourteen states, and the territory of Guam have adopted resolutions calling for the United States to ratify CEDAW.208 While San Francisco has adopted CEDAW into local law209 and efforts are underway to do the same in New York City,210 the resolutions in other cities and states are nonbinding. Many of these resolutions can be seen as calls for local implementation as well as national ratification.211 In this sense, much of the state and local CEDAW work is geared toward building momentum toward national ratification.212

The San Francisco CEDAW Ordinance, which is binding law, can be seen as a case study of a mechanism that has increased the involvement of women in the formal law-making process by expanding opportunities for community deliberation and critical engagement. First, women and women’s rights organizations were at the forefront of securing passage of the ordinance. In getting the ordinance off the ground, the San Francisco-based Women’s Institute for Leadership Development (WILD) for Human Rights spearheaded a coalition of local, national and international nongovernmental organizations.213 Undertaking the process of both educating community members about CEDAW and gaining support for its local adoption, the coalition organized monthly workshops, meetings with policymakers to make the case for the

211. Judith Resnik, Categorical Federalism: Jurisdiction, Gender, and the Globe, 111 YALE L.J. 619, 670 (2001) ("[CEDAW proponents'] goals are to change local, national and international laws; their means deploy local actors working in concert with outsiders.").
212. See id. ("To conceive of local action as... indigenous to a particular place is to miss how often that work is a product of broad efforts to shift social policy.").
213. FORD FOUND., CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES 74 (2004).
ordinance, and a public hearing where the relevance of the ordinance could be demonstrated through the testimony of women from the local community as well as government officials. Moreover, the San Francisco Commission on the Status of Women worked closely with the coalition as a key governmental partner, providing valuable contacts to City Hall.

Following passage of the ordinance, a task force composed of both governmental and nongovernmental representatives was established to monitor its implementation, pursuant to the ordinance. City agencies develop Action Plans and develop gender analyses to evaluate their employment practices, budget allocations and delivery of services in gender terms. The effect of the ordinance is to reconceptualize the domestic antidiscrimination paradigm in human rights terms. Among other things, this involves going beyond the negative rights framework of domestic equality law, by also adopting a positive rights approach and placing affirmative obligations on government. Furthermore, CEDAW prohibits policies that have a discriminatory effect on women, as well as those policies that are intentionally discriminatory, whereas only the latter are prohibited by the U.S. Constitution.

In signing the city ordinance, Mayor Willie Brown, Jr. pointed out, "The United States is the only industrialized country in the world that has yet to ratify CEDAW." Sending a signal to Washington, Mayor Brown stated, "We want to set an example for the rest of the nation because it is long overdue." Following San Francisco's adoption of CEDAW, dozens of other cities, counties, and states adopted resolutions calling on the federal government to ratify CEDAW.

In previous work, I have argued that the emergence of such state and local initiatives represents an important development for the implementation and enforcement of treaties, in light of the federal government's failure to ratify or provide broad-based consideration of CEDAW and other basic human rights treaties. "While the U.S. Constitution assigns the power to make and adopt treaties to the federal government, state and local governments have 'adopted' human rights}

214. Id.
215. Id.
216. Id. at 75.
218. FORD FOUND., supra note 213, at 74, 77.
219. See id.
220. CEDAW, supra note 16, art 1.
222. Id.
223. See States, Counties, & Cities that have Passed Resolutions on CEDAW, supra note 208.
treaties and other international norms, often in response to constituent pressures that are more effectively mobilized at the subnational level."

In fact, in adopting standards from human rights treaties, such as CEDAW, state and local enactments call for federal ratification, and in this sense invite dialogue with the federal government. I have called this arrangement "dialogic federalism" and have argued that this dialogue among various levels of government is critical to meaningful implementation of international human rights law in the United States.

Much of the scholarly debate on federalism and international human rights law in the United States argues in favor of either federal supremacy (at one end of the spectrum) or states' rights (at the other end of the spectrum). "These divergent images capture different moments of political promise and despair, at times focused on the immense power of the national project, and at other times appreciating the vitality and durability of forms of governance that, without ... great resources, continue to have social and political force." I have argued for a third mode of dialogue and deliberation concerning international human rights treaty norms are needed in the United States because of the deep skepticism regarding the democratic legitimacy of international treaty law. For an example of skepticism regarding foreign and international law, see Justice Scalia's dissents in Atkins v. Virginia, 536 U.S. 304, 347-48 (2001) (Scalia, J., dissenting), and Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting), in which he criticizes the majority's reliance on foreign and international law. See also Antonin Scalia, Justice, U.S. Supreme Court, Keynote Address at the American Society of International Law Annual Meeting: Foreign Legal Authority in the Federal Courts (2004). See also proposed House Resolution 1658, which would bar the Supreme Court from considering foreign and international law in interpreting the Constitution. H.R. 1658, 109th Cong. (2005). As alluded to earlier, this skepticism stems in part from the absence of mechanisms to ensure popular participation in the making and implementation of treaty law at international and domestic levels. Supra Part III.B.1. For further discussion of this point, see Powell, Dialogic Federalism, supra note 29, at 251-52, 255-62.

Other scholars have subsequently highlighted the value of a "dialogic approach" in other contexts. See, e.g., Sunder, Piercing the Veil, supra note 12, at 1488. In discussing the work of Muslim feminists whose community-based trainings provide opportunities for deliberation through critical engagement of both religious and human rights texts, Sunder advocates shifting from "an impositional to a dialogic approach." Id. In this context, Sunder explains that a dialogical approach enables Muslim feminists to navigate the tensions between Muslim traditions, international human rights concepts, and evolving notions of gender equality." Id. at 1499.

approach, premised on dialogue and intergovernmental relations as a way to negotiate, rather than avoid, the conflict and indeterminacy inherent in the implementation of international human rights law.

Certainly, the international legal system is premised on traditional, monolithic notions of the nation-state, and the federal government must be able to speak with "one voice" in international affairs. However, as regards domestic application of international human rights law, competing claims for authority between the federal and subfederal levels is desirable—so long as mechanisms exist to channel and resolve conflicts in interpretation. By creating opportunities for negotiation and dialogue, these competing claims can provide a means to clarify, articulate and convert abstract international human rights norms into concrete, practical, and democratically-accepted domestic laws and policies. With the "disaggregation" of sovereignty, permeability of national borders, and ascendancy of a transnational civil society, it is hardly surprising that international human rights law seeps into our national legal culture through multiple points of entry.

These interactions among various levels of government, between the

229. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000) (emphasizing the need for the President "to speak for the Nation with one voice in dealing with other governments").

230. See SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS 92 (1998) ("[T]here is an unbundling of sovereignty[:]... the relocation of various components of sovereignty onto supranational, nongovernmental, or private institutions"); Anne-Marie Slaughter, International Law in a World of Liberal States, 6 EUR. J. INT'L L. 503, 505, 537 (1995) (describing "a world of liberal States," in which the state and sovereignty are disaggregated into "component political institutions"); Anne-Marie Slaughter, supra note 114, at 183-84 ("The state is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts... are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order."). See generally Peter J. Spiro, Foreign Relations Federalism, 70 U. COLO. L. REV. 1223 (1999) (extending Professor Slaughter's disaggregation thesis to include disaggregation of federal and subfederal actors).

231. See SASSEN, supra note 230.

232. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27 (1995) ("[E]ven [the largest and most powerful States] cannot achieve their principal purposes... without the help and cooperation of many other participants in the system, including entities that are not states at all."); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVIST BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 3-5 (1998) (describing transnational advocacy networks as communication structures that use information strategically "[t]o influence discourse, procedures, and policy" on an international scale); Tadashi Yamamoto & Jessica T. Mathews, Foreword to The Third Force: The Rise of Transnational Civil Society, at vi (Ann M. Florini ed., 2000) ("[B]order-spanning networks [that comprise transnational civil society] are a real and enduring force in the international relations of the twenty-first century."); Benvenisti, supra note 204, at 169 (advocating a "transnational conflict paradigm" that "shows how domestic interest groups often cooperate with similarly situated foreign interest groups in order to impose externalities on rival domestic groups"); Koh, Frankel Lecture, supra note 205, at 647-48 (describing the role of transnational norm entrepreneurs, i.e., those who assist states to internalize norms in the transnational legal process).

domestic and the international, and between the public and private (including NGOs), result in an iterative process in which legal rules emerge and are interpreted, internalized and enforced. This iterative process "not only generat[es] law . . . but generat[es] new interpretations of those rules and internalize[es] them into domestic law."

Therefore, rather than facilitate mere transmission of the international, this iterative process can assist in the process of translation of international to national. "Just as we know that translation from one language to another requires more than literalness, we must recognize the creativity, and therefore the uncertainty, involved in domestic interpretation [of international law]."

So, while translation owes fidelity to the other's language and text (the "other" here being international law), it also requires assertion of one's own language as well ("one's own" being domestic law). The ideal is . . . neither wholly international nor wholly national, but a hybrid that express[es] the relationship between them.

The negotiation between international and domestic legal regimes, and the hybridity that results, are the driving force behind translation of broad international principles into concrete articulation of rights that are relevant and meaningful in a particular domestic context. The creativity and uncertainty inherent in translation of international to domestic law provides a space for deliberation, debate, and learning.

The translation metaphor is particularly apt in theorizing about domestic implementation of international law in the U.S. context, "because it captures the foreignness that many Americans associate with international law." As a formal matter, ratified treaties and customary international law are law of the land of the United States. However, as a practical matter, international law is often viewed as an alien source of law. By adapting international human rights law to fit the particular local context, a dialogic approach involving subnational actors facilitates translation at various sites with broader participation, ensuring thicker, more complex understandings of human rights.

Besides the value of building political momentum toward national ratification, this local treaty work also facilitates translation of abstract international law principles into more relevant, meaningful,

235. Id. at 186.
236. Knop, supra note 191, at 505-06.
237. Id. at 506.
238. Id. (citing James Boyd White, Justice as Translation: An Essay in Cultural and Legal Criticism 264 (1990)).
239. Id.
240. Cf. id. at 507 (citing Homi K. Bhabha, The Commitment to Theory, New Formations, Summer 1988, at 5, 22).
241. See Riles, supra note 89, at 278.
democratically legitimate local standards. Assuming the federal government eventually adopts CEDAW, the knowledge and experience gained at the state and local level could help inform implementation at the national and even international levels. In this way, local work on the periphery may help redefine the meaning of human rights law at the center of the international system, undermining the dichotomy between core and periphery.\textsuperscript{243} Rather than play a passive role, however, the federal government could play a more proactive role by distilling lessons from the local experiments, monitoring best practices, and pooling information. Gathering this information would be valuable in that the federal government could learn what implementation strategies work and what grassroots structures are necessary for effective implementation.\textsuperscript{244} Then, in turn, the federal government can share these workable implementation strategies both subnationally and transnationally.

\textbf{CONCLUSION}

One could view with despair the federal government's failure to ratify CEDAW. This failure is rooted in the traditional structure of international law, which derives primarily from the will and consent of national governments. However, rather than view these conditions with despair, one can interpret this failure as a result of our democracy at work. So long as Americans do not understand the relevance of international human rights treaties, our elected officials will not act to ratify them. A more participatory, democratic approach to domestic implementation of human rights law views these institutional realities "as creating the occasion for, indeed in part anticipating, a radical re-definition of our democratic and constitutional ideals."\textsuperscript{245} Thus, this Article takes the optimistic view that these conditions provide an opportunity to reconceptualize avenues for deliberation concerning human rights treaties law.

\textsuperscript{243} Cf. Dorf & Sabel, \textit{supra} note 126, at 445.
\textsuperscript{244} Cf. Deveaux, \textit{supra} note 166, at 783.
\textsuperscript{245} \textsc{Oliver Gerstenberg \& Charles F. Sabel}, \textsc{Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?} 5 (2000), \textit{at} http://www2.law.columbia.edu/sabel/papers/gerst-sabel1029.doc.