

2002

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Recommended Citation

Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 Case W. Res. J. Int'l L. 263 (2002)
Available at: <https://scholarlycommons.law.case.edu/jil/vol34/iss3/6>

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WHY AMERICA SHOULD RATIFY THE WOMEN'S RIGHTS TREATY (CEDAW)

Harold Hongju Koh *

More than half a century after Eleanor Roosevelt pioneered the drafting of the Universal Declaration of Human Rights, her country still has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW or Women's Rights Treaty).¹ Sadly, more than two decades after that treaty entered into force, most Americans—including most lawyers—cannot articulate why United States' ratification of that treaty is long overdue. In his first State of the Union address after September 11, President George W. Bush announced that "America will always stand for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; *respect for women*; private property; free speech; equal justice; and religious tolerance."² Yet at this writing, his Administration remains curiously diffident about

* Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School; U.S. Assistant Secretary of State for Democracy, Human Rights and Labor (1998-2001). This essay is based on testimony delivered in my private capacity before the U.S. Senate Foreign Relations Committee on June 13, 2002 at the Hearing on Treaty Doc. 96-53: Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by the U.N. General Assembly on December 18, 1979, and signed on behalf of the United States of America on July 17, 1980. As a government official, I had previously testified in support of the ratification of that Convention as well. See, e.g., Testimony of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor. Before the Subcommittee on International Operations and Human Rights, U.S. House of Representatives, March 8, 2000, available at http://www.state.gov/www/policy_remarks/2000/000308_koh_testimony.html. I am deeply grateful to Dean Gerry Korngold and Professor Hiram Chodosh, the Director of the Frederick K. Cox International Law Center at the Case Western University School of Law, for their hospitality and friendship during my visit to Cleveland to celebrate the Tenth Anniversary of the Cox Center and to inaugurate the Klatsky Seminar in Human Rights. I would also like to thank J. Rebekka Bonner, Christine Chinkin, Jane Connors, Kit Cosby, Oona Hathaway, Zoe Hudson, Vicki Jackson, Kris Kavanaugh, Judith Resnik, Steve Rickard, and Jessica Sebeok for their valuable contributions to this essay.

¹ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1978, 1249 U.N.T.S. 13, U.N. Doc. A/34/180 [hereinafter CEDAW]. CEDAW entered into force on September 3, 1981.

² President George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (emphasis added).

whether to endorse the ratification of the treaty.³ This essay explains why there could be no more fitting way for the Bush Administration and the United States Senate to answer the President's demand than by now moving to ratify the universal treaty for the rights of women.

In recent years, the United States Congress and a number of states have enacted versions of the Violence Against Women Act as a mark of a national commitment to end violence and discrimination against women across this country.⁴ This commitment should not stop at the water's edge. Particularly after September 11, America simply cannot be a world leader in guaranteeing progress for women's human rights, whether in Afghanistan, in the United States, or around the world, unless it is also a party to the global women's treaty.

Let me first review the background and history of CEDAW; second, explain why ratifying that treaty would only further our national commitments to eliminating gender discrimination; and third, explain why some popular misgivings that have been occasionally voiced about our ratification of this treaty are, upon examination, completely unfounded.

First, some history: The Preamble to the United Nations Charter reaffirms the faith of the peoples of the United Nations in fundamental human rights, particularly "in the equal rights of men and women."⁵ The first Article of the Charter announced, as a core purpose of the United Nations, the goal of "promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion."⁶

In 1948, the Universal Declaration of Human Rights similarly declared that "everyone" is entitled to the rights declared there "without distinction of any kind, such as race, colour, [or] sex . . . ,"⁷ language that was repeated

³ See Karen DeYoung, *Senate Panel to Defy Bush, Vote on Women's Treaty*, WASH. POST, July 18, 2002, at A21.

⁴ Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, and 42 U.S.C.) [hereinafter VAWA]. The statute created a federal civil rights remedy to target violent gender-based discrimination. In *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court struck down the civil rights remedy of VAWA as contrary to constitutional principles of federalism, but a number of states have responded with their own versions of the federal legislation. See generally J. Rebekka S. Bonner, *Reconceptualizing VAWA's "Animus" for Rape in States' Emerging Post VAWA Civil Rights Legislation*, 111 YALE L. J. 1417 (2002).

⁵ Charter of the United Nations, June 26, 1945, pmbl., 59 Stat. 1031, T.S. No. 993. The Charter entered into force on October 24, 1945..

⁶ *Id.* art. 1(3) (emphasis added).

⁷ G.A. Res. 217(A) (III), U.N. GAOR, 3d Sess., at art. 2, U.N. Doc. A/810 (1948). For a discussion of the commitment to full gender equality of Eleanor Roosevelt, the Chair of the United Nations Human Rights Commission that drafted the Universal Declaration, see generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 68, 90-92 (2001).

in both the International Covenants on Civil and Political Rights⁸ and Economic, Social and Cultural Rights.⁹ But by the late 1960s, it had become clear that a general plea for nondiscrimination did not suffice to guarantee the protection of women's rights. In 1975, a global call for an international convention specifically to implement those commitments emerged from the First World Conference on Women in Mexico City. But until 1979, when the General Assembly adopted CEDAW, there was no convention that addressed comprehensively women's rights within political, social, economic, cultural, and family life. After months of drafting, the United Nations adopted CEDAW on December 18, 1979. Less than two years later, in September 1981, the Convention entered into force, the fastest entry into force of any human rights treaty.

In the more than two decades since, 170 nations other than our own have become parties to the Convention. Only nineteen United Nations member states have not.¹⁰ That list includes such countries as Afghanistan, Iran, Somalia, Sudan, Syria, Qatar, and the United Arab Emirates. To put it another way, the United States is now the only established industrialized democracy in the world that has not yet ratified the CEDAW treaty. Frankly, this is a national disgrace for a country that views itself as a world leader on human rights.

On four different occasions, the United States Senate has held hearings regarding ratification, but without completing the process of advice and consent.¹¹ On July 30, 2002, the Senate Foreign Relations Committee voted 12 to 7 to approve CEDAW, a possible step towards a full Senate vote in the fall.¹² But having stayed out for so long, why should the

⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2(1), 999 U.N.T.S. 171, U.N. Doc. A/6316. The convention entered into force on March 23, 1976.

⁹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 2(2), 993 U.N.T.S. 3, U.N. Doc. A/6316. The covenant entered into force on Jan. 3, 1976.

¹⁰ For a comprehensive, up-to-date listing, *See* <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

¹¹ The United States signed the Convention in July 1980 during the World Conference of the United Nations Decade for Women at Copenhagen. President Carter transmitted the Convention to the Senate for advice and consent shortly thereafter. The Senate Foreign Relations Committee held hearings on the Convention in 1988 and 1990, but did not act on it on either occasion. In October 1994, the Committee favorably reported out the Convention, recommending that the Senate give its advice and consent to ratification subject to a package of four reservations, four understandings, and two declarations. Although the Clinton Administration announced that ratification was a priority, and First Lady Hillary Clinton and Secretary of State Madeleine Albright repeatedly made public calls for Senate ratification, the Republican majority in the Senate during the second half of the Clinton Administration, led by Senate Foreign Relations Committee Chair Jesse Helms, refused to bring the treaty up for a vote or even to hold additional hearings.

¹² *Women's Rights Treaty Sent to Senate*, WASH. POST, July 31, 2002, at A20; *See also* <http://foreign.senate.gov/press/02/020730.html>.

United States now ratify this treaty? There are two simple reasons. First, ratification would make an important global statement regarding the seriousness of our national commitment to these issues. Second, ratification would have a major impact in ensuring both the appearance and the reality that our national practices fully satisfy or exceed international standards.

The CEDAW treaty has been accurately described as an international bill of rights for women. CEDAW simply affirms that women, like the rest of the human race, have an inalienable right to live and work free of discrimination. The Convention affirms the rights of all women to exercise on an equal basis their "human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."¹³

CEDAW is drafted with the reality of women's lives in mind. It focuses particularly upon the economic, social and cultural areas in which women suffer the most, the confluence of discriminations that has led to the feminization of global poverty. The treaty defines¹⁴ and condemns discrimination against women¹⁵ and announces an agenda for national action to end such discrimination. By ratifying the treaty, states do nothing more than commit themselves to undertaking "appropriate measures"¹⁶ toward ending discrimination against women, steps our country has already begun in numerous walks of life. CEDAW then lays a foundation for realizing equality between women and men in these countries by ensuring women's equal access to education,¹⁷ employment,¹⁸ health care,¹⁹ marriage and family relations,²⁰ and other areas of economic and social life.²¹ CEDAW also ensures opportunities in public and political life—including the right to vote, to stand for election,²² to represent their governments at an

¹³ CEDAW, art. 1.

¹⁴ *See id.* ("the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.").

¹⁵ *See id.* art. 2 (States "Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to embody the principle of gender equality into national laws.").

¹⁶ *See id.* art. 3.

¹⁷ *See id.* art. 10.

¹⁸ *See id.* art. 11.

¹⁹ *See id.* art. 12.

²⁰ *See id.* art. 16.

²¹ *See id.* art. 13.

²² *See id.* art. 7.

international level,²³ and to enjoy equal rights “before the law.”²⁴ The Convention directs States Parties to “take into account the particular problems faced by rural women,”²⁵ and permits parties to take “temporary special measures aimed at accelerating de facto equality” between men and women, a provision analogous to one also found in the Convention on the Elimination of All Forms of Racial Discrimination, which our country has already ratified.²⁶

Ratifying this treaty would send the world the message that we consider eradication of these various forms of discrimination to be solemn, universal obligations. The violent human rights abuses we recently witnessed against women in Afghanistan, Bosnia, Haiti, Kosovo, and Rwanda painfully remind us of the need for all nations to join together to intensify efforts to protect women’s rights as human rights.²⁷ Because much of the discrimination against women goes on behind multiple veils of family privacy, culture, religion, and sovereignty, available governmental statistics are notoriously inaccurate in their undercounting of acts of gender discrimination. Yet even so, the facts are haunting. As Amartya Sen has reminded us, around the world, more than 100 million women are likely missing.²⁸ In all parts of the world, women are subject to stunning abuses resulting from deeply entrenched cultural and religious norms, and family and community practices are often shielded from external scrutiny by claims of privacy or sovereignty. To take just one example, more than 115 million women have been forced to undergo genital mutilation, and some two million still risk this harmful procedure every year.²⁹ The same goes

²³ See *id.* art. 8.

²⁴ See *id.* art. 15.

²⁵ See *id.* art. 14.

²⁶ Compare CEDAW art. 4 with International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art. 1(4), 660 U.N.T.S. 195 [hereinafter CERD]. CERD entered into force on Jan. 4, 1969.

²⁷ See, e.g., Richard Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT’L LAW (2002); Patricia V. Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT’L LAW (2002) (describing acts of sexual violence against women during the conflicts in Rwanda and the former Yugoslavia). In 1993, the General Assembly adopted a Declaration on the Elimination of Violence against Women, U.N. Doc. A/48/629, reprinted in 33 INT’L LEG. MAT. 1050 (1994) and for the past decade Radhika Coomaraswamy of Sri Lanka has served brilliantly in the post of Special Rapporteur on Violence Against Women.

²⁸ NEW YORK REVIEW OF BOOKS, Dec. 20, 1990, at 61.

²⁹ See e.g., Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor, Remarks to the Tahirh Justice Center (May 25, 2000), available at http://www.state.gov/www/policy_remarks/2000/000525_koh_tahirh.html (hereinafter Koh Tahirh speech). For the compelling account of the case that finally brought female genital mutilation into American public consciousness, See FAUZIYA KASSINDJA AND LAYLI MILLER BASHIR, *DO THEY HEAR YOU WHEN YOU CRY?* (1998). On examination, the Kassindja case

for another traditional practice: the ironically named “honor killings”—a practice better called “arbitrary killings”—whereby family members take it upon themselves to kill their sisters or cousins if they suspect them of bringing shame upon the family.³⁰ In almost every part of the globe, women are far less likely to be literate; they lag far behind men in access to higher education; and they enjoy many fewer job opportunities.³¹ Even in the 21st century, a modern form of slave trade persist under the label of trafficking in persons,” especially women and children.³²

At the State Department, where I supervised the production of the annual country reports on human rights conditions worldwide,³³ I found that

is an archetypal example of what I have elsewhere called “norm-internalization,” the application of transnational legal process through which international human rights advocates are able to bring international law norms home and embed them into domestic law. See Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623, 625-26 (1998). In the case of female genital mutilation, human rights advocates identified a problem affecting millions of faceless people behind closed doors, made effective use of transnational networks to bring the issue under public scrutiny, won a highly publicized case, then turned the rule of that case not just international cause célèbre but into a new norm of U.S. domestic law. For years, the international community had treated female genital mutilation (FGM) as invisible tribal custom. But over time, as women and their advocates discovered the issue, they pressed the World Health Organization in 1982 to speak out against FGM at the UN Commission on Human Rights. In 1994, the International Conference on Population and Development in Cairo condemned it. The following year, the UN Women's Conference in Beijing again recognized FGM as a harmful practice, and the Beijing Platform of Action called on governments and other organizations to work to end the practice once and for all. Then in 1996, the same year that Fauziya Kassindja was finally granted asylum in our country, the United States made FGM a crime, and more than a dozen other nations have enacted similar laws as well. Still, according to a recent State Department study, the percentage of married women who have been subjected to some form of FGM remains staggeringly high – ranging from 60% to 70% in Burkina Faso; to 80% to 90% in Sierra Leone; to a stunning 97% in Egypt; and 98% in Somalia. *Id.*

³⁰ See Koh Tahirh Justice Remarks, *supra* note 29. For a particularly horrific recent variant on this practice, see the case of Mukhtaran Mai, who was repeatedly raped by four men in Pakistan, upon the order of a traditional tribal council, as punishment for her young brother's apparent relationship with a woman of a higher caste. See Rory McCarthy, *Suspects in ritual rape of Pakistani woman go on trial*, THE GUARDIAN, July 27, 2002, at 16. See also Mona Eltahawy, *Rape as Punishment*, WASH. POST, July 28, 2002, at B07.

³¹ See HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT, 163-65 (2d ed. 2000).

³² See Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights, and Labor, Testimony before the House Committee on International Relations (Sept. 14, 1999). This testimony, *The Global Problem of Trafficking in Persons: Breaking the Vicious Cycle on “Trafficking Women and Children in the International Sex Trade,”* is available at http://www.state.gov/www/policy_remarks/1999/990914_koh_sextrade.html.

³³ For descriptions of how those State Department Reports are prepared, see generally Harold Hongju Koh, *Introduction to the 1998 Human Rights Report*, in U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORT ON

a country's ratification of the CEDAW is one of the surest indicators of the strength of its commitment to internalize the universal norm of gender equality into its domestic laws.³⁴ Let me emphasize that in light of our ongoing national efforts to address gender equality through state and national legislation, executive action, and judicial decisions, the legal requirements imposed by ratifying this treaty would not be burdensome. Numerous countries with far less impressive practices regarding gender equality than the United States have ratified the treaty, including countries whom we would never consider our equals on such matters, including Iraq, Kuwait, North Korea, and Saudi Arabia.

At the same time, from my direct experience as America's chief human rights official, I can testify that our continuing failure to ratify CEDAW has reduced our global standing, damaged our diplomatic relations, and hindered our ability to lead in the international human rights community. Nations that are otherwise our allies, with strong rule-of-law traditions, histories, and political cultures, simply cannot understand why we have failed to take the obvious step of ratifying this convention. In particular, our European and Latin American allies regularly question and criticize our isolation from this treaty framework both in public diplomatic settings and private diplomatic meetings.

Our nonratification has led our allies and adversaries alike to challenge our claim of moral leadership in international human rights, a devastating challenge in this post-September 11 environment. Even more troubling, I have found, our exclusion from this treaty has provided anti-American diplomatic ammunition to countries who have exhibited far worse record on human rights generally, and women's rights in particular. Persisting in the aberrant practice of nonratification will only further our diplomatic isolation and inevitably harm our other foreign policy interests.

HUMAN RIGHTS PRACTICES FOR 1998 (released Feb. 26, 1999), at http://www.state.gov/www/global/human_rights/1998_hrp_report/overview.html; Harold Hongju Koh, *Introduction*, in U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (released Feb. 25, 2000), at http://www.state.gov/www/global/human_rights/1999_hrp_report/overview.html [hereinafter 1999 COUNTRY REPORTS].

³⁴ Ratification of CEDAW would constitute a necessary, but by no means sufficient, step on the road to fulfilling America's commitment to true gender equality. A fuller commitment would require a full mainstreaming of women's rights issues into existing global human rights institutions. Ironically, as Hilary Charlesworth has pointed out, the creation within the UN system of special "women's institutions" to deal with women's human rights has, in effect, "create[d] a ghetto for women's interests. The creation of 'women's' institutions has meant that 'mainstream' human rights bodies and institutions have tended to downplay the application of human rights norms to women on the implicit assumption that women's rights are outside their concern." Hilary Charlesworth, *Transforming the United Men's Club: Feminist Futures for the United Nations*, 4 TRANS. LAW & CONTEMP. PROBS. 422, 446 (1994).

Treaty ratification would be far more than just a paper act. The treaty has demonstrated its value as an important policy tool to promote equal rights in many of the foreign countries that have ratified the CEDAW. As a recent, comprehensive world survey issued by the United Nations Development Fund for Women chronicles, numerous countries around the world have experienced positive gains directly attributable to their ratification and implementation of the CEDAW.³⁵ In such countries as Nepal, Japan, Tanzania, Botswana, Sri Lanka, and Zambia, CEDAW has been empowering women around the globe to change constitutions, pass new legislation, and influence court decisions. Ratification of CEDAW by the United States would similarly make clear our national commitment to ensure the equal and nondiscriminatory treatment of American women in such areas as civil and political rights, education, employment, and property rights.

Most fundamentally, ratification of CEDAW would further our national interests. Secretary of State Colin Powell put it well when he said:

The worldwide advancement of women's issues is not only in keeping with the deeply held values of the American people; it is strongly in our national interest as well Women's issues affect not only women; they have profound implications for all humankind. Women's issues are human rights issues We, as a world community, cannot even begin to tackle the array of problems and challenges confronting us without the full and equal participation of women in all aspects of life.³⁶

After careful study, I have found nothing in the substantive provisions of this treaty that even arguably jeopardizes our national interests. Those treaty provisions are entirely consistent with the letter and spirit of the United States Constitution and laws, both state and federal. The United States can and should accept virtually all of CEDAW's obligations and undertakings without qualification.

Some have suggested that any United States ratification be accompanied by an extensive package of reservations, understandings, and declarations. Indeed, past Administrations—including the 1994 Clinton Administration I later served – have unwisely proposed that ratification be accompanied by a detailed package of conditions designed to insulate existing U.S. practices with regard to protection of individual privacy, the role of women in combat service, comparable worth in pay, maternity

³⁵ See generally UNIFEM, BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW), available at <http://www.unifem.undp.org/cedaw/cedawen4.htm> (giving examples).

³⁶ Secretary of State Colin Powell, Remarks at Reception to Mark International Women's Day (Mar. 7, 2002), available at <http://www.state.gov/secretary/rm/2002/8691.htm>.

leave, freedom of speech, family planning, and the like. All told, these various proposals would reserve to or place understandings upon all or part of Articles 2, 3, 5, 7, 8, 11, 12, 13, and 29 of the treaty, in addition to offering a general understanding about the need to protect states' rights and a blanket declaration that the first thirty articles of the treaty are not self-executing.³⁷

To proceed with such a qualified, "swiss cheese" ratification in which the legal exceptions would overshadow the core act of ratification would be politically unwise, legally questionable, and practically unnecessary to protect American national interests. As Rebecca Cook has pointed out, the purpose of the Women's Treaty is to ensure that states parties move progressively toward elimination of all forms of discrimination against women; "reservations to the Convention's substantive provisions pose a threat to the achievement of this goal."³⁸ Upon closer examination, only one of those understandings, relating to limitations of free speech, expression and association, is even arguably advisable to protect the integrity of our national law.³⁹ More fundamentally, as Professor Henkin has noted, the unsound practice of prospectively declaring human rights treaties non-self-executing seeks to achieve by treaty declaration what Senator Bricker and his allies failed to obtain by constitutional amendment decades ago.⁴⁰ At this late date, we gain little and lose much in international credibility, if through extensive reservation practice we

³⁷ The proposed package may be found in the 1994 Senate Foreign Relations Committee Report, S384-10, Exec. Rep. Sen. Comm. on For. Rel. Oct. 3, 1994, *reprinted in* 89 AM. J. INT'L L. 107-09 (1995).

³⁸ Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, 30 VA. J. INT'L L. 643, 650 (1990); accord, Hilary Charlesworth, Christine Chinkin & Shelly Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 631-33 (1991); Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991) (arguing that extensive use of reservations to CEDAW have created the false impression that CEDAW ratification is somehow less binding than the ratification of other universal human rights treaties).

³⁹ 1994 Senate Foreign Relations Committee Report, *supra* note 37, at 108. The proposed understanding, included in the 1994 Senate Foreign Relations Committee Report, states only the legal truism that the United States understands that by ratifying the treaty, it could not constitutionally accept, consistent with the Supreme Court's First Amendment precedents "any obligation under this Convention, in particular under Articles 5, 7, 8, and 13, to restrict those rights [of freedom of speech, expression and association], through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States."

⁴⁰ *See generally* Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 AM. J. INT'L L. 341 (1995). The principal version of the Bricker Amendment stated that "[a] treaty shall become effective in the United States only through legislation which would have been valid in the absence of treaty." *Id.* at 348. *See generally* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY (1988).

resurrect Bricker's ghost and radically qualify our acceptance of a treaty that most of the world has embraced unconditionally.

Finally, let me address some myths and fallacies that have been circulated about the likely impact of United States ratification of the CEDAW.⁴¹ The most common include the following:

First, that CEDAW supports abortion rights by promoting access to "family planning." This is flatly untrue. There is absolutely no provision in CEDAW that mandates abortion or contraceptives on demand, sex education without parental involvement, or other controversial reproductive rights issues. CEDAW does not create any international right to 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 and seeking to ensure equal access for men and women to health care services and family planning information.⁴² In fact, several countries in which abortion is illegal—among them Ireland, Rwanda, and Burkina Faso—have ratified CEDAW.

A second fallacy is that CEDAW ratification would somehow undermine the American family by redefining traditional gender roles with regard to the upbringing of children. In fact, CEDAW does not contain any provisions seeking to regulate any constitutionally protected interests with respect to family life. The treaty only requires that parties undertake to adopt measures "prohibiting all discrimination against women" and to "embody the principle of the equality of men and women" in national laws "to ensure, through law and other appropriate means, the practical realization of this principle."⁴³ How best to implement that obligation consistent with existing United States constitutional protections—which strongly limit the government's power to interfere in family matters, including most parental decisions regarding childrearing—is left for each country to decide for itself.

Third, some have falsely suggested that ratification of CEDAW would require decriminalization of prostitution. Again, the text of the treaty is to the contrary. CEDAW's Article 6 specifically states that countries that have ratified CEDAW "shall take all appropriate measures,

⁴¹ For a typical compendium of such objections, see, e.g., Patrick F. Fagan, *How U.N. Conventions on Women's and Children's Rights Undermine Family, Religion, and Sovereignty*, Heritage Found., The Heritage Foundation (Backgrounder No. 1407, 2001), available at <http://www.heritage.org/library/backgrounder/bg1407.html>.

⁴² The clarity of the Treaty's own text on this point renders superfluous the so-called "Helms Understanding," attached to the Senate's proposed resolution of ratification in 1994, which states "[t]hat nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoting as a method of family planning." 89 AM. J. INT'L L. at 108.

⁴³ CEDAW, art. 2.

including legislation, to suppress all forms of traffic in women and exploitation of prostitution in women.”

Fourth, some claim that if CEDAW were U.S. law, it would outlaw single-sex education and require censorship of school textbooks. In fact, nothing in CEDAW mandates abolition of single-sex education. As one way to encourage equal access to quality education for all children, Article 10 requires parties to take all appropriate measures to eliminate “any stereotyped concept of the roles of men and women at all levels and in all forms of education by *encouraging* [not requiring] coeducation *and other types of education which will help to achieve this aim . . .*,” (emphasis added) including, presumably, single-sex education that teaches principles of gender equality.⁴⁴ CEDAW also encourages the development of equal education material for students of both genders. This provision is plainly designed not to disrupt educational traditions in countries like ours, but rather, to address those many countries in the world (like Afghanistan during Taliban rule) in which educational facilities for girls are either nonexistent or remain separate and unequal.⁴⁵

Fifth, some have suggested that U.S. ratification of CEDAW would require legalizing same-sex marriage. Whatever view one may hold regarding the desirability of same-sex marriage, this treaty plainly contains no such requirement. Article 16 of CEDAW requires only elimination of discrimination directed against women “in all matters related to marriage and family relations.” Thus, for example, the practice of polygamy is inconsistent with the CEDAW because it undermines women’s equality with men and potentially fosters severe financial inequities. Article 16 would neither require nor bar any national laws regarding same-sex marriage, which by their very nature, would apply equally to men and women.

Finally, and most pervasively, opponents of CEDAW have claimed that U.S. ratification would diminish our national sovereignty and states’ rights by superseding or overriding our national, state or local laws. Given the broad compatibility between the treaty requirements and our existing national laws, however, very few occasions will arise in which this is even arguably an issue. Moreover, the treaty generally requires States to use “appropriate measures” to implement the non-discrimination principle, which by its terms accords some discretion to member countries to

⁴⁴ *Id.* art. 10(c) (emphasis added).

⁴⁵ Under the Taliban’s harsh rule, for example, most women were forbidden from leaving their homes without a male relative and when they did, they were completely contained within a *burqa*. Few women were allowed to work, nor were they allowed to go to school. It is hard to imagine a better recipe for national failure than for a government deliberately to force half of its population into ignorance and unemployment.

determine what is “appropriate” under the national circumstances.⁴⁶ Of course, the Senate is free to address any material discrepancies between national law and the treaty by placing understandings upon its advice and consent. This falls along the lines of the “freedom of speech” understanding discussed above, or by the Congress passing implementing legislation—as it has done, for example, to effectuate the Genocide Convention⁴⁷—specifying the precise ways in which the federal legislature will carry out our international obligations under this treaty.

Ironically, many of the unfounded claims about the likely effects of CEDAW ratification have been asserted by self-proclaimed advocates of states’ rights. In fact, within our own country, the emerging trend has been the opposite. Broad sentiment has been emerging at both the state and local level to incorporate the CEDAW requirements into local law. At this writing, governmental bodies in some fifteen states and Guam,⁴⁸ sixteen counties⁴⁹ and forty-two cities⁵⁰ have adopted resolutions or instruments endorsing CEDAW or adopting it on behalf of their jurisdictions. Far from CEDAW imposing unwanted obligations on local governments, local governments are in fact responding to the demands of their citizens, who have become impatient at the lack of federal action to implement these universal norms into American law.

A host of other misconceptions exist about CEDAW, some of them frankly preposterous.⁵¹ But my main point should be clear: we must not let

⁴⁶ CEDAW, art. 2.

⁴⁷ See, e.g., Genocide Convention Implementation Act, 18 U.S.C. § 1091 (2000).

⁴⁸ To date, legislative bodies have endorsed US ratification of the CEDAW in California (twice), Connecticut (Senate), Florida (House), Hawaii (House), Illinois (House), Iowa, Maine, Massachusetts, New Hampshire, New York, North Carolina, Rhode Island (Gen. Assembly), South Dakota (House), Vermont, Wisconsin (Senate), and the territory of Guam. For a complete listing, see Working Group on Ratification of UNCEDAW, Human Rights for All, at 41-42, available at <http://www.amnestyusa.org/commit/cedawbw.pdf>. For discussion of these state and local ratification efforts, see Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L. J. 619, 667 (2001).

⁴⁹ These include counties in California, Illinois, Kentucky, Ohio, Florida, Wisconsin, and Washington. *Id.*

⁵⁰ San Francisco, California, for example, has enacted a city ordinance designed to incorporate CEDAW into the functioning of the city by promoting equality in the city’s treatment of public employees, its budgetary spending, and its provision of municipal services to city inhabitants. See S.F. CEDAW Task Force, Fourth Progress Report (2001), at <http://www.ci.sf.ca.us/cosw/cedaw/cedaw<uscore>5.htm>.

⁵¹ One such preposterous claim, for example, is that U.S. ratification of the CEDAW would somehow require the United States to abolish Mother’s Day. This claim twists a statement in the CEDAW Committee’s report on Belarus, which spoke negatively about a Belarusian holiday that discouraged women from working in the marketplace, by celebrating and encouraging only those mothers who work in the home. Rather than denigrating motherhood, the CEDAW’s central aim is to support motherhood, by promoting women’s

unfounded fears projected onto the CEDAW prevent us from the long overdue step of ratifying this important document.

Particularly in a time of terror, promoting human rights and eradicating discrimination should not be partisan issues. As President Bush recently reminded us, the United States cannot fight a war on terrorism alone; it needs cooperation not only from its current allies, but also from the rest of the world. "We have a great opportunity during this time of war," he said, "to lead the world toward the values that will bring lasting peace . . . [such as] the non-negotiable demands of human dignity [that include] respect for women. . . ."⁵² First Lady Laura Bush echoed that sentiment on International Women's Day 2002, when she said:

People around the world are looking closely at the roles that women play in society. And Afghanistan under the Taliban gave the world a sobering example of a country where women were denied their rights and their place in society Today, the world is helping Afghan women return to the lives that they once knew Our dedication to respect and protect women's rights in all countries must continue if we are to achieve a peaceful, prosperous world Together, the United States, the United Nations and all of our allies will prove that the forces of terror can't stop the momentum of freedom.⁵³

The world still looks to America for leadership on human rights, both in our domestic practices and in our international commitments. Ours is a nation conceived in liberty and dedicated to the proposition that all human beings—not just men—are created equal. Our country has fought a civil war and a centuries-long social struggle to eliminate racial discrimination. It is critically important we seize this opportunity to tell the world that we, of all nations, insist on the equality of all human beings, regardless of gender.

On a personal level, United States ratification of this important treaty should mean something to every American. My own mother, Hesung Chun Koh, came to this country more than fifty years ago from the Republic of Korea and found equal opportunity here as a naturalized American citizen. My wife, Mary-Christy Fisher, is a natural-born

freedom to make choices on an equal basis with men. Nothing in that goal conflicts with the American tradition of celebrating both Mother's Day and Father's Day, as expressions of this country's commitment to full gender equality, consistent with the nondiscrimination goals of the CEDAW.

⁵² See *supra* note 2.

⁵³ First Lady Laura Bush, Remarks to the United Nations on International Women's Day (Mar. 8, 2002), available at <http://www.state.gov/g/wi/rls/8769.htm>.

American citizen and lawyer of Irish and British heritage. I am the father of a young American, Emily Koh, who has just turned sixteen years old.

Try as I might, I simply cannot give my daughter any good reason why her grandmother and mother would be protected by CEDAW in their ancestral countries, but that she is not protected by it in the United States, which professes to be a world leader in the promotion of women's rights and gender equality. I cannot explain to her why the country we love, and which I have served as Assistant Secretary of State for Human Rights, has for so long failed to ratify the authoritative human rights treaty that sets the universal standard on women's equality. Finally, I cannot explain why, by not ratifying, the United States insists upon keeping company with such countries as Afghanistan, Iran, Sudan, and Syria, in which human rights and women's rights continue to be brutally repressed.

In the end, the choice is simple. Our continuing failure to ratify this treaty will hamper and undermine our efforts to fight for democracy and human rights at home and around the world. Ratification now of the CEDAW treaty would be both prudent foreign policy and simple justice.