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UNITED STATES PARTICIPATION IN INTERNATIONAL AGREEMENTS PROVIDING RIGHTS FOR WOMEN

by Malvina H. Guggenheim* and Elizabeth F. Defeis**

I. INTRODUCTION

A number of international agreements presently in effect and ratified by many countries, provide for political, social, and economic rights for women. In addition, the United Nations Commission on the Status of Women has prepared a comprehensive agreement, the Convention on the Elimination of all Forms of Discrimination Against Women, presently in draft form. The United States had, until recently, not ratified any of these agreements, except for the United Nations Charter, and a convention dealing with white slavery. In 1976—following International Women’s Year—the Senate, after many years of inaction, gave its advice and consent to United States ratification of the Convention on Political Rights of Women and the United States finally ratified it. Although the Convention on Political Rights of Women did not provide any new rights, its ratification was strenuously opposed by the American Bar Association on the same grounds that had long been urged in opposition to United States ratification of all human rights conventions. Its ratification may, therefore, be of considerable significance. For the first time the United States has affirmed in a binding international agreement that women’s rights, as one aspect of human rights, are a matter of international concern and an appropriate subject for treaty regulation.

This article will discuss the rights provided for by the Convention on Political Rights of Women and the other international agreements on women’s rights. And, it will analyze the constitutional arguments

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that have been made against United States ratification of such agree-
ments and the effect such ratification would have on existing United
States law.

II. INTERNATIONAL AGREEMENTS PROVIDING
RIGHTS FOR WOMEN

A. Existing Conventions

1. The United Nations Charter

The most significant and widely ratified international agreement
making reference to the rights of women is the United Nations Char-
ter. The preamble "reaffirms" the faith of the members of the United
Nations in "fundamental human rights, in the dignity and worth of the
human person, [and] in the equal rights of men and women . . . ."1
It is noteworthy that equality of rights for men and women is placed
on the same plateau as fundamental human rights and the dignity
of the human person. Article 1, setting forth the purposes of the
United Nations, enumerates as one of these purposes, "promoting and
encouraging respect for human rights and for fundamental freedom for
all without distinction as to . . . sex"2 as does Article 55.3

The General Assembly is directed to "initiate studies and make rec-
ommendations for the purpose of . . . assisting in the realization of
human rights and fundamental freedoms for all without distinction as
to . . . sex . . . ,"4 and under Article 56 "[a]ll members pledge them-
selves to take joint and separate action . . . for the achievement of the
purposes set forth in Article 55."5 The Charter also provides specif-
ically that the United Nations itself "shall place no restrictions on the

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1. U.N. CHARTER, preamble. The Charter was signed at San Francisco, June 26,
1945, and entered into force October 24, 1945. The United States ratified the Charter
on August 8, 1945, 59 Stat. 1031 (1945).
2. U.N. CHARTER, art. 1 (emphasis added).
3. Id. art. 55. This is also included among the "basic objectives" of the trusteeship
system. See id. art. 76.
4. Id. art. 13.
5. The extent to which this article imposes an affirmative obligation on members has
been the subject of considerable divergence of opinion. See Hudson, Charter Provisions
on Human Rights in American Law, 44 AM. J. INT'L L. 543 (1950); Wright, National
Courts and Human Rights—the Fujii Case, 45 AM. J. INT'L L. 62 (1951); Note, Human
(1950); Note, U.N. Charter Invalidates Allen Land Law, 2 STAN. L. REV. 797-810
(1950); Recent Cases, 26 TEMP. L.Q. 184 (1952); Recent Cases, 100 U. PA. L. REV.
1247 (1952).
eligibility of men and women to participate in any capacity and under conditions of equality in the principal and subsidiary organs. As is evident from this summary, with the exception of the last mentioned provision, the Charter provisions dealing with the rights of women are very broad and general in scope.

2. International Covenant on Civil and Political Rights

This covenant, adopted by a resolution of the General Assembly in 1966, is a broad charter of basic civil and political rights. It encompasses most of the rights contained in the United States Bill of Rights, but extends well beyond those. In addition to providing rights for the criminally accused similar to those provided by the Bill of Rights, the convention also guarantees the right to appeal and the right to

6. U.N. Charter art. 8. The composition of the United Nations Secretariat itself does not reflect an equal representation of women. Only nine of two hundred seventy nine senior staff positions are held by women. No woman has ever been Secretary General and only one of the undersecretaries is a woman. A woman was first appointed to this level in 1972. See Composition of the Secretariat, Report of the Secretary General, U.N. Doc. A/9120, at 21 (1973). See also N.Y. Times, Feb. 3, 1976, at 19, col. 1-6.

On December 8, 1975, the General Assembly passed a new resolution requesting the Secretary General to increase the number of women in professional posts. See 13 U.N. Mo. Chron. 63 (Jan. 1976).


8. Id.

9. The Convention guarantees the “liberty and security” of the person, id. art. 9; bars arbitrary arrest, id.; requires that anyone arrested be informed of the charges, id. art. 9; and be brought promptly before a court, id.; that everyone shall have a right to a fair and public hearing before an impartial tribunal, id. art. 14; presumed innocent until proven guilty, id.; be informed in detail of the charges against him, id.; be tried without undue delay, id.; have assistance of counsel of his own choosing, id.; have counsel appointed, id.; have the right to obtain the attendance of and to examine witnesses, id.; have the right against compelled self-incrimination, id.; against double jeopardy, id.; against ex post facto laws, id. art. 15; and against cruel, inhuman, and degrading punishment, id. art. 7. The last provision is, arguably, broader than the “cruel and unusual” provision of the eighth amendment to the United States Constitution, as punishment may be degrading even when not cruel and unusual.

10. Id. art. 14. In Griffin v. Illinois, 351 U.S. 12 (1956), the Supreme Court held that the due process clause of the fourteenth amendment requires states to provide an indigent with a free transcript on appeal and in Douglas v. California, 372 U.S. 353 (1963), that the equal protection clause of the fourteenth amendment requires states to provide indigents with free counsel for the first appeal, if such review exists, but it has never held that the state must provide a forum for appellate review. The question whether the Constitution requires appellate review is, however, academic since all states in the United States have provided for such review. See ABA Project on Minimum Standards for Criminal Justice 17 (1967).
compensation for unlawful arrest or detention. The convention protects the first amendment freedoms but also provides for the right of self-determination, the right to dispose of property, the right to nationality at birth, the right to move freely within a country and the right to leave a country. It prohibits slavery, forced or compulsory labor, unlawful interference with privacy, family, or honor and reputation, propaganda for war, or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence.

Several provisions make specific reference to rights of women. For example, provisions guarantee to all citizens, without distinction on the basis of sex, inter alia, the right to take part in the conduct of public affairs, to vote and to be elected, and to have access to public services. It also requires states “to insure equality of rights and responsibilities of spouses as to marriage, during marriage and at dissolution.” However, the major importance of the International Covenant on Civil and Political Rights to women is not so much in these particular provisions, but rather in two general provisions. These provide that all states who are parties to the covenant “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in it.”

Moreover, in addition to requiring

12. Those first amendment guarantees encompassed in the convention are freedom of thought, id. art. 18; freedom of expression, id. art. 19 (which provides that “this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other media . . .”); freedom of association, id. art. 22; freedom of peaceful assembly, id. art. 21; and freedom of religion, id. art. 18.
13. Id. art. 1.
14. Id.
15. Id. art. 24.
16. Id. at 12.
17. Id.
18. Id. art. 8.
19. Id.
20. Id. art. 17.
21. Id. art. 20.
22. Id.
23. Id. art. 25.
24. Id.
25. Id.
26. Id. art. 23.
27. Id. art. 3. The same guarantee is also contained in the clause barring discrimina-
states to ensure equality with respect to the rights guaranteed by the
convention, it provides that "the law shall prohibit any discrimination
and guarantee to all persons equal and effective protection against dis-
"crimination on any ground such as . . . sex."28

In sum, the convention specifically guarantees certain rights to
women, enumerates a broad spectrum of rights which must be accorded
equally to men and women, prohibits all discrimination based on sex,
and requires states to provide effective protection against such discrim-
ination. Clearly, its impact on women's rights could be enormous.
The covenant came into force on March 23, 1976 after having been
ratified by the necessary thirtys-five states.30

3. International Covenant on Economic, Social and
Cultural Rights31

As a companion to the International Covenant on Civil and Political
Rights, the International Covenant on Economic, Social and Cultural
Rights is a charter of basic rights in the economic, social, and cul-
tural areas.34 It was adopted as a resolution of the General Assembly

28. Id. (emphasis added).
29. Id. art. 26.
30. Id. art. 49 states the requirement of thirty-five states for effectiveness.
32. The parties recognize the right to work, id. art. 6; the right to just and favorable
conditions of work, id. art. 7; and the right to social security, id. art. 9.
33. Social rights include the right of everyone to an adequate standard of living, id.
art. 11; the right to the highest attainable standard of physical and mental health, id.
art. 12; and the right of everyone to an education, id. art. 13.
34. These include the right of everyone to take part in the cultural life, to enjoy the
benefits of scientific progress and its application, and to benefit from any scientific,
literary, or artistic production of which he is the author. Id. art. 15.
and was opened for ratification in 1966. The parties recognize the right to work, the right to just and favorable conditions of work, the right to social security, the right of everyone to an adequate standard of living, the right to the highest attainable standard of physical and mental health, the right of everyone to an education, and the right of everyone to take part in the cultural life, to enjoy the benefits of scientific progress and its application, and to benefit from any scientific, literary, or artistic production of which he is the author. The parties further recognize that marriage must be entered into with the free consent of the spouses, that special protection should be accorded to mothers during a reasonable period before and after childbirth, and that special measures of protection and assistance should be taken on behalf of children. The covenant requires the states who are party to the convention to ensure fair wages and equal remuneration for equal work, equal promotional opportunities, safe and healthy working conditions, rest, leisure and reasonable limitation of working hours, the right to form and join trade unions, the right of trade unions to function freely, and the right to strike. It provides that the states party to the covenant shall take measures to improve methods of production, conservation and distribution of food, to reduce still births and infant mortality, to improve environmental and industrial hygiene, to prevent and control disease, and to assure availability of medical care to all. It would make primary education compulsory and require that secondary and higher education be made generally available and equally accessible to all.

36. Id.
37. Id. art. 10.
38. Id. art. 10.
39. Id. art. 7.
40. Id.
41. Id.
42. Id.
43. Id. art. 8.
44. Id.
45. Id.
46. Id. art. 11.
47. Id. art. 12.
48. Id.
49. Id.
50. Id.
51. Id. art. 13.
52. Id.
With respect to women's rights, two provisions are particularly significant. One is the general provision which requires states to "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth . . . in the Covenant," and to guarantee that the rights will be exercised without discrimination of any kind as to sex. The other is the clause in the provision dealing with wages, specifically reiterating the requirement of "equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work." The covenant came into effect in 1975, when it was ratified by thirty-five states as required by Article 27.

The Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights encompass many rights and are not limited to rights for women. Several more narrowly drawn conventions in effect among a number of states deal specifically with rights for women.

4. Convention on the Political Rights of Women

The Convention on the Political Rights of Women, drafted by the Commission on the Status of Women and adopted by the General
Assembly,\(^{60}\) provides that "[w]omen shall be entitled to vote in all elections on equal terms with men . . . ."\(^{61}\) "Women shall be eligible for election to all publicly elected bodies . . . on equal terms with men . . . ."\(^{62}\) and they "shall be entitled to hold public office and to exercise all public functions . . . on equal terms with men . . . ."\(^{63}\) The convention came into force on July 7, 1954.\(^{64}\) As of October 1, 1975, the convention had been ratified by seventy-eight countries.\(^{65}\)

5. Convention Against Discrimination in Education\(^{66}\)

This convention, adopted by the United Nations Scientific and Cultural Organization on December 14, 1960, is much broader than the
name implies as it encompasses not only discrimination in education but the availability and quality of education as well. For example, it requires states to provide free and compulsory primary education, to make secondary education generally available and accessible, to ensure that all public educational institutions of the same level have equivalent standards of education, and to provide training for the teaching profession. Particularly relevant to women’s rights is the requirement that “in order to eliminate and prevent discrimination,” the parties will undertake to abrogate any statutory provisions and to discontinue any administrative practices which involve discrimination in education, and to ensure that admission of pupils to educational institutions is non-discriminatory. Discrimination is defined, inter alia, as any “distinction, exclusion, limitation or preference . . . based on . . . sex . . . .” The convention does permit separate educational institutions for pupils of different sex, provided that institutions have equally qualified staff and premises and equipment of the same quality. The convention came into force on May 22, 1962. As of April 30, 1975, sixty-three states had ratified it.

6. Labor Conventions

A number of conventions, promulgated by the International Labor Organization (ILO), are concerned with the rights of women. Thus,

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67. Id. art. 4.
68. Id. art. 3.
69. Id. art. 1.
70. Id. art. 2.
71. Id. at 94 n.1.
72. Interview with Ms. Frykholm, Librarian, UNESCO, December 23, 1976. Countries which have ratified are: Albania, Algeria, Argentina, Australia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Central African Republic, Chile, China, Republic of the Congo, Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark, Federal Republic of Germany, Finland, France, German Democratic Republic, Guinea, Hungary, Indonesia, Iran, Israel, Italy, Kuwait, Lebanon, Liberia, Libyan Arab Republic, Luxembourg, Madagascar, Malta, Mauritius, Mongolia, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Peru, Philippines, Poland, Romania, Saudi Arabia, Senegal, Sierra Leone, Spain, Swaziland, Sweden, Tunisia, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom, Venezuela, Republic of Viet-Nam, Yugoslavia. Id.
73. The International Labor Organization (ILO) was established in 1919 by the Treaty of Peace of Versailles. The United States was one of the founding states. The governing body is composed of twenty-four representatives of government, twelve representatives of employers, and twelve representatives of workers. The United States has recently notified the ILO of its intention to withdraw. See Binder, U.S. to Tell I.L.O. It Plans to Quit, N.Y. Times, Nov. 3, 1975, at 6, col. 1. A member is required to give such notice two
the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value requires members to "ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value." The convention was adopted by the ILO on June 29, 1951 and came into force on May 23, 1953. As of June 30, 1976 it had been ratified by eighty-nine states.

There are two other ILO conventions having broad application and significantly affecting rights of women, one on discrimination and the

years before actual termination of membership. ILO CONST. art. 1. For a detailed study of the history of the ILO, see A. Alcock, HISTORY OF THE INTERNATIONAL LABOR ORGANIZATION (1971).

75. Id. art. 2. The full text of the article is:

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

2. This principle may be applied by means of—

(a) national laws or regulations;
(b) legally established or recognised machinery for wage determination;
(c) collective agreements between employers and workers; or
(d) a combination of these various means.

It is not clear whether this enumeration of means in section 2 defines and limits the clause "by means appropriate to the methods in operation for determining rates of remuneration . . ." or the clause "in so far as is consistent with such methods . . ." in section 1 of the article. If it does not modify the former clause, the article may be interpreted, not as an absolute mandate for equal pay but as requiring equal pay for equal work only insofar as this can be accomplished and still be consistent with methods for determining remuneration presently existing in each country.

76. International Labour Convention, Chart of Ratifications, as of Jan. 1, 1974, [hereinafter cited as Labour Convention], as updated, LVII ILO OFFICIAL BULL. 11 (1974), LVIII ILO OFFICIAL BULL. 11-15 (1975), LIX ILO OFFICIAL BULL. 77-79 (1976). Countries ratifying include: Afghanistan, Albania, Algeria, People's Republic of Angola, Argentina, Australia, Austria, Barbados, Belgium, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cameroon, Canada, Central African Republic, Chad, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Dahomey, Denmark, Dominican Republic, Ecuador, Egypt, Finland, France, Gabon, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Ireland, Iraq, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Libyan Arab Republic, Luxembourg, Madagascar, Malawi, Mali, Mexico, Mongolia, Netherlands, Nepal, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Senegal, Sierra Leone, Spain, Democratic Republic of the Sudan, Sweden, Switzerland, Syrian Arab Republic, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, Upper Volta, Yugoslavia, Zaire, Zambia. Id.

other on employment policy. Under the Convention Concerning Discrimination in Respect of Employment and Occupation, each member undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

The methods enumerated in the convention include,

(b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;

(c) to repeal any statutory provision and to modify any administrative instructions or practices which are inconsistent with the policy;

\[\ldots\]

(d) to pursue the policy in respect of employment under the direct control of a national authority.

Two caveats to this general proscription on discrimination are (1) that special measures of protection provided for in other ILO Conventions or recommendations are not to be deemed discrimination and (2) that a member may, after consultation with employers' and workers' organizations,

determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex are generally recognized to require special protection or assistance,

are needed. The discrimination convention came into force June 15, 1960. It has been ratified by eighty-eight states.

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79. 362 U.N.T.S. 32, art. 2. “Discrimination” is defined to include, inter alia, “any distinction, exclusion or preference made on the basis of sex which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.” Id. art. 1. Employment and occupation are defined to include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.” Id. art. 1.
80. Id. art. 3.
81. Id.
82. Id. art. 5.
83. Id. at 32 n.1.
84. Labour Convention, supra note 76, as updated, LVIII ILO OFFICIAL BULL. 11-15 (1975), LIX ILO OFFICIAL BULL. 77-79 (1976). Countries which ratified the convention are: Afghanistan, Algeria, People's Republic of Angola, Argentina, Australia, Austria, Bangladesh, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Central African Republic, Chad, Chile, China, Colombia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark, Dominican Republic, Ecuador, Egypt, Ethiopia, Finland, Gabon, German Democratic Republic, Federal Republic of Germany, Ghana, Ghana,
The Convention Concerning Employment Policy\(^5\) requires each member to "declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment."\(^6\) Members should aim at ensuring, \textit{inter alia}, that "there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for and to use his skills and endowments in, a job for which he is well suited, irrespective of . . . sex . . ."\(^7\) The convention came into force on July 15, 1966.\(^8\)

Other ILO conventions, narrower in scope, treat such matters as employment of women at night,\(^9\) employment of women underground,\(^9\) employment of women before and after childbirth,\(^9\) and insurance for widows and orphans.\(^9\)

The Convention Concerning Night Work of Women Employed in Industry,\(^9\) revised in 1948, prohibits the employment of women, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, India, Iran, Iraq, Israel, Italy, Ivory Coast, Jamaica, Jordan, Kuwait, Liberia, Libyan Arab Republic, Madagascar, Malawi, Mali, Malta, Mauritania, Mexico, Mongolia, Morocco, Nepal, Netherlands, Nicaragua, Niger, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Senegal, Sierra Leone, Somalia, Spain, Democratic Republic of the Sudan, Sweden, Switzerland, Syrian Arab Republic, Trinidad and Tobago, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Upper Volta, Venezuela, Republic of Viet-Nam, Yemen Arab Republic, Yugoslavia. \textit{Id.}

86. \textit{Id.} art. 1.
87. \textit{Id.}
88. \textit{Id.} at 66 n.1.

The United States is not a party to this convention. A congressional injunction of secrecy was removed June 2, 1966; the convention is now in the Foreign Relations Committee. CCH CONGRESSIONAL INDEX 1633 (1971-72).

93. 81 U.N.T.S. 147, \textit{adopted} July 9, 1948. The two other conventions which deal with performance of night work by women are the Convention Concerning the Employment of Women During the Night, \textit{adopted} Nov. 29, 1919, 38 U.N.T.S. 67, and the
regardless of age, "during the night in any public or private industrial undertaking, . . . other than an undertaking in which only members of the same family are employed."¹⁴ "Night signifies a period of eleven consecutive hours at least seven of which fall after ten o'clock in the evening and before seven o'clock in the morning."¹⁶ Exceptions are permitted for force majeure,¹⁷ where because "of serious emergency the national interest demands it,"¹⁸ or where the work is "necessary to preserve 'rapidly deteriorating' materials from certain loss."¹⁸ In an industrial undertaking of a seasonal nature and where exceptional circumstances demand, the night period may be reduced to ten hours for a sixty day period each year.¹⁹ In countries where the climate makes day work particularly trying, there may be a shorter night period if compensatory rest is allowed during the day.²⁰ The convention is not applicable to women in health and welfare services who are not normally engaged in manual work²¹ or to women "holding responsible positions of a managerial or technical character."²²

Convention Concerning Employment of Women During the Night, adopted June 19, 1934, 40 U.N.T.S. 3.

These three conventions are basically similar. The differences are not relevant here. The prohibition of night work for women was the first protective measure to be made the subject of an international convention. See International Convention Respecting the Prohibition of Night Work for Women in Industrial Employment, signed Sept. 26, 1906, 21 Gr. Brit. T.S. 345. The later conventions provide that if a country that has ratified a convention subsequently ratifies a later version, its ratification of the earlier is deemed denounced.


"Industrial undertaking" as defined in article 1 includes:

(a) mines, quarries, and other works for the extraction of minerals from the earth;

(b) undertakings in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed, including undertakings engaged in shipbuilding or in the generation, transformation or transmission of electricity or motive power of any kind;

(c) undertakings engaged in building and civil engineering work, including constructional, repair, maintenance, alteration and demolition work.

The competent authority shall define the line of division which separates industry from agriculture, commerce and other non-industrial occupations.

Id. art. 1.

95. Id. art. 2.
96. Id. art. 4.
97. Id. art. 5.
98. Id. art. 4.
99. Id. art. 6.
100. Id. art. 7.
101. Id. art. 8.
102. Id. This provision was not contained in the earlier versions of the convention.
convention came into force on February 27, 1951.\textsuperscript{103} As of June 30, 1976, fifty-one states had ratified it.\textsuperscript{104}

The Convention Concerning the Employment of Women on Underground Work in Mines of all Kinds\textsuperscript{105} provides that "[n]o female, whatever her age, shall be employed on underground work in any mine."\textsuperscript{106} Exceptions are made for women in training, in health and welfare services, in management, and for others who may occasionally enter non-manual work.\textsuperscript{107} The convention came into force on May 30, 1937\textsuperscript{108} and had been ratified by seventy-eight states\textsuperscript{109} as of June 30, 1976.

Under the terms of the Convention Concerning Maternity Protection,\textsuperscript{110} a woman employed in any industrial or commercial undertak-
ing is entitled to a period of maternity leave of at least twelve weeks, with a minimum of six weeks compulsory leave following her confinement. Moreover, while on maternity leave, she must be paid cost benefits fixed by national law, and sufficient for the "full and healthy maintenance" of mother and child. She may not be dismissed while absent from work during this period. If she nurses "she shall be entitled to interrupt her work for this purpose, at . . . times to be prescribed by national laws . . . ." The convention came into force on September 7, 1955 and has been ratified by fifteen states.

Laws regulating the hours and places of permissible work for women, though originally deemed protective, have more recently been criticized as discriminatory. Such laws place restrictions on women in two ways: (1) they absolutely bar women from certain types of work and (2) they may cause employers not to hire women for other types of work because of the special conditions imposed on the employer employing women. Doubt has been expressed about the continued valid-

111. "Industrial undertaking" is defined as:
(a) mines, quarries, and other works for the extraction of minerals from the earth;
(b) undertakings in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed, including undertakings engaged in shipbuilding, or in the generation, transformation or transmission of electricity or motive power of any kind;
(c) undertakings engaged in building and civil engineering work, including constructional, repair, maintenance, alteration and demolition work;
(d) undertakings engaged in the transport of passengers or goods by road, rail, sea, inland waterway or air, including the handling of goods at docks, quays, wharves, warehouses or airports.

113. Id. art. 3.
114. Id. art. 4. The medical benefits must include prenatal, confinement and postnatal care, hospitalization where necessary, and freedom of choice between a public and private hospital. Id.
115. Id. art. 6.
116. Id. art. 5.
117. Id. at 322 n.1.
118. Labour Convention, supra note 76. Countries ratifying are: Austria, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Cuba, Ecuador, Hungary, Italy, Luxembourg, Mongolia, Spain, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Uruguay, Yugoslavia. Id.

The ILO Convention Concerning Conditions of Employment of Plantation Workers, adopted June 24, 1958, 348 U.N.T.S. 275, reproduces the provisions contained in the maternity protection convention. It also provides that no pregnant woman shall be required to undertake any type of work harmful to her in the period prior to her maternity leave. Id. art. 47.

ity of ILO instruments that emphasize protection of women rather than non-discrimination.118

There are two conventions treating compulsory widows' and orphans' insurance. One of these covers persons employed in agricultural undertakings.119 The other covers persons employed in industrial or commercial undertakings in the liberal professions and out-workers and domestic servants.120 Under both conventions, all ratifying states agree to set up and maintain a scheme of compulsory widows' and orphans' insurance. Detailed provisions cover who may be excluded, what conditions may be imposed, and how the insurance shall be financed. Both require that the pension, together with non-exempt means of the pensioner, must be sufficient to cover her essential needs.121 The convention for persons employed in agricultural undertakings came into force on September 29, 1949.122 As of June 30, 1975, six states had ratified it.123 The convention for persons in commercial undertakings came into force on November 8, 1946.124 As of June 30, 1975, seven states had ratified it.125 A separate convention provides for establishment of international machinery for maintenance of rights under these conventions.126

In addition to those conventions described above which concern particularly the rights of women, a number of ILO conventions provide


120. Convention Concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions and for Outworkers and Domestic Servants, adopted June 29, 1933, 39 U.N.T.S. 259.

121. Id. art. 22; Convention Concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Agricultural Undertakings, adopted June 29, 1933, art. 22, 39 U.N.T.S. 285.

122. 39 U.N.T.S., at 308.

123. Labour Convention, supra note 76. Countries ratifying are: Bulgaria, Czechoslovakia, Italy, Peru, Poland, United Kingdom. Id.


125. Labour Convention, supra note 76. Countries ratifying are: Bulgaria, Czechoslovakia, Ecuador, Italy, Peru, Poland, United Kingdom. Id.

that states ratifying them will undertake to apply them equally to men and women.\textsuperscript{127}

7. Marriage, White Slavery and Prostitution

There are various conventions treating marriage, white slavery and prostitution. The Convention on the Nationality of Married Women\textsuperscript{128} provides that "neither the celebration nor the dissolution of a marriage between . . . nationals . . . [of different states] nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife."\textsuperscript{129} Under laws existing in many countries, a wife automatically acquired the nationality of her husband and her rights were governed by the law of his country.\textsuperscript{130} Some women were even barred from returning to their original countries on their husband's death because, under the law of their homeland, they lost that nationality upon marrying a foreigner.\textsuperscript{131} The convention came into force on August 11, 1958.\textsuperscript{132} As of June 30, 1975, forty-nine states had ratified it.\textsuperscript{133}

\textsuperscript{127} See, e.g., Convention Concerning Conditions of Employment of Plantation Workers, adopted June 24, 1958, 348 U.N.T.S. 275. An ILO report to the Commission on the Status of Women states that "there are now 13 ILO Conventions and 144 Recommendations which cover most of the main spheres of labor and social policy and which have been widely accepted in national law and practice. Almost all of these apply to women as well as men without distinction. . . ." U.N. Doc. E/CN.6/556 (1971).


\textsuperscript{129} \textit{Id.} art. 1.

\textsuperscript{130} See, e.g., Finland: Act of May 9, 1941, § 3, concerning the acquisition and loss of Finnish citizenship; Indonesia: Act No. 3 of April 10, 1946, art. 2(1), concerning citizens and residents of Indonesia; Korea: Nationality Law No. 16 of Dec. 20, 1948, art. 3(1). Under Ethiopian law, a woman married to a foreigner may still lose her nationality. An alien wife, but not an alien husband, automatically acquires the nationality of her Ethiopian husband. U.N. Doc. E/CN.6/592, at 27-28 (1976). A United States statute, Citizenship Act of 1907, Ch. 2534, § 3, 34 Stat. 1228 provided for automatic loss of citizenship by a woman upon a marriage to a foreign national under certain circumstances. This statute was repealed in 1922. See notes 402-06 infra and accompanying text.

\textsuperscript{131} See U.N. Doc. E/CN.6/389, at 3-8 (1962). Most nationality laws now allow a woman to regain her pre-marital nationality upon the death of her husband or the dissolution of the marriage. \textit{Id.} at 35-37.

\textsuperscript{132} MULTILATERAL TREATIES, \textit{supra} note 30, at 388. Article 6 of the convention provides that the convention comes into force after ratification by six states. 309 U.N.T.S. 65, art. 6.

\textsuperscript{133} MULTILATERAL TREATIES, \textit{supra} note 30, at 388-89, \textit{as updated}, 12 U.N. Mo. CHRON. 28 (Feb. 1975). Countries ratifying are: Albania, Argentina, Australia, Austria, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Cuba, Cypress,
The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,\textsuperscript{134} provides that no marriage shall be entered into without the full and free consent of both parties,\textsuperscript{135} that no marriage shall be entered into by any person below the minimum age specified by legislation in each of the countries party to the convention,\textsuperscript{136} and that all marriages shall be registered.\textsuperscript{137} The convention came into force on December 9, 1974,\textsuperscript{138} and as of June 30, 1975, twenty-seven states had ratified it.\textsuperscript{139}

The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,\textsuperscript{140} superseding several earlier conventions on the same subject,\textsuperscript{141} obligates the parties to punish any person who, for the satisfaction of another, procures, entices,
or leads away another person for purposes of prostitution, or exploits the prostitution of another person, although that person consents.\textsuperscript{142} There is also an obligation to punish any person who keeps, manages, or knowingly finances a brothel or rents premises for the purpose of prostitution.\textsuperscript{143} Attempts to commit these acts and intentional participation are also to be punished to the extent permitted by domestic law.\textsuperscript{144} Other provisions of the convention deal with repeal of existing law which requires registration of persons engaged in prostitution,\textsuperscript{145} use of foreign convictions for multiple-offender treatment,\textsuperscript{146} extradition,\textsuperscript{147} transmission of letters of request,\textsuperscript{148} exchange of information between countries,\textsuperscript{149} prevention of prostitution and rehabilitation of victims of prostitution,\textsuperscript{150} and temporary care, maintenance and repatriation of destitute victims of international traffic in persons.\textsuperscript{151} The parties also undertake to adopt immigration and emigration measures necessary to prevent traffic in persons of either sex for the purpose of prostitution.\textsuperscript{152}

The convention came into force on July 25, 1951.\textsuperscript{153} As of June 30, 1975, forty-two states were party to it.\textsuperscript{154} Although the United States has not ratified this convention, it has ratified an earlier convention which is similar.\textsuperscript{155}

\textsuperscript{142} Id. art. 1.
\textsuperscript{143} Id. art. 2.
\textsuperscript{144} Id. art. 4.
\textsuperscript{145} Id. art. 6.
\textsuperscript{146} Id. art. 7.
\textsuperscript{147} Id. art. 8.
\textsuperscript{148} Id. art. 13.
\textsuperscript{149} Id. art. 15.
\textsuperscript{150} Id. art. 16.
\textsuperscript{151} Id. art. 19.
\textsuperscript{152} Id. art. 17.
\textsuperscript{153} MULTILATERAL TREATIES, supra note 30, at 193. Article 24 of the convention provides that the convention comes into force after ratification by two states. 96 U.N.T.S. 271, art. 24.
\textsuperscript{154} MULTILATERAL TREATIES, supra note 30, at 193-94. Countries ratifying are: Albania, Algeria, Argentina, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Egypt, Finland, France, German Democratic Republic, Guinea, Haiti, Hungary, India, Iraq, Israel, Japan, Kuwait, Libyan Arab Republic, Malawi, Mali, Mexico, Morocco, Norway, Pakistan, Philippines, Poland, Republic of Korea, Romania, Singapore, South Africa, Spain, Sri Lanka, Syrian Arab Republic, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Upper Volta, Venezuela, Yugoslavia. Id.
B. The Draft Convention on the Elimination of All Forms of Discrimination Against Women

At its last two sessions the United Nations Commission on the Status of Women has been considering a draft of the Convention on the Elimination of Discrimination Against Women. This treaty encompasses most of the guarantees contained in existing conventions and defines additional rights. The draft contains alternative texts on a number of articles, but in general it provides that the states party to the convention shall condemn discrimination against women and shall (1) initiate "by all appropriate means and without delay a policy of eliminating discrimination against women in all its forms . . ."; (2) repeal all provisions of national penal codes that discriminate against women; (3) take measures to combat traffic in women; (4) ensure to women equal rights politically; (5) ensure to women equal rights economically, including equality in employment opportunities and remuneration; (6) provide equal educational opportunities for women; (7) ensure equality before the law; (8) foster equality in determining when, whether and who to marry and foster equality during marriage; and (9) promote equality in rights pertaining to rearing children. It also contains some general provisions, such as that "[s]tates [p]arties shall under-


157. The draft convention, based on earlier drafts submitted by the Philippines and the Union of Soviet Socialist Republics, was prepared by a working group composed of fifteen members of the Commission. The group met for five days prior to the twenty-fifth session of the Commission. Id. at 29.

The Commission asked the Secretary General to obtain comments on the draft from the member-states of the United Nations, specialized agencies and non-governmental organizations and to prepare a working paper based thereon for the consideration of the Commission at its twenty-sixth session. The Secretary General did so. See E/CN.1 6/591 (1976). By May, 1976, the date on which the report was prepared, forty governments (not including the United States), several agencies of the United Nations, and ten non-governmental organizations sent in responses analyzing the draft convention, article by article, and authoring various amendments. Id. at 6-43.

158. Id. art. 2.
159. Id. art. 6.
160. Id. art. 7.
161. Id. art. 8.
162. Id. art. 11.
163. Id. art. 10.
164. Id. art. 15.
165. Id. art. 16.
take, in the social, economic, cultural and other fields, all appropriate measures to ensure the adequate development and advancement of women . . . ,"¹⁶⁶ and that

States Parties shall take all appropriate measures to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices which are based on the idea of the inferiority of women . . . .¹⁶⁷

While this convention is still in draft form and not open for ratification, most of the rights provided therein are contained in the conventions already discussed as well as in the Declaration on the Elimination of Discrimination Against Women. The declaration is not legally binding on states to the same extent as a convention ratified by the state would be. Nevertheless, as a declaration, unanimously adopted

¹⁶⁶ Id. art. 3.
¹⁶⁷ Id. art. 5. The draft contains two alternative proposals for implementing the convention. Under the first, states parties to the convention would submit reports on "legislative, administrative and practical measures which they have adopted implementing the provisions of the present Convention" to the Secretary General every four years. Id. art. 21. Under the second proposal, a Committee on the Convention on the Elimination of Discrimination Against Women would be established and states would submit a report on the "legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention" for consideration by the Committee. Id. This alternative provides for submission of a report "every two years and whenever the Committee so requests" and empowers the Committee to request further information from states. Id.

Elsewhere it has been suggested that the convention should provide more effective means for implementation, such as a provision modeled on the Covenant on Civil and Political Rights or on the International Convention on the Elimination of All Forms of Racial Discrimination. Such a means might vest the Commission on the Status of Women, or a committee established for that purpose, with authority to consider allegations by states parties to the convention, or by individuals, that a state is not fulfilling its obligations under the covenant. See Guggenheim, The Implementation of Human Rights by the U.N. Commission on the Status of Women: A Comment, 12 Tex. Int'l L.J. — (1976).

The states responding to the Secretary General's request for comments on the draft convention, see note 157 supra, "fully endorsed" the need for periodic review of the progress made by the Parties in implementing the provisions of the convention. E/CN. 6/591, at 38 (1976). However, the creation of a committee on the implementation of the convention was controversial. Some states objected to the creation of the committee, believing that control over implementation should be by the Commission. Others thought an independent committee of experts would be desirable. Id. at 39. The Netherlands suggested that consideration be given to devising a procedure similar to that laid down in Article IX of the International Convention on the Suppression and Punishment of the Crime of Apartheid. Reference was also made to the system of implementation provided for in the International Convention on the Elimination of All Forms of Racial Discrimination. Id. at 39-40.
by 111 states, it carries great moral force and, according to some views, legal force.\textsuperscript{168}

It is evident from this summary that there are a number of international agreements, ratified by many countries, which require states to accord women equality in the political, economic, and educational spheres. Since treaties are the supreme law of the land in the United States and supersede inconsistent law, United States ratification of these agreements would override inconsistent state and federal laws and guarantee equality for women in these areas. It is therefore relevant to examine (1) the arguments that there are Constitutional impediments to United States ratification of such agreements and (2) what impact ratification would have on existing United States law.

\section{III. CONSTITUTIONAL CONSIDERATIONS PERTAINING TO RATIFICATION}

Of the above agreements, only the United Nations Charter and the International Agreement for the Suppression of White Slave Traffic have been ratified by the United States prior to 1976. None of the four major agreements dealing specifically with women's rights—the Convention on the Political Rights of Women,\textsuperscript{169} the Convention Against Discrimination in Education,\textsuperscript{170} the Convention Concerning Discrimination in Respect of Employment and Occupation,\textsuperscript{171} or the ILO Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value\textsuperscript{172}—and none of the major human rights conventions—the Genocide Convention, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimina-

\textsuperscript{168} Some authorities have taken the position that United Nations resolutions, particularly if accepted by a large number of states and if frequently cited, constitute customary international law. See Bleicher, \textit{The Legal Significance of Re-Citation of General Assembly Resolutions}, 63 Am. J. Int'l L. 444 (1969). Cf. Sohn, \textit{The Universal Declaration of Human Rights}, 8 Int'l Comm'n Jurists J. 17 (Dec. 1967).


\textsuperscript{172} ILO Convention No. 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, \textit{adopted} June 29, 1951, 165 U.N.T.S. 303. See notes 74-76 supra and accompanying text.
tion of All Forms of Racial Discrimination—had been ratified by the United States, despite extended and repeated efforts by those who support United States ratification of human rights conventions.173 Opponents of United States ratification of these conventions have taken the position that the United States lacks power under the Constitution to ratify such treaties. In the main, they have made three arguments: (1) that these treaties involve matters within the domestic jurisdiction of the United States,174 (2) that they involve the reserved powers of the states,175 and (3) that they are not of international concern. Those opposed to ratification view these arguments as limitations on the scope of the treaty power.176

A. The Domestic Jurisdiction Myth

Of the treaties specifically dealing with women's rights, only one, the Convention on the Political Rights of Women,177 has been submitted to the Senate for its advice and consent to ratify.178 President Kennedy requested the Senate's advice and consent to this convention, the Supplementary Slavery Convention, and the Convention Concerning the Abolition of Forced Labor in July, 1963. In his letter of transmittal to the Senate, President Kennedy emphasized the importance of United States ratification of these conventions.179 Dean Rusk reported that


174. See notes 177-98 infra and accompanying text.

175. See notes 199-224 infra and accompanying text.

176. See notes 230-53 infra and accompanying text.


179. President Kennedy's letter of transmittal stated in pertinent part:

'United States law is, of course, already in conformity with these conventions, and ratification would not require any change in our domestic legislation. However, the fact that our Constitution already assures us of these rights does not entitle us to stand aloof from documents which project our own heritage on an international
ratification of the convention involved no legal restrictions and was in compliance with the Constitution. After hearings before a subcommittee of the Senate Foreign Relations Committee, at which a number of witnesses representing numerous citizen organizations as well as several bar associations appeared in support of United States ratification of the Convention on the Political Rights of Women, all

scale. The day-to-day unfolding of events makes it ever clearer that our own welfare is interrelated with the rights and freedoms assured the peoples of other nations.

These conventions deal with human rights which may not yet be secure in other countries: they have provided models for the drafters of constitutions and laws in newly independent nations: and they have influenced the policies of governments preparing to accede to them. Thus, they involve current problems in many countries.

They will stand as a sharp reminder of world opinion to all who may seek to violate the human rights they define. They also serve as a continuous commitment to respect these rights. There is no society so advanced that it no longer needs periodic recommitment to human rights.

The United States cannot afford to renounce responsibility for support of the very fundamentals which distinguish our concept of government from all forms of tyranny. Accordingly, I desire, with constitutional consent of the Senate, to ratify these Conventions for the United States of America.


180. Dean Rusk's report on the Convention on the Political Rights of Women states:

"No substantive legal questions are involved in the United States becoming a party to this convention. Article I, relating to the right of women to vote, merely reflects the principle established by the 19th amendment to the Constitution of the United States, which provides:

"The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

Id. at 2-3. For a discussion of the impact of the Convention on Political Rights of Women in United States law, see notes 266-91 infra and accompanying text.

181. Subcomm. Hearings, supra note 179. See, e.g., Statement of Ms. Judith Nies of the Women's International League for Peace and Freedom before the Senate Committee: "The continuing failure to act by formally ratifying these human rights conventions can only be interpreted as a refusal and lack of moral commitment to promote the basic rights of individuals throughout the world. In addition, she will soon have forfeited any right to future discussion or influence in the field of International Human Rights.

Id. at 80. See also Statement of Terence H. Benbow, Chairman, Comm. on Int'l Law of the New York State Bar Ass'n:

No provision of any of these conventions conflicts with express limitations in the Constitution of the United States. In fact, the conventions express limitations on the United States and the States which are already contained in our Constitution and particularly the Bill of Rights.

Also, after a considerable review we have found nothing in these conventions inconsistent with any existing Federal statutes.

Id. at 84. See also Statement of Marvin Schick of the American Civil Liberties Union:

[W]e firmly believe that United States ratification of the Human Rights Con-
three conventions were ordered reported favorably to the full Foreign Relations Committee. However, the American Bar Association (ABA), which had not appeared before the Subcommittee, appeared before the full Committee, opposing ratification of the Convention on the Political Rights of Women. The ABA resolution submitted to the Board of Governors by the Standing Committee on Peace and Law through the United Nations gave as the reason for such opposition that the convention was "concerned with matters essentially within the domestic jurisdiction of the United States . . . ." Eberhard P. Deutsch, Chairman of the ABA Committee on Peace and Law through the United Nations, had prepared that committee's report opposing ratification and appeared on behalf of the ABA before the Senate Foreign Relations Committee. In response to a question, he agreed that ratification of this convention would have no effect on United States law:

ventions is urgently needed if only to remove the anomaly of this country being one of the few members of the UN not to have ratified any of the Human Rights Treaties. This refusal is in stark contrast to our expression of support of the world organization and the provisions of its charter and also to the real advances in social and political rights that have been made in this country through domestic legislation. Because the three Treaties under consideration are so clearly in accord with principles that we all espouse, it is difficult to understand the delay in securing senatorial action.

Id. at 195. See also Statement of Andrew J. Biemiller, Director of Legislation, AFL-CIO, Washington, D.C., id. at 156; Resolution of the Alaska Bar Ass'n, id. at 197; Statement of John Carey on behalf of The Comm. on Int'l Law of the Ass'n of the Bar of the City of New York, id. at 199; Statement of the Bar Ass'n of the District of Columbia, id. at 225.


As Mr. Abrams, the United States representative to the United Nations Commission on Human Rights noted in his testimony before the Foreign Relations Committee, Not one of the witnesses before the Subcommittee opposed the ratification of any of the three conventions, but, to the contrary, all strongly urged that our country join the great number of others that have become parties to these elementary human rights instruments. I think it significant that no local bar association opposes their ratification, and at least seven that I know of have endorsed ratification.

Id. at 116.

183. The American Bar Association supported ratification of the Supplementary Slavery Convention and recommended that the United States take no action on the Convention Concerning the Abolition of Forced Labor. Proceedings of the House of Delegates at 1967 Annual Meeting, 92 A.B.A. Rep. 316, 342-43 (1967). In so doing, the House of Delegates adopted the recommendation of the Section on International and Comparative Law. The ABA Standing Committee on Peace and Law Through the United Nations, headed by Eberhard Deutsch, had recommended against U.S. ratification of all three treaties. The ABA position was adopted after extensive debate, in which the Attorney General of the United States, a number of past presidents of the ABA, and the then President-elect of the ABA argued in favor of ratification. See Proceedings, 62 AM. SOC. OF INT'L LAW 106 (1968).


185. Id. at 338.
Senator Dodd: I would like to get down to the hard ground on this convention respecting women. Can you give us any citation of any State or Federal law that would be overridden by the United States becoming a party to that treaty?

Mr. Deutsch: None whatever, sir.

Senator Dodd: I don't understand it. If there is no possibility of any conflict why do you oppose the convention?

Mr. Deutsch: The opposition to that convention is based on the principle that it deals with the domestic affairs of the United States and not because it might change some law existing within the United States today. Under the 19th amendment, Senator, every person is entitled to vote regardless of sex in every state. No state could pass a valid law to that effect. [sic] But that doesn't mean we ought to make a treaty to that effect.186

Similarly, the report of the annual meeting of the House of Delegates states that "Mr. Deutsch conceded that these particular treaties were 'relatively innocuous.'" He said "that the Committee's objection to these treaties was that they concerned matters that were purely domestic. The issue was one of constitutional polity . . . ."187

There is, of course, nothing in the Constitution limiting treaties to matters not within the "domestic jurisdiction" of the United States. Indeed, the argument that treaties cannot or should not deal with matters within the domestic jurisdiction of the United States188—it is not entirely clear which position the ABA was taking—misconceives the structure of international law and the function of treaties. The international community as a whole, unlike individual states, does not have a lawmaking body. To a large extent, that function is performed by treaties. Indeed, some states, as for example the Soviet Union, take the position that only treaties or rules of customary law to which the state has given explicit consent are binding.189 Treaties, therefore, are

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186. Subcomm. Hearings, supra note 179, at 34.


188. The report of the ABA Committee on Peace and Law through the United Nations, authored by Mr. Deutsch, stated:

The third convention, namely that dealing with the political rights of women, goes even further in its attempt to regulate the political régimes of states which become parties to it. It is difficult to conceive of any area more peculiarly within the domestic jurisdiction.

He continued:

The question remains, however, whether, under our Constitution, the political rights of women in this country can be made a matter of international concern by the ratification of a treaty on the subject with the advice and consent of the Senate.


one of the major means of creating international law. With the exception of treaties codifying existing customary international law, treaties are ipso facto agreements by states to be bound internationally on matters which, in the absence of the treaty, were not regulated by international law, and were thus within the domestic jurisdiction of the state. By adhering to a treaty on the matter, a state consents to subject to international law something which, in the absence of the treaty, was subject to domestic law only. 

The term domestic jurisdiction appears in the United Nations Charter and in what is generally referred to as the Connally Amendment to the United States Declaration accepting the compulsory jurisdiction of the International Court of Justice. Article 2 of the Charter provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the “domestic jurisdiction” of any state.

However, this article deals with the powers of the United Nations and not with what the United States can or cannot do constitutionally. The Connally Amendment states, inter alia:

Provided, that this declaration shall not apply to

(b) disputes with regard to matters which are essentially within the

190. See Advisory Opinion on Nationality Decrees in Tunis and Morocco, [1923] P.C.I.J., ser. B, No. 4, at 24. The same confusion was evident in the arguments of those who took the position that the Jackson Amendment to the Trade Act of 1974, 19 U.S.C. § 2432 (Supp. IV, 1974), which conditioned the granting of most favored nation treatment to the Soviet Union upon its agreement to permit emigration of those who wished to leave, constituted interference with its domestic jurisdiction. See TME, Oct. 1, 1973, at 23; New York Times, Oct. 17, 1973, at 18, col. 7. States are, of course, free to negotiate and enter into agreements concerning whatever they consider beneficial to regulate by such agreements. Moreover, the Soviet Union had already ratified the Covenant on Civil and Political Rights, see 10 U.N. Mo. CHRON. 86 (Nov. 1973), and the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 7, 1966, 660 U.N.T.S. 195, both of which provide for freedom of emigration. Thus, the argument that the inclusion of a similar provision in a treaty between the United States and the Soviet Union constituted an intrusion into the latter’s domestic jurisdiction was doubly fallacious.

191. U.N. CHARTER art. 2. The paragraph continues: “[B]ut this principle shall not prejudice the application of enforcement measures under Chapter VII.” Id. Thus the United States in fact ratified a treaty that specifically permits intervention in domestic affairs under certain circumstances. However, such intervention is not possible insofar as the United States is concerned, since enforcement measures under Chapter VII are subject to the veto power.
domestic jurisdiction of the United States of America as determined by the United States of America; . . .\textsuperscript{192}

Without the "as determined by the United States" clause, this limitation might properly be interpreted to mean that the International Court of Justice would only have jurisdiction over disputes involving matters that were regulated by customary international law or by treaties to which the United States was a party. The effect of the "as determined by the United States" clause is to permit the United States to appear to accept the compulsory jurisdiction of the International Court of Justice, while in fact reserving to itself the right to determine whether it wished to submit to such jurisdiction with respect to any specific dispute.\textsuperscript{193}

It has no bearing, however, on the matters to which the United States could constitutionally bind itself by treaty.\textsuperscript{194} Thus, whether a Missouri citizen could shoot birds in Missouri was a matter within the domestic jurisdiction of the United States prior to the treaty with Canada. This, however, neither precluded United States ratification of a treaty on the subject nor the affirmation of its constitutionality by the United States Supreme Court.\textsuperscript{195}

Professor Henkin suggests that the confusion may be due to a circular promulgated by Secretary of State John Foster Dulles "apparently in an effort to console the Bricker forces after the defeat of their effort to amend the Constitution."\textsuperscript{196} The circular, directed to the State Department, provided:

Treaties should be designed to promote United States interests by securing action by foreign governments in a way deemed advantageous to the United States. Treaties are not to be used as a device for the purposes of affecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.\textsuperscript{197}

Henkin points out that the circular announced policy, not constitutional doctrine, and that "[i]ndeed, it was probably designed to impose as

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  \item \textsuperscript{192} 61 Stat. 1218 (1946), T.I.A.S. No. 1598.
  \item \textsuperscript{194} See L. Henkin, \textit{Foreign Affairs and the Constitution} 140-56 (1972) [hereinafter cited as \textit{Henkin}].
  \item \textsuperscript{195} Missouri v. Holland, 252 U.S. 416 (1920), discussed in text at notes 202-05 infra.
  \item \textsuperscript{196} \textit{Henkin}, supra note 194, at 402-03 n.89.
  \item \textsuperscript{197} Id.
policy what the Bricker Amendment would have imposed as constitutional law, but which . . . was not the law of the Constitution unamended.\textsuperscript{108}

\section*{B. The States' Rights Argument}

Another argument which has been made against United States ratification of human rights conventions, and which would no doubt be made against United States ratification of conventions on women's rights to the extent the subject matter is not covered by federal statutes, is that ratification would improperly subject to federal regulation matters constitutionally within the reserved powers of the states.\textsuperscript{109} Even if "states' rights" were a limitation on the treaty power, it is doubtful whether United States participation in the conventions providing equality for women would thus be precluded since the subject matter is already governed by federal law to a large extent.\textsuperscript{200} Indeed, the extent to which these matters are already regulated by federal law indicates the broad expansion of federal power and the validity of Henkin's assertion that "there is practically nothing that is dealt with by treaty that could not also be the subject of legislation by Congress."\textsuperscript{201}

Whatever the division of power between the states and federal government domestically, however, it is clear that states rights do not constitute a limitation on the scope of the treaty power. That was established by the Supreme Court decision in \textit{Missouri v. Holland},\textsuperscript{202} wherein the Court rejected a challenge to the validity of a federal statute implementing a treaty with Canada which regulated the hunting of migratory birds, even though an earlier Act of Congress which regu-

\begin{itemize}
\item 202. 252 U.S. 416 (1920).
\end{itemize}
lated the same matter in the absence of a treaty had been ruled unconsti-
tutional by lower federal courts. Justice Holmes, writing for a
majority of the Court stated:

It is said that there are limits . . . to the treaty-making power, and
that one such limit is that what an act of Congress could not do unaided,
in derogation of the powers reserved to the States, a treaty cannot do.

The Court later noted:

Valid treaties of course “are as binding within the territorial limits of
the States as they are elsewhere throughout the dominion of the United
States.” . . . No doubt the great body of private relations usually fall
within the control of the State, but a treaty may override its power.

It is a matter of history that attempts to reverse that position by con-
stitutional amendment have failed.

Henkin views the treaty clause itself as a delegation of power to the
federal government. He states:

The Constitution delegated powers to various branches of the federal
government, not only to Congress; the Treaty Power was a delegation
to the federal treaty-makers in addition to and independent of the dele-
gations to Congress. Since the Treaty Power was delegated to the
federal government, whatever was within it was not reserved to the states
by the Tenth Amendment. Many matters, then, may be “reserved to
the States” as regards domestic legislation but not as regards interna-
tional agreement. They are, one might say, left to the States subject to
defeasance if the United States should decide to make a treaty about
them.

205. Id. at 434 (citation omitted) (emphasis added).
206. The so-called Bricker Amendment would have provided that “[a] treaty shall be-
come effective as internal law in the United States only through legislation which would
Repeated and extensive hearings were held on the proposed amendment. See Hearings on S.J. Res. 130 Before a Subcomm. of the Senate Comm. on the Judiciary, 82d Cong., 2d Sess., (1952); Hearings on S.J. Res. 1 Before a Subcomm. of the Senate Comm. on the Judiciary, 84th Cong., 1st Sess., (1955), in TREATIES AND EXECUTIVE AGREEMENTS (1952); Hearings on S.J. Res. 1 Before a Subcomm. of the Senate Comm. on the Judiciary, 84th Cong., 1st Sess., (1955), in TREATIES AND EXECUTIVE AGREEMENTS (1955). For a list of articles discussing the amendment, see W. Bishop, INTERNATIONAL LAW 112 n.39 (3d ed. 1971). As the scope of federal power is expanded, the significance of this amendment, even if it had passed, is diminished. Henkin, supra note 194, at 147; The Constitution, supra note 198, at 1018.
207. Henkin, supra note 194, at 146.
Like other powers, the treaty power is, of course, subject to the guarantees provided for by the Bill of Rights.\(^{208}\)

State laws regulating inheritance,\(^{200}\) repayment of debts,\(^{210}\) local taxes,\(^{211}\) conduct of various businesses,\(^{212}\) ownership of land,\(^{213}\) disbursement of assets of an insurance company,\(^{214}\) hunting of birds,\(^{215}\) all properly the subject of state regulation and not subject to federal regulation in the absence of a treaty, have been held superseded by treaties from the earliest days of United States history. Thus, in *Ware v. Hylton*,\(^{216}\) the Supreme Court invalidated a decree of the Virginia courts, based on that state's laws on repayment of debts, on the ground that it was contrary to a provision in a treaty between the United States and Britain. Most recently, the Supreme Court invoked the federal foreign affairs power to invalidate state laws dealing with inheritance of property within the state.\(^{217}\) The decision in *Zschernig* was not based on an inconsistent treaty. Rather, the Court reasoned that since inheritance by foreigners affects our foreign relations, the state was preempted from regulating the matter even though the property to be inherited was in the state.\(^{218}\) If states cannot regulate property or activity within the state, even in the absence of a treaty, because of the effect the attempted regulation may have on foreign affairs, then a fortiori the United States cannot be precluded from ratifying treaties on matters that affect the conduct of United States foreign affairs merely because the matter would otherwise be subject to state rather than federal regulation.\(^{210}\)

\(^{208}\) Reid v. Covert, 354 U.S. 1, 16 (1957).

\(^{209}\) Hauenstein v. Lynham, 100 U.S. 483 (1879).

\(^{210}\) Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).


\(^{212}\) See, e.g., Asakura v. Seattle, 265 U.S. 332 (1924); cf. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).


\(^{216}\) 3 U.S. (3 Dall.) 199 (1796).

\(^{217}\) Zschernig v. Miller, 389 U.S. 429 (1968). See also Graham v. Richardson, 403 U.S. 365 (1971), wherein the Supreme Court invalidated a state law denying welfare benefits to aliens. While the decision was based on the equal protection clause, the Court discussed at some length the power of the federal government with respect to aliens and "the area of federal-state relations" as "[a]n additional reason why the state statutes [did] not withstand constitutional scrutiny." 403 U.S. at 376.


\(^{219}\) Those who oppose United States ratification of treaties dealing with human rights argue that in the earlier treaties the person seeking to own land, conduct a busi-
In *United States v. Pink*, the Supreme Court upheld an executive agreement between the United States and Russia in which Russia assigned to the United States its claim to assets of a Russian insurance company located in New York. The Court ruled that since this agreement involved the conduct of foreign affairs, federal policy must supersede state policy. Thus the Court extended the supremacy doctrine, which had heretofore been applied only to treaties, to executive agreements as well, notwithstanding that the matter would, in the absence of foreign affairs considerations, be subject to state, rather than federal, regulation.

However, some members of the State Department apparently still labor under the mistaken notion that the United States cannot constitute...
tionally enter into treaties on matters which would be subject to state law in the absence of a treaty. Notwithstanding the decision of the Supreme Court in Missouri v. Holland that the reserved rights of the states are not a limitation on the treaty power, a representative of the State Department advised a congressional committee that the United States could not constitutionally enter into a treaty modeled on the Declaration on the Elimination of Discrimination Against Women because,

[1]he federal government cannot, under the Constitution, undertake an international legal obligation to legislate matters that fall within the jurisdiction of the states such as the acquisition, administration and disposition of property during marriage, or the rights and duties in matters relating to children or the establishment of minimum age for marriage.224

Whether the United States should enter into such treaties is open to political debate but that ratification is not constitutionally precluded by a "states' rights" argument would seem well established since Missouri v. Holland. As long as misconceptions about the legality of participation persist in the State Department, however, it may continue to advise against consideration and ratification of various treaties on women's rights and human rights, in general, in the erroneous belief that the United States lacks constitutional authority to ratify them.

C. International Concern

The main thrust of the American Bar Association report225 opposing United States ratification of the Convention on the Political Rights of Women and of Mr. Deutsch's testimony before the Senate Foreign Relations Committee226 was that the subject matter of the convention is not of international concern. While there is nothing in the language of the Constitution itself limiting the treaty power to matters of "international concern," reference to such a requirement may be found in the writings of Jefferson,227 in a number of Supreme Court decisions,228 and in an oft-quoted statement by Charles Evans Hughes.229

225. See notes 183-84 supra and accompanying text.
226. See note 186 supra and accompanying text.
227. See notes 230-31 infra and accompanying text.
228. See note 235 infra.
229. See text accompanying note 240 infra.
In his Manual of Parliamentary Practice, Thomas Jefferson noted several reservations on the treaty-making power:

To what subjects this power extends, has not been defined in detail by the Constitution, nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract, or it would be a mere nullity, *res inter alios acta.* (2) By the general power to make treaties, the Constitution must have intended to comprehend only those subjects which are usually regulated by treaty, and cannot be otherwise regulated. (3) It must have meant to except out of these the rights reserved to the states; for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way. (4) And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some, on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others.

With respect to the last two limitations—rights reserved to the states and matters in which the House of Representatives can participate—Jefferson proved to be clearly wrong. As already discussed, the contention that treaties cannot be entered into on matters that are otherwise within the reserved powers of the state was rejected by the Supreme Court and the proposition that treaties cannot be entered into on matters concerning which the House would otherwise have a voice is contradicted by long established practice. Indeed, if both these limitations applied, it would seem that no treaties creating domestic law would be valid. Since the federal legislative power is vested in Congress every treaty creating domestic law must by definition involve either the enumerated

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231. *Id.* at 162.
powers of Congress, which includes participation by the House of Representatives, or the reserved rights of the states. Yet, such a limitation cannot have been the intent of those who drafted the Constitution or there would be no need for the supremacy clause.

Jefferson's position that the treaty must "concern the foreign nation," variously stated as, must "involve our foreign relations," must be "the proper subject of negotiation between states," or must be of "international concern," has found continuous support in decisions of the Supreme Court, in lower court decisions, in statements and writings

234. There have been some agreements involving the exercise of independent executive power which have domestic effect. See, e.g., United States v. Belmont, 301 U.S. 324 (1937), and United States v. Pink, 315 U.S. 203 (1942), discussed at notes 220-23 supra and accompanying text. In these cases the Supreme Court sustained executive agreements involving settlement of claims with the Soviet Union and superseding contrary New York law, based on the constitutional power of the executive to appoint and receive ambassadors. It would seem, however, that had Congress sought to legislate on the matter, it could have done so under its power to regulate foreign commerce. Therefore, this agreement, too, would have been invalid as a treaty under Jefferson's provision that matters on which the House has a voice cannot be the subject of a treaty. While there is an area where executive and legislative powers overlap and where the executive is free to act in the absence of contrary congressional action, cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), it is unclear what, if any, authority the executive has in areas in which congressional authority does not overlap. I know of no executive agreement having domestic effect which has been sustained by the courts in the face of an express act by Congress to the contrary. But see Statement of Monroe Leigh, Legal Advisor to the State Department, before the Subcommittee on Separations of Powers of the Senate Committee on the Judiciary, May 13, 1975, DEPT. OF STATE BULL., June 16, 1975, at 831:

If there is one issue upon which all observers agree, it would be recognition of the President's authority to conclude certain executive agreements, even if within a narrow category, under the powers granted him by the Constitution and without congressional interference or limitation.

Id. Possibly, Leigh was referring to agreements that do not have domestic effect, such as those regarding the number and credentials of diplomatic personnel.

235. Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) ("all subjects that properly pertain to our foreign relations"); Asakura v. Seattle, 265 U.S. 332, 341 (1924) ("all proper subjects of negotiation between our government and other nations"); Geoffroy v. Riggs, 133 U.S. 258, 267 (1890) ("any matter which is properly the subject of negotiation with a foreign country"); Holden v. Joy, 84 U.S. 211, 243 (1872) ("all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty"). It should be noted that the Supreme Court has never invalidated a treaty on the grounds that it dealt with a matter that was not of international concern. But, in Power Authority v. Federal Power Comm'n, 247 F.2d 538 (D.C. Cir. 1957), a federal circuit court invalidated a reservation inserted by the Senate into a treaty between the United States and Canada on the allocation of Niagara waters on the grounds that the reservation was not a matter of international concern.

236. See, e.g., Power Authority v. Federal Power Comm'n, 247 F.2d 538, 542 (D.C. Cir. 1957); United States v. Samples, 258 F. 479, 482 (W.D. Mo. 1919).
of statesmen and scholars, and in the Restatement of the Foreign Relations Law of the United States.

One of the most frequently cited statements in support of that position is an extemporaneous comment made by Charles Evans Hughes. At a meeting of the American Society of International Law he noted that the treaty power is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.

He appears to divide treaties into two categories: those relating to "foreign affairs" or "matters of international concern," and those which involve laws "for the people of the United States in their internal concerns." The two are not mutually exclusive, however.

At least in our times, a matter may involve laws regulating the internal affairs of the people of a country, yet have very significant effects on its foreign relations. South Africa's and Rhodesia's treatment of its black citizens and the Soviet Union's treatment of its Jewish citizens, particularly those who seek to emigrate, are but two of the most striking examples of situations in which a state's treatment of its own citizens has aroused great international concern and may have considerable international consequences. On numerous occasions, the United Nations and its organs have discussed and passed resolutions involving a state's internal treatment of its citizens. Thus, the dichotomy postulated fails to take note of a third category: treaties that involve a state's treatment of its own citizens in matters that are of substantial international concern. It is into this category that most of the human rights covenants fall. Was Hughes saying that the United States could not enter into a treaty relating to the external affairs of the United States which also involved its internal concerns, or did he mean only that the United States could not enter into treaties involving the internal concerns of


240. According to Hughes, these areas are the proper subject of treaties. Id.

241. Id.

the United States which did not affect external concerns as well? Since he does not deal explicitly with the latter type of treaty, it cannot be said definitively what Hughes' position would be. It is at least arguable from other parts of the statement, however, that he meant to exclude from the treaty power only those matters which have no relation to our foreign affairs and did not intend to exclude those that affect United States citizens in their internal concerns as well as the foreign relations of the United States. Thus he said,

[i]t seems to me that, whatever doubt there may originally have been or may yet linger in some minds in regard to the scope of the treaty-making power, so far as it relates to the external concerns of the nation there is no question for discussion.243

[F]rom my point of view the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution . . . .244

The clear implication is that only "if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations," then "there might be ground for implying a limitation upon the treaty-making power. . . ."245 Conversely, if the treaty deals with a matter that does effect our external relations, there is no limitation on the treaty power. Certainly, the United States has ratified many treaties affecting our relations with other countries that also affect our internal affairs.246

The Restatement of the Foreign Relations Law of the United States similarly provides that:

The United States has the power under the Constitution to make an international agreement if

(a) the matter is of international concern . . . .247

A comment adds:

Matters of international concern are not confined to matters exclusively concerned with foreign relations. Usually, matters of international concern have both international and domestic effects, and the existence of the latter does not remove a matter from international concern.248

243. PROCEEDINGS, supra note 239, at 194.
244. Id. at 196.
245. Id.
246. See notes 209-18 supra and accompanying text.
247. RESTATEMENT, supra note 238, § 117(1).
248. Id. § 117, comment b. Hughes' statement also seems to indicate concern lest the treaty power be used by the federal government to regulate matters otherwise subject
One of the fallacies of the arguments of those who oppose United States ratification of human rights conventions is the failure to recognize that a matter can be both of domestic concern and of international concern, i.e., that the two are not mutually exclusive. For example, determining who can vote in a state is a matter of great domestic concern. Indeed, all human rights are or should be a matter of utmost domestic concern since the fundamental rights of the states' citizens are involved. But they are also a matter of international concern.

With the exception of Mr. Deutsch, all the witnesses who appeared before the Senate Foreign Relations Committee and before its subcommittee representing a number of organizations comprising substantial numbers of United States citizens, urged United States ratification of the Convention on the Political Rights of Women. They did so not to effect United States law, since the rights provided therein are already guaranteed by the nineteenth amendment to the Constitution,
but because they believe our action in this matter has a significant effect internationally.\footnote{250}

\footnote{250. Thus, Arthur Goldberg, United States representative to the United Nations at the time, testified before the subcommittee:}

I said at the outset that these treaties were important for the foreign policy of the United States. I say that because it is my profound conviction that whatever the views of experts may be or anybody may be upon the limitations and exercise of American power, we stand for something in the world. . . .

I would regard the signature on ratification of conventions which draw their inspiration from our Constitution to be an important exercise of the foreign policy of the United States. And I can say to you that our dedication to these ideals is one of the great armories that a representative of the United States in the world community carries with him!

\textit{Subcomm. Hearings, supra} note 179, at 29-30. Goldberg continued:

Human rights is the great concern of the member states of the United Nations, and they have changed dramatically since Secretary Dulles filed his statement. 'Great Concern' is our own attitude toward human rights. It enters very profoundly in our foreign policy.

\textit{Id.} at 40.

On the subject of human rights, Rita Hauser, former United States representative to the United Nations Commission on Human Rights, in hearings before the Subcommittee on International Organizations and Movements of the House Committee on Foreign Affairs, stated:

[A]s a student of history, I find it very difficult to understand how one can ignore the human rights aspect. At least since World War II, it is the underlying element of most of the serious conflicts in the world that have given rise to both threats to the peace and actual breach of the peace. . . .

\ldots

I think the aspect of human rights problems in the conduct of our foreign policy is central.

\textit{House Hearings, supra} note 224, at 232.

Professor Richard Gardner, former Deputy Assistant Secretary of State for International Organization Affairs, who appeared on behalf of a group of fifty-one organizations, was emphatic that the subject matter of these treaties is of international concern.

He stated:

I think most legal scholars would say that the treaty power is broad enough to encompass all matters of international concern as determined by contemporary fact rather than by conceptions of a distant past, and this is really the central point I wish to leave with the committee today, and, measured by standards of contemporary fact, the matters dealt with in those three conventions are clearly matters of international concern which justify use of the treaty making power.

\textit{Subcomm. Hearings, supra} note 179, at 111.

With reference to the rights of women, Gardner said:

[T]he denial of basic rights to women . . . are a major source of social tension and an obstacle to economic development in countries in which the United States has an important interest.

\textit{Id.}

Mr. Morris Abrams, then United States representative on the United Nations Commission on Human Rights, testified before the Senate Foreign Relations Committee:

I believe, also, that the Political Rights of Women Convention meets the test both of constitutionality and national interest—in that it is both an important objective of our foreign relations and a matter of genuine international concern. Clearly, genuine economic and social progress is difficult of attainment, especially in the developing countries—to which we send quantities of aid—if half the population is deprived of status and dignity, of the right to vote and to hold public office. Moreover, as pointed out by one witness before the Subcommittee, the withholding from
As a country which long ago enshrined human rights in its Constitution, the United States should continue to play a leadership role in this area. The failure to ratify human rights conventions deprives the United States of the affirmative effect such ratification would have on foreign relations and also has a negative effect on the United States position in the international community.\(^5\)

The rights covered in the various covenants on women's and human rights have been discussed repeatedly by the United Nations General

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women of civil and political rights, the regarding of them as household possessions, is an obstacle to the progress of family planning—a crucial means for defusing the population explosion, which is perhaps the most critical problem that faces mankind today.

Id. at 117-18.

251. Quoting Mr. Abrams again:

I would like to take as my text the following remarks directed to me by the Soviet Delegate in the course of the Commission's Spring 1966 Session. With your permission I shall read an excerpt from the Summary Record of that session:

"Mr. Morozov (Union of Soviet Socialist Republics) said that, having listened carefully to . . . the United States representative on 25 March and having heard him warmly support . . . the creation of a post of United Nations High Commissioner for Human Rights, he was obliged to point out that once again the Commission was witnessing an attempt by the United States to divert it from its basic task, which was to promote respect for human rights and fundamental freedoms. Once again, instead of being encouraged . . . to draw up conventions and instruments in the sphere of human rights with supervisory machinery to ensure their implementation, the Commission had before it a proposal so nebulous that even those who supported it were unable to speak clearly on the subject.

"An objective analysis of the political orientation of the proposal so ardently supported by the United States and its allies soon revealed that the proposal was designed to give world public opinion the impression of active participation in the cause of human rights by states which in practice obstinately refused to fulfill their obligations under the multilateral international conventions in the field of human rights drawn up under the auspices of the United Nations and its specialized agencies.

. . .

"It was clear from the facts he had just mentioned that the United States, wishing to escape from the untenable position into which it had been forced by its refusal to ratify the conventions in question, had thought that it could confuse the issue by strongly supporting the creation of the post of United Nations High Commissioner for Human Rights." U.N. Doc. E/C.4/SR. 879, at 9-10.

Id. at 119-20 (emphasis added).

John Carey, appearing on behalf of the Committee on International Law of the Association of the Bar of the City of New York, stated:

The purpose of the Conventions is to achieve common international standards on matters of concern to the international community. These Conventions deal with subjects which in our times are of "international concern," subjects which presently "in the ordinary intercourse of nations had usually been made subjects of negotiations and treaty." Holmes v. Jennison, 14 Pet. 540, 569 (1840). The Conventions, moreover, have real relation to the foreign affairs of the United States. Slavery and forced labor elsewhere have clear economic implications for United States industry competing on the world market. Slavery and forced labor, and other major violations of human rights, have major explosive tendencies which can threaten international peace and security. Even the status of women, while—like slavery or forced labor—no problem in the United States is a subject of agitation elsewhere and one on which the members of the United Nations have called for international cooperation to achieve a common minimum standard.

Id. at 202.
Assembly, by other organs and committees of the United Nations, and by other international organizations. Those rights have been the subject of a universal declaration and of numerous resolutions voted for by large numbers of states, ultimately resulting in treaties which have been ratified by many states. Surely it cannot be argued that treaties which have been ratified by fifty, sixty, seventy, or eighty states of the world cannot, constitutionally, be entered into by the United States because their subject matter is not of international concern.

A committee of lawyers, requested by the President's Commission for the Observance of Human Rights Year to study the constitutionality of United States ratification of human rights treaties, which was chaired by Supreme Court Justice Tom C. Clark and which included several past presidents of the American Bar Association as well as the then president of the American Bar Association, concluded that such treaties are a proper exercise of the treaty-making power. In his letter of transmittal of the report, Justice Clark stated:

I would like to reiterate here, however, our finding, after a thorough review of judicial, congressional, and diplomatic precedents, that humans are matters of international concern and that the President, with the U.S. Senate concurring, may, on behalf of the United States under the treaty power of the Constitution ratify or adhere to any human rights convention that does not contravene a specific constitutional prohibition . . . .

IV. POSSIBLE IMPACT OF RATIFICATION ON EXISTING UNITED STATES LAW

Until recently, very little legislation existed in the United States with respect to equality of the sexes. However, in the past several decades significant federal and state legislation has emerged. In addition, the equal protection clause of the United States Constitution has been utilized successfully to eradicate some aspects of sex-based discrimination under the law. This section will explore the legal status of women in the following areas: (1) political rights, (2) employment and economic security, (3) marriage and the family, and (4) education. Existing United States law will then be compared to provisions of the international conventions providing rights for women.

252. REPORT OF SPECIAL COMM. OF LAWYERS OF THE PRESIDENT'S COMM'N FOR THE OBSERVANCE OF HUMAN RIGHTS YEAR 1968, reprinted in House Hearings, supra note 224, Appendix 18, at 731.
253. Id. at 339-40.
A. Political Rights

1. Historical Background

Although many of the rights enumerated in the International Covenant on Civil and Political Rights are explicitly contained or implicitly recognized in the Bill of Rights, the Constitution, unlike the international agreements, presently contains no textual commitment to equality of the sexes. In 1791, it was understood that the individual states could and almost universally did limit certain political rights such as voting to white, male property owners. Holding office and jury service were public functions which were likewise restricted to the male propertied class. This was true despite the fact that before the American Revolution some of the colonies had allowed women to vote in local elections and in some instances to serve on juries.

While isolated voices were raised to protest this contraction of rights following the American Revolution, it was not until the 1840's that women in the United States initiated an organized effort for greater political, legal and social rights. During the Civil War era, however, these efforts were subordinated to the goal of achieving equality for blacks. After the Civil War, women, who had fought for equality for the newly-freed slaves, believed and expected that they would be rewarded by expansion of their own legal and social rights. At the very least, they expected to receive the right to vote. However, the fourteenth amendment, adopted in 1868, did not explicitly guarantee equal treatment for women. Rather it provided: "nor shall any State deprive any person of . . . the equal protection of the laws." The second part of the fourteenth amendment provided for a reduction in rep-
presentation if a state denied the vote to *male* citizens. Indeed, the fourteenth amendment marks the first instance in which the term *male* was inserted into the Constitution.

Furthermore, in interpreting the fourteenth amendment, the Supreme Court rejected attempts to utilize provisions of the amendment to achieve increased legal and political rights for women. In one of the earliest Supreme Court decisions arising under the fourteenth amendment, the Court held that admission to the bar was not among the privileges and immunities of citizenship and hence that the state could exclude women from the practice of law.\(^{261}\) Subsequently, in response to the challenge of a St. Louis woman, the United States Supreme Court in *Minor v. Happersett*[^262] upheld the right of the states to limit suffrage to males. The argument had been made that under the fourteenth amendment, a woman who is a citizen of the United States could not be denied the right to vote. The Supreme Court held that voting was not among the privileges and immunities guaranteed by the fourteenth amendment. In the post Civil War period, divergent elements of the women's movement joined the common cause of securing suffrage.\(^{263}\) Persistent efforts at both state and national levels were continuous over the half century between the Civil War and World War I. By 1919, thirty states had enfranchised women.\(^{264}\) This narrow-issue campaign successfully culminated in 1920 with the passage of the nineteenth amendment to the United States Constitution, which states:

> The right of citizens of the United States to vote shall not be denied or

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[^261]: Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873). In a concurring opinion, Mr. Justice Bradley stated:

> The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

**Id.** at 141.

[^262]: 88 U.S. (21 Wall.) 162 (1874).


[^264]: In chronological order the states to enfranchise women before the passage of the nineteenth amendment were: Wyoming, Colorado, Idaho, Utah, Washington, California, Oregon, Kansas, Arizona, Illinois, Montana, Nevada, North Dakota, Nebraska, Rhode Island, New York, Arkansas, Michigan, Texas, South Dakota, Oklahoma, Indiana, Maine, Missouri, Iowa, Minnesota, Ohio, Wisconsin, Tennessee and Kentucky. THE NATIONAL WOMAN SUFFRAGE ASSOCIATION, VICTORY, HOW WOMEN WON IT; A CENTENNIAL SYMPOSIUM, 1840-1940, at 161-64, app. 4.
2. Convention on the Political Rights of Women

The Convention on the Political Rights of Women, a brief and narrowly drawn agreement, requires that the opportunity to fully participate in public life be available on equal terms to all persons and specifically provides that women be entitled to vote, run for and hold office, and to exercise all public functions. The nineteenth amendment is silent on the right to run for and hold elective and other public offices. However, it is clear that even absent a specific constitutional provision similar in terms to the provision in the Convention on the Political Rights of Women, any infringement on the basis of sex of the right to run for and hold public office would today be held violative of the equal protection clause of the fourteenth amendment.

The equal protection clause states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." In recent years, the equal protection clause has been used by the courts as a tool for implementing civil and political rights of such traditionally disfavored groups as racial minorities, aliens, and illegitimates. These first two classifications have been held to be suspect classifications and any legislation so drawn is subjected to the strictest judicial scrutiny. Until recently the Supreme Court has been reluc-

265. U.S. Const. amend. XIX.
266. See text accompanying notes 58-65 supra.
267. Some early state courts held that the scope of rights encompassed in the nineteenth amendment was as broad as the rights encompassed in the fifteenth amendment. Therefore, the right of women to vote included the right to run for and hold public office. See, e.g., Opinion of the Justices, 113 A. 614 (1921), which held that:
When the ballot was conferred upon the colored race by the adoption of the Fifteenth Amendment, it is common knowledge that it was followed by the election of persons of that race to office . . . and we are unable to find that their right to hold office was ever questioned . . . .
Id. at 617. Preston v. Roberts, 110 S.E. 586 (1922), reached the same conclusion as the Maine court. However, there was some confusion concerning the scope of the rights contained in the nineteenth amendment. For example, see In re Opinion of the Justices, 139 A. 180 (1927), in which the court held that the nineteenth amendment could not be extended to include rights not granted in the text of the amendment. In addition, several states by legislation or constitutional amendment provided that women who were qualified to vote were likewise qualified to hold any or certain specified public offices. See, e.g., Ark. Stat. Ann. § 12-101 (1968); Nev. Const. art. 15, § 3, which provides that women may hold only the offices of superintendent of public instruction, deputy superintendent of public instruction, school trustee, and notary public.
268. U.S. Const. amend. XIV, § 1.
272. In the traditional test, the court inquires into legislative permissibility of the law;
tant to apply this strict scrutiny test to laws which classify on the basis of sex.\textsuperscript{273} Indeed, in the past, a woman's right to serve on a jury had been limited on the basis of sex in both federal\textsuperscript{274} and state\textsuperscript{276} courts.

whether the classification established by the legislature bears a reasonable relation to the objective of the law and whether all persons similarly situated are similarly treated. Under this standard, termed minimum scrutiny, very few state laws have been held violative of equal protection. See, e.g., Morey v. Doud, 354 U.S. 457 (1957); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948).

In two circumstances, however, the Court has required a much stricter test. These cases are:

(1) When the classification is inherently suspect such as race, creed or alienage, Korematsu v. United States, 323 U.S. 214 (1944);
(2) When the legislation affects a fundamental interest such as voting, Reynolds v. Sims, 377 U.S. 533 (1964), or travel and interstate movement, Shapiro v. Thompson, 394 U.S. 618 (1969).

In these instances, it is not enough that the state prove that the classification is reasonable, but rather the state must show a compelling interest for the classification. This scrutiny has been termed strict scrutiny. For all practical purposes, this compelling state interest is almost never found to be present by the court. See Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341 (1949); Note, 82 HARV. L. REV. 1065 (1969).

273. In Goesaert v. Cleary, 335 U.S. 464 (1948), the Supreme Court upheld a state statute which provided that only daughters or wives of male bar owners could tend bar despite a challenge based on the equal protection clause.

Justice Frankfurter lightly dismissed the contention that the statute was motivated by the desire to restrict employment opportunities in bartending to males. He wrote:

Since the line they [legislators] have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.

Id. at 467.

274. The Judiciary Act of 1789, ch. 21, 1 Stat. 73, provided that qualifications and exemptions of the state in which the federal court sat would prevail in the federal courts. Although the Judiciary Act of 1948, ch. 646, 62 Stat. 869, was intended to initiate uniform juror standards in the federal system, the act provided that a person was competent to serve as a juror unless: "(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held." Judiciary Act of 1948, ch. 646, § 951, 62 Stat. 869. This provision was deleted from the Judiciary Act by the Civil Rights Act of 1957, 28 U.S.C. § 1861 (1970). Note, 4 HOUSTON L. REV. 570, 570-71 (1966).

The qualifying provisions for federal jurors are contained in 28 U.S.C. § 1861 (1970) which was enacted in 1948:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States on account of race, color, religion, sex, national origin or economic status.


275. As of August 1, 1962, only twenty-one states permitted women to serve on juries on the same basis as men. Three states prohibited service completely: Alabama, Mis-
As late as 1961, the Supreme Court in Hoyt v. Florida\textsuperscript{276} unanimously upheld a Florida statute which automatically exempted women from jury duty unless they expressed an affirmative desire to serve. Speaking for the Court, Mr. Justice Harlan stated:

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, . . . woman is still regarded as the center of the home and family life.\textsuperscript{277}

It was not until 1971 in Reed v. Reed\textsuperscript{278} that the Supreme Court invalidated legislation that classified on the basis of sex. Since 1971, the position the Court has taken with respect to sex-based classifications can only be characterized as ambiguous. While it has invalidated statutes which appeared to discriminate against women\textsuperscript{279} or to discriminate against men,\textsuperscript{280} it has sustained sex-based classifications that it perceived to benefit women.\textsuperscript{281}

The broadest statement of the Court concerning equality of the sexes is contained in Frontiero v. Richardson.\textsuperscript{282} Justice Brennan's opinion, announcing the judgment for the Court, stated that sex is a suspect classification and discussed the adverse effects that a long history of sex discrimination has had on women, concluding:

And what differentiates sex from such non-suspect statutes as intelligence or physical disability, and aligns it with the recognized suspect

\textsuperscript{276} 368 U.S. 57 (1961).
\textsuperscript{277} Id. at 61-62.
\textsuperscript{278} 404 U.S. 71 (1971). The female petitioner in Reed challenged an Idaho statute which provided that when several persons are equally entitled to administer an estate, males must be given preference over females. Chief Justice Burger wrote for the Court:

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

\textsuperscript{279} Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). However, it is to be noted that Weinberger, which involved a federal statute, was decided on the equal protection grounds inherent in the fifth amendment due process clause. \textit{Id.} at 642-45.
\textsuperscript{282} 411 U.S. 677 (1973).
criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.283

Significantly, five of the justices did not join the Court's opinion in finding sex a suspect classification. Since Frontiero, the proposition that sex is a suspect classification has not commanded a majority of the Supreme Court.

The constitutional protection extended women against discrimination on the basis of sex to date has been largely insufficient and the future is unpredictable. Indeed, not only has the court failed to set a trend in equal protection for women, but the entire development of the equal protection doctrine is in question. Recent opinions evidence a tendency to experiment with new tests284 for equal protection285 as well as a renewed interest in further development of the due process clause.286 Thus, the effectiveness of the equal protection clause to eradicate sex-based discrimination is still uncertain.

However, with respect to an infringement on the right to run for an elective office or to hold an appointive position, the equal protection clause provides adequate protection for women. In the 1964 case of Reynolds v. Sims, the Supreme Court stated:

283. Id. at 686-87.


The fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.\textsuperscript{287}

The Court further stated:

And the concept of equal protection has traditionally been viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.\textsuperscript{288}

In more recent cases the Court has invalidated restrictions on the ability to run for elective office on equal protection principles.\textsuperscript{289} Thus, it is clear that any legislative attempt to exclude women from running for office would be held violative of the equal protection clause.

Although the Convention on the Political Rights of Women does not specifically provide for jury service by women, the rights to exercise all public functions on equal terms with men, as set forth in the convention, might be construed to encompass the right to serve on juries.\textsuperscript{290}

As noted earlier, the Supreme Court in 1961 had held that the automatic exemption of women from juries did not violate a woman's constitutional rights. That holding was effectively overruled in 1975 in \textit{Taylor v. Louisiana},\textsuperscript{291} which held that such a statute denied a male defendant his sixth amendment right to trial by a jury composed of a cross section of the community. Although the holding of the case was not based on the right of women to serve on juries on equal terms with men, the effect of the case is to invalidate all laws with respect to jury service which classify on the basis of sex.

3. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights contains broad provisions and guarantees with respect to equal treatment of men and women under the law.\textsuperscript{292} It provides an unambiguous legal basis for the elimination of discrimination based on sex and in this respect it is similar in effect to the Equal Rights Amendment\textsuperscript{293} to the United

\begin{itemize}
\item \textsuperscript{287} Id. at 560-61.
\item \textsuperscript{288} Id. at 565.
\item \textsuperscript{290} See text accompanying note 63 supra.
\item \textsuperscript{291} 419 U.S. 522 (1975).
\item \textsuperscript{292} See notes 7-30 supra and accompanying text.
\item \textsuperscript{293} U.S. Const. amend. XXVII, § 1 (proposed): “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”
\end{itemize}
States Constitution, now pending before the states. Absolute political and civil equality for both sexes is mandated both by the proposed amendment and by the International Covenant on Civil and Political Rights. While such equality is not today obligatory under state and federal law, several states, including Alaska, California, Colorado, Hawaii, Illinois, Maryland, Montana, Pennsylvania, Texas, Virginia, and Washington, have passed equal rights amendments to their respective state constitutions as a result of the debate over the Equal Rights Amendment to the Federal Constitution.

B. Employment and Economic Security

Significant federal and state legislation has been enacted in recent years in the area of employment and employment-related benefits. This section will briefly describe the federal legislation which has contributed to an equalization between the sexes in this area; namely, the Equal Pay Act, Title VII of the Civil Rights Act of 1964 (Title VII or the Act), and the Old Age and Survivor's Insurance Act. In addition, it will compare this legislation with the international conventions on these subjects.

1. The Equal Pay Act

Like the Convention Concerning Equal Remuneration for Men and

294. ALAS. CONST. art. I, § 3.
296. COLO. CONST. art. II, § 29.
298. ILL. CONST. art. I, §§ 2, 18.
299. MD. CONST., DECLARATION OF RIGHTS art. 46.
300. MONT. CONST. art. II, § 4.
302. TEX. CONST. art. I, § 3a.
303. VA. CONST. art. I, § 11.
304. WASH. CONST. art. XXXI, § 1.
Women Workers for Work of Equal Value, the Equal Pay Act of 1963 requires equal pay for equal work regardless of the employee's sex. Enacted by Congress as an amendment to the Fair Labor Standards Act, the Equal Pay Act was designed to meet the open and widespread practice of paying women less than men for the same work. It requires employers to pay equal salaries to a man and woman when their jobs involve essentially the same duties and require substantially equal skill, effort and responsibility and are done under similar working conditions. It also forbids labor unions "to cause or to attempt to cause" an employer to violate this requirement.

As of 1974, over 600 suits had been brought under the Equal Pay Act. Unlike Title VII, the Equal Pay Act covers all workers engaged in interstate commerce but it concerns wages, not other terms of employment. Because of employment patterns and the Act's limited coverage, it has a smaller impact than might be expected. However,

308. See notes 74-76 supra and accompanying text.

[Employees who in any work week [are] engaged in commerce or in the production of goods for commerce, or [are] employed in an enterprise engaged in commerce or in the production of goods for commerce. . . .
Id. § 206(a). Limited usefulness of the Act as a means to remedy discrimination in employment stems from the fact that the Act covers only workers who are employed, not those seeking employment, and applies only to wages, not to pensions or other terms of employment.


Labor Relations, Wages, Hours and Employment Regulation, No. 409, 1 BNA LAB. REL. REP. 38 (Feb. 2, 1975).
312. Id. § 206(d)(2) (1970). When the Senate passed this law, they were acting with a specific goal in mind:

Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.' Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (citation omitted).

313. TASK FORCE ON WORKING WOMEN, EXPLORATION FROM 9 TO 5: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON WOMEN AND EMPLOYMENT 90 (1975) [hereinafter cited as TASK FORCE REPORT]. The reasons for the lack of effectiveness are:

First, gaps in coverage mean that many women are not protected against sex-based wage discrimination. Second, in industrial jobs, an important area of women's em-
since the passage of Title VII, any violation of the Equal Pay Act would also constitute a violation of Title VII. Thus an action under the Equal Pay Act can be combined with an action under Title VII.314

2. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 is the most important and comprehensive of all federal and state laws prohibiting employment discrimination. Like the Discrimination Convention,316 it prohibits discrimination in employment on the basis of race, color, religion, national origin or sex.316

The Act protects the rights of persons to obtain and hold a job, as well as the right to equal treatment once the job has been obtained.317 As amended in 1972, Title VII covers employers with fifteen or more workers, but it excludes from coverage the United States government

employment, positions are frequently sex segregated both by company and by job categories. Thus, women are often paid less because they are assigned to “women’s” jobs that pay less, rather than because they are paid less for the same work. When both men and women do have the same occupation, it is still common for individual establishments to employ only workers of the same sex in a given occupational category.

Id.

314. To “discriminate against any individual with respect to his (sic) compensation . . .” is a violation of Title VII of the Civil Rights Act of 1964. See Task Force Report, supra note 313, at 278.

315. See notes 77-84 supra and accompanying text.

316. Ironically, the history of this legislation indicates that sex was added to the list of prohibited classifications as a last-minute, unsuccessful attempt by a Southern Senator to assure defeat of the bill. Offering the amendment, Representative Howard Smith remarked: “Now I am very serious about this amendment . . . I do not think it can do any harm to this legislation; maybe it can do some good.” 110 Cong. Rec. 2577 (1964). Representative Smith has since denied that the purpose of the amendment was to delay voting. See Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 Minn. L. Rev. 877, 883 n.34 (1967). See also Kanowitz, supra note 275, at 100-03 (1934).

317. The Act states that it “shall be an unlawful employment practice” for a covered employer because of race, color, religion, sex or national origin:

1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, . . . or

2. to limit, segregate, or classify his employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. . . .


In addition, Title VII makes it unlawful for an employment agency to fail or refuse to refer for employment or otherwise discriminate against any individual because of, inter alia, sex, 42 U.S.C. § 2000e-2(b) (1970), or for a labor organization to cause or attempt to cause an employer to discriminate against an individual because of, inter alia, sex. Id. § 2000e-2(c)(3).
or corporations owned by it, Indian tribes, certain agencies of the District of Columbia, and bona fide membership clubs which are exempt from taxation under 501 (c) of the Internal Revenue Code. It also provides for the creation of the Equal Employment Opportunity Commission (EEOC) to, inter alia, process, investigate, and conciliate complaints based on employment discrimination.

Similar to the Discrimination Convention, Title VII contains an exception known as the *bona fide occupational qualification* (the BFOQ) which allows

an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Litigation under Title VII has focused primarily on the interpretation of the BFOQ, on the effect of Title VII on protective state laws and, more recently, on discrimination in pregnancy-related employment practices. In accepting the BFOQ as a defense, courts have been guided by EEOC guidelines which require, inter alia, that the BFOQ exception be interpreted narrowly and that individuals be considered on the basis of individual capacities and not on the basis of characteristics generally attributed to the group.

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318. *Id.* § 2000e(b)-(d).
320. *Id.* § 2000e-4(g).
323. However, in one of the first cases arising under the BFOQ exception, Pan American Airways sought to justify its employment policy of limiting its cabin attendants to females. Pan American argued that because of the contained environment of the airplane women were more suited than men to respond to the psychological needs of its passengers. The Fifth Circuit Court of Appeals found such discrimination violative of Title VII and held that Pan American could not exclude all males simply because most males may not perform adequately. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).
324. The Commission has stated its belief that
the *bona fide occupational qualification* exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.
325. The Commission's position on the application of the BFOQ exception is:
   (a) The Commission will find that the following situations do not warrant the application of the *bona fide occupational qualification* exception:
      (1) The refusal to hire a woman because of her sex based on assumptions of
Unlike the convention which specifically provides that protective legislation contained in existing conventions and protective legislation which may be agreed to in the future shall not be deemed discrimination, Title VII makes no provision for protective legislation. The trend in the United States has been to invalidate such legislation. So-called protective legislation was first introduced in the United States at the turn of the century and was designed to ameliorate the working conditions of both sexes.\textsuperscript{326} However, in 1903, in \textit{Lochner v. New York},\textsuperscript{327} the Supreme Court held that a New York law which had set maximum working hours for bakers of both sexes violated the due process clause. Three years later in \textit{Muller v. Oregon},\textsuperscript{328} the Court sustained protective legislation limited to women thus paving the way for separate treatment for women in the area of protective legislation.\textsuperscript{329}

\begin{itemize}
  \item the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
  \item (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
\end{itemize}

\textsuperscript{328} 327. \textit{Id.} at 45 (majority opinion).
\textsuperscript{329} 328. 208 U.S. 412 (1908). The majority opinion stated:

\begin{quote}
The legislation and opinions referred to in [the Brandeis Brief] may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.
\end{quote}

\begin{itemize}
  \item That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
\end{itemize}

\textit{Id.} at 420-21 (1908).

\textsuperscript{329} 329. The Supreme Court did not apply the separate treatment doctrine consistently.

In a 1923 case, the Court invalidated a minimum wage law stating:

\begin{quote}
[While the physical differences must be recognized in appropriate cases, the legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, \textit{sui juris}, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.
\end{quote}
Although the immediate impact of the Muller decision was to upgrade working conditions for women in the sweatshops, the long range effect has been to limit opportunity for women in employment. For that reason and also because many such laws appear to conflict with the guidelines of the EEOC, a number of these laws are presently under legal attack. For example, in *Rosenfeld v. Southern Pacific Co.*,330 the defendant claimed as a defense in a Title VII action that appointing the plaintiff to the job she sought would result in a violation of California labor law which limited the number of hours women could work331 (and therefore their overtime pay) and the amount of weight women could lift.332 The court ruled:

We conclude . . . that the Commission [EEOC] is correct in determining that BFOQ establishes a narrow exception inapplicable where, as here, employment opportunities are denied on the basis of characterizations of the physical capabilities and endurance of women, even when those characteristics are recognized in state legislation.333

Since *Rosenfeld*, successful challenges to protective legislation have included weight lifting,334 hours of work per day,335 and tending bar.336 Thus, the Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds,337 which contains a prohibition against employing women in underground mines except in managerial positions or health and welfare services,338 and the Convention Concerning Night Work of Women Employed in Industry,339 which prohibits women from working at night with such exceptions as family ventures340 where necessary to prevent rapid deterioration341 and where climate makes day work difficult,342 would be inconsistent with

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Adkins v. Children's Hospital, 261 U.S. 525, 553 (1923), overruled in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

330. 444 F.2d 1219 (9th Cir. 1971).

331. CAL. LABOR CODE ANN. § 1350 (West 1971).

332. *Id.* § 1251.

333. 444 F.2d at 1227.


337. Discussed at notes 105-09 *supra* and accompanying text.


339. See discussion at notes 93-104 *supra* and accompanying text.


341. *Id.* art. 4.

342. *Id.* art. 7.
federal law. As indicated earlier, the "protective" conventions have been criticized within the ILO as well.\textsuperscript{348}

The Convention Concerning Discrimination in Respect of Employment and Occupation is broader than Title VII. It covers employees excluded under Title VII\textsuperscript{344} and it requires states to pursue a national policy designed to promote the elimination of discrimination, whereas Title VII does not require affirmative action in ending discrimination. The latter deficiency, however, is remedied in some part by Executive Order 11246, which directs federal government agencies that contract with private companies or state and local governments to include non-discrimination clauses in their contracts, and to monitor the employment policies of the contractors.\textsuperscript{346} The most widely-reported provision of the Order provides that the contractor will take affirmative action to ensure the applicants are employed without regard to race, creed, national origin or sex.\textsuperscript{346} Issued by the President, executive orders are not statutes and are without explicit congressional authority; yet they clearly bind the executive branch and courts have declared that they have the force and effect of law.\textsuperscript{347}

The discriminatory impact of pregnancy-related legislation on employment practices has been the subject of challenges both under the Constitution and under Title VII. In \textit{Cleveland Board of Education v. LaFleur},\textsuperscript{348} the Supreme Court held unconstitutional school district rules that required pregnant teachers to take unpaid maternity leave, commencing four to five months before expected childbirth. However, such rules were invalidated not because they failed to protect women from loss of wages or unemployment, but because they were an unjustifiable burden of the exercise of the "freedom of personal choice in

\textsuperscript{343} See note 118 \textit{supra} and accompanying text.
\textsuperscript{344} See note 318 \textit{supra} and accompanying text.
\textsuperscript{345} Exec. Order No. 11246, 3 C.F.R. 169 (Supp. 1974).
\textsuperscript{346} During the performance of this contract, the contractor agrees as follows:
(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.
\textit{Id.} at 170.
\textsuperscript{348} 414 U.S. 632 (1974).
matters of marriage and family life [which] is one of the liberties protected by the Due Process Clause of the 14th Amendment.\textsuperscript{340} In Geduldig v. Aiello,\textsuperscript{350} on the other hand, the Court sustained a California disability insurance program, which excluded any disability caused by or arising in connection with pregnancy. Although an equal protection challenge was made, the Court applied the minimum scrutiny test and found that the state's legitimate interests in maintaining a self-supporting insurance program on adequate levels of distribution for disabilities covered and a low contribution rate justified a non-comprehensive program.\textsuperscript{351} The EEOC had recognized that employment policies related to pregnancy have traditionally been sex discrimination in another guise and in 1972 issued guidelines which bring differential treatment of pregnancy under the Title VII ban of sex discrimination.\textsuperscript{352} However in General Electric Co. v. Gilbert,\textsuperscript{353} the Court repudiated the applicable EEOC guidelines and held that an employer's exclusion of pregnancy-related disabilities from the coverage of an employee's disability income plan did not constitute sex discrimination proscribed by Title VII. Under some state laws, however, differential treatment of a pregnancy-related disability is prohibited. For example, the highest court in New York state has recently held that an employment policy which singles out pregnancy and childbirth for treatment different from that accorded other instances of physical or medical impairment or disability is prohibited by that state's Human Rights Law.\textsuperscript{354}

\textsuperscript{349} Id. at 639.
\textsuperscript{350} 417 U.S. 484 (1974).
\textsuperscript{351} Justice Stewart attempted to distinguish the discrimination alleged here from that in Frontiero v. Richardson, 411 U.S. 677 (1973), and Reed v. Reed, 404 U.S. 71 (1971): [T]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities.
\textsuperscript{352} Id. at 496 n.20.
\textsuperscript{353} The guidelines provide in pertinent part:
   
   (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.
   
   (b) Disabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.
\textsuperscript{29} C.F.R. § 1604.10 (1975).
The Convention Concerning Maternity Protection is an employment-related convention which embodies the same elements of economic security as do the EEOC guidelines. Both the convention and the EEOC guidelines require that pregnancy be treated as any other temporary disability for purposes of insurance and sick leave. Additionally, they prohibit dismissal because of pregnancy. However, the convention also mandates a minimum of twelve weeks compulsory leave, including at least six weeks after confinement. In this respect it conflicts with the EEOC guidelines as well as with the holding of Laffleur.

3. Old Age, Survivors’, and Disability Insurance

Old age, survivors’ and disability insurance (Social Security) legislation was enacted in 1935 as a partial response to widespread economic hardship, resulting from the Great Depression. Although individuals pay Social Security taxes as wage earners, their Social Security benefits are usually conditioned upon their status as family members. This has a discriminatory impact upon married women in two basic ways: (1) as wage earners, the vast majority of women earn less than $14,100 (the Social Security taxable base maximum) and thus the entire income of the woman is taxed, and (2) as family members, a significant percentage of women collect benefits as a dependent, wife or widow, rather than as a wage earner. Where a husband is entitled to maximum benefits and a wife to minimum benefits, or near-minimum benefits, the couple will receive only the husband’s benefit and an allotment for the wife. The wife, in these cases, effectively loses her own benefits. If each were to collect his or her respective benefits, their combined Social Security tax would be less. The couple’s position in regard to Social Security is not improved because of her having worked and contributed to the system.
The conventions concerning compulsory widows' and orphans' insurance are likewise permeated by the assumption of a married woman's dependence. The conventions provide that persons not subject to compulsory insurance may qualify for a pension by voluntary payment of a fee. In the case of a married woman, the husband, if not subject to compulsory insurance, is permitted to insure voluntarily and thereby to qualify his wife for an old-age or widow's pension.

Both insurance systems likewise condition the woman's eligibility for a pension on the status of the marriage relationship. A divorced woman may now receive benefits on her former husband's Social Security, if the marriage lasted at least twenty years. The conventions permit the widow's pension to be withheld, if at the time of the death of the insured or pensioned person, the marriage had been dissolved or if a separation had been obtained in proceedings in which the woman was found to be solely at fault. Clearly, under federal law Social Security survivor's benefits cannot be withheld solely because the widow was found to be at fault in a proceeding dissolving the marriage.

\[ T \]he working woman whose husband is paying social security taxes knows that she is entitled, as his dependent, to retirement and survivor's benefits just as the women at home who are not gainfully employed. She senses, therefore, and she is quite correct, an inequity of cost/benefits between herself and women not employed outside the home. The inequity can be quantified by calculating the differential benefit. For example, if a retired man's earnings history were such that benefits payable to him amounted to $354.50 he would be entitled to another $177.30 if he were married, for the sum payable to a couple at that level is $531.80. If his wife had established her own eligibility, say to a monthly benefit of $250.60, she would of course receive that sum, rather than the lower figure, so that total family benefits would be higher for many couples where both had covered earnings than where only one did. But the marginal payment to the woman amounts to only $73.30, the difference between what she would be entitled to as a wife and what she would receive as a retired worker. The return figured in this way looks very small indeed to an employed woman.

Bell, supra note 359, at 751.

362. Convention Concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Agricultural Undertakings, adopted June 29, 1933, 39 U.N.T.S. 285; Convention Concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions and for Outworkers and Domestic Servants, adopted June 29, 1933, 39 U.N.T.S. 259. These conventions are discussed at notes 119-26 supra and accompanying text.


364. 42 U.S.C. §§ 402(b), (e), (g), 416(d) (1970).


366. The federal income tax structure, like Social Security, is premised on the traditional model of marriage in which the husband is the sole wage earner. Both taxing systems discriminate against working married women and consequently against two-wage-earner families in general. See Blumberg, Sexism in the Code: A Comparative
Sex classification bias can be a two-edged sword which disadvantages members of both sexes. Such has been the experience of widowers who have attempted to collect benefits on their wives' Social Security. Until the recent Supreme Court decision in *Weinberger v. Wiesenfeld*, widowers were ineligible to collect benefits on their wives' Social Security unless actual dependency was proven. In ruling that a widower could remain at home to care for his child and collect Social Security survivor's benefits, Justice Brennan for the majority stated:

> Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of § 402(g) is entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent . . . . It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female.\(^368\)

In contrast there is no provision regarding the collection by a widower on his wife's insurance in the conventions.\(^369\) The conventions are a plan to care for dependents and reflects traditional sex-role stereotyping.

### C. Marriage

Under our federal system of government, marriage and education have traditionally been viewed as areas reserved for state regulation and policy under the tenth amendment. Although federal legislation in the latter area has become increasingly important in recent years, both areas are still fundamentally within the domain of the state legislatures. However, as the title suggests, a major part of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages\(^370\) deals with basic legal protection of the spouses by such requirements as minimum age,\(^371\) free consent,\(^372\) solemnization,\(^373\) and

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\(^{368}\) 420 U.S. 636 (1975).

\(^{369}\) Id. at 1235.

\(^{369}\) Article 8 offers some insight into the thinking of the drafters on the subject of support by a woman. It provides that children are entitled to a pension upon the death of the mother only if the mother had contributed to the support of the child or if she had been a widow. 39 U.N.T.S. 259, art. 8, §§ 1-2; 39 U.N.T.S. 285, art. 8, §§ 1-2.


\(^{371}\) 521 U.N.T.S. 231, Preamble (1).

\(^{372}\) Id. Preamble (2).

\(^{373}\) Id. art. 1(1).
registration\textsuperscript{374} of marriage.\textsuperscript{375} These legal protections are nearly universal practice in the United States. In each of the fifty states, there are statutory requirements that marriage be entered into by freely consenting persons of a specific minimum age and that it be licensed, solemnized, authenticated and registered. An exception to this general rule is found in the recognition of common-law marriage. Although common-law marriage had once been widespread, by 1968, thirty-six states by statute or judicial decision refused to recognize the practice.\textsuperscript{376} Since the convention on marriage admits of deviation to the formal requirements only in exceptional circumstances,\textsuperscript{377} it might conflict with the law of those states which continue to recognize the validity of common-law marriage.

An introductory paragraph to the Convention on Consent of Marriage, Minimum Age for Marriage and Registration of Marriage notes:

Recalling that article 16 of the Universal Declaration of Human Rights states that:

(1) Men and Women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.\textsuperscript{378}

In the United States, law, custom and religion have combined to foster unequal sex-role stereotypes, and therefore sex discrimination, rather than full equality in the marriage relationship. In recent years, however, in response to rapidly changing social mores, the law governing marriage is developing accordingly. Yet, there remains a general pattern of inequality between the sexes upon entering, during, and in dissolving a marriage.

\begin{thebibliography}{1}
\bibitem{374} Id. art. 3.
\bibitem{375} The fundamental thrust of this convention is actually the elimination of such practices as childhood betrothal and forced marriage. U.N. Doc. E/Conf. 66/3/Add. 1, at 7 (1975).
\bibitem{376} Common-law marriage is recognized in Alabama, Colorado, District of Columbia, Florida, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina and Texas. M. Paulsen, W. Wadlington & J. Goebel, Jr., \textit{Cases \\& Other Materials on Domestic Relations} 72 (1970) [hereinafter cited as \textit{Domestic Relations}]. Generally, for a marriage to be recognized as a common-law marriage, it must include the following characteristics: an agreement to be husband and wife, living together as husband and wife, and holding out to the public that the couple is husband and wife. See Lancey v. United States, 356 F.2d 407 (9th Cir.), cert. denied, 385 U.S. 922 (1966).
\bibitem{377} 521 U.N.T.S. 231, art. 1(2).
\bibitem{378} Id. Preamble (1).
\end{thebibliography}
Assumption of the husband's surname\textsuperscript{379} and differing qualifying ages of consent for males and females\textsuperscript{380} are institutionalized inequalities which affect the terms upon which persons traditionally enter into marriage in the United States. However, the Supreme Court, in \textit{Stanton v. Stanton},\textsuperscript{381} has recently invalidated a state statute\textsuperscript{382} which required support payments to be made for a male until the age of twenty-one and a female until the age of eighteen. Justice Blackmun wrote for the court:

The test here, then, is whether the difference in sex between children warrants the distinction in the appellee's obligation to support that is drawn by the Utah statute. We conclude that it does not. It may be true... that it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males . . . .

. . . .

Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl.\textsuperscript{383}

It would seem that the rationale of the \textit{Stanton} case would apply equally to the differing qualifying ages of consent for marriage and thus a state statute so providing would likewise be vulnerable to an equal protection challenge.

\textsuperscript{379} Statutes provide for automatic name change in Hawaii, Iowa, Kentucky, Michigan and Vermont; judicial decision has determined that a name change is automatic in Alabama and Illinois; statutes allow choice of name change in Florida and New York; judicial decision has determined that women have a choice in Louisiana, Maryland and Ohio; a married woman may not change her name by statutory procedure in Iowa and Kentucky. \textsc{S. Ross, The Rights of Women}, app., chart C (1973).

\textsuperscript{380} A lower qualifying age for marriage for females has its roots in common law. Originally the age was set to establish a presumption of ability to consummate. At common law the age was fourteen for males and twelve for females. \textsc{Domestic Relations, supra} note 376, at 99. The age for males and females has been made the same by statute in all but the following states: Alabama, Alaska, Arkansas, the District of Columbia, Illinois, Missouri, New York, Oklahoma and Utah. \textsc{S. Alexander, Women's Legal Rights} 202-14 (1975).


\textsuperscript{382} \textsc{Utah Code Ann.} § 1035 (1976).

The common-law fiction of unity of the spouses has propagated serious inequalities in privileges, rights and duties during marriage. Women are still directly and indirectly denied important civil, legal and economic rights in many states because traditional views of marriage and the roles of the spouses have been memorialized in statute and case law. Among the most consequential of these are the husband's right to choose the domicile and the division of responsibilities which allot the duty to support to the man and the duty to serve to the woman. Certain states, including Arkansas, Delaware, Hawaii and New Hampshire, now allow women to acquire an independent domicile for all purposes while the majority allow it only for various limited purposes.

384. For a detailed treatment of this subject, see KANOWITZ, supra note 275, at 35-99 (1974).
386. Graham v. Graham, 33 F. Supp. 936 (E.D. Mich. 1940). But see In re Marriage of Higgason, 10 Cal. 3d 476, 487-88, 516 P.2d 289, 296-97, 110 Cal. Rptr. 897, 904-05 (1973) in which it was recognized that, in California, under the provisions of CAL. CIV. CODE § 5132 (West 1970), as amended, CAL. CIV. CODE § 5132 (West Supp. 1976), the wife also has certain obligations to support the husband.
387. All states allow a woman to establish an independent domicile for the purpose of suing for divorce. For a summary analysis of domicile statutes, see KANOWITZ, supra note 275, at 48.

Important economic ramifications have arisen from the common law division of responsibilities between the spouses which assigns support obligations to the husband and service obligations to the wife. Until very recently the institutionalized expectation that the husband would be the principal wage earner had resulted in a nearly universal denial of credit to married women in their own names. Neither had the vast majority of credit institutions considered a wife's earnings in deciding whether to extend family credit in the husband's name. See Gates, Credit Discrimination Against Women: Causes and Solutions, 27 VAND. L. REV. 409, 411 (1974). Affirmative legislative action to extend credit to creditworthy married women has been taken in at least twenty-two states. These states include: Alaska, California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin. Id. app. B.


It shall be unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction. Id. The Equal Credit Opportunity Act became effective October 28, 1975 and thus it is difficult to assess its impact at this early date.
Another significant economic incident of marriage is ownership of property. There are two systems of property ownership by married couples in the United States: common law and community property. Each of these systems contains its own serious economic disadvantage for women. In common-law states each spouse retains full legal rights in his or her own separate property. Therefore, a woman has no rights in her husband's income. In a community property state, by contrast, the earnings of each spouse usually become part of the community property. The disadvantage to the woman lies in the fact that the husband has traditionally had exclusive control of the community property. However, recent legislation in five states has enlarged the control of the wife in the community property. The community property system is based on a theory of partner relationship. Although attractive in theory, it is disappointing in practice because it fails to produce equality of result between the spouses.

At the dissolution of a marriage, alimony and child custody are still commonly decided in a sex-based manner under the laws of many states. At common law, the power to award alimony existed only as to the support of the wife; it has taken statutory provision to extend the award of alimony to men where the circumstances were appropriate. In 1968 it was reported that more than one-third of the states permitted alimony to be awarded to either spouse depending upon the need of one and the ability of the other to pay.

389. Kanowitz, supra note 275, at 60-61.
391. See Kanowitz, supra note 275, at 61.
394. Id. Divorce reform statutes in several states likewise provide for greater equality in the distribution of property upon divorce. For example, the New Jersey statute states:

In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or awards to the parties, in addition to alimony and maintenance to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during marriage.

A child custody statute is, on the other hand, usually neutral on its face, providing that the decision be in "the best interests of the child." 305 In many jurisdictions, however, the statutes are interpreted according to the "tender years doctrine," a strong presumption that it is in the best interest of the child, especially a child of tender years, to award custody to the mother. In several recent cases the courts rejected in theory the doctrine of tender years. Yet these same courts were unwilling to recognize fact situations in which maternal unfitness was evidenced, although in similar circumstances, whether wisely or not, paternal unfitness might have been found. For example, custody challenges by fathers and other relatives alleging the mother’s unfitness because of adultery, 306 co-habitation, 307 the birth of an illegitimate child 308 or homosexuality 309 have been unsuccessful. 400

A comparison of the marriage law in the United States and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriages indicates substantial harmony of purpose. Both seek to extend legal protection to each person involved in a marriage relationship and the trend is clearly toward equalizing spousal responsibilities and obligations under law.

The Convention on the Nationality of Married Women, 401 outlaws the practice of automatically altering the nationality of a woman because of the celebration or dissolution of a marriage. As late as 1915, in MacKenzie v. Hare, 403 the Supreme Court upheld a 1907 congressional act which provided for a woman’s automatic loss of nationality upon marriage to a foreigner. 403 However, in Afroyim v. Rusk, 404 the court invoked fourteenth amendment protection to ensure against "a congressional forcible destruction of . . . citizenship." 405

In a recent per curiam decision, 406 the First Circuit held "Afroyim
v. *Rusk* clearly refutes the rationale of *MacKenzie v. Hare* . . . [and] that the Supreme Court would now hold the 1907 statute unconstitutional.\(^{407}\) The statute was repealed years ago, hence, the Court's position on change of nationality on marriage will probably not be known.

### D. Education

Title IX of the Educational Amendments of 1972 (Title IX)\(^ {408}\) has added sex to the list of proscribed discriminations,\(^ {409}\) but there are severe limitations which might hamper its possible effectiveness. First, Title IX sanctions are indirect. A finding of sex discrimination empowers any federal agency to terminate or refuse to grant or continue to assist any recipient as to whom there has been such a finding on the record after opportunity for a hearing and a failure to comply.\(^ {410}\) Secondly, there is a long list of exceptions to coverage of the Title, including religious schools maintaining sex segregation on the basis of religious tenets,\(^ {411}\) military schools,\(^ {412}\) and any school which has been sex segregated from its inception.\(^ {413}\) In addition those schools which are only in the process of sex integration have a seven-year grace period.\(^ {414}\)

The Convention Against Discrimination in Education\(^ {415}\) contains sweeping statements prohibiting the limitation of a person's educational opportunities because of, *inter alia*, sex. The convention is narrower than Title IX in that it permits the establishment or maintenance of separate educational systems or institutions, if equivalent, for the sexes. This is clearly less protective of the rights of females than Title IX and federal case law. In 1954, the Supreme Court in *Brown v. Board of Education*\(^ {416}\) held with respect to racial segregation that separate was inherently unequal in the field of education. In *Kirstein v. Rector and Visitors of the University of Virginia*,\(^ {417}\) female plaintiffs were successful in their suit to sex integrate the University of Virginia because it was found that the University offered courses not available elsewhere in the state system and also because the degree offered by the Univer-

\(^{407}\) *Id.* at 947.
\(^{409}\) *Id.* § 1681(a).
\(^{410}\) *Id.* § 1682.
\(^{411}\) *Id.* § 1681(a)(3).
\(^{412}\) *Id.* § 1681(a)(4).
\(^{413}\) *Id.* § 1681(a)(5).
\(^{414}\) *Id.* § 1681(a)(2)(B).
\(^{415}\) See notes 66-72 supra and accompanying text.
\(^{416}\) 347 U.S. 483 (1954).
University of Virginia carried greater prestige than that of any other school in the state system. On the other hand, male plaintiffs were unsuccessful in their suit against South Carolina's policy of maintaining Winthrop College as an all-female institution.\footnote{418} The court distinguished this case from \textit{Kirstein}, finding that the all-female college offered neither greater tangible nor intangible benefits than schools open to males throughout the state system. The over-all results of these challenges are "at best a limited recognition of the right to equal educational opportunity regardless of sex."\footnote{419}

The convention is broader in its reach than Title IX in that it applies to all educational facilities whether or not governmental assistance is involved. However, since the vast majority of educational facilities in the United States receive federal assistance, the scope of Title IX in the area of education is virtually pervasive.\footnote{420}

\section*{V. Specific Proposals for United States Participation in International Agreements}

As the preceding discussion indicates, there are a significant number of international agreements dealing with women's rights.\footnote{421} Some mandate equality for women in various aspects of the political, economic, and educational spheres; others provide specific protection for


\footnote{420. Scholastic athletic programs, traditionally sex-segregated, have come under attack in a number of jurisdictions by girls who have been excluded from boys' teams. It has been held a denial of equal protection to exclude qualified girls from participating in all-boy non-contact sports. Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973). But where a girls' team existed, although admittedly devoid of the "concentration and competitive emphasis characteristic of boys' extracurricular sports," a rational test was applied to defeat the girls' equal protection claims. Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972).

Likewise, the Sixth Circuit refused to order integration of contact sports. Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973). Administrative agencies and state legislatures have been somewhat responsive to the discriminatory impact on girls of sex-segregated sports programs. New York allows mixed competition in non-contact sports where separate teams do not exist. In exceptional cases the chief administrative officer of the school may allow a girl(s) to participate on the boys' team even where a girls' team does exist. Regs. of the Comm'ner of Educ. § 135.4. Michigan has effected substantially the same policy by legislation. \textit{Mich. Comp. Laws Ann.} § 340.379(2) (Supp. 1972). Although in total the gains have been slight, girls have won the right to participate in boys' non-contact sports where no independent girls' team exists. \textit{See 57 Minn. L. Rev.} 339 (1972-73).

421. See notes 1-168 supra and accompanying text.}
women with respect to such matters as nationality, marriage, maternity, white slavery, night work, underground work, and pensions. Many of these agreements have been widely ratified.

Though some opposed to the United States ratification of human rights conventions have so argued, there is clearly no constitutional impediment to ratification. Whether the United States should ratify any of the treaties discussed is therefore a question of policy. Since the ratification of a treaty has both domestic and foreign affairs effects, the decision should depend on whether ratification would achieve desired domestic or foreign affairs goals. It is believed that ratification of some of the treaties discussed would have salutary effects in both areas.

Those engaged in the conduct of United States foreign affairs, and particularly those representing the United States in the United Nations, have indicated that the United States failure to ratify human rights treaties has exposed it to attack by other countries and has hurt its international standing. Ratification of any human rights treaties, including those on women's rights would no doubt improve the United States' international image. Moreover, since treaties become the supreme law of the United States, ratification of international treaties barring discrimination against women in various areas would bar such domestic discrimination and, to the extent that domestic law does not already do so, would enhance the rights of women.

Both the Convention Concerning Discrimination in Respect of Employment and Occupation and Title VII bar discrimination in employment. The Convention is broader than Title VII, however, in two respects: (1) it is not limited to "covered employees," but applies to everyone, and (2) unlike Title VII, it requires states to take affirmative action to end the discrimination. While the latter deficiency in Title VII has been remedied in part by executive order, this order could be rescinded at any time. As to protective legislation, although Article 5 of the convention permits states to adopt protective legislation, it does not require states to do so. This position would not necessarily conflict with the United States position that some forms of protective legislation are discriminatory. However, a statement at the time of ratification to the effect that the United States does not subscribe to Article 5 insofar as it is inconsistent with United States law might be advisable.

422. See notes 315-57 supra and accompanying text.
The Convention on Equal Remuneration for Men and Women Workers for Work of Equal Value is consistent with the applicable provisions of Title VII and of the Equal Pay Act. Ratification of the convention would reinforce existing laws as well as provide equal treatment for those not covered by the federal statutes.423

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages deals with matters that have traditionally been regulated by state rather than federal law in the United States.424 However, the rights specifically provided therein are already nearly universal practice in the United States. Although the convention, in its introductory section, quotes the Article of the Universal Declaration of Human Rights to the effect that "men and women . . . are entitled to equal rights as to marriage, during marriage and at its dissolution," this is not one of the operative articles of the convention. It is merely a goal which the states party to the convention seek to promote rather than a binding agreement. Moreover, while the goal of equality in marriage and dissolution has not yet been fully achieved in the United States, court decisions and state legislation in a number of states tend toward this direction. Ratification of the convention would constitute a reaffirmation of the principle of equality, thereby giving support to the judicial and legislative trend.

The Convention on the Nationality of Married Women, which protects a woman against the automatic loss of her nationality if she marries a man of another nationality, appears to parallel United States law on the subject.425 However, ratification of the treaty would have the effect of clarifying the law in this country and establishing a sound basis for such law.

The above conventions are fairly specific, each deals with a particular area of discrimination, and they are consistent with the policy and laws of the United States which attempt to eliminate discrimination in those areas. Ratification of these conventions would have the effect of more firmly securing rights for American women and of internationally committing the United States to equality for women in the respective areas.

Both the Convention Against Discrimination in Education and Title IX bar discrimination in educational opportunity. The convention is, however, broader than Title IX since it would apply to all educational

423. See notes 308-14 supra and accompanying text.
424. See notes 378-400 supra and accompanying text.
425. See notes 401-07 supra and accompanying text.
institutions, not just to those receiving federal aid. Although the convention sanctions separate educational facilities if they are equal, the convention does not require segregated facilities. This concept has, of course, been rejected by the Supreme Court insofar as racial segregation is concerned and at least qualifiedly with respect to sexual discrimination. Therefore, to the extent that maintenance of segregated facilities, on racial or sexual grounds, is inconsistent with United States law, the provision of the convention would simply have no domestic effect. However, the Convention Against Discrimination in Education goes well beyond a broad mandate for equality in educational opportunity. Some of its other provisions are consistent both with United States practice at home and its aims abroad, such as the requirement for free and compulsory primary education, but other provisions are inconsistent with United States practice and policy. For example, the provision in Article 3 barring "any difference of treatment by the public authorities . . . in the matter of school fees and the grant of scholarships," except on the basis of need or merit, would seem to proscribe affirmative action programs, now widespread but the subject of considerable controversy and litigation in the United States. The provision in Article 4 requiring the parties "to ensure that the standards of education are equivalent in all public educational institutions of the same level," would appear to require equalization of educational standards and facilities both within and between the states of the United States. The controversial nature of these provisions makes it highly unlikely that the United States would wish to ratify this convention at this time.

The Convention Concerning Night Work of Women Employed in Industry, the Convention Concerning the Employment of Women on Underground Work in Mines, and the Convention Concerning Maternity Protection bar women from working at night, underground, or during specified periods before and after giving birth. Ratification of these conventions would deny women various employment opportunities, thereby extending rather than diminishing discrimination against women. Clearly, ratification of these conventions is counter-indicated. Similarly, there is no need for United States ratification of the various conventions dealing with old age, orphans' and widows' insurance, since United States law, though in need of modification to the extent that it discriminates against married women, already affords equal or better protection than that provided for in the conventions.

The Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights are both extremely broad in
scope, encompassing a vast array of civil, political, economic and cultural rights. The provisions mandating equality for women are only one aspect of these agreements. Moreover, many of the provisions pertaining to women are already covered in narrower agreements dealing with the rights of women and are fully covered in the draft Convention on the Elimination of All Forms of Discrimination Against Women. While the United States will no doubt wish to give serious consideration to ratification of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, the provisions dealing with women's rights should not be the determinative factor in the decision.

VI. CONCLUSION

Advocates of equality for women in the United States have sought to achieve this goal through litigation, through state and federal legislation, and, most strenuously perhaps, through efforts for ratification of the Equal Rights Amendment. The efforts to obtain ratification of the Equal Rights Amendment have not succeeded thus far and indeed appear to have suffered a setback. The rights of women have nevertheless expanded in recent years primarily as a result of judicial decisions and legislation. The ratification of treaties as a means of obtaining equality for women in the United States appears to have been largely neglected. Ratification of the Convention Concerning Discrimination in Respect of Employment and Occupation, the Convention on Equal Remuneration for Men and Women Workers for Work of Equal Value, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, and the Convention on the Nationality of Married Women, would affirm and extend the rights of women in these areas. Those concerned with women's rights in the United States and internationally should also urge active participation by the United States in the drafting of the Convention on Elimination of Discrimination Against Women to ensure a meaningful convention which would provide equality for women in all areas of major significance and which would be consistent with United States policy. These conventions clearly warrant the attention of those who seek to eliminate sex based discrimination in the United States as well as of those who believe the United States should play a more active role in the promotion of human rights internationally.

426. See notes 428-32 supra and accompanying text.
The ratification of the Convention on Political Rights of Women and the American Bar Association's reversal of its long standing opposition to the Genocide Convention may be the beginning of a new United States approach to human rights conventions.