THE CITY UNIVERSITY OF NEW YORK LAW REVIEW

City University of New York Law Review

Volume 3 | Issue 1

1998

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Recommended Citation

Jordan J. Paust, *The Permissibility of Affirmative Action in Higher Education Under Human Rights Law*, 3 N.Y. City L. Rev. 91 (1998).
Available at: 10.31641/clr030110

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THE PERMISSIBILITY OF AFFIRMATIVE ACTION IN HIGHER EDUCATION UNDER HUMAN RIGHTS LAW

Jordan J. Paust†

International human rights are the supreme law of the land, and thus are a legitimate and valuable source of the permissibility of affirmative action.[1] This source is not only found in federal law relevant to decision making at federal and state levels, but is also found in federal policy which is relevant to the issue of federal preemption. Treaty-based permissibility does not however guarantee that particular measures of affirmative action will survive challenges under other constitutional provisions, but it is relevant to an evolving theory of constitutional rights. Indeed, treaty-based permissibility of affirmative action, coupled with other relevant sources, provide the basis for a compelling state interest for both federal and state initiatives, especially concerning higher education.[2]

A. BACKGROUND: TREATY-BASED PERMISSIBILITY

This essay will address two primary treaties: the International Covenant on Civil and Political Rights[3] (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination[4] (Race Discrimination Convention). Despite the general prohibition in each treaty of "discrimination" and "distinc-

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1 *See* Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT'L L. 659, 659 (1997).

2 *See id.*

3 International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The United States ratified the Covenant on September 8, 1992. *See* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 261 (3d ed. 1995).

4 International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter Race Discrimination Convention]. The treaty was ratified by the United States on November 20, 1994. *See* LILLICH & HANNUM, *supra* note 3, at 269.

tions" on the basis of race, the treaties recognize the permissibility of "differentiation" to promote affirmative action.[5]

With respect to the ICCPR, the Human Rights Committee created by the treaty, recognized that "[n]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[6] The Committee added:

> [T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the [ICCPR] . . . . Such action may involve granting for a time . . . certain preferential treatment in specific matters. . . . [A]s long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the [ICCPR].[7]

Further, when ratifying the ICCPR, the United States adopted the "Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights,"[8] [Report or Understanding]. This formal Understanding permits certain forms of affirmative action. It states in pertinent part: "The United States understands distinctions based upon race . . . —as those terms are used in Article 2, paragraph 1 and Article 26—to be permitted [when] such distinctions are, at [a] minimum, rationally related to a legitimate governmental objective."[9]

In a previous essay, I documented why the "Understanding"

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[5] *See* Paust, *supra* note 1, at 661-63, 667-71.

[6] *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, Hum. Rts. Comm. General Comment No. 18, ¶ 13, at 27, U.N. Doc. HRI/GEN/1 (1992).

[7] *Id.* at ¶ 10, at 27.

[8] *United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645 (May 1992) (earlier draft, adopted later by the Senate and President) (*reproduced from* U.S. Senate Exec. Rep. 102-23 (102d Cong., 2d Sess.)) [hereinafter *Senate Committee Report*]. In the Report, it was noted that the Committee created by the Covenant had interpreted the Covenant to allow certain forms of "differentiation:"

> In interpreting the relevant Covenant provisions, the Human Rights Committee has observed that not all differentiation in treatment constitutes discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. In its General Comment on nondiscrimination, for example, the Committee noted that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.

Id. at 655; *see* Paust, *supra* note 1, at 662-63 n.12.

[9] *Senate Committee Report*, *supra* note 8, at 655.

operates as a reservation to the Covenant and why this reservation is compatible with the object and purpose of the ICCPR, as well as its authoritative interpretation by the Human Rights Committee.[10] As such, the Understanding affirms that certain forms of race-based affirmative action are permitted as a matter of United States treaty law, that is, they are permitted whenever such distinctions are rationally related to a legitimate governmental objective.[11] Moreover, at a minimum, the Report is a formal expression of federal policy expressing the permissibility of affirmative action.[12]

The other significant treaty, the Race Discrimination Convention,[13] is clearly useful as supreme federal law authorizing certain forms of race-based affirmative action. As its name suggests, the treaty contains general provisions outlawing racial discrimination. Nevertheless, certain "special measures," which may include race-based affirmative action, are expressly excluded from the definition of proscribed racial "discrimination." For example, the Racial Discrimination Convention states in paragraph 4 of Article 1:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.[14]

There is no exception or limitation expressly related to this article elsewhere in the treaty. Indeed, the statement of Conrad K. Harper, a Legal Adviser at the United States Department of State, concerning ratification of the treaty, included the following assessment: "[A]rticle 1 (4) explicitly exempts 'special measures' taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection. As a result, the Convention leaves undisturbed existing U.S. law regarding affirmative action programs."[15]

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10 *See* Paust, *supra* note 1, at 662-64.

11 *See* Paust, *supra* note 1, at 664.

12 *See* Paust, *supra* note 1, at 664.

13 Race Discrimination Convention, *supra* note 4.

14 Race Discrimination Convention, *supra* note 4, arts. 2-4, 6, at 216-18, 222.

15 Conrad K. Harper, Statement to the Senate Committee on Foreign Relations (May 11, 1994), *in Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 721, 722 (1994).

Article 2 of the Race Discrimination Convention lends support to the propriety of certain special measures, even creating duties to take special and concrete measures of affirmative action "when the circumstances so warrant."[16] Furthermore, Article 5 may be interpreted to prohibit "discrimination" and "distinctions," but not "differentiations."[17] Nor are "special measures" for adequate advancement of racial or ethnic groups and individuals mandated.[18]

As Professors McDougal, Lasswell, and Chen aptly summarize:

> The Convention's broad formulation of forbidden acts is not, however, intended to prescribe that all differentiations are unlawful discriminations. The differences made impermissible are those which fail to establish a demonstrable, rational relation to individual potentialities for self-development and contribution to the aggregate common interest. The basic requirement of rationality, that is, an absence of arbitrariness, is implicit in the reference in Article 1 (1) . . . and is made explicit in Articles 1 (4) and 2 (2).[19]

Thus, it can be recognized that the use of the terms "distinction" and "discrimination" in the ICCRP and the Race Discrimination Convention require the conclusion that not all forms of differentiation[20] are impermissible, and that race-based affirmative action may be required under both treaties.[21]

B. Certain Methods of Incorporation

Given the permissibility of affirmative action under the treaties as they are incorporated in United States law, how may one use

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16 Race Discrimination Convention, *supra* note 4, art. 2 (2).

17 *See* Paust, *supra* note 1, at 667.

18 *See* Paust, *supra* note 1, at 667.

19 Myres S. McDougal et al., Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity 596 (1980); *see* Dr. W.A. McKean, *The Meaning of Discrimination in International and Municipal Law,* 44 Brit. Y.B. Int'l. L. 177, 185-86 (1970) ("[I]n international legal usage, 'discrimination' has come to acquire a special meaning. It does not mean any distinction or differentiation but only arbitrary, invidious or unjustified distinctions. . . . Moreover, it does not forbid special measures of protection. . . . In this respect, the definition accepted in the international sphere is more advanced and sophisticated than that adopted in most municipal legal systems."); *see also* South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.) (Second Phase), 1966 I.C.J. 4, 306 (July 18) (Tanaka, J., dissenting) (justice may require different treatment).

20 The term "differentiation" seems preferable in order to emphasize the special meanings that pertain concerning both treaties. For a discussion on the use of such a term or "differential," see Paust, *supra* note 1, at 662-63 n.12, 667 n.29.

21 *See* Race Discrimination Convention, *supra* note 4, art. 2(2) (Article 2 of the Race Discrimination Convention also mandates affirmative action "when the circumstances so warrant").

human rights law to provide more meaningful and effective equality of opportunities in higher education? Here, I will address three strategies which, I term: (1) the interpretive approach; (2) the primacy and preemption approach; and (3) the enhancement and protection of state implementary choice approach.

1. The Interpretive Approach

The first method involves the utilization of treaty law as an aid for interpretation and enhancement of constitutional rights, duties, and powers, thus, a form of indirect incorporation.[22] Through this method, the treaty-based permissibility of affirmative action and related duties can be used to influence constitutional norms, an approach that should prove useful against attempted extensions of *Hopwood v. Texas*.[23]

For example, when considering the phrase "equal protection" (found in both the Fourteenth Amendment to the United States Constitution and Article 26 of the ICCPR), one would utilize treaty interpretations that clearly allow for certain forms of affirmative action. The word "protection" should be interpreted in a manner that allows for certain measures of affirmative action to promote an "equal" and effective "protection" against ongoing discrimination.[24] Further, since international law is supreme law of the United States, the Fourteenth Amendment should be interpreted to preclude any state from denying "the equal protection of the laws" by failing to recognize the protection of treaty laws embodied

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[22] *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 34, 83, 108, 112-13, 191-96, 246, 248-56 (1996); Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 462 (1997).

[23] 78 F.3d 932, *reh'g denied*, 84 F.3d 720 (5th Cir. 1996), *cert. denied*, 116 S.Ct. 2580 (1996). Even *Hopwood* did not require that laws treat and protect each person at every social moment in exactly the same way. *See id.* at 946-47. The latter approach might lead to a denial of the constitutional propriety of any laws protecting special interests or distinctions, such as certain tax codes, welfare laws, pollution laws, laws providing government subsidies, laws providing judicial and official immunities, and laws concerning the selection of judges.

[24] Both "equality" and "protection" should be viewed as processes and judged with reference to all relevant interests and legal policies at stake. Thus, equality should be viewed in context and through time, not merely in connection with isolated circumstances, a limited number of persons, or a particular moment in time. Such an approach will allow fuller inquiry into various interconnected legal policies at stake and the consequences of choice. For example, a deeper, richer understanding of equality and protection of the laws in connection with law school admission processes will involve attention to many more features of context than mathmaticized weightings of grade point averages (which are themselves products of diverse institutions, majors, and educational experiences) and LSAT scores.

in permissible affirmative action.[25]

Treaty-based permissibility of affirmative action provides the necessary compelling state interest component of the strict scrutiny test applied to racial classifications,[26] especially coupled with the United States' duties under Article 2 of the Race Discrimination Convention.[27] Moreover, the United States Constitution's Supremacy Clause obligates the states to the treaties so that the dual duties and interests provide a greater compulsion of state interest.[28] Even in *Hopwood*, several judges stressed that diversity in higher education can be a compelling state interest.[29] Treaty-based permissibility of affirmative action and duties to take special and concrete measures must necessarily enhance such a recognition.

2. *The Primacy and Preemption Approaches*

Another method for the permissibility of affirmative action involves the utilization of the Supremacy Clause[30] to override state or

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25 Concerning the use of the Fourteenth Amendment to protect human rights, see PAUST, *supra* note 22, at 179-80, 186, 193, 196, 237, 244, 248, 255-56, 315. *See* Myres S. McDougal & Richard Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683, 708 (1950).

26 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231-32 (1995).

27 *See* Finzer v. Barry, 798 F.2d 1450, 1462-63 (D.C. Cir. 1986) (in a First Amendment analysis, a compelling governmental interest is supported by United States obligations under international law), *rev'd in part and aff'd in part sub nom*; *see also* Jewish Defense League, Inc. v. Washington, 347 F. Supp. 1300, 1301 (D.D.C. 1972) ("paramount governmental interest" of protecting persons and property of diplomats stems from international law); 1 U.S. Op. Att'y Gen. 52, 52-53 (1794) ("[domestic] law is strengthened by the law of nations"); de la Vega, *supra* note 22, at 468, 470 (arguing treaty obligations may constitute a compelling state interest). *But cf.* Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 512 (9th Cir. 1988) (The government did not advance a compelling state interest and "[c]ertainly the existence of a Treaty does not by itself justify content-based discrimination in violation of the First Amendment" (citing Boos v. Barry, 485 U.S. 312, 324 (1988))).

28 *See* de la Vega, *supra* note 22, at 468, 470. Professor de la Vega states: "The treaty obligations themselves can constitute a compelling state interest. This is particularly true for the United States government, which has affirmative obligations under [the Race Discrimination Convention.]" *Id.* at 468 (footnote ommitted). She adds: "[S]tates and local entities are also obligated . . . [T]hat obligation can be the basis of the compelling state interest for affirmative action programs." *Id.*

29 *See* 78 F.3d at 964-65 (Wiener, J., concurring) (diversity may be a compelling interest); 84 F.3d 720, 724 & n.11 (5th Cir. 1996) (Politz, J., dissenting) ("student body diversity *is* a compelling governmental interest for the purposes of strict scrutiny"); *id.* at 725 (Stewart, J., dissenting) (arguing that the panel majority should not have reached the issue of whether diversity is an appropriate admissions criterion) (emphasis added).

30 The Supremacy Clause reads in pertinent part: "*all* Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any

local attempts to outlaw affirmative action. The ICCPR and Race Discrimination Convention are supreme law of the land, thus, under the Supremacy Clause and the doctrine of federal preemption, the treaties' permissibility of affirmative action should trump inconsistent state law or policy.[31] As the Supreme Court empha-

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Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2 (emphasis added).

[31] *See* Paust, *supra* note 1, at 671. There, I also note that although the instrument of ratification for each treaty contains a declaration that many of the articles are "non-self-executing," such declarations function as reservations that are fundamentally inconsistent with the objects and purposes of the treaties and, under international law, are thus void *ab initio*. *See* Paust, *supra* note 1 at 671 & n. 43-44; PAUST, *supra* note 22, at 361-86. Moreover, the declaration concerning the International Covenant merely addresses Articles 1-27 and expressly does not apply to Article 50. Article 50 mandates: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." Such "shall" language is mandatory and self-executory. *See also* PAUST, *supra* note 22, at 55-59, 62, 69-71, 74, 110, 112; *Senate Committee Report*, *supra* note 8, at 656-57 ("the *Covenant will apply to state and local* authorities [and will be implemented] by appropriate . . . judicial means, federal or state . . . .") (emphasis added).

Even if the treaties are not void *ab initio*, the declarations should be interpreted to preserve rights, since treaties are to be construed liberally to protect express and implied rights. *See, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933); Nielsen v. Johnson, 279 U.S. 47, 51 (1929); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Asakura v. City of Seattle, 265 U.S. 332, 342 (1924) ("Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.") (citations omitted); United States v. Payne, 264 U.S. 446, 448-49 (1924) ("Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do . . . .") (citation omitted); Geofroy v. Riggs, 133 U.S. 258, 272 (1890); Hauenstein v. Lynham, 100 U.S. 483, 487 (1879) ("Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred.") (citation omitted); Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 249 (1830) ("If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?"); PAUST, *supra* note 22, at 72 n.83, 110 n.13.

Further, because the Supremacy Clause of the U.S. Constitution includes all treaties, a declaration of non-self-execution is unavoidably unconstitutional and void under the Supremacy Clause. *See, e.g.* PAUST, *supra* note 22, at 51, 55, 59, 63-64, 370-71; Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 64, 67-69 (1997). Certainly a mere declaration by the President, even with full consent of the Senate, cannot alter a constitutional command.

Importantly also, the declaration concerning the Covenant is not a general declaration of non-self-execution, but one that is expressly limited and does not inhibit the reach of Article 50. Further, it has a special and limited meaning: merely "to clarify that the Covenant will not create a private cause of action in U.S. courts." *Senate Committee Report*, *supra* note 8, at 657. Thus, even if the declaration was operative, the Senate Committee Report assures that the declaration does not make the Covenant generally non-self-executing (i.e., it was intended to be partly self-executing) and that it does not generally inhibit the legal status of the Covenant as supreme federal law

sized in *United States v. Pink*,[32] "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty . . . [and] must give way before the superior Federal policy evidenced by a treaty[.]"[33]

This constitutional mandate is supplemented by Article 50 of the ICCPR which requires that the treaty has the force of law in all parts of the United States "without any limitations or exceptions."[34]

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for use by federal and state courts, as long as the Covenant is not used directly to create a cause of action.

Even if portions were "non-self-executing" in a general sense or in the special sense preferred by the Executive upon adoption (relating merely to the creation of a private cause of action directly under the treaties), the treaties should still trump inconsistent state law under the Supremacy Clause of the U.S. Constitution and the doctrine of federal preemption. *See* Oyama v. California, 332 U.S. 633, 649-50 (1948) (Black, J., concurring) (human rights articles in the U.N. Charter, which to date have not been found to be self-executing, provide additional reasons why a California law "stands as an obstacle to the free accomplishment of our policy in the international field" and cannot prevail); *id.* at 673 (Murphy, J., concurring) ("Its inconsistency with the Charter . . . is but one more reason why the statute must be condemned."); Gordon v. Kerr, 10 F. Cas. 801, 802 (C.C.D. Pa. 1806) (No. 5,611) (stating that a seemingly non-self-executing treaty "is supreme" over a state constitution); 6 Op. Att'y Gen. 291, 293 (1854) (held that all treaties are supreme law over that of the states—even those requiring "enactment of a statute to regulate the details"); PAUST, *supra* note 22, at 62-64, 68, 97, 134-35; LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 947 (1973); BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 192 (1980); de la Vega, *supra* note 22, at 457 n.206, 460, 467, 470; Joan Fitzpatrick, *The Preemptive and Interpretive Force of International Human Rights Law in State Courts*, 90 AM. SOC'Y INT'L L. PROC. 262, 264 (1996); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 867 n.65 (1987); Paust, *supra* note 1, at 671-72 & n.45; Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097-1104 (1992); Quincy Wright, *National Courts and Human Rights—The* Fujii *Case*, 45 AM. J. INT'L L. 62, 69 (1951). *But see In re* Alien Children Education Litigation, 501 F. Supp. 544, 590 (S.D. Tex. 1980); Sei Fujii v. State, 242 P.2d 617 (Cal. 1952). Subsequent legal developments have obviated the two prongs of the *Sei Fuji* rationale. *See* PAUST, *supra* note 22, at 74, 282.

Additionally, generally non-self-executing treaties can be used indirectly as aids for interpretation of other laws, defensively in civil or criminal contexts, for supremacy or preemptive purposes, or to provide a compelling state interest. *See, e.g.*, PAUST, *supra* note 22, at 62-64, 68, 97-98, 134-35, 370, 377-78 n.4, 384; de la Vega, *supra* note 22, at 457 n.206, 460, 467, 470; Paust, *supra* note 1, at 672 n.45.

[32] 315 U.S. 203 (1942).

[33] *Id.* at 230-31, citing Nielsen v. Johnson, 279 U.S. 47 (1929). On supremacy more generally, see *Asakura*, 265 U.S. at 341; Maiorano v. Baltimore & Ohio R.R., 213 U.S. 268, 272-73 (1909); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 271, 274-76 (1817); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348-49 (1809); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 237 (1796) ("every treaty," "all treaties"); Hamilton v. Eaton, 11 F.Cas. 336, 338, 340 (C.C.D.N.C. 1792) (No. 5,980); 10 F. Cas. 801, 802 (C.C.D. Pa. 1806) (No. 5,611); Page v. Pendleton, 1 Wythe Rep. 127, 129, 132 (Va. 1793); 6 U.S. Op. Att'y Gen. 291, 292-93 (1854); PAUST, *supra* note 22, 51-57, 62-64, 67-68 nn.35 & 42, 92, 97, 133-35 nn.81 & 84, 143, 202, 314, 384 n.72, 386 n.100, 413.

[34] ICCPR, *supra* note 3, art. 50.

The United States Executive Report concerning the ICCPR also made clear that "the Covenant will apply to state and local authorities . . . [and] with respect to Article 50 . . . the intent is not to modify or limit [United States] undertakings under the Covenant[.]"[35] The successful effort in California to outlaw affirmative action should not have prevailed because it is both inconsistent with human rights treaties and federal policy assuring the permissibility of affirmative action.[36]

3. The Enhancement and Protection of State Implementary Choice

The third method recognizes the authority of states within the United States and various municipal entities to execute human rights treaties in a manner that more adequately assures affirmative action and enriches the process of equality. Instruments ratified by the United States contain a federal clause.[37] Even though the instruments acknowledge that federal jurisdiction ends where state and local government jurisdiction begins, these clauses do not make the human rights treaties inapplicable as federal law.[38] On the contrary, the understandings allow state participation by effectuating choice while they also assure concurrent duties to implement the treaties through federal and state processes. Thus, the clauses create an overall responsibility for implementation in the federal government and guarantee that, at a minimum, states cannot deny human rights based in the treaties.[39]

The ICCPR's federal clause is typical. It reads:

> [T]his Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for fulfill-

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35 *Senate Committee Report*, *supra* note 8, at 656-57.

36 *See* Paust, *supra* note 1, at 674.

37 *See Senate Committee Report*, *supra* note 8, at 659; Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 728 (1994) (reprinting the Senate resolution of ratification of the Race Discrimination Convention).

38 *Cf.* Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 576-77 (1997).

39 *See* Fitzpatrick, *supra* note 31, at 263; Paust, *supra* note 1, at 673-74; Elizabeth Landry, Note, *States as International Law-Breakers: Discrimination Against Immigrants and Welfare Reform*, 71 WASH. L. REV. 1095, 1116-17 (1996).

ment of the Convention.[40]

Such a clause does not change the fact that affirmative action is permissible under the treaty, while simultaneously fulfilling the ICCPR's obligations. More generally, the fact that the federal government has jurisdictional competence to implement treaty law is well understood.[41] The federal clause is also relevant to whether various entities within the federal government or the states may proceed in mandating affirmative action. For example, the United States may exercise its jurisdictional competence by implementing the ICCPR, or it may allow the states to proceed to take steps to implement it. Even if the states do not proceed, the United States remains bound by the treaty and is ultimately responsible for domestic implementation.

This ultimate responsibility for the implementation of the ICCPR exists as a matter of general international law.[42] It is also evident in the federal clause of the ICCPR. The phrases "shall be implemented" and "shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for fulfillment of the [ICCPR]" mandate that it be implemented. Additionally, this responsibility is especially assured by Article 50 of the ICCPR, which requires: "The provisions of the present [ICCPR] shall extend to all parts of federal States without any limitations or exceptions." As David Stewart of the Office of the Legal Adviser of the United States Department of State recognized, "Article 50 . . . was included precisely to prevent federal states from limiting their obligations to areas within the federal government's authority, a reser-

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40 *Senate Committee Report, supra* note 8, at 659. The understanding included in the resolution ratifying the Race Discrimination Convention reads:

> [T]his Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the [S]tate and local governments. To the extent that [S]tate and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.

Nash (Leich), *supra* note 37, at 728.

41 *See* Missouri v. Holland, 252 U.S. 416 (1920); PAUST, *supra* note 22, at 97-98, 207, 256 n.468, 282, 371-72, 385; Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 345-46 (1995). The same applies with respect to customary international law. *See* United States v. Arjona, 120 U.S. 479, 483-88 (1887); Frend v. United States, 100 F.2d 691, 693 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939).

42 *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 207 (b) & (c), reporters' note 3 (3d ed. 1987); Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . . ."); Henkin, *supra* note 41, at 346.

vation exempting constituent units might readily be characterized as contrary to the object and purpose of the Article, if not the [ICCPR] as a whole."[43]

With respect to the Race Discrimination Convention, the duty to take action is even stronger. Article 2 (2) of the treaty requires the United States, "when the circumstances so warrant," to take "special and concrete measures" of affirmative action.[44] Under the federal clause, it may be left to the discretion of the United States to exercise its jurisdictional competence in mandating special measures or to allow states to proceed. In the event that the states do not proceed, the United States is consequently bound by Article 2 of the Race Discrimination Convention to take action. In other words, there is no gap in the United States duty under Article 2; the Unites States still retains its duty, in spite of the fact that neither the states nor federal governmental entities have proceeded to adopt special measures.[45]

Individual states cannot deny the permissibility of affirmative action assured under the treaties. Indeed, the federal clauses require that the treaties "shall be implemented . . . otherwise by the state and local governments," thereby making duties under the treaties concurrent. Thus, the federal clause of the ICCPR, in conjunction with both Article 50 of the ICCPR and the Supremacy Clause of the United States Constitution, compel states and substate entities to execute and effectuate the treaty by choosing among affirmative and permissible options while not denying rights under the ICCPR. Likewise, the federal clause of the Race

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[43] David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1201 (1993); *see Senate Committee Report, supra* note 8, at 656-57 ("the Covenant will apply to state and local authorities . . . with respect to Article 50 . . . the intent is not to modify or limit U.S. undertakings under the Covenant . . . intended to signal . . . that the U.S. will implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state as appropriate . . . ."); PAUST, *supra* note 22, at 361, 363; Fitzpatrick, *supra* note 31, at 263; Landry, *supra* note 39, at 1116, (quoting the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, U.N. Doc. CCPR/C/79/Add. 50, at 2-3, paras. 9, 11-12 (1995), which recognized the U.S. Government's "readiness . . . to take such further measures as may be necessary to ensure that the States of the Union implement the rights guaranteed by the Covenant" and the "assurances of the Government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United States.").

[44] Race Discrimination Convention, *supra* note 4, at 218.

[45] *See* Stewart, *supra* note 43, at 1201-02 (the U.S. remains bound under the Covenant, the U.S. will also "ensure that the state and local governments fulfill their obligations," and the Understanding "concerns the steps to be taken domestically by the respective federal and state authorities").

Discrimination Convention, coupled with the Supremacy Clause of the United States Constitution, compel the same.

Equally important is the fact that nothing in either of the federal clauses prohibit state or municipalities from executing or further implementing the treaties. The clauses recognize and confer a concurrent power to do so, especially in the phrases: "shall be implemented . . . otherwise by the state and local governments . . . to the extent that the state and local governments exercise jurisdiction," and "to the end that competent authorities of the state or local governments may take appropriate measures for fulfillment of the Covenant."

Thus, each federal clause delegates and guarantees the ability of state and local authorities to take positive steps in seeking equality through affirmative action, and to have those choices protected as long as they are otherwise in fulfillment of the treaties.

CONCLUSION

In summary, the federal clauses provide state and local abilities to participate in treaty effectuation in ways that might otherwise have been suspect under more inhibiting notions of federal preemption.[46]

The new implementary freedom guaranteed under the treaty regimes encourages participation and provides an opportunity for states and sub-state entities to choose affirmative action programs in higher education and in other fields or processes. This newer flexibility makes sense when affirmative action is limited to reasonable need, and circumstances vary in different states. Local authorities may then choose among the permissible option that it is most

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[46] *See* Harper, *supra* note 15, at 726 ("This is to make clear that ratification does not preempt State and local anti-discrimination initiatives. The understanding also makes clear that where States and localities have jurisdiction over such matters, the Federal government will ensure compliance."); *Senate Committee Report*, *supra* note 8, at 657 ("intended . . . that the U.S. will implement . . . by appropriate legislative, executive and judicial means, federal or state as appropriate, and that the Federal Government will remove any federal inhibition to the States' abilities to meet their obligations."); Fitzpatrick, *supra* note 31, at 263-64 (an "invitation to state authorities to: (1) provide appropriate state remedies for treaty norms; (2) assess potential preemption . . . ; (3) absorb international human rights norms into the common law lawmaking enterprise; and (4) turn to international law benchmarks in interpreting both state constitutions and statutes."); Landry, *supra* note 39, at 1116-17 ("expression of the affirmative obligation of the states to implement the provisions of the Covenant . . . .").

More generally, states can experiment within the contours of logical and policy-serving meaning of a treaty norm as long as there is no denial of the core of settled meaning.

appropriate to their needs. Such delegated discretion is especially appropriate for public colleges and universities that face academic choices, such as, who should participate in the learning process as students or faculty members.[47] Given the fact that such academic choice is supported by compelling state interests, supplemented by treaty law, as well as the related authority recognized in the federal clauses, it should now be easier to defend colleges and universities when their choices become the focus of domestic litigation. We can help to "bring human rights home" by participating in *amicus* briefs when colleges and universities are sued.

[47] In turn, public colleges and universities have been delegated the power and responsibility held by the states to make these types of choice with respect to educational processes.