

**THE DISTRICT OF COLUMBIA v. THE 50 STATES:  
A 21st CENTURY LAWSUIT TO REMEDY  
AN 18th CENTURY INJUSTICE**

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**INTRODUCTION**

For 190 years, resourceful residents of the District of Columbia (“D.C.”), both indignant because Congress and state legislatures have failed to pass the necessary legislation to grant them equal representation in the U.S. Congress, and humiliated by Congress’ plenary authority over them, have attempted without success to adjudicate an effective legal remedy to win equal rights under the law. Their inventive yet doomed challenges have claimed that the U.S. Constitution, which circumscribes their fundamental rights by granting representation only to the “people of the several states,” is unconstitutional, arguing, among other things, that the denial of equal congressional representation violates the political principle of no taxation without representation; infringes on their right to Equal Protection under the 5th and 14th Amendments; and contravenes their right to a republican form of government under Article 4. Thus, U.S. courts have left the District of Columbia without legal recourse to overturn a 210-year-old injustice, permitting a subversion of its residents’ natural rights, and in the prescient words of Rep. John Smilie prior to the passage of the Organic Act of 1801, which served to officially disenfranchise them, made any who lived in the District “not a citizen, but a subject.”<sup>1</sup>

As unsympathetic as U.S. courts have been to the District’s legal challenges, the District’s fortunes have fared considerably better before the world’s leading human rights monitoring institutions charged with monitoring U.S. compliance with its own human rights obligations under international law. In fact, so sympathetic have these rights-monitoring institutions been that they have unanimously declared the denial of voting rights to the District as an international human rights violation, and called on the United States to remedy this abuse by adopting such legislation as may be necessary to grant them equal rights under the U.S. Constitution. The fact that official U.S. policy toward the residents of its own capital city has been found to violate internationally recognized human rights standards should be sufficient inducement for the national government to forcefully act, but it hasn’t, which reaffirms the widespread notion that the United

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\* To Frank Karel and Jim Gray, who reached for the impossible, and to all the true believers—you know exactly who you are. And for Jo, Ian, Arran, and Dylan, who contributed in ways too innumerable to count and too significant to summarize.

<sup>1</sup> 6 ANNALS OF CONG. 997 (1801), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=010/llac010.db&recNum=496>.

States practices a policy of “American exceptionalism” –one that allows it to exist within and without its legal obligations under international law- free, on the one hand, to call on every other nation to comply with their own human rights obligations; while on the other hand ignoring U.S. obligations when convenient. This double standard has contributed to the U.S. Governments’ international reputation for arrogance, and has damaged its credibility as a defender of human rights worldwide, making it that much easier for rogue nations to justify non-compliance with international human rights standards, at the expense and suffering of their people.

For example, the United States’ effort to influence reform in the Hong Kong legislature has been retarded by its failure to remedy the non-voting status of the District of Columbia, as is noted by former House of Representatives member Rep. Tom Davis (R-VA):

I got it in Hong Kong with the vice-mayor [Donald Tsang] when I brought up democracy in Hong Kong because we had been briefed on that by Martin Lee [Hong Kong’s leading pro-democracy leader] and the vice mayor said to us: “Give your nation’s capital the right to vote and then come talk to us about democracy in Hong Kong.”<sup>2</sup>

The District of Columbia’s lack of equal congressional voting rights has also enabled foreign governments to deflect criticism away from their own human rights abuses. For example, on November 2, 2004 the Republic of Belarus introduced in the Third Committee of the 59th Session of the United Nations General Assembly, a draft resolution “On the Situation of Democracy and Human Rights in the United States of America.” The Belarus Embassy press release read:

The draft resolution shows that any country in the world can become an object of legitimate concern in the sphere of human rights. The document brings up as matters of primary concern the numerous cases of violations of human rights committed in the United States of America, namely in the sphere of electoral procedures, civil liberties, political and other rights.<sup>3</sup>

The resolution read in pertinent part:

Guided by the purposes and principles of the Charter of the United Nations, the provisions of the Universal Declaration of Human Rights, the

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<sup>2</sup> World Rights, [http://world-rights.org/us/HK\\_Vice\\_Mayor\\_on\\_DC\\_Voting\\_Right\\_012505.htm](http://world-rights.org/us/HK_Vice_Mayor_on_DC_Voting_Right_012505.htm) (as said on WTOP Radio on January 25, 2005).

<sup>3</sup> Press Release, Embassy of the Republic of Belarus in the United States of America, Introduction by the Republic of Belarus of a Draft Resolution “Situation of Democracy and Human Rights in the United States of America” in the Third Committee of the 59th Session of the United Nations General Assembly (Nov. 4, 2004), *available at* <http://www.belarusembassy.org/news/digests/pr110404.htm>. (Contact author for website information).

International Covenants on Human Rights and other applicable human rights instruments . . . .

. . . .

Noting that the United States is a member of the Organization of America States (O.A.S.) and is obliged to observe the human rights standards under the O.A.S. Charter, and aware that O.A.S. Inter-American Commission on Human Rights on December 23, 2003, decided that the denial of equal participation by the residents of Washington D.C. in their own national legislature by duly elected representatives constituted violations of provisions of the American Declaration of the Rights and Duties of Man,

Noting the Needs Assessment Mission Report on the United States of America Presidential Elections of the Organization on Security and Cooperation in Europe (ODIHR.GAL/74/04) . . . .

Urges the Government of the United States . . . [t]o bring the electoral process and legislative framework into line with international standards . . . [and t]o take the necessary steps in accordance with its constitutional process and with the provision of the International Covenant on Civil and Political Rights as well as with respect to the recommendations made by the Inter-American Commission on Human Rights, and grant the residents of Washington D.C. an effective remedy, which includes adopting the legislative or other measures necessary to guarantee to them the effective right to participate, directly or through freely chosen representatives and in general conditions of equality, in their national legislature . . . .<sup>4</sup>

After succeeding in its purpose of embarrassing the United States and prompting the U.N. to stop action on a U.S. resolution ostracizing Belarus, the draft resolution was withdrawn on November 19, 2004.

Part I of this Article will define international law and its primary sources, including customary international law and its development in these areas: state practice as customary law on the right of representation for all people in the national legislature; whether states generally and consistently follow such a practice out of a sense of legal obligation; dissenting state views exempting them from binding customary law; “instant” customary law and “regional” customary law; declarations and resolutions made by international organizations contributive to making customary law on the matter of representational rights; and decisions and findings of international tribunals and other global bodies, including legal experts and scholars on the question of the right to vote under international law.

Part II will examine the contours of a new legal strategy that the author proposes the D.C. Government consider implementing on behalf of the disen-

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4 *Id.*

franchised residents of the District. This innovative legal challenge draws on customary international law, as more fully informed by the recent findings and recommendations made by international panels of human rights experts on the question of D.C. voting rights, and the First and Ninth Amendments. In order to vindicate these rights, in the proper jurisdiction and by identifying the appropriate defendants in a cause of action, such a complaint would be filed in an original action before the U.S. Supreme Court.<sup>5</sup>

It would name as defendant, not the U.S. Congress or the Commerce Secretary, but the State Legislatures, Governors, and Attorneys General of the Several States, because the District's continuing lack of voting rights are fairly traceable to these would-be defendants. Moreover, they enjoy the constitutional authority under Article 5 to convene state conventions for the purpose of proposing a constitutional amendment to fully remedy the anomalous disenfranchisement of approximately 600,000 American citizens, who bear all of the responsibilities of citizenship, but do not enjoy one of the world's most fundamental rights: the right to equal representation in the national legislature of their country through duly elected representatives.

Part III will look at the use of foreign jurisprudence and international law in U.S. Supreme Court cases and the standards for invoking it, as well as provide a brief overview of where Associate Justices stand on the application of international law and foreign law in U.S. cases. The application of foreign jurisprudence in U.S. cases may signify their positions in any new legal challenge to win equal rights for the citizens of the District of Columbia in the Court.

## I. CUSTOMARY LAW IN THE CONTEXT OF VOTING RIGHTS IN THE DISTRICT OF COLUMBIA

### A. *The Application of International Law in Support of Equal D.C. Voting Rights*

The American Law Institute ("ALI") defines "international law" as consisting "of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical."<sup>6</sup> It also notes more generally that international law is law "that applies to states and interna-

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5 U.S. CONST. art. III, § 2 (provides for Supreme Court original jurisdiction in controversies between the Several States). *See also* *United States v. Texas*, 143 U.S. 621 (1892); *California v. S. Pac. Co.*, 157 U.S. 229 (1895); 22 MOORE'S FEDERAL PRACTICE §§ 400-499 (3d. ed. 2010) (suits between a state and citizens of another state are also specifically consigned to the Court's original jurisdiction).

6 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987).

tional (intergovernmental) organizations,” and that is “contained in widely accepted multilateral agreements.”<sup>7</sup>

Article 38(1) of the *Statute of International Court of Justice* has established four main “sources” of international law as auxiliary ways to discern rules of law, including “international conventions, international customs, as evidenced by a general practice accepted as law, general principles of law recognized by civilized nations, and judicial decisions and the teachings of the most highly qualified publicists of the various nations.”<sup>8</sup> These so-called “sources” of international law are considered authoritative by the ALI, and are recognized as such in its Restatement.

The Restatement also recognizes its binding nature, defining international law as rules of law “applicable to a state or international organization that cannot be modified unilaterally by it.”<sup>9</sup> Moreover, the U.S. Supreme Court, in *The Paquete Habana*, recognized binding international law.<sup>10</sup> Thus, if evidence can be produced in U.S. Courts proving that the continuing denial of equal congressional voting rights to the District of Columbia on general terms of equality violates international law, as federal common law, together with rights made available to them under the Bill of Rights, U.S. Courts may consider themselves bound to render a declaratory judgment in favor of the District’s right to elect voting representatives to Congress.

Accordingly, this contribution asks whether the right to vote in the national legislature of one’s own country through duly elected representatives is a right secured to the citizens of the District of Columbia under international law, and if so, does international law compel U.S. courts to recognize that right?

#### B. *Customary International Law as General and Consistent State Practice*

The Restatement defines one source of international law as a rule of law accepted by the community of nations in the “form of customary law.” It interprets customary international law (“CIL”) as following from “a general and consistent practice of states drawn from a sense of legal obligation” –*opinio juris sive necessitatis*.

Consequently, any new legal challenge on behalf of equal D.C. voting rights based on customary international law will, of necessity, require that the District prove that there is in existence today a global state practice, both general and consistent, and followed from a sense of legal obligation, which provides the citizens living in the world’s capital cities the right to representation in the national

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7 *Id.* cmt. d.

8 Acts and Documents No. 6: Charter of the United Nations, the Statute and Rules of Court and Practice Directions, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

9 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 101 reporters note 1.

10 *The Paquete Habana*, 175 U.S. 677 (1900).

legislature of their countries on general terms of equality, whether they live in city-states, unitary systems, or federal districts.

If this practice can be demonstrated, then U.S. Courts would be faced with a dynamic new question regarding the District of Columbia's alleged right to equal political participation, one that would create considerable tension between international law and the U.S. Constitution. In any event, such a vital question put before the U.S. Supreme Court during this era of increasing globalization, could provide the Court with the opportunity to, once and for all, resolve a 200-year-old injustice, could end a serious human rights blotch on America's record, and could harmonize state practice not only in the Western Hemisphere, but across the globe.

### C. *Evidence of State Practice and opinio juris*

The Restatement notes that the “the process of determining whether a rule has been accepted as international law depends on the particular source of international law indicated.”<sup>11</sup> Accordingly, the best evidence of general state practice regarding the right of all citizens to enjoy equal representation is found in official documents such as state constitutions and applicable statutes. While a state-by-state survey of the representational rights granted to capital city residents in the 194 national legislatures of U.N. member states may be required to posit definitive proof of universal state practice regarding this right, for the purposes of this contribution it will be assumed that the United States is unique in circumscribing this right to the citizens of the District of Columbia.

Regardless, state practice need not be universally followed to become customary law. According to the Restatement “[a] practice can be general even if it is not universally followed . . . [and] there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.”<sup>12</sup> Furthermore, while the Restatement recognizes that customary law may fail to concretize over time if a “significant number of important states” resist adoption of a custom or practice, customary law may also be specific to and binding on those states, *inter se*, in a particular region of the world, thus creating “regional” customary law.<sup>13</sup> This principle has been recognized by the International Court of Justice (“ICJ”) in *Columbia v. Peru* (The Asylum Case), even though the Court did not find evidence of customary law in that case.<sup>14</sup> However, the Court did define the contours of regional customary law, concluding a state alleged to be bound by

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11 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. a (1987).

12 *Id.* § 102 cmt. b.

13 *Id.*

14 1950 I.C.J. 266.

custom must have accepted it out of a sense of legal obligation *opinion juris*, or barring that, acquiesced in it, “not merely for reasons of political expediency.”<sup>15</sup>

The Restatement also notes “a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law.”<sup>16</sup> Because the right to representation in a national legislature appears to be a fundamental right, as the following examples of regional and global state practices and *opino juris* suggest, this may put U.S. policy on the District of Columbia at odds with customary international law.

#### D. *State Practice and opinio juris in the Americas*

No other constitution in the Americas that creates a federal district does so without representation in the national legislature. The District of Columbia is the only capital city in the Western Hemisphere where equal voting rights for its residents are curtailed. For example, in Brazil, the citizens of the Federal District elect three Senators, equal to the number of state-elected Senate representatives.<sup>17</sup> They also elect representatives to the House of Deputies, proportional to the Federal District’s population.<sup>18</sup>

Article 45 of the Constitution of the Federative Republic of Brazil states that “[t]he Chamber of Deputies is composed of representatives of the people, elected, by the proportional system, in each state, territory and in the Federal District.”<sup>19</sup> Article 46(1) further states that “[e]ach state and the Federal District shall elect three Senators for a term of office of eight years.”<sup>20</sup>

In Argentina, residents of the capital city of Buenos Aires, constituting an electoral district, elect three senators and eight deputies to the Argentine National Congress, equal to the citizens of the other electoral districts comprising the Province of Buenos Aires.<sup>21</sup> Section 45 of the Constitution of the Argentine Nation asserts “[t]he House of Deputies shall be composed of representatives directly elected by the people of the provinces, of the City of Buenos Aires, and of the Capital City.”<sup>22</sup> Section 54 of the constitution states “[t]he Senate shall be

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15 *Id.* at 277.

16 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1987).

17 c) The Federal Senate, <http://www2.camara.gov.br/english/the-federal-senate> (last visited Dec. 1, 2010).

18 Establishing the Number of Deputies, <http://www2.camara.gov.br/english/the-chamber-of-deputies/establishing-the-number-of-deputies> (last visited Dec. 1, 2010).

19 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 45 (Braz).

20 *Id.* at art. 46(1).

21 Electoral Constituency, [http://eng.senado-ba.gov.ar/Map\\_Section.aspx](http://eng.senado-ba.gov.ar/Map_Section.aspx) (last visited Dec. 1, 2010).

22 Art. 45, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), available at, [www.argentina.gov.ar/argentine/portal/documentos/constitucion\\_ingles.pdf](http://www.argentina.gov.ar/argentine/portal/documentos/constitucion_ingles.pdf).

composed of three senators from each province, and three from the City of Buenos Aires, who shall be jointly and directly elected.”<sup>23</sup>

The citizens of Mexico City elect representatives to the Chamber of Deputies of the Congreso de la Unión, proportionate to the citizens of each state and territory, and in the Chamber of Senators, Federal District residents vote for two senators, equal to the same number of senators representing each state.<sup>24</sup> Article 51 of the 1917 Constitution of Mexico stipulates “[t]he Chamber of Deputies is composed of representatives of the Nation, all elected every three years by the Mexican citizens.”<sup>25</sup> Article 52 declares “[o]ne proprietary deputy shall be elected . . . according to the general census of the Federal District and of each State and Territory.”<sup>26</sup> Article 56 states that “[t]he Chamber of Senators shall be composed of two members for each State and two for the Federal District, all directly elected every six years.”<sup>27</sup>

In Venezuela, the population of the Capital District of Caracas elects its own deputies to the 167-member, Unicameral Asamblea Nacional, on the basis of proportional representation equal to each of the other federal entities.<sup>28</sup> Article 186 of the Constitution of the Bolivarian Republic of Venezuela says “[t]he National Assembly shall consist of Deputies elected in each of the federal entities by universal, direct, personalized and secret ballot with proportional representation.”<sup>29</sup>

In Haiti, the residents of Port-au-Prince are guaranteed the right to vote for and be represented by members of the House of Deputies and Senate in the country’s parliament.<sup>30</sup> Article 89 of the Constitution of 1987 of Haiti states that “[t]he House of Deputies is a body composed of members elected by direct suffrage by the citizens . . . .” Article 94 states “[t]he Senate is a body composed of members elected by direct suffrage of the citizens.”<sup>31</sup>

In Guyana, the residents of Georgetown enjoy the right to participate in the fifty-three-member National Assembly.<sup>32</sup> Article 59 of the Constitution of the Co-operative Republic of Guyana states that, “every person may vote at an elec-

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23 *Id.* at art. 54.

24 *Constitucion Politica de los Estados Unidos Mexicanos [C.P.]*, *as amended*, *Diario Oficial de la Federacion [DO]*, 5 de Febrero de 1917 (Mex.), *available at* <http://www.ilstu.edu/class/hist263/docs/1917const.html#SectionI>. (Contact author for website information).

25 *Id.* at art. 51.

26 *Id.* at art. 52.

27 *Id.* at art. 56.

28 *Constitution of the Bolivarian Republic of Venezuela*, *available at* [http://www.analitica.com/bitlioteca/venezuela/constitucion\\_ingles.pdf](http://www.analitica.com/bitlioteca/venezuela/constitucion_ingles.pdf) (last visited July 26, 2010).

29 *Id.* at art. 186.

30 *Constitution of 1987: The Republic of Haiti*, <http://www.constitution.org/cons/haiti.htm> (last visited July 26, 2010).

31 *Id.* at art. 94.

32 *Constitution of the Co-Operative Republic of Guyana*, <http://www.constitution.org/cons/guyana.htm> (last visited July 26, 2010).



tion if he is of the age of eighteen years or upwards and is either a citizen of Guyana or a Commonwealth citizen domiciled and resident in Guyana.”<sup>33</sup>

In Cuba, the residents of Havana have the right to voting representation in the National Assembly of People’s Power.<sup>34</sup> Article 71 of the Constitution of the Republic of Cuba provides that “[t]he National Assembly of People’s Power is comprised of deputies elected by free, direct and secret vote, in the proportion and according to the procedure established by law.”<sup>35</sup>

In Canada, residents living in the capital city of Ottawa in the province of Ontario possess the right to vote for members of Parliament of Canada in the House of Commons on a basis equal to those citizens living in the other provinces. Article 3 of the Consolidation of Constitution Acts of Canada and the Canadian Charter of Rights and Freedoms states “[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”<sup>36</sup>

Such examples of state practice and *opinio juris* in the Western Hemisphere regarding the right to representation in the national legislature are highly suggestive of the existence of, at the very least, a “regional” customary law, binding among the states, *inter se*, supported if not in fact, then by America’s acquiescence.

#### E. *State Practice and opinio juris in Europe*

In Belgium, the citizens of the federal district of Brussels are provided representational rights in the Belgian Federal Parliament. Article 61 of the Constitution of Belgium provides that “[t]he members of the Chamber of Representatives are elected directly by citizens who have completed the age of eighteen and who do not fall within the categories of exclusion stipulated by law. Each elector has the right to only one vote.”<sup>37</sup> Article 64 stipulates that “[t]o be eligible, one must: 1, be Belgian; 2, enjoy civil and political rights; 3, have completed the age of twenty-one; 4, be legally resident in Belgium. No other condition of eligibility can be required.”<sup>38</sup> Regarding Senate representation, Article 67(1)(2) states “the Senate is made up of seventy-one senators, of whom: at least one of the senators . . . [from the Dutch electoral college, the Council of the Flemish Community, or appointed by the senators] is to be legally resident, on the day of his election, in

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33 *Id.* at art. 59.

34 The Constitution of the Republic of Cuba, [http://www.cubanel.org/ref/dis/const\\_92\\_e.htm](http://www.cubanel.org/ref/dis/const_92_e.htm) (last visited July 26, 2010).

35 *Id.* at art. 71.

36 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

37 1994 CONST. art. 61 (Belg.), <http://www.fed-parl.be/gwuk0004.htm#E11E4> (last visited July 26, 2010).

38 *Id.* at art. 65.

the bilingual region of Brussels-Capital” and at least six senators from the French electoral college, Council of the French Community, or appointed by the senators “are to be legally resident, on the day of their election, in the bilingual region of Brussels-Capital.”<sup>39</sup>

In Germany, citizens residing in the city-state of Berlin are also afforded full voting rights in the Bundestag. Article 38(1)(2)(3) of the Basic Law for the Federal Republic of Germany stipulates “[m]embers of the German Bundestag shall be elected in general, direct, free, equal, and secret elections . . . . Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected. Details shall be regulated by a federal law.”<sup>40</sup>

In Austria, the capital city residents of Vienna are also guaranteed such rights in the Österreichisches Parliament. Article 26(1) of the Austria Constitution sets out “[t]he House of Representatives is elected by the nation in accordance with the principles of proportional representation on the basis of equal, direct, secret, and personal suffrage for men and women who have completed their nineteenth year of life on a day appointed prior to the election.”<sup>41</sup> Article 34(1)(2) specifies “the States are represented in the Senate in proportion to the number of nationals in each of them . . . . However, every State is entitled to a representation of at least three members.”<sup>42</sup>

In England, the population of London, which is part of a unitary system, is entitled to enjoy parliamentary voting rights and representation in the House of Commons of the Parliament of the United Kingdom of Great Britain and Northern Ireland. *Statutory Instruments 2007, No. 1681, Representation of the People, England Redistribution of Seats, the Parliamentary Constituencies (England) Order 2007* prescribes in Section 2(1)(a) that “England shall be divided into the parliamentary constituencies . . . which are named in . . . the Table in the Schedule to this Order . . . . [the] Name, Designation and Composition of Constituencies in England . . . [of] Greater London,” including 73 Greater London constituencies (voting districts).<sup>43</sup>

In Sweden, the citizens of the capital of Stockholm, also a unitary system, have the right to representation in the Riksdag, the National Diet of Sweden. Under

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39 *Id.* at art. 67.

40 GRUNDGESETZ FÜR DIE BUNDESRPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I (Ger.).

41 BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] BGBl. No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl. I No. 100/2003, art. 26, ¶ 1 (Austria), *available at* <http://www.servat.unibe.ch/icl/au00000.html>. (Contact author for website information).

42 *Id.* at art. 34, ¶1(2).

43 The Parliamentary Constituencies Order No. 1681, 2007, § 2(1), *available at* [http://www.opsi.gov.uk/si2007/uksi\\_20071681\\_en\\_1](http://www.opsi.gov.uk/si2007/uksi_20071681_en_1), (Eng.) (Contact author for details on access procedure). *See also* Greater London Authority, 5, [www.parliament.uk/commons/lib/research/notes/snpc-02208.pdf](http://www.parliament.uk/commons/lib/research/notes/snpc-02208.pdf) (last visited July 26, 2010). (Contact author for website information).

Chapter 3, the Riksdag, of the Constitution of Sweden, Instrument of Government, Chapter 3, Article 2 affirms “[e]very Swedish citizen who is currently domiciled within the Realm or who has ever been domiciled within the Realm is entitled to vote in a Riksdag election.”<sup>44</sup>

No state in the 27 member European Union restricts the right of any citizen domiciled in the capital city to vote in the national legislature by virtue of their residency. Thus, all European states, in addition to all states in the Americas (except for the United States), incorporate, either in constitutional or statutory law, the right of capital citizens to vote in national decision-making bodies as a matter of law, and not “as a matter of courtesy or habit.”<sup>45</sup> This survey clearly buttresses the case for the right of representation having emerged as a rule of customary law. This same state practice and *opinio juris* is revealed also in a brief overview of Central Asia states.

#### F. *State Practice and opinio juris in Central Asia*

In Latvia, citizens of Riga are endowed with full representative voting rights in the 100 member Saeima,<sup>46</sup> its Unicameral Parliament. Article 8 of the Constitution of the Republic of Latvia affirms that all citizens are entitled to vote in the national assembly, noting “[a]ll citizens of Latvia who enjoy full rights of citizenship and, who on election day have attained eighteen years of age, shall be entitled to vote;” under Article 9, and “[a]ny citizen of Latvia, who enjoys full rights of citizenship and, who is more than twenty-one years of age on the first day of elections may be elected to [the parliament].”<sup>47</sup>

In Russia, the citizens of Moscow are provided with equal voting rights in the Federal Assembly, electing two delegates to the Federation Council of Russia –comparable to other “federal subjects” of Russia- and deputies to the State Duma.<sup>48</sup> Article 95(2) of the Constitution of the Russian Federation provides the residents of Moscow the right to representation in the Council of the Federation, which “includes two representatives from each subject of the Russian Federation: one from the legislative and one from the executive body of state authority.”<sup>49</sup> Article 97(1) grants “[a] citizen of the Russian Federation over 21 years of age

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44 Regeringsformen [RF] [Constitution] 3:2 (Swed.), available at [http://www.riksdagen.se/templates/R\\_PageExtended\\_\\_\\_6320.aspx](http://www.riksdagen.se/templates/R_PageExtended___6320.aspx) (last visited Dec. 1, 2010).

45 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1987).

46 Constitution of the Republic of Latvia, [http://www.saeima.lv/LapasEnglish/Constitution\\_Visa.htm](http://www.saeima.lv/LapasEnglish/Constitution_Visa.htm) (last visited July 29, 2010). (Contact author for website information).

47 *Id.* at art. 8, 9.

48 KONSTITUTSIIA ROSSIJSKOI FEDERATSII [Konst. RF] [Constitution], available at <http://www.constitution.ru/en/10003000-06.htm>.

49 *Id.* at art. 95(2).

and with the right to participate in elections may be elected deputy of the State Duma.”<sup>50</sup>

In the Ukrainian National Republic, the citizens of Kiev may elect representatives to the unicameral parliament of Ukraine—the Verkhovna Rada.<sup>51</sup> Article 76 of the Constitution of Ukraine provides “[a] citizen of Ukraine who has attained the age of twenty-one on the day of elections, has the right to vote, and has resided on the territory of Ukraine for the past five years, may be a National Deputy of Ukraine.”<sup>52</sup>

In India, the National Capital Territory of Delhi, one of seven Union territories and twenty-eight states entitled to parliamentary representation, elects representatives to both the Council of States and the House of the People.<sup>53</sup> Article 80 of the Constitution of India states the Parliament of the Union, consisting of the Council of States and the House of the People, is composed of “not more than two hundred and thirty-eight representatives of the States [and of the Union territories,]” inclusive of citizens of the National Capital Territory of Delhi.<sup>54</sup> Article 81(b) stipulates “the House of the People shall consist of . . . not more than [twenty members] to represent the Union territories, chosen in such manner as Parliament may by law provide.”<sup>55</sup>

In Pakistan, the people of the Federal City of Islamabad may elect representatives to the Majlis-e-Shoora, the national unicameral parliament, on an equal basis to the people of the provinces and the Federally Administered Tribal Areas.<sup>56</sup> Article 51(1)(a) of the Constitution of Pakistan states that “[t]here shall be three hundred and forty-two seats of the members in the National Assembly . . . . The seats in the National Assembly . . . are allocated to each Province, the Federally Administered Tribal Areas and the Federal Capital,” thus providing citizens of the Federal City of Islamabad representatives in the Majlis-e-Shoora.<sup>57</sup>

### G. *State Practice and opinio juris in Africa*

In Morocco, the voters of Rabat may elect members to the Assembly of Representatives of Morocco directly, and to the House of Councillors indirectly through an electoral college system composed of local authorities, professional

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50 *Id.* at art. 97(1).

51 Constitution of Ukraine, <http://www.rada.gov.ua/const/conengl.htm#r7> (last visited July 29, 2010).

52 *Id.* at art. 76.

53 INDIA CONST., amended by the Constitution (Eighteenth Amendment) Act, 2000, *available at* <http://indiacode.nic.in/coiweb/welcome.html>

54 *Id.* at art. 80.

55 *Id.* at art. 81(b).

56 PAKISTAN CONST., *available at* <http://www.pakistani.org/pakistan/constitution/>.

57 *Id.* at art. 51(1)(a).

chambers and, at the national level, employee representatives.<sup>58</sup> Article 37 of the Constitution of Morocco affords the capital residents of Rabat the right to vote directly for members of the House of the Assembly of Representatives, the law providing they “shall be elected for a six-year term by direct universal suffrage.”<sup>59</sup> Under Article 38, they may also be elected to the House of Councillors through an electoral college system, composed of local authorities, professional chambers and, at the national level, employee representatives.<sup>60</sup>

In Nigeria, Abuja residents in the Federal Capital Territory elect representatives to the Nigerian National Assembly, one to the Senate and two to the House of Representatives.<sup>61</sup> Article 48 of the Constitution of the Republic of Nigeria states that residents of the Federal Capital Territory of Abuja may elect one senator to the Nigerian National Assembly and two to the House of Representatives, as “[t]he Senate shall consist of three Senators from each State and one from the Federal Capital Territory, Abuja.”<sup>62</sup> Article 49 stipulates “the House of Representatives shall consist of three hundred and sixty members representing constituencies of nearly equal population as far as possible, provided that no constituency shall fall within more than one State.”<sup>63</sup>

In Senegal, voters in Dakar may elect deputies to the 150-member National Assembly by direct and universal ballot, and indirectly to the 100-member Senate.<sup>64</sup> Article 3 of the Constitution of the Republic of Senegal states “[n]ational Sovereignty shall belong to the Senegalese people who shall exercise it through their representatives or by way of referendum . . . , [s]uffrage may be direct or indirect . . . , [i]t shall always be universal, equal and secret . . . [and all] Senegalese nationals . . . shall be eligible to vote.”<sup>65</sup>

In South Africa, citizens of the three capital cities, Cape Town (legislative), Bloemfontein (judicial), and Pretoria (administrative), vote for representatives on a national basis in the National Assembly, the lower house of the Parliament of South Africa, and vote for representatives on a provincial basis in the National Council of Provinces, with each capital city voting for their individual provincial delegations.<sup>66</sup> Article 47 of the Constitution of South Africa provides citizens residing in the three capital cities, Cape Town, Bloemfontein, and Pretoria, with voting representatives in the National Assembly on a national basis, stipulating

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58 Constitution of Morocco, <http://www.al-bab.com/maroc/gov/con96.htm> (1996) (last visited July 29, 2010).

59 *Id.* at art. 37.

60 *Id.* at art. 38.

61 CONSTITUTION OF NIGERIA, (1999), <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (last visited July 29, 2010).

62 *Id.* at art. 48.

63 *Id.* at art. 49.

64 Constitution of the Republic of Senegal.

65 *Id.* at art. 3.

66 S. AFR. CONST. 1996, available at [www.info.gov.za/documents/constitution/index.htm](http://www.info.gov.za/documents/constitution/index.htm).

“[e]very citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly.”<sup>67</sup> Article 60 states “[t]he National Council of Provinces is composed of a single delegation from each province consisting of ten delegates” thus ensuring provincial representation.<sup>68</sup>

Exemplifications in Africa also appear to confirm that each state’s practice enshrines the right of national representation for the citizenry of capital cities, consistent with state practice in the Americas, Europe, and Central Asia.

#### H. *State Practice and opinio juris in Asia*

In the Republic of Korea, no limitations are placed on the right of citizens in the capital of Seoul to elect single-member constituencies to the 299-member National Assembly of South Korea.<sup>69</sup> Article 24 of the Constitution of the Republic of Korea guarantees “[a]ll citizens have the right to vote under the conditions prescribed by law.”<sup>70</sup> Article 41(1)(3) declares “[t]he National Assembly is composed of members elected by universal, equal, direct, and secret ballot by the citizens . . . [t]he constituencies of members of the National Assembly, proportional representation, and other matters pertaining to National Assembly elections are determined by law.”<sup>71</sup>

In Malaysia, citizens of the Federal Territory of Kuala Lumpur are represented in the National Parliament. In particular they are appointed two representatives in the Senate, equal in number to the thirteen states, and may elect to the 180-member House of Representatives seven members.<sup>72</sup> Article 45 of the Constitution of Malaysia provides “the Senate shall consist of elected and appointed members as follows . . . two members for each State shall be elected in accordance with the Seventh Schedule; and two members for the Federal Territory of Kuala Lumpur.”<sup>73</sup> Article 46 states “[t]he House of Representatives shall consist of one hundred and eighty elected members . . . [t]here shall be . . . one hundred and seventy-two members from the States in Malaysia as follows . . . seven members from the Federal Territory of Kuala Lumpur.”<sup>74</sup>

In Japan, the residents of Tokyo may vote for representatives in a parallel voting system in the bicameral legislature of the National Diet of Japan, both in the House of Representatives, with single-member constituency and proportional

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67 *Id.* at art. 47.

68 *Id.* at art. 60.

69 Constitution of the Republic of Korea, [http://korea.assembly.go.kr/res/low\\_01\\_read.jsp](http://korea.assembly.go.kr/res/low_01_read.jsp) (last visited August 23, 2010). (Contact author for details on access procedure).

70 *Id.* at art. 24.

71 *Id.* at art. 41(1)(3).

72 Federal Constitution of Malaysia, [confinder.richmond.edu/admin/docs/malaysia.pdf](http://confinder.richmond.edu/admin/docs/malaysia.pdf) (last visited August 23, 2010).

73 *Id.* at art. 45.

74 *Id.* at art. 46.

representation systems, and in the House of Councillors, with local constituency system and proportional representation systems.<sup>75</sup> Article 42 of the Constitution of Japan specifies “[t]he Diet shall consist of two Houses, namely the House of Representatives and the House of Councillors.”<sup>76</sup> Article 43(1)(2) says “[b]oth Houses shall consist of elected members, representative of all the people . . . . [t]he number of the members of each House shall be fixed by law.”<sup>77</sup>

In Indonesia, the voters of the Jakarta Special Capital Region, one of 33 provinces, elect representatives to the 550-member People’s Representatives Councils (Dewan Perwakilan Rakyat: “DPR”), and to the Regional Representatives Council (Dewan Perwakilan Daerah: “DPD”).<sup>78</sup> Article 2 of the 1945 Constitution of the Republic of Indonesia provides the Jakarta Special Capital Region representation in the House of Representatives, stipulating “[t]he People’s Consultative Assembly shall consist of members of the [DPR] augmented by delegates from regional territories and functional groups, in accordance with statutory regulations.”<sup>79</sup> Article 27(1) states “[a]ll citizens, without exception, shall be equal before the law and in government.”<sup>80</sup>

In Singapore, all citizens have the right to elect representatives to the 94-MP, unicameral Singapore Parliament, as single member or Group Representation Constituencies (“GRC’s”).<sup>81</sup> Article 39(1) of the Constitution of the Republic of Singapore declares “[p]arliament shall consist of (a) such number of elected Members as is required to be returned at a general election by the constituencies prescribed by or under any law made by the Legislature.”<sup>82</sup> Article 44(1)(2) mandates that “[m]embers of Parliament shall be persons qualified for election . . . . [and a] person shall be qualified to be elected or appointed as a Member of Parliament if . . . he is a citizen of Singapore.”<sup>83</sup>

### I. *State Practice and opinio juris in Oceania*

In Australia, residents of Canberra, also known as the Australian Capital Territory (“ACT”), enjoy the right to elect representatives to the Senate and to the

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<sup>75</sup> Nihonkoku Kenpō [KENPŌ] [CONSTITUTION], available at <http://history.hanover.edu/texts/1947con.html>.

<sup>76</sup> *Id.* at art. 42.

<sup>77</sup> *Id.* at art. 43(1)(2).

<sup>78</sup> The Constitution of the Republic of Indonesia, [http://www.indonesia-ottawa.org/indonesia/constitution/fourth\\_amendment\\_const.pdf](http://www.indonesia-ottawa.org/indonesia/constitution/fourth_amendment_const.pdf) (last visited August 23, 2010).

<sup>79</sup> *Id.* at art. 2.

<sup>80</sup> *Id.* at art. 27(1).

<sup>81</sup> Parliament of Singapore, <http://www.parliament.gov.sg/AboutUs/Org-MP.htm> (last visited Dec. 1, 2010).

<sup>82</sup> Constitution of the Republic of Singapore, [http://www.servat.unibe.ch/icl/sn00000\\_html](http://www.servat.unibe.ch/icl/sn00000_html) (last visited Aug. 23, 2010). (Contact author for website information).

<sup>83</sup> *Id.* at art. 44(1)(2).

House of Representatives.<sup>84</sup> Section 3(2) of the *Senate (Representation of Territories) Act 1973* states and “[t]he Territories to which this Act applies are the Australian Capital Territory and the Northern Territory of Australia.”<sup>85</sup> Section 4 provides “[e]ach Territory shall be represented in the Senate by two Senators for the Territory directly chosen by the people of the Territory.”<sup>86</sup> Section 4 of the Australian Capital Territory Representation (House of Representatives) Act 1974 prescribes “[f]or the purposes of the *Australian Capital Territory Representation (House of Representatives) Act 1974*, the areas having the boundaries described . . . shall be the two Electoral Divisions of the Territory.”<sup>87</sup>

In New Zealand, Wellington citizens elect a representative in the 122-member House of Representatives, participating in a Mixed Member Proportional (MMP) electoral system, which provides for proportional representation.<sup>88</sup> Section 27 of the *Electoral Act 1993 No 87* [of New Zealand] states that “[t]he House of Representatives shall have as its members those persons who are elected from time to time in accordance with the provisions of the Electoral Act 1956 or this Act, and who shall be known as members of Parliament.”<sup>89</sup> Section 47(1) states “every person who is registered as an elector of an electoral district . . . is qualified to be a candidate and to be elected a member of Parliament, whether for that electoral district, any other electoral district.”<sup>90</sup>

In the Republic of Kiribati, the citizens of South Tarawa, the island nation’s capital and one of 23 electoral districts, have the right to elect representatives to the unicameral House of Assembly, the Maneaba ni Maungatabu, as prescribed

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84 <http://www.aph.gov.au/house/members/mi-state-asp>. (Contact author for website information); see also Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/productsbytopic/8CA5022B2135F162CA256CD0007BEE22?OpenDocument>, (last visited Dec. 1, 2010) (The disproportionate number of representatives allotted among the states, Tasmania, ACT and Northern Territory calls into question the fairness of the distribution of voting rights. While the residents of the states of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia elect 12 Senators, as well as representatives to the House of Representatives, based on population, the residents of the ACT and the Northern Territory elect only two Senators and two representatives to the House. At first blush this may appear reasonable in light of the fact that the population of New South Wales is 6.9 million, Victoria, 5.2 million, and Queensland, 4.2 million, and the population of the ACT is only 340,000, and the Northern Territory a scant 217,000. Yet Tasmania, with a population of 495,000, also elects 12 senators and five representatives to the House).

85 *Senate (Representation of Territories) 1973 Act*, <http://www.foundingdocs.gov.au/scan.asp?sID=1070> (last visited Aug. 23, 2010).

86 *Id.* at sec. 4.

87 *Australian Capital Territory Representation (House of Representatives)*, <http://www.foundingdocs.gov.au/scan.asp?sID=1075> (last visited Aug. 23, 2010).

88 *New Zealand Parliament*, <http://www.parliament.nz/en-NZ/MPP/MPs/MPs/Default.htm> (last visited Dec. 1, 2010). (Contact author for details on access procedure).

89 *Electoral Act 1993*, <http://www.legislation.govt.nz/act/public/1993/0087/4.0/whole.html#DLM308518> (last visited Aug. 23, 2010).

90 *Id.* at sec. 47(1).



in the Elections Ordinance 1977.<sup>91</sup> Article 52 of the Constitution of Kiribati states “[t]here shall be a legislature for Kiribati which shall be known as the Maneaba ni Maungatabu and shall consist of a single chamber.”<sup>92</sup> Article 55 sets out that “a person shall be qualified to be elected as an elected member of the Maneaba ni Maungatabu if . . . he is a citizen of Kiribati . . . [and] attained the age of 21 years.”<sup>93</sup>

In Tuvalu, the citizens of the capital city, Funafuti, elect two representatives in the 12-member Parliament.<sup>94</sup> Article 81(1) of the Constitution of Tuvalu provides that “[p]arliament shall consist of such number of members as is fixed by or under an Act of Parliament . . . .”<sup>95</sup> According to *Electoral Provisions (Parliament) (Amendment No. 2) Act 1997*, Section 15 “[r]egistered electors may vote in contested elections in any electoral district for the electoral districts they are registered.”<sup>96</sup>

Thus, the right to representation appears to be a fundamental human right and is consistently practiced in states by legal obligation; from the island nation of Tuvalu, with a population of 12,000,<sup>97</sup> to the Russian Federation, with a population of 140,000,000;<sup>98</sup> from predominantly Muslim states to predominantly Catholic states; from Southeast Asia to North Africa; everywhere but in the District of Columbia of the United States of America.

While a state-by-state survey is required to analyze in greater depth the voting rights practices of all 193 U.N. members, it appears unlikely that a dissimilar pattern of practice and *opinio juris* will emerge. There exists a de facto case based on preliminary evidence that the curtailment of voting rights in the District of Columbia may be a violation of customary international law.

#### J. Duration of Practice Prior to Becoming Customary Law

It is generally accepted that state practice exercised over even a comparatively brief period of time may create customary law, so long as the practice is “general and consistent,” and reflects a broad international consensus. While no precise

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91 Constitution of Kiribati, [http://www.pacii.org/ki/legis/consol\\_act/cok257/](http://www.pacii.org/ki/legis/consol_act/cok257/) (last visited Aug. 23, 2010).

92 *Id.* at art. 52.

93 *Id.* at art. 55.

94 Constitution of Tuvalu, [http://www.tuvaluislands.com/const\\_tuvalu.htm](http://www.tuvaluislands.com/const_tuvalu.htm) (last visited Aug. 23, 2010); see also Comparative Data, <http://aceproject.org/epic-en/CDCountry?country=TV> (last visited Dec. 1, 2010).

95 *Id.* at art. 81(1).

96 Electoral Provisions (Parliament) (Amendment No. 2) Act 1997 (Act 10 of 1997), available at [www.pacii.org/tv/legis/num\\_act/epn2a1997455.rtf](http://www.pacii.org/tv/legis/num_act/epn2a1997455.rtf)

97 CIA – The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html> (last visited Dec. 1, 2010). (Contact author for details on access procedure).

98 CIA – The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/rs.html> (last visited Dec. 1, 2010). (Contact author for details on access procedure).

science exists permitting an empirical analysis of what does and does not constitute customary law, and a final determination is more legal art than incisive ratiocination, a consensus has emerged that the time necessary for state practice to become customary law has notably and unalterably changed in the post World War II era.

The necessity that state practice take place over an extended period of time before being recognized as *opinion juris* has given way to a more expeditious approach, resulting from the swiftness and ease of modern communications, and the almost instant globalization of contemporary practices. The I.C.J. established the principle of expeditious customary law in the North Sea Continental Shelf Cases, finding that “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law.”<sup>99</sup> *United States v. Maine*<sup>100</sup> has also acknowledged this principle in a case that addressed the doctrine of continental shelf, and is often cited as a model of the acceptance of “instant customary law”<sup>101</sup> in U.S. jurisprudence. The Restatement notes that “[t]he doctrine of the continental shelf became accepted as customary law on the basis of assertions of exclusive jurisdiction by coastal states and general acquiescence by other states.”<sup>102</sup> In light of these two cases, it appears that the pre-World War II era timetable for the development of a rule of international customary law, has been replaced. The evolution of customary law is on a fast track. It would appear now that a mere decade suffices to give rise to customary law.

Such a principle supports the assertion that the right to representation has become a rule of customary law in the form of “expeditious law,” at the very least regarding state practice in the Western Hemisphere, if not global practice. This notwithstanding the fact that the citizens of the Federal District of Brasilia were granted the right to elect three Senators to the Federal Senate, and equal to the Brazilian states –together with a proportionate number of representatives to the Chamber of Deputies- only since 1986. A quarter century of general and consis-

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99 See *Continental Shelf*, 1969 I.C.J. 44, 72 (“The dispute, which was submitted to the Court on 20 February 1967, related to the delimitation of the continental shelf between the Federal Republic of Germany and Denmark on the one hand, and between the Federal Republic of Germany and the Netherlands on the other.”).

100 *United States v. Maine*, 420 U.S. 515 (1975).

101 See *Continental Shelf*, 1969 I.C.J. 44, 72 (“The Truman Proclamation of 1945 was not challenged by governments and was followed by similar claims by other states. The International Law Commission, engaged in codifying and developing the law of the sea during the years 1950-56, avoided a clear position as to whether the continental shelf provisions in its draft convention were codifying customary law or proposing a new development. The provisions were included in the 1958 Convention on the Continental Shelf. It was soon assumed that the doctrine they reflected was part of international law even for states that did not adhere to the Convention.”).

102 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporters notes 2 (1987).

tent state practice in the region suffices even under the narrowest definition of “instant” customary law to create such a right for the people of the whole region.

### K. *State Dissent and Customary Law*

While it is generally recognized that when a state dissents from engaging in a particular state practice during a period when it is developing into a rule of international law it is not bound by it, even after that practice is recognized as customary law by the community of nations, such dissent on principle by demurring states has been infrequent. In any event, the United States has never lodged any such dissent regarding the state practice of full and equal congressional voting rights for the District of Columbia. In fact, the United States has done the opposite.

Acknowledging the gross unfairness of the long-standing constitutional prohibition on full and equal congressional voting rights for the District of Columbia, the U.S. Congress, supported by then-President Jimmy Carter, passed a constitutional amendment designed to secure those rights in 1978, and which would have guaranteed, if passed, that right to the nation’s capital.<sup>103</sup>

Only the reluctance of 22 state legislatures to ratify the amendment doomed it to failure. However, the United States, far from dissenting to a regional, if not worldwide state practice, demonstrated its explicit support for it. Furthermore, historically the United States has been a prime mover on the world stage in efforts to secure fundamental human rights for all people. Eleanor Roosevelt was a leading architect of the U.N. Universal Declaration of Human Rights (“UDHR”), and a representative of the United States in that forum. Article 21 of the UDHR provides for the right of everyone “to take part in the government of his country, directly or through freely chosen representatives.”<sup>104</sup> The United States has never dissented on the substance and content of that declaration of principle. At the very least, the United States has demonstrated its acquiescence in the state practice of granting all citizens the right to representation in the national legislative body, at the regional, if not global, level.<sup>105</sup>

### L. *Ancillary Evidences of State Practices*

The Restatement recognizes multiple sources for proving that a rule of law has developed, including, among others, “judgments and opinions of international judicial and arbitral tribunals . . . judgments and opinions of national judicial tribu-

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103 US Senator Paul Strauss, <http://paulstrauss.org/voting-rights> (last visited Dec. 1, 2010).

104 Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

105 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987) (“[C]ustomary law may be built by the acquiescence as well as by the actions of states [cmt. b] and become generally binding on all states . . .”).

nals . . . [and] the writings of scholar.”<sup>106</sup> It further identifies as secondary sources international agreements as contributive to customary law, inclusive of binding resolutions and declaratory resolutions of international organizations, also commenting that

The contributions of such resolutions and of the statements and votes supporting them to the lawmaking process will differ widely, depending on factors such as the subject of the resolution, whether it purports to reflect legal principles, how large a majority it commands and how numerous and important are the dissenting states, whether it is widely supported (including in particular the states principally affected), and whether it is later confirmed by other practice.<sup>107</sup>

The Restatement also observes that legally binding multilateral international agreements, “open to all states,” may contribute to the maturation of customary law and that “[i]nternational agreements constitute practice of states and as such can contribute to the growth of customary law.”<sup>108</sup> Moreover, “[a] wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law.”<sup>109</sup> Multilateral agreements are commonly utilized in the area of human rights, serving also as a basis for legislation and contributing to customary law. Most importantly, the Restatement emphasizes, “[a] determination as to whether a customary rule has developed is likely to be influenced by assessment as to whether the rule will contribute to international order.”<sup>110</sup>

As set forth in The Restatement:

[A]rticle 38(1)(d) of the Statute of the International Court of Justice . . . does not include resolutions of international organizations among the ‘subsidiary means for the determination of rules of law.’ However, the Statute was drafted before the growth and proliferation of international organizations following the Second World War. Given the universal character of many of those organizations and the forum they provide for the expression by states of their views regarding legal principles, such resolutions sometimes provide important evidence of law.<sup>111</sup>

Finally, in his book *Principles of Public International Law*, Ian Brownlie identifies “[t]he opinions of official legal advisers . . . state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs,

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106 *Id.* § 103(2).

107 *Id.* § 102 reporters notes 2.

108 *Id.* § 102 cmt. i. *See also*, *Continental Shelf*, 1969 I.C.J. 44

109 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. i (1987).

110 *Id.* § 103 cmt. a.

111 *Id.* § 103 reporters notes 2.

and resolutions relating to legal questions in the United Nations General Assembly,” as evidentiary sources.<sup>112</sup> Several such sources follow.

M. *Declaratory Resolutions of International Organizations*

1. The Universal Declaration of Human Rights

Article 21 of the Universal Declaration of Human Rights (“UDHR”) incorporates the positive right of all citizens of all countries “to take part in the government of his country, directly or through freely chosen representatives.”<sup>113</sup> Reinforcing this right to representative equality, Article 1 asserts “[a]ll human beings are born free and equal in dignity and rights.”<sup>114</sup> Moreover, Article 2 stipulates that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . political or other opinion . . . or other status,” such as the fact that the District of Columbia is a federal enclave, and its residents vote consistently in the majority for presidential and local candidates of the Democratic Party.<sup>115</sup> Article 2 further qualifies the right to equality asserting that “no distinction shall be made on the basis of the political . . . [or] jurisdictional . . . territory to which a person belongs, whether it be . . . non-self-governing or *under any other limitation of sovereignty*.”<sup>116</sup>

The significance of the UDHR, as evidence of the emergence of customary law on the right to vote, is recognized in the Restatement. “The United Nations General Assembly in particular has adopted resolutions, declarations, and other statements of principles that in some circumstances contribute to the process of making customary law, insofar as statements and votes of governments are kinds of state practice and may be expressions of *opinio juris*.”<sup>117</sup> Furthermore:

“Declarations of principles” may have greater significance than ordinary resolutions. A memorandum of the Office of Legal Affairs of the United Nations Secretariat suggests that: [I]n view of the greater solemnity and significance of a “declaration,” it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.<sup>118</sup>

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112 IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (Oxford University Press, 7th ed. 2008).

113 UDHR, *supra* note 104, at art. 21.

114 UDHR, *supra* note 104, at art. 1.

115 UDHR, *supra* note 104, at art. 2.

116 UDHR, *supra* note 104, at art. 2 (emphasis added).

117 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporters notes 2 (1987) (citations omitted).

118 *Id.* (citation omitted).

After vigorous review, debate and negotiation, the U.N. General Assembly, of which the United States was a voting member, adopted the UDHR on December 10, 1948.<sup>119</sup> The vote in support of the adoption of the UDHR was unanimous. After the adoption of the UDHR by the General Assembly, it called on U.N. member states “to cause [the UDHR] to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories.”<sup>120</sup> The U.S. Department of State often refers to the UDHR in its annual Country Reports on Human Rights Practices it publishes on its website.<sup>121</sup>

## 2. The Inter-American Democratic Charter

On September 11, 2001, the General Assembly of the Organization of American States (“O.A.S.”) adopted the Inter-American Democratic Charter by acclamation.<sup>122</sup> The United States, acting as a Charter Member of the O.A.S., voted to support it.<sup>123</sup> The principles evinced in the Charter recognize representative democracy for what it is: a vital component of peace and international order. Among other things, the Charter “recognizes that representative democracy is indispensable for the stability, peace, and development of the region, and that one of the purposes of the O.A.S. is to promote and consolidate representative democracy.”<sup>124</sup>

The Inter-American Democratic Charter affirmed that “the participatory nature of democracy in [O.A.S.] countries in different aspects of public life contributes to the consolidation of democratic values and to freedom and solidarity in the Hemisphere” and observed that “the American Declaration on the Rights

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119 General Assembly resolution 217 A (III), *available at* <http://ods.un.org>

120 A United Nations Priority, <http://www.un.org/rights/HRToday/declar.htm> (last visited Dec. 1, 2010). (“An eight-member drafting committee prepared the preliminary text of the Universal Declaration. The committee, chaired by Mrs. Eleanor Roosevelt, widow of the former United States President, agreed on the central importance of affirming universal respect for human rights and fundamental freedoms, including the principles of non-discrimination and civil and political rights . . . . The Commission then revised the draft declaration, in the light of replies from Member States, before submitting it to the General Assembly . . . . The General Assembly, in turn, scrutinized the document, with the 58 Member States voting a total of 1,400 times on practically every word and every clause of the text.”).

121 U.S. Dept. of State Human Rights Reports, *available at*, <http://www.state.gov/g/drl/rls/hrrpt/>

122 The OAS is comprised of 35 States (Antigua and Barbuda, Argentina, Commonwealth of The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Commonwealth of Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, St. Kitts & Nevis, Suriname, Trinidad and Tobago, United States of America, Uruguay, and the Bolivarian Republic of Venezuela).

123 Organization of American States, Inter-American Democratic Charter, Sept. 11, 2001, *available at* [http://www.oas.org/OASpage/eng/Documents/Democratic\\_Charter.htm](http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm).

124 *Id.*

and Duties of Man and the American Convention on Human Rights contain the values and principles of liberty, equality, and social justice that are intrinsic to democracy[.]”<sup>125</sup> Moreover, it noted that “the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society, and recognizing the importance of the continuous development and strengthening of the inter-American human rights system for the consolidation of democracy,” it reiterated that “in the Declaration of Managua for the Promotion of Democracy and Development . . . the member states expressed their firm belief that democracy, peace, and development are inseparable and indivisible parts of a renewed and integral vision of solidarity in the Americas . . . ,” and the “ability of the Organization to help preserve and strengthen democratic structures in the region will depend on the implementation of a strategy based on the interdependence and complementarity of those values[.]”<sup>126</sup> It further emphasized that “in the Declaration of Managua for the Promotion of Democracy and Development, the member states expressed their conviction that the [O.A.S.’s] mission is not limited to the defense of democracy wherever its fundamental values and principles have collapsed,” but that is also extended to calling for “ongoing and creative work to consolidate democracy as well as a continuing effort to prevent and anticipate the very causes of the problems that affect the democratic system of government[.]”<sup>127</sup> The General Assembly resolved to adopt the Inter-American Democratic Charter.<sup>128</sup>

The O.A.S. General Assembly agreed that:

The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. Democracy is essential for the social, political, and economic development of the peoples of the Americas. The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the [O.A.S.]. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry . . . .<sup>129</sup>

It acknowledged that the “[e]ssential elements of representative democracy include . . . respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections . . . and universal suffrage as an expression of the sovereignty of the people.”<sup>130</sup> It further stated that “[i]t is the right and responsibility of all

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125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 Organization of American States, Inter-American Democratic Charter, Sept. 11, 2001, available at [http://www.oas.org/OASpage/eng/Documents/Democratic\\_Charter.htm](http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm).

130 *Id.* at art. 3.

citizens to participate in decisions relating to their own development[.]” that “[t]his is also a necessary condition for the full and effective exercise of democracy[.]” and that “[p]romoting and fostering diverse forms of participation strengthens democracy.”<sup>131</sup> Moreover, the Assembly declared that “[d]emocracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments.”<sup>132</sup> It also maintains that “[m]ember states reaffirm their intention to strengthen the inter-American system for the protection of human rights for the consolidation of democracy in the Hemisphere.”<sup>133</sup>

The Restatement points out that “[d]eclarations interpreting a charter are entitled to considerable weight if they are unanimous or nearly unanimous and have the support of all the principal members.”<sup>134</sup> Such explicit language about the import of representative democracy in the Western Hemisphere argues persuasively that, at a minimum, a “regional” customary law has developed in the Americas on the matter of representational rights, consistent with state practice of every state but the United States, and *opinio juris*.

### 3. European Parliament

In 1989, the European Parliament, the main legislative body of the European Union, adopted a declaratory resolution on fundamental rights and freedoms, called the Declaration of Fundamental Rights. Noting its regard for the shared general principles of law of Member States, case law of the Court of Justice of the European Communities, the UDHR, the *U.N. Covenant on Civil and Political Rights*, together with the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and its Protocols, the parliament resolved under Article 17(1)(2)(3)(4) of the Principles of Democracy that “[a]ll public authority emanates from the people and must be exercised in accordance with the principles of the rule of law;” that “[e]very public authority must be directly elected or answerable to a directly elected parliament[.]” that “European citizens shall have the right to take part in the election of Members of the European Parliament by free, direct and secret universal suffrage[.]” and that “European citizens shall have an equal right to vote and stand for election.”<sup>135</sup>

Moreover, in 2000, the Presidents of the European Parliament, the Council of the European Union, and European Commission, signed the *European Union*

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131 *Id.* at art. 6.

132 *Id.* at art. 7.

133 *Id.* at art. 8.

134 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 reporters notes 2 (1987).

135 Convention for the Protection of Human Rights, <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (last visited Dec. 1, 2010).



*Charter of Fundamental Rights*,<sup>136</sup> which set forth in consolidated text for the first time in the history of the European Union a comprehensive declaration of the civil and political rights of “European citizens and all persons resident in the EU.”<sup>137</sup> The Charter defines the rights of European Union citizens to vote and stand for elections to the European Parliament. Article 39(1)(2) secures that right, stating that “[e]very citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State,” and “[m]embers of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.”<sup>138</sup>

The unanimous adoption of *Declaration of Fundamental Rights and Freedoms* by the European Parliament,<sup>139</sup> and the acceptance of the *European Union Charter of Fundamental Rights* by the Presidents of the European Parliament, the Council of the European Union, and the European Commission, coupled with evidence of the general and consistent state practice of European Union member states and *opinio juris* regarding the right to representation, must be accorded substantial weight and consideration of whether this right to political participation has grown into customary law.

N. *International Organization Agreements Codifying and Developing Human Rights Law as Customary Law*

1. The Charter of the O.A.S.

The Restatement refers to legally binding multilateral international agreements, “open to all states,” as evidence of primary sources of customary law.<sup>140</sup> The United States is a founding member of the O.A.S. and is therefore bound by the terms of its Charter.<sup>141</sup> Among other things, the principles referred to in the O.A.S. Charter are consistent with those enunciated in the Inter-American Dem-

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136 Council of the European Union, available at <http://www.consilium.europa.eu/showPage.aspx?id=242&lang=EN>. (The Council of the European Union, together with the European Parliament, forms the bi-cameral legislative branch of the European Union, and is the main decision-making body of the European Union).

137 Charter of Fundamental Rights of the European Union, 2000/C364/01, Dec. 18, 2000, available at [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm) [hereinafter Charter of Fundamental Rights].

138 Charter of Fundamental Rights, *supra* note 137.

139 The European Parliament is composed of parliamentarians elected by 27 countries (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom).

140 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. f (1987).

141 Charter of the Organization of American States, available at [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm).

ocratic Charter and endowed with the terminology of *opinio juris*. They affirm that the purpose of the organization is to “consolidate representative democracy” in the Western Hemisphere. Article 2 states that “in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations,” the O.A.S. stated that its essential purposes include “promot[ing] and consolidate[ing] representative democracy.” and “promoting and encouraging respect for human rights and . . . fundamental freedoms for all” as set forth under Article 1(3) of the U.N. Charter.<sup>142</sup> The O.A.S. Charter, under Article 3(d), declares that the “solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.”<sup>143</sup>

The O.A.S. Charter also attests that one of the central organs of the O.A.S., the Inter-American Commission on Human Rights (“IACHR”), shall “promote the observance and protection of human rights.”<sup>144</sup> The IACHR is composed of a panel of eminent international legal scholars and experts elected by the O.A.S. General Assembly. The central human rights instruments of the O.A.S. are the *American Declaration of the Rights and Duties of Man* and the *Inter-American Convention on Human Rights*, which, according to the IACHR, define the human rights referred to in the Charter binding on O.A.S. states. The *American Declaration of the Rights and Duties of Man* provides under Article 2 the right to equality: “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”<sup>145</sup> Under Article 20 the right to vote and to participate in government is addressed: “[e]very person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”<sup>146</sup>

In 2003, after 11 years of litigation between the Statehood Solidarity Committee and the United States Government, the IACHR issued REPORT N° 98/03 CASE 11.204 STATEHOOD SOLIDARITY COMMITTEE UNITED STATES.<sup>147</sup> The report concluded that as a result of the denial of the right of the

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142 Charter of the Organization of American States, *supra* note 141, at chap. I, art. 2(b).

143 Charter of the Organization of American States, *supra* note 141, at chap. I, art. 3(d).

144 Charter of the Organization of American States, *supra* note 141, at chap. XV, art. 106.

145 OAS Declaration of the Rights and Duties of Man, [http://www.hrcr.org/docs/OAS\\_Declaration/oasrights3.html](http://www.hrcr.org/docs/OAS_Declaration/oasrights3.html). (last visited Dec. 1, 2010).

146 *Id.* at art. 20.

147 *Id.* (In its summary, the report states “[o]n April 1, 1993, the Inter-American Commission on Human Rights (the “Commission”) received a petition from Timothy Cooper on behalf of the Statehood Solidarity Committee (the “Petitioners”) against the Government of the United States (the “State” or “United States”). The petition indicated that it was presented on behalf of the members of the Statehood Solidarity Committee and all other US citizens resident in the District of Columbia.”).

citizens of the District of Columbia to enjoy equal political participation in the U.S. House of Representatives and the U.S. Senate, “the State is responsible for violations of the Petitioners’ rights under Articles II and XX of the American Declaration by denying them an effective opportunity to participate in their federal legislature.”<sup>148</sup> The IACHR then recommended that “Petitioners [be provided] an effective remedy, which includes adopting the legislative or other measures necessary to guarantee [them] the effective right to participate, directly or through freely chosen representatives and in general conditions of equality, in their national legislature.”<sup>149</sup> To date the United States has failed to comply with the Commission’s recommendations.

It should be recalled that the Restatement supports the view that “to the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is” and that “[j]udgments and opinions of international tribunals generally are accorded more weight than those of domestic courts, since the former are less likely to reflect a particular national interest or bias.”<sup>150</sup> The United States has also signed, but not ratified, the IACHR, which stipulates under Article 23 that “every citizen shall enjoy the . . . [right] to take part in the conduct of public affairs, directly or through freely chosen representatives[,] to vote and to be elected in genuine periodic elections . . . , and to have access, under general conditions of equality, to the public service of his country.”<sup>151</sup> Under Article 24, “[a]ll persons are equal before the law . . . [and c]onsequently, they are entitled, without discrimination, to equal protection of the law.”<sup>152</sup>

However, Article 18 of the *Vienna Convention on the Law of Treaties, 1969*, which is legally binding on the United States, obligates every state not to defeat the “object and purpose” of the treaty “prior to its entry into force,” when “it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification.”<sup>153</sup>

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148 Inter-American Commission on Human Rights Statehood Solidarity Comm. U.S. Report N°. 98/03, Case 11.204, available at <http://www.cidh.oas.org/annualrep/2003eng/USA.11204.htm> (Report, at 1).

149 *Id.*

150 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. b (1987).

151 American Convention on Human Rights, Nov. 22, 1969, available at <http://www.cidh.org/basicos/english/Basic3.American%20Convention.htm>.

152 *Id.* at art. 24.

153 Vienna Convention on the Law of Treaties, 1969, May 23, 1969, U.N.T.S., vol. 1155, p.331, available at [untreaty.un.org/ilc/texts/instruments/.conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/.conventions/1_1_1969.pdf). (Contact author for details on access procedure).

## 2. The Council of Europe

Forty-seven European and Central Asian states are members of the Council of Europe (“C.O.E.”), as distinct from the European Union. As of 2009, each participating member has ratified the *European Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 1)*.<sup>154</sup> Article 3 of the *Convention Protocol 1 (Enforcement of certain Rights and Freedoms not included in Section I of the Convention adopted in 1952)* provides, *inter alia*, that “[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”<sup>155</sup>

The Convention is legally binding on all signatory states, and enforceable under Article 38 of the Convention by the European Court of Human Rights. The right to representation granted under the European Convention’s Protocol is consistent with general state practice and *opinio juris* in the region, providing evidence a rule of customary law exists, at least at the regional level, regarding that right.

## 3. *Matthews v. The United Kingdom*

As noted above, international judicial decisions also provide evidence of customary law. In 2000, the European Court of Human Rights held in *Matthews v. The United Kingdom* that a British citizen living in Gibraltar was denied the right to stand for election in the European Parliament under Article 3 of Protocol 1 of the *European Convention on Human Rights*.<sup>156</sup> Though Gibraltar was a part of the European Union, it had never had the right to vote in Parliamentary elections. Article 3 provides for the right to regular, free and fair elections “under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”<sup>157</sup>

The petitioner had complained that the prohibition prevented her from participating in elections to choose the legislature of the European Parliament and was

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154 Council of Europe, <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG> (last visited Dec. 1, 2010). (The Council of Europe is made up of 47 states (Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom).)

155 The European Convention on Human Rights, Nov. 4, 1950, *available at* <http://www.hri.org/docs/ECHR50.html> [hereinafter European Convention].

156 *Matthews v. The United Kingdom*, Application No. 24833/94, (1999), *available at* <http://webcitation.org/5IWx37qMR>.

157 European Convention, *supra* note 155, protocol 1, art. 3.

therefore a violation under Article 3 of Protocol No. 1.<sup>158</sup> The European Court found that the petitioner had been denied any opportunity to express her opinion in the choice of members of the European Parliament, despite the fact that, as the Court had found, legislation that emanated from the European Community forms part of the legislation in Gibraltar and the applicant is directly affected by it.

The very essence of the applicant's right to vote to choose the legislature, as guaranteed under Article 3 of Protocol No. 1, had been denied.<sup>159</sup> Thus, the provision had been violated. The European Court of Human Rights' decision in *Matthews v. The United Kingdom* is consistent with the IACHR's decision in *Statehood Solidarity v. the United States*.

#### 4. The Organization for Security and Cooperation in Europe

The United States is also a founding member of the Organization for Security and Cooperation in Europe ("OSCE"), formerly known as the Conference for Security and Cooperation in Europe ("CSCE").<sup>160</sup> The CSCE rose out of a two-year, bi-lateral conference among Warsaw Pact and Western nations, culminating in the unanimous adoption by those states of the Helsinki Act in 1975, which enunciated the vital principles of the CSCE, and which, after the conclusion of the Cold War, became known as the OSCE at the Budapest Summit in 1994.<sup>161</sup> The OSCE, a "de facto" 55-member international organization<sup>162</sup> that meets regularly on security and human rights issues affecting those states,<sup>163</sup> considers the

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158 *Matthews v. The United Kingdom*, Application No. 24833/94, (1999), available at <http://webcitation.org/51Wx37qMR>.

159 *Id.*

160 Conference on Security and Co-Operation in Europe Final Act (1975), [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf)

161 Fourth Heads of State Summit, <http://www.osce.org/item/15849.html> (last visited Dec. 1 2010).

162 Eric Manton, *The OSCE Human Dimension and Customary International Law Formation*, available at [http://www.osce.org/documents/odih/2006/01/36428\\_en.pdf](http://www.osce.org/documents/odih/2006/01/36428_en.pdf). (Eric Manton notes "[t]he new OSCE possesses many of the traits one expects of an international organization including recognition as a 'regional arrangement' under Chapter VIII of the UN Charter and Observer Status in the General Assembly of the UN, in spite of the fact that it still does not have a founding charter, and thus is arguably not an international legal entity.").

163 Conference on Security and Co-Operation in Europe Final Act, *supra* note 160. (The CSCE was attended by "High Representatives" of 35 states, including Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia. The second stage of the Conference was attended by six non-participating Mediterranean States as well, including the Democratic and Popular Republic of Algeria, the Arab Republic of Egypt, Israel, the Kingdom of Morocco, the Syrian Arab Republic, Tunisia. These states offered contributions and made statements.)

human rights commitments of its participating states to be “matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned.”<sup>164</sup> However:

The OSCE has a unique status. On the one hand, it has no legal status under most of its instruments, decisions and commitments are framed in legal language and their interpretation requires an understanding of the principles of international law and of the standard techniques of the law of treaties. Furthermore, the fact that OSCE commitments are not legally binding does not detract from their efficacy. Having been signed at the highest political level, they have an authority that is arguably as strong as any legal statute under international law.<sup>165</sup>

The Helsinki Final Act asserts that “the participating States will respect human rights and fundamental freedoms . . . promote and encourage the effective exercise of civil, political . . . and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.”<sup>166</sup> It continues by stating that:

[I]n the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights . . . . [A]nd fulfill their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound.<sup>167</sup>

In addition, signatory countries agreed to “fulfill in good faith their obligations under international law, both those obligations arising from the generally recognized principles and rules of international law and those obligations arising from treaties or other agreements, in conformity with international law, to which they are parties.”<sup>168</sup>

The I.C.J. referenced the Helsinki Final Act in the Nicaragua Case as evidence of *opinio juris*, thus, “opening up the possibility that the Final Act and perhaps also other OSCE documents may qualify as customary international law,” posits Eric Manton.<sup>169</sup> Citing Arie Bloed, he argues that:

The binding force of these documents is not seriously doubted. Van Dijk correctly states: “[a] commitment does not have to be legally binding in order to have binding force; the distinction between legal and non-legal

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164 Manton, *supra* note 162, at 1 n.4.

165 Manton, *supra* note 162, at 4 (footnote omitted).

166 Helsinki Final Act, August 1, 1975, available at <http://www.hri.org/docs/Helsinki75.html>.

167 *Id.*

168 *Id.*

169 Manton, *supra* note 162, at 5 (footnotes omitted).

binding force resides in the legal consequences attached to the binding force,” not in the binding force as such. Violation of politically, but not legally binding agreements is as inadmissible as any violation of norms of international law. In this respect there is no difference between politically and legally binding rules.<sup>170</sup>

Manton maintains that:

OSCE documents are . . . eligible as evidence of state practice. The qualifiers of type of language and proportion of support for the resolutions are met as OSCE documents usually use mandatory terminology, express obligations, and are accepted unanimously. In addition, due to the shortened required time to demonstrate consistent state practice . . . , and while the OSCE commitments have been around for over 25 years in the Helsinki Final Act, many of the most progressive commitments have been developed since the end of the Cold War. Thus Stuart Ford would be correct in saying: “[s]tretching as they do over a period of nearly ten [now twenty] years, these declarations are evidence of a general state practice consistent with OSCE principles.”<sup>171</sup>

In 1989, the Concluding Document of the Vienna Meeting of the CSCE issued a similar resolution to the Helsinki Final Act regarding the assembly’s principles, in which all of the participating states, including the United States, “express their determination to guarantee the effective exercise of human rights and fundamental freedoms, all of which derive from the inherent dignity of the human person and are essential for his free and full development . . . [and] recognize that civil, political . . . and other rights and freedoms are all of paramount importance and must be fully realized by all appropriate means.”<sup>172</sup> It went on to declare that the participating states agreed to “ensure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind” and to “ensure that no individual exercising, expressing the intention to exercise or seeking to exercise these rights and freedoms or any member of his family, will as a consequence be discriminated against in any manner.”<sup>173</sup>

In 1990, the CSCE met again to expand on the human rights principles and obligations of member states. The concluding document, known as the *Copenhagen Document 1990*, incorporated both the principles and the human rights commitments the 35 convening CSCE States, including the United States, promised

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170 Manton, *supra* note 162, at 5-6 (footnote omitted).

171 Manton, *supra* note 162, at 8 (footnotes omitted).

172 Concluding Document of the Vienna Meeting of the CSCE, Jan. 19, 1989, *available at* <http://web.archive.org/web/19990220113731/http://www.osceprag.cz/docs/chronos.htm>.

173 *Id.* at 8.

to observe.<sup>174</sup> The CSCE reaffirmed the principles first articulated in the Helsinki Final Act and subsequent Vienna 1989 document, expressing “their conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice . . .” and “reaffirm[ed] their commitment to implement fully all provisions of the Final Act and of the other CSCE documents relating to the human dimension [human rights].”<sup>175</sup>

Article 1(4) of the *Copenhagen Document* states that participating States will “ensure that their laws . . . conform with their obligations under international law and are brought into harmony with the provisions of the Declaration on Principles and other CSCE commitments.”<sup>176</sup> Article 1(5) asserts that “among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following: free elections that will . . . ensure in practice the free expression of the opinion of the electors in the choice of their representatives[.]”<sup>177</sup> Article 1(6) states that “the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government . . . [and that t]he participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes.”<sup>178</sup>

Further:

To ensure that the will of the people serves as the basis of the authority of government, the participating States will . . . permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote . . . . guarantee universal and equal suffrage to adult citizens . . . [and] respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination . . . .<sup>179</sup>

Again, quoting Manton arguing OSCE human dimension standards constitute hard “soft law” that qualifies as *opinio juris*:

The OSCE human dimension (documents, commitments, instruments) is a *de facto* treaty regime, as it is founded on *pacta sunt servanda* –on the good faith of the participating States. It is a treaty in the sense that there are

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174 Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, (June 29, 1990), [http://www.osce.org/documents/odihr/1990/06/13992\\_en.pdf](http://www.osce.org/documents/odihr/1990/06/13992_en.pdf). [hereinafter Copenhagen].

175 Copenhagen, *supra* note 174.

176 Copenhagen, *supra* note 174 at art. 1(4).

177 Copenhagen, *supra* note 174 at art. 1(5).

178 Copenhagen, *supra* note 174 at art. 1(6).

179 Copenhagen, *supra* note 174 at art. 1(7).



legitimate expectations among the States that each will be in good faith, but this *de facto* contractual agreement does not address merely a single document, but rather the OSCE process as a whole. This intention to act in good faith in a *de facto* contractual agreement (combined with its “hard” obligations and binding force), may thus amount to evidence of *opinio juris*.<sup>180</sup>

Thus, the *Copenhagen Document 1990*, together with other relevant OSCE documents and commitments, has been unanimously adopted by consensus by 56 OSCE participating States.<sup>181</sup> These documents enshrine the fundamental right to political participation for all people, and may now, twenty years after their adoption, provide an important supplementary source of customary law (in the form of a regional European/Central Asian customary law) stemming from the state practice and *opinio juris* of the states, and acquiesced to by the United States, a participating member of the OSCE.

##### 5. Expressions of Concern Under the *Copenhagen Document 1990* by the OSCE/ODIHR on D.C. Voting Rights

The OSCE has expressed serious concerns about the denial of voting rights to the residents of the District of Columbia. The Office of Democratic Institutions and Human Rights (“ODIHR”)<sup>182</sup> issued its final report on the 2004 U.S. presidential elections, expressing serious concern about the failure of the United States to meet its obligations under the OSCE *Copenhagen Document* in this regard.<sup>183</sup> The OSCE report observed that:

[T]he U.S. constitutional framework grants full representation and voting rights in elections for federal office to U.S. citizens, who are also citizens of individual states. However, to varying degrees, these rights are limited for

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180 Manton, *supra* note 162 at 17 (footnotes omitted).

181 The 56 OSCE participating States are Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark; Estonia, Finland, France, Georgia, Germany, Greece, Holy See, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, The former Yugoslav Republic of Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, United States of America, and Uzbekistan.

182 See Office for Democratic Institutions and Human Rights, <http://www.osce.org/odihr/13421.html> (last visited Dec. 1, 2010) (The ODIHR is a “specialized institution of the OSCE dealing with elections, human rights, and democratization.”).

183 UNITED STATES OF AMERICA GENERAL ELECTIONS, OSCE/ODIHR, Warsaw, Pol. (Nov. 2, 2004). Democracy First, a Washington, DC-based NGO, intervened on behalf of the District of Columbia in 1992, 1993, 1994, and 1995, before OSCE Human Dimension Implementation Meetings in Warsaw, Poland, calling on the OSCE to intervene.

citizens of other U.S. jurisdictions, such as Washington, D.C. Ensuring equal voter rights is a fundamental OSCE commitment.<sup>184</sup>

On March 9, 2007, the OSCE/ODIHR issued its U.S. 2006 mid-term congressional elections report, concluding similarly to its 2004 report that United States Government policy concerning District residents was inconsistent with OSCE human rights standards. The OSCE report stated that:

U.S. citizens who are not citizens of one of the fifty states are not able to vote for members of Congress and do not have the right to vote on the floor . . . . These restrictions exist even though such U.S. citizens are subject to U.S. federal law and pay federal taxes . . . . [It is] estimated that in Washington D.C. alone, without including U.S. citizens of U.S. territories, up to half a million U.S. citizens are not permitted to vote in federal elections for full congressional representation. As these citizens are subject to U.S. laws, including taxation, the denial of full representation, as underscored by the Constitution and Supreme Court decisions, would appear to be a limitation of voting rights.<sup>185</sup>

The OSCE/ODIHR further recommended that U.S. authorities should consider all possibilities to provide full representation rights for all U.S. citizens.<sup>186</sup>

On March 13, 2009 the OSCE/ODIHR issued its U.S. 2008 presidential election report, concluding similarly to its 2006 report that “[s]ome 600,000 residents of Washington D.C. are entitled to vote only for Electors, i.e. for the President and the Vice-President as if the District of Columbia was a state, but are not represented in Congress by representatives with full voting rights.”<sup>187</sup> It added:

The D.C. Court of Appeals rejected the “taxation without representation” argument in *Green v. D.C.* [1966]. In *Adams v. Clinton* [2002] the D.C. Court of Appeals said that voting rights were a matter for legislative, not judicial relief. The U.S. Supreme Court refused to reconsider this ruling. This effectively closes the judicial approach to voting rights for D.C. residents for the near future. A draft bill to address the issue was passed by the House in 2007 but is yet to be passed by the Senate. The OSCE Parliamentary Assembly, in its 2005 Washington Declaration, called on the U.S.

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184 *Id.* at 2.

185 UNITED STATES OF AMERICA MID-TERM CONGRESSIONAL ELECTIONS, 7 November 2006, OSCE/ODIHR, Warsaw, Poland.

186 *Id.* at 19-20.

187 UNITED STATES OF AMERICA GENERAL ELECTIONS, 4 November 2008, OSCE/ODIHR Limited Election Observation Mission Final Report, Issued on March 13, 2009, Warsaw, Poland, *available at* <http://www.osce.org/odihr-elections/documents.html?lsi=true&limit=10&grp=221> (last visited Dec. 1, 2010).

Congress to adopt “such legislation as may be necessary to grant the residents of Washington D.C., equal voting rights.”<sup>188</sup>

The OSCE reiterated its previous recommendation to the United States that “[c]onsideration should be given for providing full representation rights in Congress for all U.S. citizens, including those of Washington, D.C. and U.S. territories.”<sup>189</sup>

#### 6. Expressions of Concern Under the 1990 Copenhagen Documents by the OSCE Parliamentary Assembly on D.C. Voting Rights

In 2005, the OSCE Parliamentary Assembly (“PA”), composed of 320 members from 55 parliaments, assembled in Washington, D.C. and passed a unanimous resolution calling on the U.S. Congress to grant equal congressional voting rights to Washingtonians; i.e., one member of the U.S. House of Representatives and two representatives in the U.S. Senate. The PA resolution called “on the Congress of the United States to adopt such legislation as may be necessary to grant the residents of Washington, D.C. equal voting rights in their national legislature in accordance with its human dimension commitments.”<sup>190</sup> Such declarations by legal scholars, human rights experts, and democratic practitioners, authoritative interpreters of international human rights law, further serve to codify and develop customary international law.

#### 7. The African Union

The Constitutive Act of the African Union, which established the African Union (“AU”) in 2000 (and replaced the Organization of African Unity), creates legally binding commitments on the part of member states.<sup>191</sup> Like the O.A.S., the EU, the COE, and the OSCE, the objectives of the AU run parallel regarding support for principles of representative democracy and the right for all citizens to vote through duly elected representatives in the national legislature of one’s country.

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188 *Id.* at 8 n.16.

189 *Id.* at 32.

190 The OSCE Parliamentary Assembly’s resolution language was authored by the NGO, Worldrights.

191 <http://www.africa-union.org/root/AU/memberstates.map.htm> (Contact author for website information). 53 African nations have also endorsed the Constitutive Act (Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Rep., Cape Verde, Chad, Côte d’Ivoire, Comoros, Congo, Djibouti, Democratic Rep. of Congo, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Lesotho, Liberia, Madagascar, Mali, Malawi, Mozambique, Mauritania, Mauritius, Namibia, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Seychelles, Sierra Leone, Somalia, Sao Tome & Principe, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe).

The objectives of the AU include 1) the “[e]ncourage[ment of] international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;” and 2) the “[p]romot[ion] and protect[ion of] human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.”<sup>192</sup> Under Article 4 of the Constitutive Act, AU State members also agree to function according to certain principles, including “[r]espect for democratic principles, human rights, the rule of law and good governance.”<sup>193</sup>

The Constitutive Act also refers to the *African Charter on Human and People’s Rights* (“*African Charter*”).<sup>194</sup> Article 13 of the *African Charter* establishes that “[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law” and also that “[e]very citizen shall have the right of equal access to the public service of his country.”<sup>195</sup> All AU States have ratified the *African Charter*.<sup>196</sup> The commitments undertaken by AU States to respect human rights in accordance with the *African Charter*, consistent with the UDHR, both of which provide for equal representation in the national legislatures of African states, reinforces the argument that state practice in Africa contributes to customary international law.

When taking into account European and Central Asia state practice, as well as state practice in Oceania, it appears as though a general and consistent state practice followed from a sense of legal obligation on the fundamental right to vote in the national legislature of one’s own country has emerged in the Eastern Hemisphere as well as in the Western hemisphere, thus contributing to the codifying and development of customary law worldwide.

#### O. *Other International Covenants Codifying and Developing Customary Law*

The Restatement acknowledges that a broad network of complimentary multilateral agreements, commonly used in the field of international human rights law, constitute state practice and support the growth and development of customary law.<sup>197</sup> And while, the *American Declaration of the Rights and Duties of Man*, the *Inter-American Convention on Human Rights*, the *European Convention for the*

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192 Constitutive Act of the African Union, available at [http://www.au2002.gov.za/docs/key\\_oau/au\\_act.htm](http://www.au2002.gov.za/docs/key_oau/au_act.htm) (last visited Dec. 2, 2010).

193 *Id.* at art. 4.

194 *Id.* at art. 3.

195 African Charter on Human and People’s Rights, <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf>. (Contact author for website information).

196 See African Union, <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (last visited Dec. 2, 2010).

197 See, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

*Protection of Human Rights and Fundamental Freedoms and its Protocols*, the *European Union Charter of Fundamental Rights*, the *Copenhagen Document 1990*, and the *African Charter* provide other important examples of multilateral accords that have been ratified by states at the regional, hemispheric level, and demonstrate evidence of state action and practice,<sup>198</sup> two other major international human rights treaties, the *International Covenant on Civil and Political Rights* (“ICCPR”) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (“ICERD”), provide additional evidences of state practice at the global level.<sup>199</sup>

Both treaties are legally binding on signatory states and provide for the right to representation for all citizens in the national legislature of their country. The United States is a signatory to the ICCPR and took no reservations to Article 25 and 26. Under Article 25:

Every citizen shall have the right and the opportunity . . . and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country.<sup>200</sup>

Under Article 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>201</sup>

In 1996, the U.N. Human Rights Committee<sup>202</sup> issued General Comment 25, which defines in detail the contours of Article 25, after the matter of the disen-

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198 Excepted from this list is the UDHR, which serves as a model for the world’s other human rights instruments, and is in fact universal in its acceptance and application.

199 See also, Statement of Timothy Cooper on Behalf of the International Human Rights Law Groups before the 58th Sessions of the UN Commission on Human Rights Under Item 11: Civil and Political Rights, April 16, 2002 available at <http://dcwatch.com/issues/voting04.htm> and <http://world-rights.org/home.htm>.

200 Office of the United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights, opened for signature* December 16, 1966, available at <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR]

201 ICCPR, *supra* note 200, at art. 26.

202 The Human Rights Committee considers periodic compliance reports submitted by member States of the U.N. that have signed and ratified the ICCPR. Committee members are elected by the member states, but serve in their own personal capacity. Committee members recuse themselves

franchisement of the District of Columbia was first presented to the Committee during its 53rd Sessions in New York in 1995.<sup>203</sup>

According to General Comment 25:

Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures, as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.<sup>204</sup>

It further noted that:

The conduct of public affairs . . . is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocations of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by [A]rticle 25 should be established by the constitution and other laws.<sup>205</sup>

Moreover, it stated that:

Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in [A]rticle 25 that those representatives do in fact exercise governmental power, [and that n]o distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political, national or social origin, property, birth or other status.<sup>206</sup>

Further, it maintained that:

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when the Committee considers their own country reports. Article 40 of the ICCPR stipulates that “[t]he States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.”

<sup>203</sup> See Timothy Cooper, WASHINGTON POST, April 1, 1995. The intervention on behalf of the District of Columbia was made by Timothy Cooper, executive director, the Statehood Solidarity Committee.

<sup>204</sup> Human Rights Committee, General Comment 25, available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

<sup>205</sup> *Id.* ¶ 5.

<sup>206</sup> *Id.* ¶ 3, 4.

Any conditions which apply to the exercise of the rights protected by Article 25 should be based on objective and reasonable criteria . . . . The exercise of these rights by citizens may not be suspended or excluded on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.<sup>207</sup>

During the appearance of the United States' delegation to the Human Rights Committee in 1995, U.S. State Department Legal Advisor, Conrad Harper, informed the Committee that the “courts of the [United States] could refer to the Covenant and take guidance from it.”<sup>208</sup>

To date, 165 countries are party to the ICCPR, with 72 additional signatories.<sup>209</sup> U.N. General Assembly Resolution 2200A(XXI) adopted and opened it for signature, ratification and accession in 1966. It entered into force in 1976.<sup>210</sup> Similarly, under ICERD Article 1:

[T]he term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or *effect of nullifying or impairing* the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>211</sup>

Article 2, paragraph 1(c) states that “[e]ach State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have *the effect of* creating or perpetuating racial discrimination wherever it exists[.]”<sup>212</sup> ICERD Article 5 stipulates that:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its form and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (c) Political rights, in particular the rights to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part

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207 *Id.* ¶ 4.

208 Conrad Harper, Legal Advisor of U.S. Department of State, Statement to the United Nations Human Rights Committee, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995).

209 ICCPR, *supra* note 200.

210 ICCPR, *supra* note 200.

211 International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* December 21, 1965, 660 U.N.T.S. 195, *available at* <http://www2.ohchr.org/english/law/icerd.htm> [hereinafter ICERD] (emphasis added).

212 ICERD, *supra* note 211, at art.2, ¶ 1(c) (emphasis added).

in the Government as well as in the conduct of public affairs at any level and to have equal access to public service[.]<sup>213</sup>

The United States is a signatory to ICERD and took no reservations to Article 2 paragraph 1(c) or Article 5. To date, 173 countries are party to ICERD, with 85 additional signatories. U.N. General Assembly Resolution 2106 (XX)2 adopted and opened it for signature, ratification and accession in 1965. It entered into force in 1969.<sup>214</sup>

#### 1. Expressions of Concern Under the ICCPR by the U.N. Human Rights Committee on D.C. Voting Rights

In light of the fact that the ICCPR is legally binding on the United States, and that the U.N. Human Rights Committee is empowered to review U.S. Government compliance under its treaty obligations, the Committee has twice reviewed and twice expressed serious concern about the congressional non-voting status of the District of Columbia.<sup>215</sup> In 1995, the Committee questioned the delegation of the United States when it appeared before the Committee to report on U.S. compliance. Regarding the disenfranchisement of the citizens of the District of Columbia, committee member and international human rights expert Ms. Cecilia Medina Quiroga of Chile sought clarification on the voting rights of D.C. residents.<sup>216</sup>

Mr. Deval Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, responded on behalf of the United States, stating that the District's "delegate" in the U.S. House of Representatives for the District of Columbia enjoyed a "voice" in Congress, but had no right to vote in Congress.<sup>217</sup> Committee member Quiroga responded by stating that although the representative had summarized the status of the District of Columbia's voting right, he did not explain "why."<sup>218</sup>

In 1999, then Vice-Chair of the U.N. Commission on Human Rights, Mr. Francisco Aguillar of Costa Rica, also stated unofficially to Timothy Cooper of the Statehood Solidarity Committee at the United Nations in Geneva, Switzerland that the disenfranchised status of Washingtonians was a violation of internation-

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213 ICERD, *supra* note 211, at art. 5.

214 ICERD, *supra* note 211.

215 Human Rights Committee, <http://www2.ohchr.org/english/bodies/hrc/> (last visited Dec. 2, 2010).

216 Human Rights Committee, *supra* note 204. (The U.N.'s intervention with the official U.S. Delegation to the Human Rights Committee was prompted by testimony before the U.N. Committee by Timothy Cooper of the Statehood Solidarity Committee.)

217 TIMOTHY COOPER, CHRONOLOGY OF MAJOR EVENTS IN THE INTERNATIONAL HUMAN RIGHTS CAMPAIGN ON BEHALF OF EQUAL RIGHTS FOR THE PEOPLE OF WASHINGTON D.C., *available at* [http://world-rights.org/us/dc\\_human\\_rights\\_time\\_line.htm](http://world-rights.org/us/dc_human_rights_time_line.htm).

218 *Id.*



ally recognized human rights standards under the ICCPR. Mr. Aguillar had been the U.N. Human Rights Committee chair in 1995.<sup>219</sup>

In 2005, the U.N. Human Rights Committee again questioned the delegation of the United States when it appeared before them on U.S. compliance on the matter of the disenfranchisement of the citizens of the District of Columbia in the U.S. Congress.<sup>220</sup> Finding that their non-voting status was inconsistent with its treaty obligations, the U.N. Human Rights Committee addressed the issue in its Concluding Observations and Recommendations.

The U.N. Human Rights Committee called on the U.S. Government to grant the residents of Washington, D.C. full representation in Congress, noting that the U.N. Human Rights Committee “remains concerned that residents of the District of Columbia do not enjoy full representation in Congress, a restriction which does not seem to be compatible with article 25 of the covenant.” The Committee recommended that the United States provide the citizens of the District of Columbia, at the very least, the right to representation in the national legislature of the United States with regard to the House of Representatives.<sup>221</sup>

## 2. Expressions of Concern Under the ICERD by the U.N. Committee on the Elimination of Racial Discrimination on D.C. Voting Rights

In light of the fact that the ICERD is legally binding on the United States, and the U.N. Committee on the Elimination of Racial Discrimination (“CERD”)<sup>222</sup> is empowered to review U.S. Government compliance under its treaty obligations, the CERD has twice reviewed and twice expressed serious concern about the congressional non-voting status of the District of Columbia. In 2001, the CERD examined the U.S. compliance report at the U.N. in Geneva, Switzerland.<sup>223</sup> Two legal experts on racial discrimination on the CERD questioned the U.S. practice of curtailing the voting rights of the citizens of the District of Columbia in Congress, particularly in view of the fact that the city’s majority popula-

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219 Human Rights Committee, *supra* note 204.

220 The U.N. Human Rights Committee issued its Concluding Observation on D.C. voting rights based on an intervention by Worldrights, *available at* <http://world-rights.org/home.htm>.

221 See Human Rights Committee, *U.N. Human Rights Committee Calls for Full Representation in Congress for DC Residents*, CCPR/C/USA/Q/3/CRP.4 (July 10-26), *available at* <http://world-rights.org/home.htm>.

222 Office of the United Nations, High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, *monitoring racial equality and non-discrimination*, *available at* <http://www2.ohchr.org/english/bodies/cerd/>.

223 ICERD, *supra* note 211. Article 9 of the ICERD stipulates that: “1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the State concerned; and (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.”

tion is African-American.<sup>224</sup> The rights experts were Ms. Gabriele Britz of Germany and Mr. Mario Jorge Yutzis of Argentina. Mr. Ralph F. Boyd, then U.S. Assistant-Attorney for Civil Rights of the U.S. Department of Justice, defended U.S. government policy, claiming District residents may vote for a non-voting delegate in the House of Representatives. CERD member Mario Jorge Yutzis expressed dissatisfaction with the U.S. delegation's response.

In 2008, the CERD again questioned the delegation of the United States when it appeared before them on U.S. compliance on the matter of the disenfranchisement of the citizens of the District of Columbia. CERD member Mr. Morten Kjaerum of Germany expressed his concern over the prohibition on D.C. voting rights in light of the District's majority African-American population.<sup>225</sup> The U.S. defended the District's absence of congressional voting rights as non-rationally motivated, notwithstanding evidence suggesting that racial animus has contributed to the disenfranchisement of District of Columbia residents for centuries.<sup>226</sup>

A total of nine major international human rights instruments explicitly refer to the right of all people to participate in their country's national legislature through the election of voting representatives. Taken together, this network of complementary multilateral agreements, which use similar, and in some cases identical, language to describe this right which finds foundational root in the language of Article 21 of the U.N. Declaration of Human Rights, appears to affirm the universality of a global state practice as acknowledged and accepted by all of the world's states and followed from a sense of legal obligation, thus providing further evidence of a manifest global state practice honoring the right of political participation for all citizens, regardless of where they live, and codifying and developing customary international law on three levels—the regional, the super-regional and the universal.

Lastly, recalling the Restatement's assertion that “[a] determination as to whether a customary rule has developed is likely to be influenced by assessment as to whether the rule will contribute to international order,”<sup>227</sup> there can be no question that international order is served by the advance and consolidation of representative democracy at all elevations of participatory governance, be they local, national, or international. In fact, a judgment by the United States Supreme Court that a 19th century injustice will not be left to stand in light of 21st century democratic standards, and that it will be, at last, fully and finally remedied will no

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224 Human Rights Committee, *supra* note 220.

225 ICERD, *supra* note 211.

226 Human Rights Advocacy Worldwide, <http://world-rights.org/home.htm> (last visited Dec. 2, 2010). *See also* VIOLATIONS OF EQUAL POLITICAL PARTICIPATION IN THE UNITED STATES CONGRESS, Submitted for consideration to the U.N. Committee on the Elimination of Racial Discrimination, Worldrights, December 10, 2007.

227 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. a (1987).

doubt be viewed by the rest of the world as a triumph of American jurisprudence over tyranny and a testament to the nation's commitment to the right to vote, both at home and abroad, and a tacit acknowledgment of the long-standing presumption that democracy is a pre-condition for the protection of human rights and the making of a more peaceful planet.

## II. MAKING THE CASE: *THE DISTRICT OF COLUMBIA v. THE 50 STATES*

This section outlines the contours of a new legal strategy for winning full and equal congressional voting rights for the District of Columbia in the U.S. Supreme Court, and ending, to the maximum extent practicable, Congress's 200 year-old plenary authority over the District, through a grant of injunctive relief, predicated on the application of customary international law as federal common law to justify that relief. The case is referred to herein as *The District of Columbia v. The 50 States*. As stated previously, the defendants in such a suit would be the State Legislatures, the Governors, the Attorneys General, Speakers of the House of Representatives, and the Presidents Pro Tempore of the Senates of the Several States.

### A. *U.S. Supreme Court Original Jurisdiction*

It is proposed that a motion be submitted to the U.S. Supreme Court for leave to file an original action before the Court on behalf of the District of Columbia, naming as defendants the State Legislatures of, the Governors of, the Attorneys General of, Speakers of the House of Representatives of, and the Presidents Pro Tempore of the Senates of the Several States, and brought under the authority of Article III, section 2 of the Constitution of the United States and 28 U.S.C. section 1251(a), which provides for Supreme Court original jurisdiction of suits between the Several States.<sup>228</sup> The Supreme Court would have original jurisdiction over the instant case because of the character of the parties: the District of Columbia is suing the Several States because the District is a de facto state, other than with respect to the limitations imposed on it as incorporated in the merits of the District's claim. The Supreme Court has previously held that its original jurisdiction includes only those cases under Article III in which the Court had subject matter jurisdiction due to the character of the parties, as opposed to the presence of a federal question.<sup>229</sup>

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228 U.S. CONST. art. III, § 2; *See also* 22 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* (3d ed.) (Suits may also between a state and citizens of another state are also specifically consigned to the Court's original jurisdiction); *United States v. Texas*, 143 U.S. 62 (1892); *California v. Southern Pac. Co.*, 157 U.S. 229 (1985).

229 *Cohens v. Virginia*, 19 U.S. 264 (1821). (The existence of a state as a party gives the Supreme Court original jurisdiction under Article III. However, the party-based grants did include controversies "between a State and Citizens of another State." ).

Two questions would be presented to the Court for review. First, whether the First Amendment provides the citizens of the District of Columbia with equal representation in the Congress of the United States under the Ninth Amendment, the laws of nations and customary international law. Second, whether District of Columbia citizens are guaranteed the right to equal representation in the Congress of the United States by virtue of rights retained under the Ninth Amendment, the law of nations and customary international law?

### B. *Grounds for Review Under Original Jurisdiction*

#### 1. Seriousness and Dignity of Claim

This case is appropriate for the U.S. Supreme Court to address under original jurisdiction because both the seriousness and dignity of the claim and the lack of availability of another forum meet the requirements of the Court's conditions.<sup>230</sup> The constitutional issue to be addressed (equal representation under general terms of equality in the U.S. Senate and the U.S. House of Representatives) is serious because the residents of the District of Columbia have been denied the opportunity to be represented in Congress since the passage of the Organic Act of 1801 by Congress. The basis of democratic government and governance is the consent of the governed; a principle espoused in the Declaration of Independence.<sup>231</sup> There can be no more serious purpose in a democracy than securing the right to vote, the free expression of the will of the people.<sup>232</sup>

The unrepresented and non-voting status of District residents in the national legislature of the United States violates customary international law, a network of legally binding international human rights instruments protective of fundamental rights, as well as the principles and purposes of international institutions dedicated to the consolidation and promotion of representative democracy on two hemispheres and representative of over 90 nations. Three major international human rights panels, composed of the world's leading human rights experts empowered to consider the illegality of the status of the District of Columbia under international human rights law, have roundly condemned violations of international human rights law by the United States Government in this instance. Add to this the grave implications such denunciations have had and continue to have on the capacity of the United States to conduct foreign policy and influence, among

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230 *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972) (U.S. Supreme Court stating that Original Jurisdiction is granted "only in appropriate cases. And the question of what is appropriate concerns of course the seriousness and dignity of the claim."). *See also* *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1982) (The Supreme Court finding that "where claims are of sufficient 'seriousness and dignity,' in which resolution by the judiciary is of substantial concern, the Court will hear them."). The principles are the same whether the Court's jurisdiction is exclusive or concurrent. *See also* *Texas v. New Mexico*, 462 U.S. 554 (1983); *California v. West Virginia*, 454 U.S. 1027 (1981).

231 THE DECLARATION OF INDEPENDENCE (U.S. 1776).

232 *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

other things, democratic reform in such areas of the world as Hong Kong and Belarus, and the abiding embarrassments such condemnations have had and continue to have on the honor and dignity of the nation. These condemnations expose the intrinsic hypocrisy that lies at the foundation of this nation, whereby, against all sense of fairness and any notion of equality, it is justified as a matter of law and perpetuated in the name of partisan politics, that the citizens of the capital city of a great world democracy are treated as unequal, both in dignity and in fundamental rights, as compared to the citizens of the 50 states and the rest of the self-governing people of the world.

This hypocrisy, startling, disturbing, unreasonable, which violates the tranquility of rational, objective and fair minds, is perhaps best illustrated by the inexplicable contradiction that exists when it is noted that America has waged war in Iraq to liberate and democratize a foreign people, while here at home, the people of the District of Columbia live in a democratic wasteland, abide in a backwater bathed in the web of a tyranny that will not end, though centuries come and go. Even as soldiers from the District of Columbia offer their lives for the democracy of others—6,000 miles away—they do so without true democracy at home. While it may appear as self-evident that a nation's first duty is to serve its own, it has not been so for over two hundred years. A nation cannot serve the cause of democracy beyond its borders without reconciling tyranny at home. It cannot preach freedom far and wide while practicing subjugation of the patriotic citizens of its capital city. To have done so and continue to do so is to shame its credibility, weaken its legacy and expose itself to the derision of the world community of nations.

In 1801, Rep. John Smilie, a member of the Democratic-Republican Party from the 9th congressional district of Pennsylvania, put into words, as few have done better since, the expressive seriousness of the nature of the District of Columbia's present claim. At once it expresses the dignity of the District's call for right and the incomprehensibility of the contradiction revealed at the heart of a nation established on principles of liberty. In a speech delivered to members of the House of Representatives condemning the impending disenfranchisement of the inhabitants of the District of Columbia, Smilie stated that:

Not a man in the District would be represented in the government, whereas every man who contributed to the support of a government ought to be represented in it; otherwise his natural rights were subverted, and he left, not a citizen, but a subject. It was a right which this country, when under subjection to Great Britain, thought worth making a resolute struggle for, and evinced a determination to perish rather than not enjoy.<sup>233</sup>

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233 6 ANNALS OF CONG. 997 (1801), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=010/llac010.db&recNum=496>.

The Founding Fathers, despite their best intentions, created conditions for District residents that bear an uncomfortable resemblance to involuntary servitude. There exists in the District of Columbia a perpetual involuntary political servitude that is imposed from above by Congress without the consent of the people and in violation of internationally recognized human rights and customary international law. The citizens of the District of Columbia are compelled by law to perform all of the duties of citizenship, yet are denied, as if subjects, the right to have any say in the making of those laws through duly elected representatives. And above all, they are denied the right to enjoy the dignity of a real republican form of government, set irrevocably beyond the commands of Congress, in all cases whatsoever, except those measured by the necessity of a compelling national interest, and the right to live free under true democracy.

In the 20th century the U.S. Supreme Court informed the nation that discrimination would no longer stand as a condition permissible in the states. By an act of reason and courage it undid *Plessy v. Ferguson*, and vanquished a central injustice left standing for too long.<sup>234</sup> It reviewed a serious claim about the indignity imposed on a subjugated population.

Our petition for leave to file an original action before Supreme Court on behalf of the District of Columbia requests that the Court vanquish a similar injustice serving to subjugate a huge concentration of American citizens without rational basis, while doing incalculable damage to the nation. The Court should remedy a grievous infraction of basic rights so fundamental that they are in this day and age universal. This is a cause that calls for relief –an end to a stinging disenfranchisement and a final repudiation of an intolerable servitude that no other Americans face: the absence of genuine self-government and equal voting rights.<sup>235</sup>

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234 See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

235 See Lee A. Casey, *The Constitution and the District of Columbia*, Mar. 22, 2007, available at <http://www.heritage.org/research/legalissues/wm1404.cfm> (Some conservative lawyers view the District's unique circumstances in a different light. Because of the District's unique character as the federal city, neither the Framers nor Congress accorded the inhabitants the right to elect Members of the House of Representatives or the Senate. In exchange, however, the District's residents received the multifarious benefits of the national capital. As Justice Joseph Story noted in *Commentaries on the Constitution of the United States*, "there can be little doubt, that the inhabitants composing [the District] would receive with thankfulness such a blessing, since their own importance would be thereby increased, their interests be subserved, and their rights be under the immediate protection of the representatives of the whole Union." In effect, the Framers believed that the residents were "virtually" represented in the federal interest for a strong, prosperous capital).

## 2. No Alternative Forum

There is no alternative judicial forum, other than the U.S. Supreme Court, in which to try a case of this magnitude.<sup>236</sup> This case implicates the Fifty States in unconstitutional conduct, and may only be remedied by the Fifty States through injunctive relief by order of the U.S. Supreme Court. No other court in the land is capable of providing injunctive relief in such a broad civil action, involving every state legislator in each House and Senate of every State, except Nebraska.<sup>237</sup> If the District were to be compelled to litigate this in each of the Fifty States, the District would likely face undue prejudice by the state courts. Further, it would be highly impractical and would not promote judicial economy. Moreover, state courts could not provide the District with an adequate remedy as, at a minimum, 38 states are required for ratification of a constitutional amendment. No one court could provide injunctive relief. Finally, the Supreme Court is the only judicial forum empowered to supercede state sovereignty. It is the only judicial body capable of enjoining the Fifty States to act constitutionally and to grant the District relief in order to redress the constitutional infirmities and actual injuries the District of Columbia suffers. To redress the injury, the Fifty States would be required to call state conventions in order to pass a constitutional amendment that would grant the District equal political rights, consistent with the states, under the U.S. Constitution.<sup>238</sup>

The Fifty States, in particular their state legislatures, would properly be the defendants in this case because a causal connection can be established between those state legislatures and the District of Columbia's absence of rights. Those state legislatures are directly responsible for the District's injury, which is actual, distinct and palpable, and therefore fairly traceable. Furthermore, state legislatures possess all necessary constitutional powers to redress the District's injury. A grant of injunctive relief by the U.S. Supreme Court to the District of Columbia is required to compel states to call state conventions for the purpose of passing a constitutional amendment that would 1) treat the District of Columbia as if it

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236 *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972) (Original jurisdiction is honored "only in appropriate cases . . . And the question of what is appropriate . . . necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.").

237 Nebraska Legislature, [http://nebraskalegislature.gov/about/history\\_unicameral.php](http://nebraskalegislature.gov/about/history_unicameral.php) (last visited August 25, 2010) ("Nebraska's legislature is unique among all state legislatures in the nation because it has a single-house system.").

238 U.S. CONST., art. V ("The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.").

were a state, for most intents and purposes,<sup>239</sup> or 2) grant the District of Columbia statehood.<sup>240</sup>

For the purposes of standing, is the District's injury traceable to the state legislatures of the Fifty States? This question is answered in the affirmative. Between 1978 and 1985, only 16 state legislatures ratified the proposed D.C. voting rights amendment, which would have provided the District with full and equal voting rights in Congress, both in the House of Representatives and in the U.S. Senate.<sup>241</sup> 34 state legislatures did not ratify the amendment, aborting any prayer of passing the amendment.<sup>242</sup>

To strengthen any District of Columbia claim that its injury is in fact fairly traceable to the Fifty States, the District of Columbia would serve legal notice on the States declaring its intention to file suit against them after 90 days. Legal notice would be served should the respective States legislatures fail to take such

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239 D.C. Equal Constitutional Rights Amendment, Timothy Cooper, May 15, 2001: A D.C. Bill of Rights: The Constitutional Amendment Text: "For purposes of discussion, the language of an amendment for equal constitutional rights might read as follows:

Section 1. All US citizens residing in the non-federal areas of the District of Columbia shall be treated as residents of a state for all constitutional intents and purposes, and shall enjoy those same rights, powers and privileges, including: equal representation in the House of Representatives under Article 1; equal representation in the US Senate under the 17th amendment; the right to a republican form of government under Article 4; the right to all powers and privileges under the 9th and 10th amendments; equal protection under the 14th amendment.

Section 2. Congress shall limit its power to exercise its "exclusive legislation" over the District of Columbia under Article 1, Section 8, paragraph 17 of the constitution to the following geographical areas, except in the case of a compelling national interest: all federal buildings and properties, and the National Park Service area; all foreign embassies and missions.

Section 3. The Federal Height Act of 1910 shall remain in full force and effect.

Section 4. All other federal laws shall apply to the District of Columbia, as if it was a state.

Section 5. General services may be provided to the federal government by the government of the District of Columbia on an as needed basis on such terms as are mutually satisfactory to the parties. The federal government shall have jurisdiction over and provide for the District of Columbia's courts and correctional facilities until such time as the District becomes a state.

Section 6. Nothing shall prevent the federal government from compensating the District of Columbia in the form of payment in lieu of taxes for revenues foregone as the seat of national government.

Section 7. The 23rd amendment shall be repealed concurrently with the passage of this amendment.

Section 8. Nothing in this amendment shall prohibit the District of Columbia from becoming a state in due course. At such time as the District becomes a state, this amendment shall become null and void. The Congress shall have the power to enforce these articles by appropriate legislation."

240 H.R. 51, 103d Cong. (1993), available at <http://www.thomas.gov/cgi-bin/bdquery/z?d103:HR00051:@@D&summ2=m&>.

241 H.R.J. Res. 554, 95th Cong. (1978), available at [http://www.sourcewatch.org/index.php?title=Voting\\_rights\\_in\\_the\\_District\\_of\\_Columbia#District\\_of\\_Columbia\\_Voting\\_Rights\\_Amendment](http://www.sourcewatch.org/index.php?title=Voting_rights_in_the_District_of_Columbia#District_of_Columbia_Voting_Rights_Amendment).

242 ALEXANDER HAMILTON, AN EXPRESSION OF SUPPORT TO PROVIDE THE DISTRICT OF COLUMBIA WITH VOTING REPRESENTATION, reprinted in, THE PAPERS OF ALEXANDER HAMILTON at 189 (Harold C. Sybett & Jacob E. Cooke eds., Columbia University Press 1962) (1804).



steps as may be necessary to call into session a state convention for the purpose of passing a constitutional amendment that largely would treat the District of Columbia as if it were a state, or make the non-federal areas of the District a state while preserving a discrete federal enclave over which Congress would continue to exercise exclusive jurisdiction in all cases whatsoever, as required by the Constitution.<sup>243</sup> Assuming in advance the Several States will rebuff the District's appeal for them to call state conventions to pass such an amendment, the District could then proceed to serve the States with legal notice, claiming violations of customary international law under the Bill of Rights with a high degree of certainty that their claim will meet the requirements to demonstrate standing: injury, causation, and redressability.<sup>244</sup>

**III. GROUNDS TO BE TREATED AS A STATE UNDER AUTHORITY OF  
ARTICLE III, SECTION 2 AND 28 U.S.C. SECTION 1251(A), WHICH  
PROVIDES FOR SUPREME COURT ORIGINAL JURISDICTION  
OF SUITS BETWEEN THE SEVERAL STATES**

*A. The District of Columbia Is Treated as If It Was a State Under 537 Federal Statutes, So Its Claim Should Be Heard Under Original Jurisdiction*

It would be an undue burden for the Plaintiff to prove that the District of Columbia has sovereign immunity like the Fifty States when the issue the Plaintiff would bring before the Court would not exist if the District of Columbia did have sovereign immunity. Nevertheless, for all intents and purposes, other than the Constitutional claims that the Plaintiff would present to the Court, the District of Columbia is treated as a state in 537 federal statutes.<sup>245</sup>

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243 Casey, *supra* note 235 (The question of the constitutionality of D.C. statehood under an act of Congress remains controversial. "Statehood is now the clear preference of District of Columbia voting-rights advocates, but . . . would, in any case . . . require a constitutional amendment since an independent territory, subject to the ultimate authority of Congress, was a critical part of the Framers' original design for an indestructible federal union of indestructible states.").

244 U.S. CONST. art. III § 2; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (The plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. The plaintiff bears the burden of establishing these elements); *See also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-102 (1998) ("[T]he Supreme Court has made clear that courts must resolve questions of standing before any consideration of the merits.").

245 Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.-C.L. L. REV. 39, 92 n.271 (1999) ("There are 537 federal statutes that treat the District of Columbia as though it were a State for programmatic, governmental and constitutional purposes.").

The Constitution requires that any case brought before the Supreme Court in original jurisdiction be between one state and another state for the purposes of original jurisdiction.<sup>246</sup> However, the District of Columbia is a de facto state, other than with respect to the limitations imposed on it as incorporated in the merits of the Plaintiff's claim. The District functions just as any other state. It has its own executive, legislative, and judicial branches of government. It has its own District of Columbia Code. It even possesses its own National Guard. Further, the District is held to the same standards of governance, administration, and judicial comportment as any of the Fifty States.

Additionally, the District is subject to all of the permanent laws of the United States, as enumerated in the U.S. Code, as are the Fifty States.<sup>247</sup> District of Columbia citizens are in fact state citizens inasmuch as they:

[S]hare all of the essential characteristics of citizens of the states. Like state residents but unlike territorial residents, they pay federal taxes, indeed more per capita than most states. Like state residents but unlike territorial residents, they vote for president and vice-president. District residents are counted in the national census . . . . [They] were part of the original thirteen states. They fight wars, are drafted into the military, and have lost many men and women in foreign battles. They are treated like residents of the states for federal diversity jurisdiction purposes. The principle of one person-one vote applies within the District to the reapportionment of the District's Council.<sup>248</sup>

The only distinctions are that the District of Columbia does not enjoy the equal right to vote in Congress and Congress exercises plenary authority over the District by virtue of Article I, Section 8, Clause 17 of the U.S. Constitution. These dissimilarities inform the merits of the District's complaint against the Fifty States and are the basis for its injuries.

#### B. *The Supreme Court Has Treated the District of Columbia as a State*

For constitutional purposes, the Supreme Court has treated the District of Columbia directly as a State. The Court held that the "courts of the District are bound, equally with courts of the states, to observe the command of the Full Faith and Credit Clause, wherever applicable," under the Full Faith and Credit Clause of Article IV of the Constitution.<sup>249</sup>

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246 28 U.S.C.S. § 1251 (2009).

247 Published by the Office of the Law Revision Counsel of the U.S. House of Representatives.

248 Raskin, *supra* note 243, at 55-56 (footnotes omitted).

249 *Loughran v. Loughran*, 292 U.S. 216, 228 (1934).

*C. The Supreme Court Has Upheld Congress' Authority to Treat the District of Columbia as If It Were a State For Limited Purposes; If Congress May Treat the District as If It Were a State, So Too May the Supreme Court*

The Supreme Court has upheld Congress' right to tax the District of Columbia.<sup>250</sup> The Constitution states: “[r]epresentatives and direct taxes shall be apportioned among the several States which may be included within this Union.”<sup>251</sup> Despite the absence of any mention of the District in this clause, the Court held that direct taxation on the District was permissible due to its constitutional authority over the District.<sup>252</sup>

The Supreme Court affirmed legislation extending Article III diversity jurisdiction to citizens of the District.<sup>253</sup> This was not always the case. For example, the Court denied District residents the right to bring diversity suits in federal court under Article III, which provides federal jurisdiction only to disputes “between Citizens of the several States.”<sup>254</sup> In *Hepburn*, District residents argued they were “a distinct political society, and . . . therefore ‘a state’ according to the definitions of writers on general law.”<sup>255</sup> The Court, rejecting that position, held that the term “state” under the Constitution means a member of the union.<sup>256</sup> However, the Court conceded that “it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed” to District residents, who are also citizens of the United States.<sup>257</sup>

By analogy, it would be extraordinary if the U.S. Supreme Court, which is open to aliens suing under the Alien Tort Claims Act and the laws of nations and customary international law, and to the “States,” which are composed of the citizens from every state in the union, under Original Jurisdiction, be “closed” to the District of Columbia, which is composed of the “citizens of the United States” as well, and have an extraordinary case regarding violations by the Fifty States under customary international law that could and should be heard by the Supreme Court under Original Jurisdiction.

Under a *Tidewater* plurality, the Supreme Court affirmed that Congress has the power to treat the District as if it were a state for limited purposes affecting “only the mechanics of administering justice in our federation.”<sup>258</sup> So too should

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250 *Loughborough v. Blake*, 18 U.S. 317 (1820).

251 *Id.* at 319.

252 *Id.* at 325.

253 *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1948).

254 *Hepburn v. Ellzey*, 6 U.S. 445 (1805).

255 *Id.* at 452.

256 *Id.*

257 *Id.* at 453.

258 *Nat'l Mut. Ins. Co.*, 337 U.S. at 585.

the U.S. Supreme Court, in the interest of “administering justice in our federation,” treat the District of Columbia as if it were a State for the limited purposes of hearing the District’s extraordinary claims under Original Jurisdiction.<sup>259</sup>

The Court need not reach a conclusion on the merits of the District of Columbia’s case in order to rule favorably on the question of jurisdiction. The Plaintiff’s merits arguments are separate and distinct from that of jurisdiction.

#### IV. CAUSE OF ACTION

Plaintiff maintains a cause of action under 42 U.S.C.S. § 1983 because the Several States and their legislative representatives have denied them the constitutional right to equal representation in the national legislature of their own country as enjoyed under Article 1, Section II of the Constitution by the “people of the several states.”<sup>260</sup>

42 U.S.C.S. § 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.<sup>261</sup>

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<sup>259</sup> *Id.*

<sup>260</sup> U.S. CONST. art. I § 2.

<sup>261</sup> 42 U.S.C. § 1983 (2006). There are two potential obstacles to the District’s claim against the Fifty States’ legislators: the Eleventh Amendment and common-law official immunity. Any clash with the Eleventh Amendment can be avoided by bringing suit against the legislators in their personal, rather than official, capacities. State officials can be sued personally for official acts without impediment to state sovereignty because an official who violates federal law is considered to be acting without the state’s authority and, thus, is not entitled to share in the state’s immunity. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908) (“If the act which the [official] seeks to enforce be a violation of the Federal Constitution, the officer . . . comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”). State sovereign immunity is easily avoided in the District’s claim, but the District may have more difficulty overcoming the legislators’ common-law immunity.

Although the Supreme Court has consistently applied common-law immunity as a bar to §1983 actions against state legislators acting within the scope of their legitimate legislative power, it has recognized the potential for exceptions. *See, e.g., Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951) (“It is not necessary to decide here that there may not be things done, in the one House or the other,

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of an extraordinary character, for which the members who take part in the act may be held legally responsible.”). The District’s claim is arguably such an exception for a number of reasons.

First, the District’s unique claim is easily distinguished from current common-law immunity jurisprudence. The courts have generally only considered the §1983 claims of individuals or small groups of citizens alleging frivolous, vague, and limited constitutional rights violations resulting from the legitimate acts of their own state’s legislators. See, e.g., *Id.* at 369 (upholding California state senators’ immunity from citizen’s §1983 claim alleging his contempt prosecution resulting from his refusal to testify before committee violated his First Amendment rights); *National Ass’n of Social Workers v. Harwood*, 69 F.3d 622 (9th Cir. 1998) (dismissing 1983 claim brought by Rhode Island non-profit organizations against Speaker of Rhode Island House of Representatives and head doorkeeper alleging that congressional policy banning lobbyists from House floor violated the First Amendment); *Larson v. Senate of Pennsylvania*, 152 F.3d 240 (3d Cir. 1998) (applying common-law immunity to state judge’s §1983 claim that his impeachment violated various constitutional rights, despite evidence that he awarded special treatment to campaign contributors, lied before grand jury, and obtained prescription drugs using staff information); but see *Dyer v. Abe*, 138 F. Supp. 220, 224 (D. Haw. 1956) (allowing citizen’s §1983 claim against state legislators alleging failure to reapportion legislative districts for 50 years despite drastic population shift violated citizens’ right to due process and equal protection of laws).

In contrast, the District’s claim involves the continuous and deliberate violation of the internationally-mandated human rights of over 600,000 citizens, directly and solely the result of legislative inaction on the part of all fifty States. Although the states’ legislators do have the authority to propose and ratify constitutional amendments, this power does not authorize them to withhold sovereign equality and basic civil liberty to an entire population without a legitimate purpose. The state legislators’ refusal to propose and ratify a D.C. voting rights amendment can be considered either legislative laziness or blatant discrimination, either of which is an abuse of legislative authority that falls outside the scope of common-law immunity. See *Tenney*, 341 U.S. at 382 (Douglas, J., dissenting) (“If a committee departs so far from its domain to deprive a citizens of a right protected by the Constitution, I can think of no reason why it should be immune.”). The District is not simply grasping at straws in an attempt to find a cause of action against the states’ legislators, unlike many previous §1983 plaintiffs who alleged minor, temporary “injuries” of far less significance than §1983 was intended to address. See, e.g., *Larson*, 152 F.3d at 244. The District’s claim alleges the violations of the very civil rights that §1983 was designed to address, chiefly the equal protection of the laws and the right to vote. Because these violations are far more serious and occur on a much larger scale than ever previously considered by the courts, the current interpretation of common-law immunity should not be applied to bar the District’s claim.

The Court’s rationale behind its application of common-law immunity to §1983 actions is also not compelling in the District’s situation. Common-law immunity was developed to protect the integrity and efficiency of the legislative process by allowing legislators to perform their duties without fear of liability for their official acts and preventing outside influence from overpowering the will of the voters. *Tenney*, 341 U.S. at 373-74. Rather than allow the litigious influence of one individual to regulate legislative conduct, the Court has held that “self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.” *Id.* at 378. This rationale fails with respect to the District’s claim because District citizens have no authority over the Fifty States’ legislatures and cannot use the threat of lost votes to influence the actions of individual legislators. Furthermore, the fact that District citizens have been continuously denied an equal voice in Congress for over 200 years proves that the citizens of the Fifty States themselves will not push for reform and legislative “self-discipline” cannot be counted on to correct the injustice. To achieve equality and enjoy the basic civil liberties mandated by international law, District citizens have no alternative to civil litigation against the state legislators, and the desired remedy will constitute only a minor, temporary interference with the states’ legislative function. This limited effect on the states’ legislators is overwhelmingly out-

Under 42 U.S.C. § 1983, only persons are liable; a state is not subject to suit; however, an officer of the state may be sued in his “official capacity for prospective or injunctive relief[,]” notwithstanding the fact that a suit is in actuality a cause of action against a governmental entity.<sup>262</sup> “Despite this logical inconsistency, the current state of the law is that a state may not be sued for damages, but may be sued for declaratory or injunctive relief.”<sup>263</sup> In their individual capacities, employees of federal, state and local government “may be sued for damages, declaratory or injunctive relief.”<sup>264</sup>

## V. ARGUMENT

### A. *Does the First Amendment Provide the Citizens of the District of Columbia With Equal Representation in the Congress of the United States Under the Ninth Amendment, Laws of Nations, and Customary International Law?*

The District of Columbia claims that its citizens are denied the right of freedom of expression under the First Amendment<sup>265</sup> because they cannot voice

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weighed by the States’ unchecked, oppressive interference with the District’s legislative process, and affording immunity to the States’ legislators seems wholly irrational.

Finally, the application of common-law official immunity to all §1983 claims can be challenged on the grounds that it eviscerates the intended force of §1983 as a civil remedy and violates customary international law. While §1983 was intended to provide citizens with a cause of action against officials who violate their constitutional rights under the guise of state authority, the Court’s interpretation of common-law immunity has resulted in all but the lowliest of state and local government employees enjoying absolute immunity from legal responsibility. See, e.g., *National Ass’n of Social Workers*, 69 F.3d at 622 (granting common-law official immunity to head doorkeeper of state house of representatives). By severely limiting the reach of §1983 liability, common-law immunity leaves many potential plaintiffs without an effective remedy, in violation of several international covenants, treaties, and declarations to which the United States is a party. See, e.g., *International Covenant on Civil and Political Rights*, art. 2, §3(a) (“[e]ach State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”); *UN Universal Declaration of Human Rights*, art. 8 (“[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”). The Court’s interpretation of common-law immunity prevents §1983 from being an effective remedy, as mandated by customary international law, and should thus be re-evaluated. The District’s claim provides a timely opportunity for such consideration.” Source: Memo dated July 13, 2010, from Stacey Rohrs to Timothy Cooper, Executive Director, Worldrights

<sup>262</sup> Ian D. Forsythe, *A Guide to Civil Rights Liability Under 42 U.S.C. § 1983*, (footnotes omitted), available at [http://www.constitution.org/brief/forsythe\\_42-1983.htm](http://www.constitution.org/brief/forsythe_42-1983.htm).

<sup>263</sup> Forsythe, *supra* note 262.

<sup>264</sup> Forsythe, *supra* note 262 (“Government officials may be sued in their individual capacity. Such a suit does not represent a suit against the government entity for which he is associated. The failure to identify in which capacity a defendant is being sued is a critical pleading defect.”) (footnotes omitted).

<sup>265</sup> The First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

their opinions on policies regarding any and all national issues of solemn import in the greatest deliberative bodies in the land; the U.S. House of Representatives and U.S. Senate. They are prohibited the fundamental right to equal representation that is not only a constitutional right but also a right secured to them by virtue of customary international law and the laws of nations, as exhaustively described. For the entire 208-year history of the District of Columbia, it has suffered all manner of injury sustained from the denial of full and equal congressional voting rights, as evidenced by the fact that the District residents have been segregated from the affairs of the nation and never once been afforded the right to voice their opinions, participate in the debate over and passage of vital national legislation affecting their lives, economically, politically, and otherwise, even from time to time affecting whether they live or die, by leading them into harm's way. Never has a single citizen of the District of Columbia ever had their voice heard on the floor of the U.S. Senate or had an effective vote cast on their behalf in the U.S. House of Representatives on any legislation since 1801, censoring their opinions in the wells of Congress, silencing their voices while others are heard and actions taken on their behalf, curtailing their right to speak in the highest chambers of government where it most matters when it most matters.

On all matters of foreign policy, on deliberations of war and peace, on the ratification of international treaties, on the selection of Supreme Court Justices, on impeachment proceedings, on national health care, on tax policy, on education, on crime, on civil rights, on all federal statutory laws whatsoever, the District of Columbia may not speak.

This is materially demonstrated by virtue of the fact that no voting representative of the District of Columbia in the United States Congress has ever had the unimpeded right to vote on any of the law passed by Congress and contained in the United States Code,<sup>266</sup> which embodies all the laws of the United States and represents the full expression of the voice of the people of the Fifty States of the United States, except those living as citizens in the District of Columbia, in violation of their First Amendment rights and customary international law.

The case law on voting rights as a right retained by them under the First Amendment is explicit: “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good

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or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

<sup>266</sup> United States Code Annotated, <http://west.thomson.com/productdetail/3198/22048097/productdetail.aspx?promcode=600582C43556&promtype=internal#> (last visited Dec. 1, 2010). (The 2009 edition of the United States Code Annotated® (Copyright 1927-2009) is 378 volumes in hardback. The list price is \$6791. According to West Legal Products and Services, “[t]his set contains all the laws, as classified to the United States Code, of a general and permanent nature enacted by Congress (Titles 1-50 and the Constitution), plus their judicial constructions . . . [and i]t mirrors the official text of the United States Code published by the Office of the Law Revision Counsel of the House of Representatives.”)

citizens, we must live. . . . [and o]ther rights, even the most basic, are illusory if the right to vote is undermined.”<sup>267</sup> Voting is a fundamental right.<sup>268</sup> “[T]he right to vote in state elections is one of the rights historically ‘retained by the people’ by virtue of the Ninth Amendment as well as included in . . . First Amendment rights.”<sup>269</sup> “The right to vote derives from the right of association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment.”<sup>270</sup> While the 14th Amendment does not apply to the District, the Fifth Amendment does. In *Bolling v. Sharpe*,<sup>271</sup> which was handed down as a companion decision with *Brown v. Board of Education*,<sup>272</sup> and ended segregation in District of Columbia schools, the Supreme Court held that:

[While the Fifth Amendment] does not contain an equal protection clause, as does the Fourteenth Amendment . . . the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process” of law, and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.<sup>273</sup>

Without the right to speech on the floor of the U.S. House of Representatives and the U.S. Senate through elected representatives, there can be no right to free speech for the citizens of the District of Columbia, no right to the free expression of the will of the people, the very essence of democratic government and liberty in a democracy.

To resolve constitutional challenges to election laws, a balancing test is applied. First, the Court considers the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments, or in the case of the District of Columbia, the Fifth Amendment. Then the Court must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule that the party claims infringes on a constitutionally derived right. Finally, the Court must determine the legitimacy and strengths of each of the first two interests, as well as the “extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>274</sup>

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<sup>267</sup> *Lubin v. Panish*, 415 U.S. 709 (1974) (Douglas, J., concurring) (quoting *Wesberry v. Sanders*, 376 U.S. 1 (1964)).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 722.

<sup>270</sup> *Id.*

<sup>271</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>272</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>273</sup> *Bolling*, 347 U.S. at 499.

<sup>274</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).



The magnitude of the infringement on the rights of the citizens of the District of Columbia is breathtaking. Over half a million people have been purposefully denied the right to the free expression of their will through the voice of their duly elected representatives in both houses of the United States Congress since 1801. They have been gagged and muzzled by state legislatures that would not grant them this right, though they had been repeatedly asked. Not only are they prohibited from expressing their views on national legislation and participating in negotiations to pass or vanquish proposed legislation, when it is passed without their consent, they are then subject to this law and compelled to obey it under penalty of law. Representation is equal to speech. There can be no free speech without the right to elect representatives to the United States Congress, who in turn speak for them and express their will. There can be no free expression of the people in a representative democracy without all of the people enjoying the full and equal right to speech, which under the First Amendment may not be abridged.

There is no reasonable basis on which to deny the citizens of the District of Columbia equal representation in Congress as well as the right to genuine self-governance. There is no objective and reasonable governmental purpose to be served by curtailing those rights. Any governmental justification for doing so has long since come and gone. The historical rationale cannot be imposed on a modern District of Columbia. The disenfranchisement of the District of Columbia is no longer justified to protect a fledgling national government perched on the wings of a rising new experiment in federalism.

In *Statehood Solidarity Committee v. United States of America*, District of Columbia citizens argued that:

[T]he appropriate test to determine the existence of discrimination . . . is whether differential treatment is proved to be “reasonable” and that unreasonableness or injustice does not depend on the intent or motive of the party charged with discriminatory treatment . . . [A]pplying this test in the circumstances of the present case leads to the result that the United States Government imposes an unjustified and arbitrary distinction upon the people of the District of Columbia which lacks a legitimate aim and an objective justification, and that this differential treatment bears no relationship of proportionality between the means employed and the aim sought to be realized. To the contrary, the Petitioners claim that the differential treatment is detrimental to the residents of the District of Columbia, and cannot be properly justified by reference to the arguments of the framers of the U.S. Constitution at the time of the forming of the Republic over 200 years ago relating to the physical security of the federal seat of government. The Petitioners note in this regard that according to the Department of Defense, as of February 28, 1994 there were 1,607,844 men and women employed by the

Armed Services of the United States of America. In light of the U.S. government's present-day military capabilities, the Petitioners maintain that it is impossible to imagine circumstances under which the men, women and children of the District of Columbia could conceivably pose a viable threat to the seat of government.<sup>275</sup>

That argument is as pertinent today as in 1994. There remains no legitimate justification on the part of the federal government to deny the District of Columbia equal congressional voting rights and full local autonomy. The grand political compromise of 1783 may have assisted in forging the bonds of the nation, but the full enfranchisement of the District of Columbia will not undo those bonds, which have held fast for over 200 years. The Republic is secure and well capable of expanding democracy, without fear of injury, by giving a voice to citizens of its capital city.

Moreover, the First Amendment and customary international law require this be done. The United States is the only identifiable country in the world that disenfranchises the citizens of its capital city, denying free speech by curtailing their right to representation in the national legislature. Furthermore, international scrutiny of this prohibition on voting rights in America's capital city citizens has become an international embarrassment for the United States and has begun to hamper its foreign policy, to the detriment of all the American people. The lasting disenfranchisement of the capital city does the nation harm, corroding its dignity, tarnishing its reputation, undermining its seriousness of purpose. A country that seeks to light the world's path to democracy must correct its own undemocratic infirmities.

In light of the stability of the federal republic in the 21st Century and the Republic's manifest capability of defending itself, *arguendo*, should the need arise from the citizens of the District of Columbia, the requirements of the balancing test have been met. The Fifty States, which are bound by the Constitution, are bound to rectify this anomalous policy under the First and Fifth Amendments, which is also violative of the laws of nations and therefore customary international law, because it has been demonstrated that the "general and consistent" practice of nations, followed from "a sense of legal obligation" (*opinio juris*), is to provide for that universal right to be represented in the national legislature of one's own country and to vote, regardless of where one lives, is binding on the United States and the Fifty States, and therefore may be compelled by order of injunctive relief.<sup>276</sup>

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275 See REPORT N° 98/03, CASE 11.204, ¶¶ 42, 43 (Dec. 29, 2003), available at <http://www.cidh.org/annualrep/2003eng/USA.11204.htm>.

276 *Riddell v. Fuhrman*, 233 Mass. 69 (Mass. 1919) (The court recognized that "[i]nternational law is a part of the law of the United States, and must be administered whenever involved in causes presented for determination, though in a state court.").

*B. Are District of Columbia Citizens Guaranteed the Right to Equal Representation in the Congress of the United States by Virtue of Rights Retained Under the Ninth Amendment and the Law of Nations and Customary International Law?*

The Ninth Amendment guarantees rights not enumerated by the Framers of the U.S. Constitution.<sup>277</sup> Chief among these are the laws of nations, which incorporate the rights of individuals. These rights apply to all the people of the United States because U.S. courts have recognized that international law “is part of the law of the United States.”<sup>278</sup> The laws of nations are defined in federal common law as customary international law, which is held to be binding on U.S. Courts, and which, arguably, provides for all citizens of all countries the right to enjoy equal representation in their own national legislature, as articulated under the plain language of internationally recognized human rights as well as customary international law. Case law in U.S. courts enumerates the right to vote as well.

A citizen’s constitutional rights can hardly be infringed on simply because a majority of population chooses that they be.<sup>279</sup> The right to vote is a civil right guaranteed by the Constitution, as the Supreme Court “re-emphasized in *Oregon v. Mitchell*.”<sup>280</sup> “Rights, not explicitly mentioned in the Constitution, have at times been deemed so elementary to [the United States’] way of life that they have been labeled as basic rights.”<sup>281</sup> “[T]he Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.”<sup>282</sup>

The Ninth Amendment indicates that not all liberties and rights are mentioned in the first eight amendments, and that is relevant to show that other fundamental rights exist.<sup>283</sup> To decide which rights are fundamental, judges “must look to the ‘traditions and (collective) conscience of our people’ to determine whether a principle is ‘so rooted (there) . . . as to be ranked as fundamental.’”<sup>284</sup> The judge must consider “whether a right involved ‘is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’”<sup>285</sup> Equal congressional

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<sup>277</sup> U.S. CONST. amend. IX reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

<sup>278</sup> See Forsythe, *supra* note 262.

<sup>279</sup> *Palmer v. Thompson*, 403 U.S. 217, 235 (1971) (Douglas, J., dissenting).

<sup>280</sup> *Id.* at 234 (citing *Or. v. Mitchell*, 400 U.S. 112 (1970)).

<sup>281</sup> *Id.* at 233 (alteration in original).

<sup>282</sup> *Id.* at 237 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring)).

<sup>283</sup> *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring).

<sup>284</sup> *Id.* at 493 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>285</sup> *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

voting is one such right. Voting rights form the basis of democracy, without which there can be no equality; only tyranny, without the hope of the administration of justice and a life of liberty. That is why the right to representation “on general terms of equality”<sup>286</sup> is recognized as a rule of customary international law and a right retained by the people under the Ninth Amendment, making it, Plaintiff submits, a right enforceable by the U.S. Supreme Court in the case of *The District of Columbia v. The 50 States*.<sup>287</sup>

## VI. PRAYER

WHEREFORE, the District of Columbia prays for the following relief:

1. Declare the District of Columbia’s lack of full and equal congressional voting rights unconstitutional under the First and Ninth Amendments and customary international law and grant it injunctive relief;
2. Declare the District of Columbia’s lack of full and equal congressional voting rights unconstitutional under the First and Ninth Amendments and customary international law and grant it states’ rights through the passage of a constitutional amendment that would treat the District as if it were a state, for most intents and purposes;<sup>288</sup>
3. Declare District of Columbia’s lack of full and equal congressional voting rights unconstitutional under the First and Ninth Amendments and customary international law and grant D.C. statehood by constitutional amendment;<sup>289</sup> and
4. For such further and other relief to be granted as the Court may deem just and proper.

## VII. U.S. SUPREME COURT DECISIONS INCORPORATING INTERNATIONAL AND CUSTOMARY LAW

If a case is made in the Supreme Court that the right to vote in the national legislature is an enforceable right secured to the citizens of the District of Columbia under the First and Ninth Amendments as well as customary international law, a brief overview of three important U.S. cases relating to the laws of nations as customary law provides an indication of how the majority on the Court may respond.

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<sup>286</sup> *Statehood Solidarity Committee v. United States*, REPORT N° 98/03, CASE 11.204 (Dec. 29, 2003) (Recommendation of the Inter-American Commission to the United States of America regarding the residents of the District of Columbia: “Provide the Petitioners with an effective remedy, which includes adopting the legislative or other measures necessary to guarantee to the Petitioners the effective right to participate, directly or through freely chosen representatives and in general conditions of equality, in their national legislature.”).

<sup>287</sup> *Supra* note 243.

<sup>288</sup> *Supra* note 237.

<sup>289</sup> *Supra* note 238.

The first case to incorporate customary international law into U.S. law was *The Paquete Habana*.<sup>290</sup> The U.S. Supreme Court held that:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>291</sup>

The second case was *Filártiga v. Peña-Irala*.<sup>292</sup> In 1980, *The Paquete Habana* was cited in *Filártiga v. Peña-Irala*, a case brought by a torture victim, not a citizen of the United States, under customary international law. The Court held “that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”<sup>293</sup> The Court went on to say that “*Habana* is particularly instructive . . . [because] it held that the traditional prohibition against seizure of an enemy’s coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into ‘a settled rule of international law’ by ‘the general assent of civilized nations.’”<sup>294</sup> Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.<sup>295</sup>

Among the sources of customary law cited by the Court in *Filartiga v. Pena-Irala* was the *United Charter*, defined as a treaty by the Court, as a source of customary international law.<sup>296</sup> It noted that Article 55 of the Charter:

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290 *The Paquete Habana*, 175 U.S. 677 (1900).

291 *Id.* at 700 (citing *Hilton v. Guyot*, 159 U.S. 113 (1895)).

292 *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

293 *Id.* at 878.

294 *Id.* at 881 (citing *The Paquete Habana*, 175 U.S. 677 (1900)).

295 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (The requirement that a rule command the “general assent of civilized nations” to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law. The Court declined to pass on the validity of the Cuban government’s expropriation of a foreign-owned corporation’s assets, noting the sharply conflicting views on the issue propounded by the capital-exporting, capital-importing, socialist and capitalist nations).

296 *Filartiga*, 630 F.2d 876.

[M]akes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern. [The Charter] provides: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion." And further: "[a]ll members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes' set forth in Article 55."<sup>297</sup>

The Court stated that:

These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, "[m]embers can no longer contend that they do not know what human rights they promised in the Charter to promote." Moreover, a U.N. Declaration is, according to one authoritative definition, "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." Indeed, several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law.<sup>298</sup>

The third case to incorporate customary international law into U.S. law was *Sosa v. Alvarez-Machain*.<sup>299</sup> In 2004, after Alvarez-Machain was acquitted for kidnapping and torturing a DEA agent in Mexico, he sued the United States for false arrest under the Federal Tort Claims Act (FTCA).<sup>300</sup> The act waives sovereign immunity in suits for personal injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."<sup>301</sup> Additionally, Alvarez sued Sosa for violating the laws of nations under the Alien Tort Statute (ATS), a 1789 law giving district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations."<sup>302</sup> The FTCA was dismissed in District

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297 *Id.* at 881.

298 *Id.* at 883 (citations omitted).

299 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

300 *Id.* at 698.

301 *Id.* (citation omitted).

302 *Id.* at 698-99 (citation omitted).

Court, but Alvarez was awarded summary judgment and damages on the ATS claim.<sup>303</sup> The Ninth Circuit affirmed the ATS judgment, and reversed the lower court's dismissal of Alvarez-Machain's FTCA claim.<sup>304</sup> Of relevance are the historical precedents the Supreme Court used to justify dismissal of Alvarez's claim.

Justice Souter delivered the opinion of the Court, which reflected the majority's thinking on the application of the laws of nation to domestic cases, and the standard of proof the Court requires for customary international law violations.<sup>305</sup> "[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."<sup>306</sup> The Court went on to say that:

Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created. Holmes explained famously in 1881 that "in substance the growth of the law is legislative . . . [because t]he very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned." One need not accept the Holmesian view as far as its ultimate implications to acknowledge that a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.<sup>307</sup>

Further:

[W]e now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice. And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction that federal courts have no authority to derive "general" common law.

Whereas Justice Scalia sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today. *Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identi-

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303 *Id.* at 699.

304 *Id.*

305 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

306 *Id.* at 725.

307 *Id.* at 725-26 (citation omitted).

fied limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

We think an attempt to justify such a position would be particularly unconvincing in light of what we know about congressional understanding bearing on this issue lying at the intersection of the judicial and legislative powers. The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable . . . . We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism . . . .<sup>308</sup>

Moreover:

While we agree with Justice Scalia to the point that we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field) just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.<sup>309</sup>

And finally:

Whatever the ultimate criteria for accepting a cause of action . . . we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted. And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.

Thus, Alvarez's detention claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized. "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs

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308 *Id.* at 729-30 (footnotes omitted) (citations omitted).

309 *Id.* at 731.



and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”<sup>310</sup>

In conclusion, the *Sosa* court uses the same criterion found in the Restatement to establish violations of customary international law.

A. *The Associate Justices of the U.S. Supreme Court on the Use of Foreign Law in U.S. Cases*

What are the attitudes of past and current Associate Justices of the U.S. Supreme Court regarding the use of foreign law in U.S. cases? In recent years, six Supreme Court Justices have invoked foreign authorities, either delivering or joining in opinions, citing foreign law. In 2003, former Justice Sandra Day O’Connor stated that decisions of other countries courts could be persuasive authority in U.S. courts and that:

[N]o institution of government can afford to ignore the rest of the world . . . . Conclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts—what is sometimes called “transjudicialism.” American courts have not, however, developed as robust a transnational jurisprudence as they might. Many scholars have documented how the decisions of the Court on which I sit have had an influence on the opinions of foreign tribunals. One scholar has even remarked that: “When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois.”

This reliance, however, has not been reciprocal. There has been a reluctance on our current Supreme Court to look to international or foreign law in interpreting our own Constitution and related statutes. While ultimately we must bear responsibility for interpreting our own laws, there is much to be learned from other distinguished jurists who have given thought to the difficult issues we face here.<sup>311</sup>

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310 *Id.* at 732-34 (quoting *The Paquete Habana*, 175 U.S. 677 (1900)).

311 Remarks by Sandra Day O’Connor, Associate Justice, Supreme Court of the United States at the Southern Center for International Studies, Atlanta, Georgia, October 28, 2003.

Justice Stephen Breyer, dissenting from the denial of certiorari in *Knight v. Florida* and *Moore v. Nebraska*, both 8th amendment cases involving petitioners who spent nearly twenty years or more on death row, wrote that he found decisions by foreign courts “useful” in interpreting the U.S. Constitution.<sup>312</sup>

In *Thompson v. Oklahoma*, Justice John Paul Stevens, joined by Justices Brennan, Marshall, and Blackmun, held that the 8th Amendment prohibition on “cruel and unusual punishment” was applicable to the States under the 14th Amendment, forbidding the application of the death penalty on a minor who was

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312 Available at [http://fedbbs.access.gpo.gov/library/sc\\_99/989741d.pdf](http://fedbbs.access.gpo.gov/library/sc_99/989741d.pdf). (“A growing number of courts outside the United States –courts that accept or assume the lawfulness of the death penalty– have held that lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel. In *Pratt v. Attorney General of Jamaica* for example, the Privy Council considered whether Jamaica lawfully could execute two prisoners held for 14 years after sentencing. The Council noted that Jamaican law authorized the death penalty and that the United Nations Committee on Human Rights has written that ‘capital punishment is not per se unlawful under the [Human Rights] Covenant.’ But the Privy Council concluded that it was an ‘inhuman act to keep a man facing the agony of execution over a long extended period of time,’ and the delay of 14 years was ‘shocking.’ It held that the delay (and presumptively any delay of more than five years) was ‘inhuman or degrading punishment or other treatment’ forbidden by Jamaica’s Constitution unless ‘due entirely to the fault of the accused.’

The Supreme Court of India has held that an appellate court, which itself has authority to sentence, must take account of delay when deciding whether to impose a death penalty. A condemned prisoner may ask whether it is ‘just and fair’ to permit execution in instances of ‘[p]rolonged delay.’ The Supreme Court of Zimbabwe, after surveying holdings of many foreign courts, concluded that delays of five and six years were ‘inordinate’ and constituted ‘torture or . . . inhuman or degrading punishment or other such treatment.’ And the European Court of Human Rights, interpreting the European Convention on Human Rights, noted the convention did not forbid capital punishment. But, in the Court’s view, the convention nonetheless prohibited the United Kingdom from extraditing a potential defendant to the Commonwealth of Virginia—in large part because the six-to-eight year delay that typically accompanied a death sentence amounts to ‘cruel, inhuman, [or] degrading treatment or punishment’ forbidden by the convention.

Not all foreign authority reaches the same conclusion. The Supreme Court of Canada, for example, held that Canadian constitutional standards, though roughly similar to those of the European Convention on Human Rights, did *not* bar extradition to the United States of a defendant facing the death penalty. And the United Nations Human Rights Committee has written that a delay of 10 years does *not* necessarily violate roughly similar standards set forth in the Universal Declaration of Human Rights. Given the closeness of the Canadian Court’s decision (4 to 3) and language that the United Nations Human Rights Committee used to describe the ten-year delay (“disturbingly long”), one cannot be certain what position those bodies would take in respect to delays of 19 and 24 years.

Obviously this foreign authority does not bind us. After all, we are interpreting a ‘Constitution for the United States of America.’ Nonetheless . . . this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances. . . . Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a ‘decent respect to the opinions of mankind.’

In these cases, the foreign courts I have mentioned have considered roughly comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their views are useful even though not binding.” (citations omitted)).

fifteen years old at the time of his crime.<sup>313</sup> In his majority opinion, Justice Stevens, writing on behalf of his colleagues, said “[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.”<sup>314</sup> Justice Stevens also references three major human rights treaties that “explicitly prohibit juvenile death penalties.”<sup>315</sup>

More recently in *Lawrence v. Texas*, a landmark opinion creating a constitutional right to homosexual sodomy, Justice Kennedy rejected the controlling points of *Bowers v. Hardwick*, relying in part on a decision of the European Court of Human Rights in his majority opinion. Justice Kennedy reasoned that:

To the extent *Bowers* relied on values shared with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent. The doctrine of *stare decisis* essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.<sup>316</sup>

In a concurring opinion in *Grutter v. Bollinger*, a case upholding a law school’s minority preferences in admissions, Justice Ginsberg, joined by Justice Breyer, invoked the language of the *International Convention on the Elimination of All Forms of Racial Discrimination*:

The Court’s observation that race-conscious programs “must have a logical end point” accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, endorses “special and concrete measures to ensure the adequate development

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

314 *Id.* at 830 (“Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.”).

315 *Id.* at 831 n.34.

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

and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.” But such measures, the Convention instructs, “shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.”<sup>317</sup>

In *Roper v. Simmons*, Justice Kennedy delivered the majority opinion of the court.<sup>318</sup> Justice Kennedy stated that “[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . . The opinion of the world community, while not controlling on our outcome, does provide respected and significant confirmation for our own conclusions.”<sup>319</sup> Justice Kennedy goes on to say that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>320</sup>

In *Hamdan v. Rumsfeld*, the Court’s most recent application of international law, Justice Stevens invoked portions of the *Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955]* and customary international law:

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford “all the judicial guarantees which are recognized as indispensable by civilized peoples” . . . . [T]his phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I) . . . .

We agree with Justice Kennedy that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any “evident practical need,” and for that reason, at least, fail to afford the requisite guarantees. We add only that . . . various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused

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317 *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citations omitted).

318 *Roper v. Simmons*, 543 U.S. 551 (2005) (Forbids the imposition of the death penalty on convicted offenders when their crimes were perpetrated under the age of eighteen, consistent with the 8th and 14th Amendments).

319 *Id.* at 578 (citation omitted).

320 *Id.*

must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him . . . .<sup>321</sup>

Justice Sotomayor, has also endorsed the application of international law in her dissenting opinion in *Croll v. Croll*, which involved the application of the *1980 Hague Convention on the Civil Aspects of International Child Abduction* in a child custody case.<sup>322</sup> She wrote:

While not essential to my conclusion that *ne exeat* rights constitute “rights of custody” under the Convention, I note that my analysis is consistent with the decisions of most foreign courts to consider the issue. Given the desirability of uniformity in treaty interpretation, these cases lend support to my understanding of the Convention.<sup>323</sup>

Further, Justice Sotomayor relied on several International authorities when she wrote:

While traditional American notions of custody rights are certainly relevant to our interpretation of the Convention, the construction of an international treaty also requires that we look beyond parochial definitions to the broader meaning of the Convention, and assess the “ordinary meaning to be given to the terms of the treaty in their context and in the light of [the Convention’s] object and purpose.”<sup>324</sup>

On occasion justices have also commented on the use of foreign law outside the confines of the Court. For example, in 2005, Justice Ginsburg made the following remarks before the American Society of International Law:

Returning to my own perspective, while U.S. jurisprudence has evolved over the course of two centuries of constitutional adjudication, we are not so wise that we have nothing to learn from other democratic legal systems newer to judicial review for constitutionality. The point was well made by Second Circuit Judge, former Dean of Yale Law School, Guido Calabresi: “Wise parents,” Judge Calabresi said in a 1995 concurring opinion, “do not hesitate to learn from their children.” In the value I place on comparative dialogue—on sharing with and learning from others—I am inspired by counsel from the founders of the United States. The drafters and signers of the Declaration of Independence cared about the opinions of other peoples; they placed before the world the reasons why the States, joining together to become the United States of America, were impelled to separate from Great Britain. The Declarants stated their reasons out of “a decent Respect

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321 *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006) (citation omitted).

322 *Croll v. Croll*, 229 F.3d 133, 144 (2d Cir. 2000) (Sotomayor, J., dissenting).

323 *Id.* at 150 (citations omitted).

324 *Id.* at 145 (citations omitted).

to the Opinions of Mankind.” To that end, they presented a long list of grievances, submitting the “Facts”—the “long Train of [the British Crown’s] Abuses and Usurpations”—to the scrutiny of “a candid World . . . .”

Far from [exhibiting hostility] to foreign countries’ views and laws, Professor Vicki Jackson of the Georgetown law faculty told a congressional committee last year, “the founding generation showed concern for how adjudication in our courts would affect other countries’ regard for the United States.” Even more so today, the United States is subject to the scrutiny of “a candid World.” What the United States does, for good or for ill, continues to be watched by the international community, in particular, by organizations concerned with the advancement of the “rule of law” and respect for human dignity.

The new United States looked outward not only to earn the respect of other nations. In writing the Constitution, the Framers looked to other systems and to thinkers from other lands for inspiration, and they understood that the new nation would be bound by “the Law of Nations,” today called international law. Among powers granted the U. S. Congress, the Framers enumerated in Article I the power “[t]o define and punish . . . Offences against the Law of Nations.”

John Jay, one of the authors of *The Federalist Papers* and the first Chief Justice of the United States, wrote in 1793 that the United States, “by taking a place among the nations of the earth, [had] become amenable to the laws of nations.” Eleven years later, Chief Justice John Marshall cautioned that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”

There are generations-old and still persistent discordant views, I acknowledge, on recourse to the “Opinions of Mankind.” A mid-19th century U. S. Chief Justice expressed opposition to such recourse in an extreme statement. He wrote: “[n]o one, we presume, supposes that any change in public opinion or feeling . . . in the civilized nations of Europe or in this country, should induce the [U.S. Supreme Court] to give the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted.”

Those words were penned in 1857. They appear in Chief Justice Roger Taney’s opinion for a divided Court in *Dred Scott v. Sandford*, an opinion that invoked the majestic Due Process Clause to uphold one human’s right

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to hold another in bondage. The Dred Scott decision declared that no “descendan[t] of Africans [imported into the United States], and sold as slaves” could ever become a citizen of the United States.<sup>325</sup>

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<sup>325</sup> Remarks by Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States before the American Society of International Law, Apr. 1, 2005.

